IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE (COMMERCIAL DIVISION) ACCRA HELD ON FRIDAY, THE 28TH DAY OF APRIL, 2023 BEFORE HER LADYSHIP JUSTICE AKUA SARPOMAA AMOAH (MRS.)

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SUIT NO. CM/BFS/0320/2022

UNIVERSAL MERCHANT BANK LIMITED … PLAINTIFF

VS.

MENZBEK LIMITED … DEFENDANT

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PARTIES: - PLAINTIFF REPRESENTED BY DANIEL TEI – PRESENT

DEFENDANT REPRESENTED BY EBENEZER KOBINA BEDIAKO – PRESENT

COUNSEL: - AUDREY TWUM HOLDING BRIEF FOR KWAME BOAFO

AKUFFO FOR PLAINTIFF – PRESENT

JONATHAN ANTWI FOR DEFENDANT – PRESENT

MOTION FOR SUMMARY JUDGMENT

NOTE:

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J U D G M E N T

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The present Motion seeks Summary Judgement against the Defendant in respect of the reliefs endorsed on the Plaintiff's "Re-amended Writ" in terms of ***Order 14 of the High Court Civil Procedure Rules, 2004 (CI 47)***.

By its "Re-amended Writ and Statement of claim" filed on the 30th of December, 2022, the Plaintiff seeks the following reliefs against the Defendant;

a) *The principal sum of* ***One million and Four Thousand, Nine Hundred and Ninety -Eight Ghana cedis and Seventy pesewas (GH¢ 1,004,998.70)***
b) *Accrued interest on the facility, which presently stands at* ***Three Million, Six Hundred and Thirty-One Thousand, One Hundred and Forty-Two Ghana Cedis and Twenty–Four pesewas (GH¢ 3,631,142.24)*** *as at 31st May, 2022 calculated on 31% and continuing to date of final payment*

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c) *Penal Interest charges (interest rate plus a margin of 10%) as per the terms on the balance outstanding to date of final payment.*
d) *An order specifying the time within which the judgment of this Court should be complied with*
e) *Costs*

The record shows that the Defendant was, on the 13th of January 2023 served with the said Re-amended statement of Claim. However, in keeping with its conduct from the inception of the suit, the Defendant has, as at the date of hearing the instant Application, failed to file a defence to the claim. As is obvious ***Order 11 rule 2*** of ***CI 47*** the time for filing a statement of defence has long elapsed.

That being said, it is clear from a reading of ***Order 14*** that a Plaintiff may apply for Summary Judgement whether or not a Defence has been filed. A Defendant may also (whether or not a Defence has been filed) show cause in terms of ***Order 14 (3)*** against the Application by affidavit or otherwise. It is however significant to note that, the said provision requires that cause shown by Defendant must be to the satisfaction of the Court.

In the case at hand, the Defendant upon being served with the Plaintiff's motion for Summary Judgement filed in response, a process entitled ***"AFFIDAVIT IN OPPPOSITION TO MOTION FOR JUDGEMENT IN DEFAULT OF DEFENCE"***. I have carefully examined the processes on record and unable to fathom any reason for Defendant responding to an

Application for Summary Judgement with an affidavit opposing the grant of Judgement in Default of Defence.

It should be quite obvious from a reading of Plaintiff's Application that the same is brought, not because the Defendant has failed to file a defence but because Plaintiff contends that Defendant has no defence to its claim. Defendant appears to have missed the clear distinction between the concepts of "Summary Judgement" and "Judgement in Default of Defence."

In the case of ***REPUBLIC v HIGH COURT EX PARTE PORT HANDLING, CIVIL MOTION J5/23/2013 DATED THE 30TH OF OCTOBER, 2013***

The Supreme Court highlighted this distinction as follows;

"Summary judgment and default judgment are conceptually different. A summary judgment is a judgment on the merits even though it is obtained by formal motion without a plenary trial....a default judgment on the contrary though obtained by motion is not a judgment on the merits but a judgment based solely on the inability of the respondent to the application to file appearance or defence within the statutory periods set by the rules."

The said affidavit in opposition is therefore clearly irregular for which reason the instant Application should in law, be deemed unopposed. I will however for the sake of completeness and in the interest of justice consider the substance of the Defendant's affidavit in opposition, in order to determine whether or not it ought to be granted leave to defend the action.

Now, the subject matter of the Plaintiff Bank's suit arises out of an "Invoicing Discounting" loan Facility Agreement dated 16th June 2017, by which the Defendant requested and was granted a loan in the sum of ***Two Million Ghana Cedis (GH¢ 2,000,000).*** By the terms of the said Agreement (a copy of which is attached to the affidavit in support as ***Exhibit F)*** the facility was to expire in 12 months from the date of disbursement and at an interest rate of 31% per annum.

Salient among the terms of the facility were the following;

i) *That Penal Interest Rate plus margin of 10% p.a. would be charged on account when payment becomes irregular*

ii) *That the Plaintiff reserves the right to call on the facility in the occurrence of a default in the covenants stated in Paragraphs 6 of the terms and conditions of the offer letter*

By a "Deed of Lien" dated the 17th of March, Plaintiff says that the Defendant pledged its fixed investment of ***One Hundred Thousand Ghana Cedis (GH¢100,000.00.)*** as additional security for the facility. The terms of this new arrangement was to the knowledge of the Defendant made in accordance with the terms of ***Exhibit F.***

Plaintiff says the Defendant however, in breach of the terms of ***Exhibit F*** failed to settle its indebtedness to Plaintiff resulting in the Defendant's indebtedness in respect of the "Invoicing Discounting Loan" standing at a total of ***One Million and Four Thousand Nine Hundred and Ninety-Eight Ghana Cedis Seventy Pesewas (GH¢ 1,004,998.70.)*** as of the 31st of May, 2022. Accrued interest also stood at ***Three Million Six Hundred and Thirty-***

One Thousand One Hundred and Forty-Two Ghana Cedis Twenty-Four Pesewas (GH¢ 3,631,142.24) as of the same date.

Plaintiff on the basis of the foregoing seeks recovery of the afore-mentioned amounts in addition to the payment penal charges and costs.

In its ***"AFFIDAVIT IN OPPOSITION TO JUDGEMNT IN DEFAULT OF DEFENCE"***, the Defendant admits having taken the facilities in question. The said affidavit is however devoted to explaining away the Defendant's failure to file a Defence and does not in my opinion, satisfactorily show cause against the Plaintiff's prayer for Summary Judgment as required by ***Order 14 (3***).

In any event the fact that the Plaintiff amended its Writ, cannot be good enough reason for failure to file a defence. Similarly, the fact that the Parties were "engaged in settlement talks" cannot also be good reason for the said failure. See the case of ***GHANA CARGO HANDLING COMPANY v DOLPGHYNE AND ANOTHER 6TH JULY 1970 DIGESTED IN (1970) CC 84 (HC)***

The Defendant proceeds to depose to the fact that it has a good defence to the Plaintiff's suit and "annexes" a document said to be its Statement of Defence to its affidavit.

This is clearly in breach of ***Order 20 rule 14*** which provides that;

14(1) Any document to be used in conjunction with an affidavit shall be exhibited and not merely annexed or attached to the affidavit.

(2) Any exhibit to an affidavit shall be identified by a certificate of the person before whom the affidavit is sworn.

(3) The certificate shall be titled in the same manner as the affidavit and rules 3 subrule (1)(2)(3) shall apply accordingly. [Emphasis mine]

The word used in the said provision is *"shall"* which by virtue of ***Section 42 of the Interpretation Act, 2009 (Act 792)*** makes compliance with same mandatory. The purported Statement of Defence is neither exhibited nor certified as required by the Rules and should be disregarded by this Court.

Unfortunately, the Defendant's affidavit in opposition is fraught with so many irregularities that continuously turning a blind eye to same could give the impression of this Court condoning non-observance of the Rules.

As held in the unreported case of ***PATRICK ANKOMAYI v HANNAH BUCKMAN, CIVIL APPEAL; NO J/4/43/2013 DATED THE 26TH OF FEBRUARY, 2014;***

" ..The rules of Court are not ornamental pieces. They are meant to be complied with..."

Again, even if this Court decided to waive the Defendant's non-compliance with the afore-mentioned provisions, the Defendant would not have succeeded in demonstrating that it has a reasonable defence to Plaintiff's claim or that there are triable issues that require the conduct of a plenary trial.

Order 14 (4) requires that depositions in an affidavit filed in an application such as the instant discloses the sources of the deponent's information and the grounds for the deponents belief. Nowhere in the papers filed by the Defendant, has it satisfied this requirement. There is no proof of the so-called repayments made or justification provided for an Order to "go into account".

Having admitted taking the said facilities, it behoved Defendant to show cause against the grant of Summary Judgement by condescending upon the claim and stating clearly and concisely what its defence was. Defendant was required to demonstrate that it had a viable defence to the Plaintiff's suit. This it failed to do in my considered opinion.

In the case of ***SAM JONAH v DUODU-KUMI [2003-2004] SCGLR 50*** the Supreme Court emphasised that;

"The objective of Order 14 of the high Court (Civil Procedure) Rules.... is to facilitate the early conclusion of actions where it is clear from the pleadings that the defendant has no cogent defence. It is to prevent a plaintiff from

being delayed when there is fairly no arguable defence to be brought forward.."

Indeed I see the Defendant's resistance to the grant of the instant motion as a delay tactic as its Counsel had on the 28th of March, 2023 stated in open Court that it did not intend to contest the suit. It is for this reason that I consider Plaintiff's prayer for Summary Judgement in respect of reliefs (a) and (b) deserving.

Reliefs (c) and ***(d)*** require closer scrutiny. By ***Relief (c),*** Plaintiff prays for recovery of penal interest charges as per the terms of ***Exhibit F.*** It is trite learning that the law applicable to a transaction is the law in force at the time the cause of action arose.

From the Plaintiff's pleadings, the facility granted in 2017 was for a period of 12 months, which would mean that Plaintiff's cause of action against the Defendant would have crystalized sometime in the year 2018. It is not in doubt that by ***Clause 3(c)*** of ***Exhibit F,*** the parties agreed that penal charges would be exacted by the Plaintiff whenever payments became irregular. But I am unaware of any legislation that permitted the imposition of penal charges on borrowers at the time.

Indeed, the inclination of the Courts, prior to the introduction of the new ***Borrowers and Lenders Act, 2020 (Act 1052)*** was to strike down provisions in agreements for the payment of penal interest as unenforceable. A case in point is ***BOATENG v MELBOND MICROFINANACE [2018-2019] 791*** where the Court held that;

"Penal interest is penal in nature and by its terminology meant to serve as punishment against the borrower. A court of law should not lend support to punishment of borrowers by their lenders in an otherwise commercial transaction. Interest may be exigible as return on investment for use of one's money but to exact penal interest is akin to imposing punishment on borrowers by their lenders in an otherwise commercial activity."

Any amount due the Plaintiff prior to the introduction of ***Act 1052*** should therefore be less any penal charges.

Now, even if we proceed under ***Act 1052,*** the relevant portions of ***Section 55(1)*** which deal with penal charges states that**;**

55(1) A lender shall not in response to a right exercised by a borrower under this Act

(a) Penalise the borrower;….

(3) Where a credit agreement provides for the application of a penal interest rate on a delayed repayment of

a) The principal amount of the loan

b) The interest on the principal amount of the loan or

c) both the principal amount and the interest on the principal amount of the loan

the agreed penal rate shall be applied on the amount of the delayed payment only and not on the total amount of the outstanding loan.

The pleadings of the Plaintiff fail to provide particulars of the delayed amount or when the same became "irregular" under ***Clause 3 (c)*** of ***Exhibit F***. I am therefore not disposed to granting the said ***Relief (c)***

The Plaintiff by ***Relief (d)*** also prays that the Court sets a time limit within which its Judgement will be complied with.

Order 41 rule 4 (1) states that;

4 (1) Subject to subrule (3) a judgement or order which requires a person to do an act shall specify the time within which the act is to be done.

Subrule (3) of the said rule states clearly that;

(3) "where the act which a person is required by a judgment or order to do is <u>to pay money to any other person</u>, give possession of immovable property or deliver movable property subrule (1) shall not apply unless the court otherwise directs." [My emphasis]

In the absence of such direction by this Court, I consider Plaintiff prayer for timelines to be set in this case unwarranted. The same is therefore refused.

In the premises, Summary judgment is entered in favour of Plaintiff against the Defendant as follows:

1. Recovery of the sum of ***One million and Four Thousand, Nine Hundred and Ninety-Eight Ghana cedis and seventy pesewas (GH¢ 1,004,998.70)*** BEING Defendants indebtedness to Plaintiff as of the 31st of May, 2022
2. Interest on ***(1***) above which stood at ***Three Million, Six Hundred and Thirty-One Thousand, One Hundred and Forty-Two Ghana Cedis and Twenty–Four pesewas (GH¢ 3,631,142.24)*** as at 31st May, 2022 calculated at the agreed interest rate of 31% per annum and continuing to date of final payment.

3. Relief (c) is dismissed
4. Relief (d) is dismissed

Costs of ***Fifteen Thousand Ghana Cedis (GH¢ 15,000.00.)*** in favour of the Plaintiff against the Defendant.

(SGD)

AKUA SARPOMAA AMOAH (MRS)

JUSTICE OF THE HIGH COURT

<u>Cases referred to</u>:

REPUBLIC v HIGH COURT EX PARTE PORT HANDLING, CIVIL MOTION J5/23/2013 DATED THE 30TH OF OCTOBER, 2013

GHANA CARGO HANDLING COMPANY v DOLPGHYNE AND ANOTHER 6TH JULY 1970 DIGESTED IN (1970) CC 84 (HC)

PATRICK ANKOMAYI v HANNAH BUCKMAN, CIVIL APPEAL; NO J/4/43/2013 DATED THE 26TH OF FEBRUARY, 2014;

SAM JONAH v DUODU-KUMI [2003-2004] SCGLR 50

BOATENG v MELBOND MICROFINANACE [2018-2019] 791

Statute referred to:

The High Court Civil Procedure Rules, 2004 (CI 47)

The Interpretation Act, 2009 (Act 792)

The Borrowers and Lenders Act, 2020 (Act 1052)