**IN THE HIGH COURT, SEKONDI HELD ON TUESDAY, THE 22ND DAY OF JUNE 2023 BEFORE HER LADYSHIP JUSTICE DR. BRIDGET KAFUI ANTHONIO-APEDZI (MRS) J.**

**SUIT NO: E2/16/21**

**DAVID CLIFFORD BREW-SMITH**
**PT. 1 KETAN**
**TAKORADI - PLAINTIFF**

**VRS**

**GEORGE KOFI ADU**
**H/NO. UNKNOWN**
**MPINTSIN - DEFENDANT**

**J U D G M E N T**

## A. INTRODUCTION

On 13th January 2021, the Plaintiff, David Clifford Brew-Smith, commenced an action against the Defendant, George Kofi Adu, for the following reliefs:

a. Recovery of cash, the sum of GHS 66,000.00, being the total indebtedness of the Defendant,

b. Interest from January 2021 till date of final payment, at the agreed interest rate of 20%
c. Costs, inclusive of legal cost

At the close of pleadings, the following issues were set down for trial:

a. ***Whether or not the duration of the financial assistance granted the Defendant was for one month or more?***

b. ***Whether or not the Defendant has paid an accrued interest of GHS 9,000.00 or GHS 11,000.00?***

c. ***Whether or not the Plaintiff is entitled to his claims?***

d. ***Any other issues arising out of the pleadings***.

Flowing from the pleadings the Court added the following issues:

e. ***Whether or not the GHS 9,000 paid was part of the principal or the interest accrued.***
f. ***Whether or not the interest charged is excessive and unconscionable.***

**B. THE PLAINTIFF'S CASE**

According to the Plaintiff, the Defendant approached him on 26/10/2017 for financial assistance to repair his excavator to enable him execute a contract. The Plaintiff claims he contacted a friend since he (Plaintiff) did not have money himself. Thereafter, he was able to raise a total of GHS 17, 000.00, at an interest rate of 20% per month, to be paid within two months.

The Plaintiff says that the Defendant defaulted on his obligations under the agreement, although he was doing works with the excavator. Accordingly, the Defendant would not pay unless he is compelled by the court to do so.

## C. THE CASE FOR THE DEFENDANT

The Defendant filed a statement of defence admitting the receipt of GHS 17,000.00, as a loan from the Plaintiff but denied that the duration of its payment was two months. The Defendant stated that he was able to repay GHS 11,000.00 out of the said GHS 17,000.00. He claimed that his inability to pay the remaining balance was due to the breakdown of the excavator.

## D. TESTIMONY

The Defendant admitted all that the Plaintiff said under oath and did not cross-examine the Plaintiff, on the facts and evidence related to the schedule of amounts allotted, as follows:

| | | | |
|---|---|---|---|
| 1. | 12/10/2019 | - | GHS 5, 000.00 |
| 2. | 18/10/2019 | - | GHS 3, 000.00 |
| 3. | 26/10/2019 | - | GHS 10, 000.00 |
| 4. | 01/12/2019 | - | GHS 2, 000.00 |
| | **TOTAL** | - | **GHS 20,000.00** |

The four (4) transactions listed above were documented and executed by both parties. The Plaintiff tendered them into evidence and they were marked, as Exhibits A to D. The payment period stated for each of the said transactions was for a month.

## E. PRELIMINARY LEGAL POINT

Before proceeding, I must comment on the professionalism of counsel, in recent times. The adherence to rules of practice and/or procedure seem to be taken as a matter of convenience rather than fidelity. For instance, in this case, not only did the Defendant not abide by the express provision of Order 11, Rule 8 of C. I. 47 but also there was not a single authority cited in the written address. Ostensibly, counsel left it to the court to figure the authorities out on its own. Further, counsel failed to identify the specific law alleged to have been violated by the transactions. It lowers the standards of practice and does not promote the ends of justice - this must not be entertained.

1. *Legal Mandate*

For the first time, in filing the required address, the Defendant raised the issue of the illegality of the contract. He states that the tendering of loan application forms by the Plaintiff is suggestive of plaintiff's license to grant loans to the defendant. The Defendant submitted that nowhere in his pleadings did the Plaintiff indicate his source of authorization to grant loans, as a money lender, or a micro-finance company or a financial institution. The Defendant asserted that the Plaintiff cannot hide under the guise of offering financial assistance, to grant loans and charge interest. The Defendant concluded that the onus was upon the Plaintiff to establish the source of the legal authority to charge interest, which in this case was fixed at 20% per month for each transaction, an interest rate which the Defendant says is unconscionable.

The question that falls for determination, arising from the belated query raised by the Defendant, at the stage of written addresses, is whether or not the cause of action fell under the law of contract or implicated the relevant enactments on moneylending/borrowing and loan recovery.

It is trite learning that whether or not an act constitutes moneylending, or the granting of a loan is rebuttable. Accordingly, every case turns on its peculiar facts. Where a finding is made that the cause of action falls under a loan or moneylending

statutes, a suit for its recovery can proceed under CAP 175. Alternatively, where the transaction is subsumed under the common law of contract/the Contract Act, its terms can be reviewed on unconscionable doctrines.

**Holding 1:** Arising from the pleadings, the testimony and the evidence adduced, I hold that the Plaintiff provided a loan, or the recovery of which CAP 175 applies. For instance, he syndicated the various monetary allotments, which he gave to the Defendant, in a businesslike fashion and charged interests thereon, within strict timelines. Accordingly, the Plaintiff suit, to recover the loan he granted, under the terms that were agreed to, is subject to enactments on loan recovery.

Besides, the law of contract, which is followed by the principles of equity, are available to do justice to the transactions willingly entered into by contracting parties.

2. *Law on Illegality*

Order 11, Rule 8 of the High Court (Civil Procedure) *Rules*, 2004 (C.I.47) stipulates that the Defence of Illegality ought to be specifically pleaded. Although the Defendant failed to abide by this statutory requirement, the court will address it as a preliminary legal point to determine if it is fundamental or otherwise. Further, where the other party will not be prejudiced by surprise, the failure is not irreparable.

Illegality as a defence has been a long-standing common law principle of ***ex turpi causa non oritur actio***. It is raised as a defence in contractual relations executed in contravention of a statute/law or a provision thereof. ~~, that the~~ It is premised on the principle that Courts will not assist a party whose case is based upon an immoral or illegal act. The principle has public policy underpinnings ~~of~~ regarding enforcement since the law cannot forbid an act also and reward it, at the same time.

The reliance principle was a common law formulation to address illegality. This could be traced to the very old case of, ***Holman v Johnson (1775) 1 Cowp 341 at 343 and also applied in Tinsley v Milligan (1994) 1 AC 340]***, where in the words of Lord Mansfield

> *"No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act".*

Where the maxim of ***ex turpi causa*** is successfully applied, it acts as a complete bar to recovery. However, the defence of illegality is not an absolute defence to a civil claim.

Other principles were also formulated to circumvent the harshness of the defence of illegality. The Supreme Court of the United Kingdom (UK) recently, in ***Patel v Mirza, [2016 UKSC 42, 2017 A.C 467***, established a discretionary approach on illegality. It requires, balancing various considerations, including the element of proportionality. This has affected the usefulness of the old reliance principle, which was hitherto applicable in Ghana.

In the Supreme Court of Ghana case of **Ernestina Boateng v Serwah and Others (J4 8 of 2020) [2021] GHASC 19 (14 April 2021)**, Pwamang JSC adopted the discretionary approach, for the analysis of the defence of illegality. To allow a claim for reliefs under a contract allegedly tainted with illegality, the following factors must be considered:

a) *the seriousness of the illegality,*
b) *whether the denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts, and*

c) *whether it would be harmful to the integrity of the legal system to allow the claim.*

Also, Date-Bah, JSC in **City & Country Waste Ltd v Accra Metropolitan Assembly [2007-2008] SCGLR** 409 states at follows:

> "*balancing the need to deny enforceability to the contract sued on by the Plaintiff against the need to prevent the unjust enrichment of the Defendant, and, considering that in relation to the Defendant's non-compliance with the statutory provisions binding on it, the Plaintiff was not in pari delicto in a broad sense*"

Although the Defendant did not cite any relevant enactment - in issue, the court take cognizance of the Non-Bank Financial Institution Act, 2008 (ACT 774) and Loans Recovery Act 1918 (Cap 175). Section 2 (1) of Act 774 prohibits the business of moneylending without a license.

The above notwithstanding, caselaw points to the fact that the failure to procure license does not render a loan transaction illegal, void or unenforceable. Also, where a statute has a penal provision for any violation, the court will not hesitate to apply it - but, the circumstances matter.

In the **Ahenfie Cloth Sellers Association** (**Per the President Joana Ewurabena**) **v Philomena Mensah & 3 Others [2010] DLSC 6137** the Court enforced a contract which contravened the statutes on moneylending, i.e. Money Lenders Act (Cap 176). [though the Act is repealed by Act 774, the principles still apply] Speaking for the court, Brobbey JSC held as follows;

> "*It was not the intendment of the legislature when it passed Caps 176 and 175 to prohibit lending and borrowing. Moneylending and borrowing were not proscribed*

*or prohibited by Cap 176 or 175. All that the legislature did by the two statutes was to regulate the methods of lending and borrowing by getting lenders to acquire licenses which place some obligations on them for the protection of borrowers. That was what Section 5 of Cap 176, which regulated lending money without license was intended for. A contract may be in violation of a statute and yet it may be enforceable. Such a contract can be described as voidable. It is not void but may be enforced on the satisfaction of certain conditions".*

In effect, it is now settled per **Ahenfie Cloth Sellers Association** (**Per the President Joana Ewurabena**) **v Philomena Mensah & 3 Others** that money lending agreements entered into without the requisite money lenders license as required under the law is enforceable.

Lending money is a social phenomenon. No legislature can legislate to prohibit it. If it does, it will be an exercise in futility because people cannot be stopped from borrowing money and lending it when needs arise.

## F. EVALUATION AND THE RESOLUTION OF THE ISSUES

***The Burden of Proof in Civil Suits Generally***

In civil suits, the burden of proof is on the party who asserts the existence of facts in issue. Depending on the admissions made, the party on whom the burden of proof lies is enjoined by the provisions of sections 10, 11(4), 12 and 14 of the *Evidence Act*, 1975 (NRCD 323), to lead cogent evidence. This must be such that, on the totality of the evidence on record, the trier of facts will find that party's version to be more probable than its non-existence, in relation to the rival accounts.

This basic principle of proof in civil suits, is expounded in **ZAMBRAMA V SEGBEDZIE (1991) 2 GLR 221.** The same has been applied in numerous cases, including **TAKORADI FLOOR MILLS V SAMIR FARIS (2005/06) SCGLR 882; CONTINENTAL PLASTICS LTD V IMC INDUSTRIES (2009) SCGLR 298** at

pages 306 to 307; **ABBEY V ANTWI (2010) SCGLR 17** at 19 (holding 2); and **ACKAH V. PERGAH TRANSPORT LIMITED AND OTHERS [2010] SCGLR 728**.

In **ACKAH V. PERGAH TRANSPORT LIMITED AND OTHERS [2010] SCGLR 728** at page 736, ~~by~~ Adinyira, JSC stated as follows:

> *"It is a basic principle of law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail…It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that, on all the evidence, a reasonable mind could conclude that the existence of a fact is more reasonable than its non-existence. This is the requirement of the law on evidence under section 10 (1) and (2) and 11 (1) and (4) of the Evidence Act, 1975 (NRCD 323)."*

Also, in the Supreme Court case of **BISI AND OTHERS V. TABIRI ALIAS ASARE [1987-88] 1 GLR 372,** Osei-Hwere JA (as he then was) held that:

> *"The standard of proof required of a plaintiff in a civil action is to lead such evidence as will tilt in his favour the balance of probabilities on the particular issue. The rampant encounter with the pleader's demand for strict proof has never been taken to call for an inflexible proof either beyond reasonable doubt or with mathematical exactitude or with such precision as would fit a jig-saw puzzle. With the definition supplied, preponderance of evidence, in short, becomes the trier's belief in the preponderance of probability. An American decision Norton v. Futrell, 149 Cal App. 2d 586 (1957) has explained that: 'The term 'probability' denotes an element of doubt or uncertainty and recognizes that where there are two choices, it is not necessary that the jury be absolutely certain or doubtless, but that it is sufficient if the choice selected is more probable than the choice rejected'."*

Further, there is the distinction between the legal burden of proof and evidential burden of proof. Whereas the legal burden of proof is mostly borne by a plaintiff or whoever makes an assertion, the evidential burden requires the production of evidence in support of either an assertion or a tactic, tactical onus to contradict or weaken an adversary's evidence. Thus, at the trial, the Plaintiff bore the burden of producing evidence and the burden of persuasion on the issues set down for trial. The Defendant is also at liberty to introduce evidence to contradict the Plaintiff's case.

*This principle is also stated in Section 14 and 17 of NRCD 323*. Commenting on the principle, Pwamang JSC, in delivering the majority decision in **AMIDU AND ANOTHER V ALAWIYE AND OTHERS (J4/54/2018) [2019] UNREPORTED SC, (24 July 2019),** had this to say "*It is the party who stands to lose on an issue, if no evidence is led on it, that bears the burden of proof as far as that issue is concerned.*"

ISSUE 1

***a. Whether or not the duration of the financial assistance granted the Defendant was for one month or more?***

The parties joined issues on the quantum of loan and the duration of the interest to the paid. Whereas the Plaintiff averred in the Statement of Claim that the total amount given was GHS20,000.00, which was to be paid within two months, the Defendant pleaded GHS17, 000.00 and further denied the two months duration for payment. A financial assistance or loan (whatever the nomenclature) cannot be given for an indefinite period.

As stated earlier in this decision, the Defendant admitted the transactions that Exhibits A to D, were tendered in proof of. He did not cross-examine the Plaintiff's relevant testimony.

Where there exists a written agreement, that documentary evidence is preferred over conflicting oral evidence. (See **YORKWA V DUAH [1992-93] GBLR 278, CA**). Also, the Defendant admitted under cross examination that the total money loaned was GHS 20,000.00.

**Holding 2:** Therefore, the court concludes that the total amount disbursed to Defendant, as the loan is GHS 20,000.00 and that the repayment period for each transaction was to be made within a month.

ISSUE 2

***b. Whether or not the Defendant has paid an accrued interest of GHS 9,000 or GHS11,000.***

The Defendant says he made a total payment of GHS11,000 out of GHS17, 000, on the principal loan. On the other hand, the Plaintiff says that the Defendant only paid GHS 9,000.00 and that was out of the accrued interest.

As stated in ***AMIDU AND ANOTHER V ALAWIYE AND OTHERS*** [supra], it is the party who stands to lose on an issue, that bears the burden of proof as far as that issue is concerned. Thus, the Defendant bears the burden to prove that indeed the amount of money paid was GHS11,000.00.

The following ensued under cross-examination of the Defendant:

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*Q: In all, he gave you financial assistance of GHS 20, 000.00?*

*A: That is so, my Lord*

*Q: Now, when the 1st loan matured on 12th November 2019, you did not pay?*

*A: I paid GHS5,000.00 by mobile money transfer but I cannot remember the exact date on which I paid.*

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*Q: Now, after taking all these monies from October 2019, for one month on each occasion, the first payment made was in June 2020, for GHS 5,000.00?*

*A: I cannot recall the date, however I remember I paid GHS 8,000.00.*

*Q: Now your next payment was GHS2,000.00 through Patrick Bonney. Is that not so?*

*A: My Lord, the amount through Patrick Bonney was the money I paid, however, the GHS2,000 I paid through mobile money.*

*Q: You made the last payment of GHS 2,000.00 in November 2020 also through Bonney?*

*A: It was the last payment that I paid that was through Patrick Bonney, I had earlier made payment of GHS2,000.00 twice through mobile money.*

*Q: In all, you made a total payment of only GHS9,000.00*

*A: In total I paid GHS11,000.00*

From the above exchange, the Defendant claimed to have used Patrick Bonney to pay GHS2,000 twice, both through mobile money. Mobile money payment is capable of proof. Yet, the Defendant did not discharge the evidentiary burden he owed, to prove that he paid GHS 11, 000.00 instead of GHS 9,000.00. Although the Plaintiff did not categorically put it to him, it behoves on the Defendant to lead evidence in rebuttal. He stated he made some payments through Patrick Bonney, yet he also failed to call him to corroborate his assertion. He was inconsistent with the exact amount paid. Per his answers during cross-examination, his two mobile money (momo) transfers totalled ~~of~~ GHS 4,000.00. Earlier, he said he made a payment of GHS 5,000.00 through momo transfer, but when questioned again on

the next adjourned date, he said it was GHS 8, 000.00. His answers made payment of GHS 9,000.00 more probable because the sum of GHS 4,000.00 and GHS 5,000.00 is GHS 9,000.00.

**Holding 3:** The court therefore concludes that the Defendant paid GHS 9,000.00 out of the principal amount adjudged to be GHS20,000.00.

ISSUE 3

***Whether or not the GHS 9,000 paid was part of the principal or the interest accrued.***

Parties to a loan transaction may agree on terms of payment. The terms of the present transaction suggest that the Defendant was to pay both the principal and the interest after a month, per each loan transaction. From the evidence on record, the Defendant flouted the said terms and failed to pay both the principal and interest.

To avoid convolution, the court will apply all the moneys repaid, first, to the principal amount payable, of GHS20,000.00.

**Holding 4:** The court concludes that the GHS 9,000.00 paid was for the principal amount and not the related interest.

ISSUE 4

***Whether or not the interest charged is excessive and unconscionable.***

Where parties have agreed on an interest, the court may exercise the authority conferred on it by Section 1 of Loan Recovery Act, 1918 (Cap 175). Where the interest appears excessive and unconscionable, a court shall re-open the transaction, be equitable and to revise the rate of interest downwards. There is abundant authority that permits the court to a re-open money lending or a loan transaction and review the interest payable [See the case of **AHENFIE CLOTH**

**SELLERS ASSOCIATION** (**Per the PRESIDENT JOANA EWURABENA**) **V PHILOMENA MENSAH & 3 OTHERS** (supra).

Section 1 of CAP 175 authorizes a court to reopen a loan transaction, however so described and beyond labels. See the High Court case **G. N. BANK GHANA LIMITED VS MRS OLIVIA NTI KYEREMEH & ANOR (2018),** which provided context upon which a court will re-open a loan contract, in the interest of justice.

In the case of **ROYAL BENEFICIARIES ASSOCIATION V MRS. VIVIAN MENSAH & OTHERS Civil Appeal No.J4/22/2013** dated 26/7/2013, Anin Yeboah JSC *(as he then was),* considered similar circumstances as in the instant case and held thus:-

> ***"It is apparent that the appellant had paid fifteen million cedis for every week and had indeed paid for thirty eight weeks out of the fifty - two weeks which was agreed as the terms of the contract. It must be pointed out that by simple calculation of the outstanding balance the appellant had paid C570,000,000 and was left with only C 210,000,000 .00 to be paid to the Respondent. Given the amount of money paid by the Appellant to the Respondent a so-called company limited by guarantee, we are of the view that the whole transaction which is obviously unconscionable should be re-opened for the court to impose its terms favorable under the circumstances''.***

The present case, the court is of the view that an interest rate of 20% per month is excessive and unconscionable.

**Holding 5:** The court therefore awards an interest on the outstanding principal of GHS11,000.00, at the prevailing bank rate from January 2020 to the final date of payment.

Cost award: The court awards general costs of GHS 5,000.00 to the Plaintiff

Cost of GHS 5,000.00 is awarded as a legal cost by the Defendant.

**DR. BRIDGET KAFUI**

**ANTHONIO-APEDZI (MRS.)**

**JUSTICE OF THE HIGH COURT**

**COUNSEL:**

1. **F.F. FAIDOO FOR THE PLAINTIFF**

2. **KWAKU GYIMAH KYE FOR THE DEFENDANT**