IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE, COMMERCIAL DIVISION HELD IN ACCRA ON THE 4TH DAY OF MAY, 2023 BEFORE HIS LORDSHIP JUSTICE JUSTIN KOFI DORGU

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SUIT NO: CM/0049/2016

BARCLAYS BANK OF GHANA LTD } PLAINTIFFS

VRS

AKUAFO ADAMFO & 4 ORS } DEFENDANTS

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PARTIES: ABSENT

JUDGMENT

In A Writ of Summons filed on the 29th of March, 2016 and subsequently amended, the Plaintiff claims against the Defendants the following reliefs;-

"(a) Recovery of the sum of GH¢62, 915, 744.00

(b) Interest at the rate of 30.22% per annum on the sum of GH¢62, 915, 744.00 from the 11th day of December, 2015 to date of final payment

(C) Legal fees and costs at the approved mid-year review of Ghana Bar Association's rate"

The brief facts of the case are that, the Plaintiff, a reputable banking institution granted two short term facilities in the nature of loans and an overdraft to the Defendant to

the total value of GH¢60, 000.00. The 1st Defendant defaulted in the repayment which became due on the 24th October, 2014. As at 11th December, 2015 when the Plaintiffs wrote the final demand notice to the Defendants, the total indebtedness of the Defendant stood at GH¢62, 915, 744.00, the figure on which the Plaintiff issued the instant Writ on the 19th January, 2016.

It is instructive to note that the 2nd to 4th Defendants are incorporated entities that gave separate corporate guarantees and indemnities for the repayment and reimbursement to the Plaintiff should the 1st Defendant default whilst the 5th Defendant undertook by an unlimited personal guarantee to repay all the monies lent to 1st Defendant inclusive of interest. At the close of pleadings, two issues were set down for trial and they are:-

"(1) The exact amount the 1st Defendant owed the Plaintiff since the Defendants disputed the amount claimed and

(2) Whether or not the Plaintiff orally agreed at a meeting allegedly held with the Defendants on 17th August, 2015 not to insist on its legal rights to demand immediate payment until restructuring had been undertaken."

When trial was to commence, this Court presided over by Koomson J (as he then was) with the agreement of the Parties and their Lawyers appointed an Independent Auditor to ascertain the total indebtedness of the 1st Defendant and to use the findings to resolve the first issue set down and as recounted above. On the 6th of April, 2018, the Court adopted the certified sum of GH¢1, 454, 538.83 as the indebtedness of the 1st Defendant as at that date, principal and interest inclusive. It is therefore the outstanding issue of "whether or not the Plaintiff orally agreed with the Defendants not to insist on its legal rights to demand immediate payment until after restructuring had been undertaken by the 1st Defendant at a meeting held on 17th August, 2015 that I now rule.

Now, irrespective of the way one looks at this case, it is primarily a civil case and as all civil trials, the degree of proof required of a party is proof on the preponderance of

probabilities or on the balance of probabilities (see Sections 11 and 12 of the Evidence Act of the 1975 (NRCD 323). Thus in the case of **GIFTY AVADZINU V. THERESA NJOOMA [2010] MLRG 105 @ 108,** The Court of Appeal reiterated the old time principle thus;-

"*The law relating to the standard of proof in all civil actions without exception was stated to be proof by preponderance of probabilities, having regard to Sections 11 (4) and 12 of the Evidence Decree, 1975 (NRCD 323). This means that a Plaintiff or Counterclaimant must be able to establish by cogent admissible evidence the facts of all allegations made so that when the whole evidence is considered and so to say weighed the case of the Plaintiff or Counterclaimant will be heavier than that of the opponent*".

Then also in the case of **CONTINENTAL PLASTICS ENGEINNERING CO. LTD V. IMC INDUSTRIES TECHMLE GBBH [2009] SCGLR 298 @ 306 -307** quoting with approval the Court of Appeal case of ZAMBRAMA per Kpegah JA (as he then was) the Supreme Court rendered the principle on proof as follows;-

"*I will therefore venture to state the position to be: a person who makes an averment or assertion which is denied by his opponent, has the burden to establish that his averment or assertion is true. And he does not discharge this burden unless he leads admissible and credible evidence from which the facts he asserts can properly and safely be inferred. The nature of even averment or assertion determines the degree and nature of the burden*".

Now, closely related to this principle is the how of the proof. In other words, how is this concept of proof ascertained. In the case of **MAJOLAGBE V. LARBI & ORS [1959] GLR 190 @ 192,** the Court rendered the principle thus:-

"*Proof in law is the establishment of fact by proper legal means. Where a party makes an averment capable of proof in some positive way, e.g. by providing documents, description of the things, reference to other facts, instances or circumstances and his averment is denied, he does not prove it merely by going into the witness box and repeating that averment on oath, or*

having it repeated on oath by his witness. He proves it by providing other evidence of facts and circumstances from which the Court can be satisfied that what he avers is true".

Now, there is no gainsay that the outstanding issue recounted above is at the instance of the Defendants, the foundation of the said issue can be found in paragraphs 8, 11 and 12 of the amended Statement of Defence as follows;-

"8. In further answer to paragraph 9, 1st Defendant reiterates that just like the other business dealings that they have had with the Plaintiff, it (1st Defendant) has made all the necessary payments to Plaintiff.

11. 1st Defendant will contend that it acted on the promise by Plaintiff not to enforce its right under the contract dated the 17th day of March, 2014 guarantee and it would have been unequitable for Plaintiff to unilaterally vary the promise. An act which would have been detrimental to Defendants' and

"12. Defendants will further contend that regardless of the fact that Plaintiff is bound by this subsequent oral agreement it gave not to enforce its rights, which promise has amended the terms of the original agreement and is estopped from insisting on its strict legal rights for payments of the financial facilities granted to 1st Defendant and guaranteed by the 2nd, 3rd, 4th and 5th Defendants, Defendants have fully paid up all their debts owed to Plaintiff".

Since the Plaintiff denied the existence of any such oral agreement, it fell on the Defendants to prove that which he alleges. Section 25 (1) of the Evidence Act, 1975 (NRCD 323) provides;-

"*Except as otherwise provided by law, including a rule of equity, the facts recited in a written document are conclusively presumed as between the Parties to the document or their successors in interest*".

This principle was further given judicial interpretation in the case of **RE; KORANTENG (DECEASED) ADDO V. KORANTENG & ORS [2005-2006] SCGLR 1039 @ 1041**, where the Court unanimously held:-

"*Under Section 25(1) of the Evidence Decree, 1975 (NRCD 323), the facts reacted in a written document were conclusively presumed to be true as between the Parties to the document or their successors in interest. Section 25 (1) had the effects of establishing an estoppel by written document which were applicable to the facts of the instant case….*"

So also is the case of **YORKWA V. DUAH [1992-93] GBLR 279 (CA),** the Court of Appeal held on the principle thus;-

"*Wherever there was in existence a written agreement and conflicting oral evidence over a transaction, the practice in the Court was to lean favourably towards the documentary evidence, especially if it was authentic and the oral evidence conflicting"*

It is instructive to note here that even though the Defendant who according to this case ought to have testified first because he was asserting the existence of the oral agreement, he never did so. In fact, even though he filed a Witness Statement, due to his unavailability, the Witness Statement was only admitted into evidence as hearsay evidence. It was thus not subjected to any form of cross-examination and so has very little or no probative value. The only evidence available on the part of the Defendant is therefore the cross-examination of Plaintiff and its witness on their Exhibit H, which the Defendant was insisting was their proof. Here are excerpts of the said cross-examination conducted on the 9th December, 2021

"Q. You have stated to this Court that you received an email from one Mr. Arnold Okai of IAKO Consult, is that correct?

A. Yes My Lord.

Q. You also stated that there was attached to the email a 21 page document titled Akuafo Adamfo Marketing Company Limited Financing Proposal. Kindly have a look at your Exhibit H and confirm if that is the said document?

A. Yes My Lord.

Q. Are you aware that this document was sent to you in furtherance of the meeting that Plaintiff indicated that it was not going to insist on its legal right to enforce the liability of the loan granted Defendants until restructuring of Defendant's Company?

A. My Lord, I insist that the statements the Counsel is alluding to of the meeting between the Defendants and our Head of Credit never took place and this is because Counsel earlier stated that because of my role or position I was not relevant or needed at that meeting. So if that is the case then this proposal for restructuring should have been sent to our MD and Head of Credit, but you realize it was sent to me alone without them being given a copy. It goes to buttress my point that no such meeting ever took place …...

Q. I suggest to you that the only reason why the restructuring document was sent to you was in respect of the fact that at the said meeting your email address was provided for same to be sent through to Plaintiff.

A. My Lord that cannot be true, and it is very curious and unusual for a client to meet the MD and Head of Credit and a proposal is being sent to that effect and they will not even be in copy....."

PW1 then proceeded to explain the regulations governing the internal operations of the Plaintiff to the Court regarding decisions of the nature alleged by the Defendants viz-a-vis who would have been present were such a meeting to have taken place during cross-examination on 17th November, 2021 as follows;

"Q. On the 17th day of August 2015, at a meeting between Defendants represented by Kamzi Nahas and Samer Karade and Plaintiff's Managing Director and the Head of

Credit at the time to discuss Defendants' liability and obligation to liquidate their indebtedness, is that not so?

A. My Lord I am not aware of any such meeting

Q. And it was at this particular meeting that 1st Defendant did in fact reiterate to Plaintiff about the restructuring and Plaintiff agreed not to insist on its legal right to claim the debt owed until the completion of the restructuring exercise, is that not so?

A. As I have indicated already I am not aware of any such meeting and even if there was the MD and Head of Credit could not have agreed to any restructuring when the Relationship Manager was not present at such meeting, because it will be the responsibility of the Relationship Manager to put together this restructuring request and go and defend it at Credit. Again it is stated that the agreement was oral and officers of the stature of Managing Director and Head of Credit will never do such a thing knowing that Banking is a highly regulated industry and Barclays Bank also being part of an international bank of that stature where it is always subjected to various auditing, oral agreement cannot and has never been part of our way of work".

In Counsel for Defendants further attempt to compel PW1 into an admission of the Defendants averments in his cross-examination on the 17th November, 2021, this is what ensued;-

"Q. Are you aware that at several meetings between your bank and Defendants, 1st Defendant informed Plaintiff of its financial difficulties and the need to undertake restructuring exercise?

A. It is not true in the sense that no officer of the bank can meet any customer without the RM arranging for such meetings and the RM being part of those meetings because the RM is the intermediary between the customer and the bank. And if for whatever reason the RM cannot be part of the meeting, at least somebody within the relationship team has to be.

Q. Can I take that to mean that there was a time when you as RM was not present at any of such meetings with Plaintiff bank?

A. My Lord I am not aware of any such time. If there was going to be a meeting to talk about facilities and banking transactions, RM will definitely be part of the meeting unless that meeting is for social purposes.

Q. I am suggesting to you then that the only reason why you are not aware of the 17th August 2015 meeting is because in the line of your business you are not entitled to be at such meetings.

A. It is not true.

Q. I am also suggesting to you that the only reason why you waited until August 2016 before initiating this action is that Plaintiff was just upholding the promise made to the Defendants that it will not enforce its right to recover the facility until the restructuring is completed.

A. It is not true. There is a process the bank goes through when it wants to restructure a facility. First of all a written request will be received from the client with cash flow projections to show that when the restructuring is done they can indeed repay and when the Bank is satisfied with the cash flow projections, the RM will initiate the restructuring and when approval is obtained a formal facility letter will be issued to the client detailing the terms of the restructuring for client's acceptance before we can say indeed a restructuring has taken place. And I do not think there is any evidence on file".

My Lord, PW2 who was Plaintiff's Head of Wholesale Credit at the material time and alleged to have been at the said meeting corroborated PW1's response supra that neither the alleged meeting nor the alleged oral agreement took place when she was cross-examined on 26th January, 2022 as follows;-

"Q. Are you also aware that Exhibit H was sent through Mr. Ato Robertson to Plaintiff in furtherance of discussions at the various meetings where Plaintiff orally and unconditionally agreed not to insist on its rights to enforce the facility?

A. My, apart from the meeting allegedly held on the 17th August 2015 which came to my attention and I reiterated the point that I was not present and the meeting never happened, I am not aware of any other meetings where an oral agreement was reached. Like I indicated, as Credit Head, no restructuring request was submitted to me".

Now, I have no doubt that the evidence of the Plaintiff and his witness remained resolute and was never shaken or discredited under the intense cross-examination. What it also means is that the Plaintiff's case that the one and only agreement existing between the Parties was the 'facility agreement dated the 17th March, 2014 and titled 'Letter of Variation –Multi Option Facility'.

In the case of FOFIE V. ZANYO [1992] 2 GLR 475-501 @ 553,

the Supreme Court per Osei Hwere JSC held thus:-

"The sanctity of contracts has been preserved in the hallowed "maxim parta sant servande". It is the function of the Courts to see that reasonable expectations or Parties embodied in their agreements are not disappointed. Equity has its correlative maxim which is that it will impute an intention to fulfill an obligation…"

This case seems to fall on all fours with the case of ALAMEDDINE BROTHERS V. PATERSON ZOCHNIS & CO LTD [1971] 2 GLR 403. As far as the allegation of variation of contract is concerned. And as stated earlier on in this judgment, this issue is at the instance of the Defendant. In the said case Sowah JA (as he then was) held thus:-

"A party who alleges a variation in a contract assumes the burden of proving it. In this instant case, we do not believe the Defendants have sufficiently discharged this burden of proof to satisfy the Court that what they aver is true".

Concluding therefore and after due evaluation of all the evidence laid before me, I find the proof offered by the Defendants in this case not only deficient but also unfortunately absent. The Defendants could not prove that there was actually a meeting held on the 17th August, 2015 or on any other date that had any agenda on the restructuring of the Defendants' facility and subsequent variation of the terms of repayment as the Defendants will want this Court to believe.

Since the only challenge to the Plaintiff's claim is this allegation, I find on the preponderance of probabilities that the Plaintiff succeeds on its claims and so entitled to judgment.

Accordingly, and in addition to the judgment recovered on the 16th April, 2018, the Plaintiff is entitled to interest at the contractual rate of 30.22% per annum from 17th April, 2018 to date of final payment.

I award cost of GH¢50, 000.00 against the Defendants.

(SGD)

JUSTICE JUSTIN KOFI DORGU

(JUSTICE OF THE HIGH COURT)

LEGAL REPRESENTATION

MAXWELL LOGAN FOR THE PLAINTIFF

CITED CASE

GIFTY AFADZINU V. THERESA NJOOMA [2010] MLRG 105 @ 108

CONTINENTAL PLASTICS ENGEINNERING CO. LTD V. IMC INDUSTRIES TECHMLE GBBH [2009] SCGLR 298 @ 306 -307

MAJOLAGBE V. LARBI & ORS [1959] GLR 190 @ 192

RE; KORANTENG (DECEASED) ADDO V. KORANTENG & ORS [2005-2006] SCGLR 1039 @ 1041

YORKWA V. DUAH [1992-93] GBLR 279 (CA),

FOFIE V. ZANYO [1992] 2 GLR 475-501 @ 553

ALAMEDDINE BROTHERS V. PATERSON ZOCHNIS & CO LTD [1971] 2 GLR 403