IN THE SUPERIOR COURT OF JUDICATURE IN THE HIGH COURT OF JUSTICE, COMMERCIAL DIVISION "10" HELD IN ACCRA ON THURSDAY, 18TH DAY OF MAY, 2023 BEFORE HER LADYSHIP JUSTICE ADELAIDE ABUI KEDDEY

SUIT NO. CM/BFS/0739/2021

CAL BANK PLC - PLAINTIFF

VRS

1. **MIDWEST CONTRACT WORKS LTD - DEFENDANTS**
2. **HONDA CONSTRUCTION LTD**
3. **KWASI BLAY**
4. **GODFRED ANDOH**

RULING

The Plaintiff/Applicant herein filed the instant application with a supporting 39-paged Affidavit in support dated 14th March, 2023 praying for Summary Judgment against the Defendants/Respondents for the following reliefs as endorsed on the Amended Writ of Summons dated 11th November, 2023 to wit:

a) An order for the recovery of the sum of Fifty-Four Million, Three Hundred and Eight Thousand, Seven Hundred and Sixty Ghana Cedis and Fourteen Ghana Pesewas (GHS 54,308,760.14).

b) Interest on relief (a) at the contractual rate of 24.5% per annum (2.05% per month} from May 2021 to the date of final payment.

c) An order for the realization of the securities offered for the loan facility.

d) An order for the interim preservation of all the securities offered for the loan facility pending the final determination of this Suit.

e) Costs in this suit including solicitor's fees on a full indemnity basis and;

f) Any other orders that this honourable Court deems fit.

It is the case of the Applicant that by virtue of a loan agreement executed between the first Defendant and the Plaintiff around June 2015, it was agreed that the Plaintiff bank will advance to the first defendant company a total of three loan facilities as follows:

a) A bank guarantee limit of Twelve Million Ghana Cedis (GHS 12, 000,000.00);

b) A discounting line of Twelve Million Ghana Cedis (GHS 12,000.000.00); and

c) A medium-term loan of Twelve Million Ghana Cedis (GHS 12,000.000.00).

Subsequently the first defendant made a second application to the Plaintiff for a loan facility to enable it complete a road contract which was granted by Plaintiff. Thus, a loan facility agreement dated November 2015 was executed. The Plaintiff advanced to the first defendant a Short-Term loan facility (Asset Finance Facility) of the Ghana Cedi equivalent of One Million, Nine Hundred and Five Thousand United States Dollars (US$ 1, 905,000.00) exhibited and marked as **Exhibit 'SJ1'**. The said loan facility was for a period of twelve (12) months at an interest rate of the Bank's Cedi Base Rate of 28.5% per annum plus a 3% margin attracting a default charge of two percent (2%) flat on any unfunded instalment and on any outstanding on the current account when the facility expires and a penal rate of ten percent (10%) above the prevailing interest rate. The first defendant fully accessed and utilised the benefits of the loan facilities advanced to it at all material times.

Plaintiff avers that the facility agreements were restructured by way of a facility agreement dated March 2019 to increase the first Defendant's direct exposure to a

Short-Term loan of up to Fifty Million Ghana Cedis (GHS 50,000.000.00) at a rate of the Ghana Reference Rate (GRR) at 16.27% at the time of the execution of the facility, plus a Risk Premium of 10.73% per annum or as may vary from time to time in accordance with change to the GRR or the Plaintiff's assessment of the first Defendant's Risk Premium for a period of twelve {12} months. A copy of the restructured loan facilities of June 2015 and November 2015 as dated March 2019 is exhibited and marked as **Exhibit "SJ2"**. The repayment of **Exhibit "SJ2"** was to be made in the following manner:

a. Primary: Cash flow from the various contracts awarded by COCOBOD and Government of Ghana worth One Hundred and Ninety-Four Million, Eight Hundred and Four Thousand, and Seventy-Seven Ghana Cedis, Forty-Two Ghana Pesewas (GHS 194,804,077.42). this includes confirmed Interim Payment Certificates (IPCs) totaling Fifty-Two Million and Twenty-One Thousand, Four Hundred and Two Ghana Cedis, Forty-Five Ghana Pesewas (GHS 52,021,402.45) as at November 2018 and;

b. Secondary: Realisation of securities, set off against any or all accounts of the first defendant company and any other source of repayment available to the plaintiff.

That the Defendants under the restructured loan facility agreement dated March 2019, provided the following as security for the repayment of the loan facility and same was duly executed and registered at the Collateral Registry of the Bank of Ghana:

a. Mortgage over residential property at Plot Number 71 Block 8, Section 167, Haatso, Accra belonging to Mr. Godfred Andoh;

b. Mortgage over residential property at Plot Number 72 Block 8, Section 167, Haatso Accra belonging to Mr. Godfred Andoh;

c. Mortgage over a parcel of land situate and lying at Sefwi Punikrom (22.88 acres) in the Western Region belonging to Mr. Godfred Andoh;

d. Mortgage over property on Plot Number 29 Block 10 Section 166, Haatso, Accra belonging to Mr. Godfred Andoh;

e. Mortgage over a residential property being Plot No. 4 situate at Regimanuel Gray Estates, Golden Gate, Asanfra Link, Accra;

f. Assignment over contract proceeds;

g. Charge over all funds in 1st Defendant Company account with Plaintiff bank;

h. Charge over CAL Security Deposit worth Three Million, Eight Hundred and Fifty-five Thousand, Seven Hundred and Nine Ghana Cedis Twenty-three Pesewas (GHS 3,855,709.23) held with the Plaintiff bank which amount was applied to reduce the debt in May 2019.

i. Assignment of contract proceeds from Ghana Cocoa Board;

j. Debenture secured by 1st Defendant Company's plant and equipment;

k. Charge over six (6) new caterpillar equipment financed by the Plaintiff bank with Registration Numbers: GT 8301-16, GT 8298-16, GT 8305-16, GR 4881-16, GT 8302-16;

l. Cross Guarantee by 2nd Defendant company, Hodna Construction Limited;

m. Joint and several Guarantees of the Company Directors namely 3rd and 4th Defendants; and

n. Assignment of insurance proceeds due from assets insured by 1st Defendant company.

The Applicant contends that the third and fourth defendants as directors of the first Defendant company, jointly, severally, irrevocably and unconditionally guaranteed the repayment of the facilities procured by the first Defendant company by a Director's Guarantee dated 3rd June, 2015 attached and marked as **Exhibit "SJ3"**. Also,

the 3rd Defendant and the 4th Defendant jointly, severally, irrevocably and unconditionally guaranteed the repayment of the facility procured by the first Defendant company by execution of a Joint and Several Guarantee of Directors dated 22nd May, 2018 attached and marked as **Exhibit "SJ4"**. That by so doing, the said directors agreed to be liable for the payments of all sums of money which became due at any time thereafter or which may be accrued or become due to the Plaintiff bank by the first Defendant company in respect of any liability whatsoever, whether actual or contingent and whether in the character of principal debtor or guarantor or surety or otherwise together within all cases.

The Plaintiff/Applicant contends that additionally, according to clause 6 of **Exhibit "SJ3"** and **Exhibit "SJ4"**, the third and fourth Defendant agreed that the Plaintiff bank may at all times, without prejudice to the said Guarantees, and without discharging or in any way affecting the liability of the guarantors do the following among others:

a) Determine, vary or increase any credits to the first defendant company;

b) Grant to the first Defendant company or any other person anytime or indulgence, and

c) Renew any bills, notes or other negotiable securities.

It is the case of the Applicant that the first Defendant has failed to carry out its contractual obligation assumed under the earlier loan facility agreements dated June 2015 and November 2015 and the restructured loan facility of March 2019 despite several demands made on the first Defendant by the Plaintiff.

The Applicant avers that the crux of the defence of the first and second defendants is that the two have been meeting their contractual obligations under **Exhibit "SJ", Exhibit "SJ1"** and **Exhibit "SJ2"** until the actions of some third parties halted their business operations. Also, the Defendants are alleging that in considering the Guarantees, **Exhibit "SJ3"** and **Exhibit "SJ4"**, cannot be incorporated into the restructured agreement of March 2019 as it only applies to the two earlier loan facility

agreements, **Exhibit "SJ"** and **Exhibit "SJ1"**. The Applicant contends that the third and fourth defendant's defence that the restructured facility of March 2019 is misplaced as the said defendants did not guarantee the restructured loan is a sham and not a legally cognizable defence to the claim. That the Defendants, 1st, 2nd and 4th have not denied liability owed to the Plaintiff in paragraph 1, 3 and 8 of their Statement of Defence and have at all times material represented to the court their willingness to repay the debts due to the Plaintiff by the first defendant. For that reason, the court should restrain the defendants from pursuing such a sham as a defence in the face of the admissions of their liability. The Applicant therefore prays that the Court should grant the instant application and enter judgment in favour of the Plaintiff on the merits of the present case.

On the other hand, the Defendants/Respondents are opposed to the instant application. In a 26 paragraphed Affidavit in Opposition filed on 29th March, 2023, the 4th Defendant, the Chief Executive of the 1st Defendant Company on behalf of all the Defendants deposed to the fact that there is only one loan facility that has given rise to the instant action and that the loan facility dated March 2019 with an addendum was neither signed by the 3rd Defendant nor executed by any Director's Guarantee.

Further to that, the parties were ordered by the Court on 20th July, 2022 to file their Witness Statements before 30th September for Case Management Conference on 10th November, 2022 after the Court found that there are triable issues to be resolved. The defendants attached **Exhibit '1'** which is a copy of the Pre-Trial Conference/Settlement Issues agreed on for trial:

1. Whether or not the November, 2015 Loan Facility Agreement and the Subsequent Loan Facility in March, 2019 made the Two (2) Facility Agreements the same;

2. Whether or not the interest rate of 24.53% is the rate to be applied to 1st Defendant's default on the Loan Facility Agreement in November, 2015 and March, 2019.
3. Whether or not the 2nd, 3rd and 4th Defendants' guarantees given under the November, 2015 Loan Facility Agreement applies to the March 2019 Loan Facility Agreement.
4. Whether or not 2nd, 3rd, and 4th Defendants have failed to discharge their obligations under the respective guarantees signed in relation to the November, 2015 and March 2019 Loan Facility Agreements.
5. Whether or not 1st Defendant has failed to discharge its contractual obligation under the following Facility Agreements: i] November, 2015 and ii] March, 2019.
6. Whether or not 1st Defendant is indebted to Plaintiff to the tune of Fifty-Four Three Hundred and Eight Thousand, Seven Hundred and Sixty Ghana Cedis Fourteen Pesewas (GHC54, 308,760.14).

The defendants attached **Exhibit '2'** headed: FACILITY AGREEMENT BETWEEN CALBANK LIMITED AND MIDWEST CONTRACT WORKS LIMITED MARCH 2019 to their Affidavit in Opposition.

It is the case of the defendants that the instant application is incompetent, misconceived and an abuse of the court process and that the plaintiff wants to manipulate the process to prevent their case from being heard and determined on its merits.

To start with, Order 58 of the High Court (Civil Procedure) Rules CI 47 contains special rules that guide the operations of the Commercial Court. Order 58 incorporates court oriented Alternative Dispute Resolution as part of the adjudicating process of the Commercial Court. By Order 58 rule 3(2) parties in suits before the Court are not

allowed to apply for summary judgment or judgment on admissions, until after the pre-trial settlement conference. Order 58 rule 3 (2) of CI 47 provides:

> "An application for summary judgment or judgment on admissions shall not be filed until after the pre-trial settlement conference."

The pretrial settlement conference at the Commercial Court is so fundamental that it clothes the court with the jurisdiction to hear an application for Summary Judgment only if the parties have participated in the pretrial session and the matter has been remitted for full trial. Non-compliance with this fundamental rule as dictated by Order 58 rule 3 (2) will render any subsequent procedure which begets Summary Judgments null and void.

The record shows that there has been a pre-trial Conference in respect of this action and the parties were unable to settle at the pre-trial conference. I will now determine the present application on its merit.

It is trite that the essence of Summary Judgment is to enable a plaintiff who has served a Writ of Summons and Statement of Claim on a Defendant to obtain judgment without a trial provided the plaintiff can prove his or her claim clearly by affidavit evidence. The judgment may be for a part of the claim or the entire claim. Order 14 r (1) of C.I. 47 states:

> Where in an action a Defendant has been served with a statement of claim and has filed appearance, the Plaintiff may on notice apply to the Court for judgment against the Defendant on the ground that the Defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or that the Defendant has no defence to such a claim or part of a claim, except as to the amount of any damages claimed.

The conditions prerequisite to the grant of Summary Judgment was established by the Court in the case of **YARTEL BOAT BUILDING VRS ANNAN [1991] 2 GLR 11** as follows:

1) The Defendant must have been served with a Statement of Claim.

2) The Defendant must have entered an appearance and

3) The Affidavit in support of the application must not only depose to facts indicating that the Plaintiff's claim is real and considerably unimpeachable but must also contain an averment that the Defendant had no defence to the action.

It is evident from the record that the first two conditions have been met in the instant case. The issue to be determined by the Court at this point is whether or not the defendants have a defence to the claim and whether or not the defence raised is a legal defence or reasonable to raise any triable issues.

In the case of **SADHWANI V AL-HASSAN (1999-2000) 1 GLR 19** where the trial judge dismissed an application for Summary Judgment on the grounds that there were triable issues, the Court of Appeal per Georgina Wood J.A (as she then was) held that:

> *In applications to sign final judgment, the trial judge was required to examine the pleadings and determine whether there existed a bona fide or good defence known in law. Once any of them was established, it would constitute a triable issue. It could be an issue of fact or law. However, the judge was not empowered to try the merits of the respective claims using the affidavit evidence on hand. In any case, the affidavit evidence presented in an application for summary judgment was not intended to be used for the resolution of triable issues that might emanate from the pleadings since that would undermine the very foundation of justice. In the instant case, the pleadings raised the crucial issue of the validity of the respondent's undertakings and the quantum of the respondent's indebtedness to the appellant. Those were factual issues which in accordance with the rules of procedure had to be tried by viva voce evidence and be subjected to cross examination. Since these were triable issues, the trial judge was justified in rejecting the application for summary judgment.*

From the pleadings, the 1st, 2nd and 3rd Defendants in their Joint Statement of Defence dated 20th August, 2021 in response to paragraph 5 of the Writ of Summons and Statement of Claim dated 29th June, 2021 stated that the first Defendant made periodic payments on the facility to the Plaintiff until Ghana Cocoa Board unilaterally terminated its contract. Further to that, its business was also affected by COVID-19.

Then, in response to the restructured facility agreement dated March 2019, to increase 1st Defendant's direct exposure to a short-term loan of GHS50, 000,000.00 at a rate of Ghana Reference Rate (GRR at 16.27%) plus a Risk Premium of 10.73% per annum per paragraph 6, the Defendants avers that the facility granted was entirely different from the earlier facility granted in November 2015 and had independent terms and conditions. That it was also guaranteed by different personalities.

The Defendants aver that it applied for the said facility when it was awarded a road contract to rehabilitate the Benchema Junction-Ajoafua Motor Road in the Western North Region by Government of Ghana through Ghana Cocoa Board. Following the repayment of the November 2015 facility, the plaintiff granted the 1st Defendant another facility to finance the Ghana Cocoa Board contract. 1st and 4th Defendants contend that the 3rd Defendant did not provide a Joint Guarantee to this facility and therefore an invitation to 3rd defendant to retire the indebtedness is misplaced. The 3rd Defendant in his Statement of Defence dated 14th February, 2022 highlighted same and added that he became aware of the existence of the structured loan with its terms and conditions when there was a default by 1st Defendant even though he is a director of same.

The 1st, 2nd and 3rd Defendants contend that they entered into negotiations with the plaintiff to ascertain the actual indebtedness of the 1st defendant but could not reach any conclusion though a substantial portion of the loan facility had been retired by 1st Defendant. Also payment effected by Ghana Cocoa Board in the joint names of the plaintiff and the 1st Defendant was retained by the Plaintiff to the exclusion of the 1st defendant. Then again, cash security offered by the 1st Defendant and interest thereon

has been used by the bank to retire the facility but Plaintiff failed to notify the 1st and 4th defendants of the interest on the cash security.

The Defendants with the exclusion of 3rd Defendant have denied vehemently the assertion of the Plaintiff in the said Writ of Summons and Statement of Claim that as at 22nd June 2021, the 1st Defendant's account stood at Fifty-Four Million, Three Hundred and Eight Thousand, Seven Hundred and Sixty Ghana cedis, Fourteen Ghana Pesewas (GHC54, 308,760.14) and continues to accrue interest at the contractual rate till date. It is therefore the case of the defendants that the Plaintiff is not entitled to its reliefs endorsed on the Writ of Summons and that the 1st Defendant does not owe plaintiff.

There is also a contention on whether the third and fourth defendants guaranteed the restructured facility of March 2019 and whether the Director's Personal Guarantee that appear on Exhibits SJ3 dated 3rd June 2015 and SJ4 dated 22 May 2018 can by any stretch of arguments be inferred that 3rd Respondent has given his personal guarantee for the March 2019 agreements and its addendum.

It seems to me that the Applicant is alleging a breach of the said Guarantees by the Defendants. In that regard, the Applicant is praying the indulgence of the Court to consider the simple construction of the two Guarantees and their respective clauses summarily. However, it is my considered view that the Court cannot interpret the construction of the two Guarantees and their respective clauses summarily, and in isolation from the Loan Agreements/Facilities since it goes to the root of the entire claim.

In the case of **YIRENKYI V TORMEKPEY [1987-88] 1 GLR 533-539** where the Plaintiff-Respondent (T) bought a second-hand Toyota truck for ¢157,000 from the Defendant-Appellant (Y), a motor vehicles dealer and then spent ¢56,860 to make substantial repairs to rehabilitate the truck. T brought an action against Y to recover

both sums and for damages for loss of use and pleaded that after taking delivery of the truck he found that contrary to the warranty given by Y to him, the truck was not roadworthy, and that Y then authorised him to have the truck repaired and promised to refund the cost of repairs. Although Y admitted receipt of the purchase price, he denied having given T any warranty. Subsequently, T then moved for summary judgment under Order 14 of the High Court (Civil Procedure) Rules, 1954 (L.N. 140A) as amended by the High Court (Civil Procedure) (Amendment) (No. 2) Rules, 1977 (L.I. 1129), r. 2 on the ground that Y had admitted receiving the purchase price. The trial judge allowed the motion. Y appealed on the grounds that (a) the pleadings disclosed several disputable issues which could only be resolved by evidence; and (b) the trial judge had failed to appreciate that the relief was based on breach of contract which he had denied. The court held per Osei Hwere J.A (as he then was) that:

> *"The trial judge was not entitled to conclude without evidence that there was a breach of warranty that the vehicle (a second-hand one) was reasonably fit for the purpose for which it was required, especially as the allegation of unroadworthiness, deposed to by the Plaintiff, was denied by the Defendant…".*
>
> *The Court was of the view that the Defendant's defence raised triable issues and that the Defendant's admission that the ¢157,000 had been paid could not be considered in isolation because it was inextricably bound up with the contract of sale and to demand its refund there had to be proof either on admission or upon legally receivable evidence that the contract had been breached. The Court concluded that the application for Summary Judgment was incompetent and allowed the appeal.*

In applying the principle established in the aforementioned case to the case at hand, I am of the considered view that the authenticity of the Guarantees and the issue of endorsement of same cannot be determined by the affidavit evidence only. The court would have to interpret the Agreements as a whole.

In the case of **SANUNU V SALIFU [2009] SCGLR 586,** the Supreme Court held that under Order 14 rule 1 of C.I. 47, a trial judge

> *"… must come to the conclusion that on the face of the claim there is no defence to the action. A defence set up need only show that there is a triable issue; and leave to defend ought to be given unless there is clearly no defence in law and no possibility of a real defence on the question of fact."*

It is evident from the discourse so far that there are issues of facts to be determined at the trial. The law on triable issues was highlighted by Georgina Wood J. A (as she then was) in the unreported case of **ALEX BROBBEY V AKWASI ADDAI CIVIL APPEAL NO 176/1999** where the Kumasi High Court had granted a Summary Judgment that:

> *"It follows that a Defendant/Respondent to such as application is not bound to show a good defence to the merit and consequently it would be wrong for a judge to try the merits of the case on the affidavit evidence placed before him. Thus, even though a judge may think that the Defendant might at the trial not succeed in his defence and so fail, he is nevertheless bound to grant the Defendant leave, possibly conditional leave to defend the claim…"*

In order for the Applicant to succeed in the instant application, the affidavit in Support must not only depose to facts that the Plaintiff's claim is real and considerably unimpeachable but must also contain an averment that the Defendant had no defence to the action. According to Halsbury, a defendant is entitled to unconditional leave in all cases where he shows that he has a genuine defence or adduces facts which may constitute a plausible defence, or shows that there is substantial question of fact or law to be tried or investigated (see Halsbury's Laws of England, Fourth Edition, 519).

Having examined carefully the processes filed in this application, the submissions of both Counsel and the relevant authorities. I am of the considered view that the plaintiff has failed to satisfy the court that the Defendants have no reasonable defence to the claim. The fact that there are contentions on the substantive claim in terms of

the principal sum outstanding, the applicable Guarantees and the interpretation of the clauses therein shows that there are triable issues to be determined by the court. Obviously, the Defendants have a reasonable defence. On the whole, it is evident that the instant application has failed to pass the three-fold test as established as a rule in the case of **YARTEL BOAT BUILDING VRS ANNAN** supra.

For the aforementioned reasons, the application fails. The application for Summary Judgment is hereby dismissed. Cost of Ghc5000.00 awarded in favour of Defendants/Respondents against the Plaintiff/Applicant.

(sgd.)

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JUSTICE ADELAIDE ABUI KEDDEY

JUSTICE OF THE HIGH COURT

(COMMERICAL DIVISION)

COUNSEL:

1. **Puu Maya Fareedah Attah Nantogmah, Esq., with Kofi Owusu Boateng, Esq., and Margaret Tansisua Lambongang, Esq. Holding Brief for Thaddeus Sory, Esq.**

2. **Kwesi Blay, Esq., For Defendant/Respondent**

AUTHORITIES

Cases

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2. Sadhwani vs. Al-Hassan (1999 – 2000) 1 GLR 19……. 11
3. Sanunu vs. Salifu (2009) SCGLR 586…….. 15
4. Yartel Boat Building vs. Annan (1991) 2 GLR 11…… 10