IN THE SUPERIOR COURT OF JUDICATURE IN THE COMMERCIAL DIVISION (COURT 1) OF THE HIGH COURT OF JUSTICE ACCRA, HELD ON TUESDAY THE 30TH DAY OF APRIL, 2024 BEFORE HER LADYSHIP JUSTICE SHEILA MINTA

SUIT NO. CM/BFS/0854/2019

STANBIC BANK GH LTD. - PLAINTIFF

VRS.

DANIEL AGUALEY AMANOR - DEFENDANT

JUDGMENT

INTRODUCTION

The Plaintiff offered to the Defendant a vehicle and Asset financing facility of GHS624,720.00 for the purchase of a new DAF truck with trailer. And for the said facility the parties executed a Finance Lease Agreement on 27th March, 2018. The Plaintiff further granted the Defendant an Overdraft facility of GHS500,000.00 with an interest rate of 27% and a further Bank Guarantee of GHS500,000.00. According to the Plaintiff the Defendant failed to honour his obligations and proceeded to sell the DAF truck in liquidation of part of Defendant's debt and also instituted this suit on 25th May, 2019. But the Defendant's story is that yes, he took the said facility from the Plaintiff to be paid within a period of forty-eight (48) months and the cancellation of the contract before the tenor and the seizure and subsequent sale of the truck were all unlawfully done. According to the Defendant the Plaintiff has not been able to show how much is exactly owed the Plaintiff by the Defendant, having failed to attach Defendant's statement of account. The Defendant however does not show that he has paid off the facility though he also filed a

Counterclaimed. He Counterclaimed against Plaintiff for unlawful seizure and sale of the Truck and damages for loss of use of same.

SUMMARY OF PLAINTIFF'S CASE

The Plaintiff's case is that on 22nd March, 2018 it offered to the Defendant a Vehicle and Asset Financing Facility (Finance Lease) for the sum of GHS624,720.00 for the purchase of a DAF truck for the Defendant to use for his business. According to the Plaintiff the Finance Lease was for a non-cancellable period of 48 months from the date of first draw down. That by the terms of the agreement the said Truck would be owned by the Plaintiff and same subsequently transferred to the Defendant at the end of the agreement. The parties also agreed that the Plaintiff could repossess same when rental repayment fall in arrears. The said facility was to attract an interest of 27% per annum plus a 5% interest rate upon default in payments. The Plaintiff posited that in addition to the said Finance Lease it gave to the Defendant an Overdraft in the sum of GHS500,000.00 and a Guarantee of another GHS500,000.00.

By the Plaintiff's case the security provided by Defendant for the facilities were:

First-ranking legal mortgage over a 4-bedroom residential property located

at Baatsona and owned by Defendant with a forced sale value of GH1,063,950.00 and an open market value of GHS1,418,600.00 in February 2018 and a charge over the said DAF truck valued at Euro 137,000. The Plaintiff again alleged that the Defendant executed a Deed of Mortgage in favour of the Plaintiff. The Defendant failed to honour his obligations towards the Plaintiff and several demands were made to him and when he still failed to pay up the Plaintiff proceeded to repossess the DAF truck and subsequently disposed of same through an auction sale at a reserved price of GHS488,000.00 but sold same to the highest bidder for GHS450,000.00. According to the Plaintiff proceeds from the sale of the DAF truck could not completely liquidate the Defendant's debt to it and

hence the instant suit against the Defendant for the recovery of the sum of GHS1,456,376.01, interest on the said sum or in the alternative for the judicial sale of the said 4-bedroom residential property at Baastona used as security for the loan.

In support of the Plaintiff's claim the following documents were tendered in evidence:-

Exhibit A: Finance Lease Agreement dated 22nd March, 2018.

Exhibit A1: Vehicle & Asset Finance Facility Letter dated 22nd March, 2018.

Exhibit B: Undertaking by Defendant dated 12th May, 2017.

Exhibit C: Demand letter dated 10th December, 2018.

Exhibit C1: Final demand letter dated 18th January, 2019.

Exhibit C2: Final demand letter dated 21st January, 2019.

Exhibit D: Notice of Intention to Sell DAF Articulator dated 25th January, 2019.

Exhibit E: STC Valuation and Newspaper publications.

SUMMARY OF DEFENDANT'S CASE

The Defendant's defence is that firstly, the cancellation of the agreement and the institution of the instant action was premature as the facility was for a non-cancellable period of forty-eight (48) months and therefore same has been brought in bad faith as the facility was to expire sometime in March 2022. Secondly, it is the Defendant's case that the copies of the Loan Offer Letters and Agreements were never given to him to appraise himself with the conditions of the facilities despite numerous demands. The Defendant further stated that he contributed an amount of GHS156,180.00 as equity contribution towards the purchase of the DAF truck and also subsequently made various payments toward liquidating his indebtedness though he does not prove how much the various payments came to.

Thirdly, the Defendant's problem with the Plaintiff is that it unlawfully seized the said truck from his driver by deceit without an order of the Court and further proceeded to again unlawfully sell same without a Court's order for variation. According to the Defendant the said sale contravened the Borrowers and Lenders Act and the charge was not registered with the collateral registry as required by law. And that the unlawful conduct of the Plaintiff resulted in the collapse of his cement business and the loss of use of the leased Truck estimated at GHS2,000.00 per day from 25th January, 2019 till date as restitution and hence his counter-claim as follows:-

i. A declaration that the refusal by the Plaintiff to furnish the Defendant with all the documentation relevant to the loan transaction is a breach of the *audi alteram paterm* rule of natural justice and therefore the terms contained therein are null and void and unenforceable.
ii. A declaration that the seizure and the subsequent sale of the Defendant's truck by the Plaintiff is unlawful and a consequential order directed at the Plaintiff to compensate the Defendant for loss of use of the vehicle; or in the alternative a refund of all the money paid by the Defendant to the Plaintiff prior to the unlawful seizure and sale of the truck.
iii. A declaration that the actions of the Plaintiff amount to a breach of contract and the award of special and general damages for breach of contract.

The Defendant in proof of his case tendered the following documents:-

Exhibit 1: Correspondence dated 7th September, 2018 to Plaintiff to Defendant requesting for documentation of credit facilities.

Exhibit 1A: Email dated 30th August, 2018 to the Plaintiff, requesting for documentation on credit facilities.

Exhibit 2: Email from Plaintiff to Defendant dated 19th November, 2021 communicating a credit of GHS863,234.93 leaving a debit balance of -GHS459,360.08.

Exhibit 2A: Text message from Defendant to Plaintiff dated 19th November, 2021 communication a credit of GHS863,234.93 with a debit balance of -GH459,360.08.

ISSUES FOR TRIAL

At the close of pleadings and settlement having failed at Pre-Trial, the parties and the Judge set down the following issues for trial.

1. Whether or not in March 2018, the parties executed a finance lease agreement (Agreement) by which the Plaintiff offered the Defendant a Vehicle and Asset Financing Facility to the tune of GHS624,720.00
2. Whether or not the parties agreed that ownership of the Assets should be registered in the name of the Plaintiff during the term of the lease and only transferred to the Defendant at the end of the lease.
3. Whether or not the Defendant has defaulted in the repayment which stood at GHS397,946.01 as at April 11, 2019
4. Whether or not the act of the Plaintiff impounding the DAF Truck with trailer from the Defendant and denying the Defendant the use of same is lawful (in law or equity).
5. Whether or not the Plaintiff breached the contract between the Plaintiff and Defendant.
6. Whether or not the Defendant is entitled to his counterclaim.
7. Whether or not in March 2018, the Plaintiff gave the Defendant an overdraft facility in the sum of GHS500,000.00.
8. Whether or not the aforementioned overdraft has been repaid by the Defendant.
9. Whether or not the total indebtedness of the Defendant to the Plaintiff in respect of all the aforementioned facilities stood at GHS1,459,376.01 as at April 11, 2019.

In ***Fidelity Investment Advisors vrs. Aboagye Atta [2003-2004] 2 GLR 188***, the Court held that what issues are relevant and essential was a matter of law entirely for the judge to determine the case. The Court has also noted that Counsel for the Defendant has set down 3 issues and argued same. These are:-

a. Whether or not Plaintiff's termination of the Financial Lease Agreement between the Plaintiff and Defendant is lawful. This is not different from issue 4 above.
b. Whether or not the Defendant owes the Plaintiff an amount of GHS1,459,376.01. This is a repetition of issue 9 above.
c. Whether or not the Plaintiff's seizure and subsequent sale of DAF Truck with registration number GE 4653-18 is lawful. A re-statement of an aspect of issue 4 above.

In support of this approach Counsel cited with the approval of this Court what the apex Court said in the case of ***Fattal vrs. Wolley [2013-2014] 2 SCGLR 1070 at 1076*** through Georgina Wood, C. J. (as she then was) thus:-

> *"Admittedly, it is indeed, sound basic learning that courts are not tied down to only the issues identified and agreed upon by the parties at pre-trial. Thus, if in the course of the hearing, an agreed issue is clearly found to be irrelevant, moot, or even not germane to the action under trial, there is no duty cast upon the court to receive evidence and adjudicate upon it. The converse is equally true. If a crucial issue is left out, but emanates at the trial from the pleadings or the evidence, the court cannot refuse to address it on the ground that it is not included in the agreed issues."*

I am minded to agree with Counsel for the Defendant that some of the issues set down at pre-trial are none issues or moot. For instance, issues 1 to issues 3 set down at pre-trial are none issues as both sides are ad idem that there was an agreement which has been breached. I will therefore proceed to consider the remaining issues as set down by Counsel for the Defendant and may also consider the ones set down at pre-trial some of which have been re-couched by the Defendant. I will discuss issue 4 first, which would

dispose off the Defendant's issues A and C, followed by issue 9 that addresses the Defendant's issue B.

BURDEN OF PROOF

The burden of persuasion is primarily on the Plaintiff or the Counterclaimant, as the case may be to adduce sufficient and credible evidence in support of their assertions. The burden, however is not static but dynamic to the extent that it keeps shifting from one party to another in respect of their respective claims at any stage of the action and especially where a Defendant has a counterclaim. In the case of ***Takoradi Flour Mills vrs. Samir Fans [2005-200] SCGLR 882***, the Supreme Court held that:-

> *"It is sufficient to state that this being a civil suit, the rules of evidence require that the Plaintiff produces sufficient evidence to make out his claim on a preponderance of probabilities as defined in Section 12 (2) of the NRCD 323. In assessing the balance of probabilities, all the evidence, be it that of the Plaintiff or the Defendant, must be considered and the party in whose favour the balance tilts is the person whose case is more probable of the rival versions and is deserving of a favourable verdict"*

See also the case of ***Faibi vrs. State Hotels Corporation (1968) GLR 471***. In the case of ***Okudzeto Ablakwa (No. 2) vrs. Attorney General & Another [2012] 2 SCGLR 845*** the court held at p. 867 that:

> *"If a person goes to court to make an allegation, the onus is on him to lead evidence to prove that allegation, unless the allegation is admitted. If he fails to do that, the ruling on that allegation will go against him. Stated more explicitly, a party cannot win a case in court if the case is based on an allegation which he fails to prove or establish. This rule is further buttressed by section 17 (b) which, emphasizes on the party on whom lies the duty to start leading evidence…"*

Having discussed the burden of proof which the parties are to discharge in proof of their respective cases, I will proceed to analyze the issues as stated above.

ISSUE A

Whether or not Plaintiff's termination of the Financial Lease Agreement between the Plaintiff and Defendant is lawful.

It is not in doubt that both parties executed **Exhibit "A"** which is a Finance Lease Agreement dated 22nd March, 2018 setting out the terms that are to govern the relationship of the parties. According to the Defendant, per the express terms of the said agreement, none of the parties could terminate the

agreement within the first 48 months from the date of draw down. And that the first draw down date being 30th April, 2018, 48 months from the said date would be 29th April, 2022. The Defendant was made to pay the initial rent for the truck and at the time of termination, the initial rent payment by the Defendant was still subsisting. It is the Defendant's contention therefore that instituting this current suit on 21st May, 2019, 14 months into the agreement constituted cancelation of **Exhibit "A",** was premature and contrary to the terms of the agreement and therefore unlawful. The said term stated thus:- *"The Lease will be for a non-cancellable period of 48 (forty-eight) months from first draw down."* The Defendant submitted that the Court should declare that the termination of the Lease Agreement by the Plaintiff is unlawful which entitled him to a claim for damages against the Plaintiff.

The Plaintiff also stated that the Defendant defaulted in his payment and was justified in the action it took. It stated that by the Defendant's failure to pay his debt when due constituted a default by the Defendant. The Plaintiff averred that paragraph 12 of **Exhibit "A1"** clearly specified instances where default could be said to have occurred and states thus:-

12.1 An event of default will occur:

12.1.1 *should the Borrower fail to make payment by due date of any amount due in terms of the Facility or any other facilities that the Bank has accorded the Borrower or may offer to the Borrower; or*

12.1.2. *should the breach any term or condition of this facility letter or any other facility the Bank may grant to the Borrower or any other facility between the Borrower and the Bank or any other subsidiary or associate company of Bank and the Borrower fails to remedy the breach within 7 (seven) days of receiving written notice to do so; or*

…

12.2 *If an event of default occurs, then, in any such event, the full amount of the Facilities and other facilities accorded to the Borrower by the Bank, then outstanding, and all accrued thereon together with additional interest as defined above immediately become due and payable.*

According to the Plaintiff the Defendant failed to make payments in accordance with the agreed terms and demands were made to Defendant to correct the default by **Exhibits "C"** being demand letters dated 10th December, 2018, 18th January, 2019 and 21st January, 2019.

Per the terms of the agreement between the parties a default has been occasioned by the Defendant's inability to pay in accordance with the agreed terms and even though it was a non-cancellable for 48 months from the date of draw down, the debt become due and payable upon default and in accordance with the agreement the whole debt become immediately payable. I am therefore of the considered view that the Plaintiff had the right to enforce the agreement by taking legal steps to recover its debt including the exercise of a lien over the truck. I am again of the view that no cancellation of the agreement took place. The legal action of the Plaintiff was consistent with Clause 12.2 of

the Agreement. The termination of the Finance Lease Agreement was therefore lawful. This issue cannot be resolved in favour of the Defendant.

ISSUE C

Whether or not the Plaintiff's seizure and subsequent sale of DAF Truck with registration number GE 4653-18 is lawful.

By the testimony of the Defendant the Plaintiff by deceit unlawfully seized the truck from his driver and at the time of the seizure his stake in the truck in monetary terms was GHS274,052.00. The Defendant further stated that

the seizure was made without a court order. It is the Defendant's case that the Plaintiff seized the truck on 25th January, 2019 and sold same on 15th March, 2019 when the non-cancellable agreement was still subsisting and therefore the seizure was unlawful. The Defendant posited that the sale of the said truck without an order of the Court sinned against the Borrowers and Lenders Act, as the charge was not registered with the Collateral Registry in accordance with law. The sale having taken place in 2019 the Defendant contends that the relevant Act is the Borrowers and Lenders Act, 2008 (Act 773) coupled with Rule 20 of Bank of Ghana Notice No. BG/GOV/SEC/2012/08 which required the Plaintiff to register the Charge under Act 773, give 30 days' notice of intention to realize the asset and obtain a certificate from the Collateral Registry.

The Defendant referred the Court to the provision on sale without a court order as provided under Rule 20 of the Bank of Ghana Notice No. BG/GOV/SEC/2012/08 which states as follows:-

> *"20. (1) The Lender that intends to realize a charge registered at the Collateral Registry without a court order shall register a notice of that intention thirty (30) days after the day of receipt of the notice of default of the borrower.*

(2) The Registrar shall certify the realization process by issuing a certificate to that effect.

(3) All realizations of charges shall be made in accordance with the Auction Sales Act, 1989 (P.N.D.C.L. 230) other applicable laws."

The Plaintiff also contend that per the agreement between the parties the Plaintiff was the owner of the Truck and could repossess the Truck upon default by the Defendant. The said clause on page 1 of **Exhibit "A"** states:-

> *"The Lessor shall repossess the assets leased, should rental payments fall in arrears that are not acceptable to the Lessor. The repossession would be without prejudice to Lessor's right to other recourse, including legal action under the Finance Lease Law PNDC Law 331."*

It was further a term of **Exhibit "A"** that; *"The Lessor will at all times remain the owner of the goods and the Lessee acknowledges and confirms that it is a mere bailee of the goods."* According to the Plaintiff having agreed that ownership of the Truck should reside in the Plaintiff until the debt is paid, it had the mandate to sell same the way it did.

On the 1st November, 2023 the following was recorded when Plaintiff's witness was under cross-examination by Counsel for the Defendant:-

"Q: Did the Plaintiff have any Court order authorizing them to impound the vehicle from the Defendant.

A: No, but it has been stated in the Offer Letter that if the Defendant doesn't go by the terms of the offer in terms of payment of the loan, the asset will be repossessed.

Q: I put it to you that the officers of the Plaintiff misrepresented to the Defendant's driver that they were taking the truck to their yard for routine maintenance.

A: No, my Lady.

Q: I put it to you further that at the time the truck was impounded, the Defendant had some belongings in the truck which he was not allowed to take away.

A: Yes, my Lady.

Q: Can you tell the Court how much you sold the truck?

A: GHS450,000.00.

Q: Can you tell the Court what procedure you followed in selling the truck

A: When the asset was repossessed, a letter was written by the Plaintiff to the Defendant and it was Notice of Intention to Sell the Asset, the letter was dated 29th January 2019 as Exhibit "D". After the letter was

communicated to the Defendant, the asset was valued by Intercity STC Coach Limited, and the value of the asset and the condition of the asset was communicated to the Plaintiff by Intercity STC Coaches Limited. Then the truck was sold by auction, but before the auction Plaintiff placed a notice in the Ghanaian Times on 8th, 9th and 11th March 2019.

Q: You have no evidence before this Court in support of your claim that the vehicle was sold at auction and how much it was sold for.

A: At paragraph 26 of the witness statement it was stated that GHS450,000.00 was the value of the asset sold, and that is my evidence.

Q: You do not have before this Court the auctioneer's account as it is usually done during public auctions. Is that not so?

A: No, I disagree with you that it is usually done."

The procedure adopted by the Plaintiff as recounted by its representative is completely at variance with the requirement of the law on the sale of a charged asset without a Court order. Section 38 of Act 773 of 2008 defined charge to include the movable asset covered

by the financing. In the case of ***Boyefio vrs. NTHC Properties [1996-971] SGGLR 531]*** cited by Counsel for the Defendant, the Supreme Court stated; *"Where an enactment has prescribed a special procedure by which something was to be done, it was that procedure alone that was to be followed."* The Plaintiff having failed to comply with the Borrowers and Lenders Act at the time Act 773 and the Auction Sales Act 1989 were in force made the seizure and subsequent sale of the Truck unlawful. This issue is therefore resolved in favour of the Defendant.

ISSUE B

Whether or not the Defendant owes the Plaintiff an amount of GHS1,459,376.01.

The Plaintiff's claim against the Defendant is the sum of GHS1,459,376.01 and the Defendant having denied this, Plaintiff has to lead credible evidence that indeed the Defendant owes it the said sum. It is the Plaintiff's case that various agreements were executed between the parties being a vehicle finance; an overdraft facility and a deed of guarantee. Per Plaintiff's **Exhibit "A"** (Finance Lease Agreement dated 22nd March, 2018) was for the sum of GHS624,720.00 at an agreed interest rate of 27% per annum and the security offered was a charge over the DAF Tractor valued at Euro 137,000. Plaintiff also tendered **Exhibit "A1"** which is a facility letter dated 22nd March, 2018 for Overdraft and Vehicle & Asset Finance Guarantee for which Defendant was to offer his Residential property at Baatsona, lien over Fixed Deposit of the Defendant and the DAF Truck as security for the said agreement. The Defendant wrote **Exhibit "1"** dated 7th September, 2018 to Plaintiff demanding copies of the following:

1. *Copies of the recent pre-facility and the facility letters*
2. *The total amount debited under the VAF, the facility, the repayment and schedule, the interest rate and the exchange rate used.*

This is in support of the Defendant's averments that he was never given copies of the agreements purported to have been executed by the parties. There is no evidence on

record that the Plaintiff replied to the said **Exhibit "1"** even though the Plaintiff's receipt stamp is on same.

In the Plaintiff's **Exhibit "C"** dated 10th December, 2018 a demand was made against the Defendant for the *"Total Outstanding Amount:* ***GHS8970.39****, Total Arrears Amount: GHS12,225.68."* **Exhibit "C1"** tendered by the Plaintiff is also dated 18th January, 2019 which stated among others follows:-

> *"We are by this letter terminating the lease agreement and demanding immediate full payment of the outstanding amount of* ***GHS914,149.04*** *as of 18th January, 2019 not later than 30 days from the date of this letter.*
>
> *Should you fail to comply with the above demand on the time line given, the Bank shall take the following actions without any further notice to you.*
>
> 1. *Repossess the assets leased to you.*
> 2. *Dispose the repossessed leased assets to pay the outstanding debt if the sale proceed is sufficient.*
> 3. *Continue to demand further payments from you in the event that the amount realized from the sale of the leased assets are insufficient to pay off the outstanding debt."*

In Plaintiff's **Exhibit "C2"** also a letter dated January 2019 a demand was being made against the Defendant as follows: *"Stanbic hereby demand immediate repayment of the total amount of* ***GHS523,833.06*** *as at January 2019 … Also not that your guarantee of GHS500,000 is valid until 1st May, 2019."*

Exhibit "D" is again a letter dated 29th January, 2019 titled "Notice of Intention to sell – DAF Articulator Head GE 4653-18" with the debt of Defendant stated as follows:-

"Finance Lease (VAF) GHS914,376.08

Bonds and Guarantee	GHS500,000.00
Overdraft	GHS523,833.06
Total now due	GHS1,938,209.14"

Beyond the Exhibits of the facility agreements and the demand letters the Plaintiff failed to attach the account statements of the Defendant to assist the Court in ascertaining how much is due and owed it. The Defendant in challenging the Plaintiff's case as to the debt owed the Plaintiff, also tendered **Exhibits "2** and **2A"** which were credit alerts to Defendant from Plaintiff with an outstanding debit balance of -GHS459,360.08 as at 19th November, 2021. The Plaintiff's explanation to this alert on the Defendant's account is that it was a mistake. Nowhere in the Plaintiff's testimony did they provide any evidence that this was a mistake and same has been corrected per any accounts or even a subsequent alert sent to the Defendant to correct the error.

On 1st November, 2023 when the Plaintiff's Witness Akosua Aboagyewaa Bruks was again being cross-examined by Counsel for the Defendant the following were recorded:-

Q: So your evidence is solely based on the documents pertaining to the application and grant of the loan that were showed and given to you. Is that the case.

A: Yes my Lady.

Q: Apart from Exhibit "A" (Finance Lease Agreement), do you have any other agreement with respect to the loan?

A: Yes, there is another agreement attached as "A1" (Overdraft Guarantee Facility).

Q: Can you tell the Court in total, how much you granted the Defendant?

A: It was GHS1,620.00.

Q: Can you tell the Court whether the Defendant ever made any payments.

A: Yes, my Lady.

Q: Can you tell the Court how much in total the Defendant paid?

A: No, because there are not bank statements here.

Q: Is it your evidence that you do not know how much the Defendant paid?

A: No for now.

If the Plaintiff's witness's testimony at the time trial was taking place was that she did not have the Defendant's bank statement and did not know how much the Defendant had paid to the Plaintiff it will be challenging for the Court to come to a conclusion on how much is owed the Plaintiff by the Defendant. All the Plaintiff knows is that the Defendant owes the Plaintiff GHS1,459,376.01 when at various periods per the demand letters different figures have been stated on the correspondence to the Defendant. Per **Exhibit "C"** (18th December, 2018) demand was made for GHS890,376.01 and **Exhibit "C1"** (18th January, 2019) and then **Exhibit "C2"** (dated 21st January, 2019 and within the same month and year that is 29th January, 2019 per **Exhibit "D"** the indebtedness of the Plaintiff was stated as GHS1,938,209.14. Subsequent to this **Exhibit "D"** the DAF Truck was impounded on 25th January, 2019 and sold by the Plaintiff for GHS450,000.00 when the

purported value placed on sale by STC was GHS480,000.00 by a public auction and per its testimony the amount paid into a margin account to pay down the vehicle loan. By the Plaintiff's Statement of Claim paragraph 19 referred, it averred that the Truck was sold at a reserved price of GHS488,000.00 but same per the testimony in Court of the witness of the Plaintiff, same was sold at GHS450,000.00.

An on the 7th December 2023 the following were further recorded when Plaintiff's witness was being cross-examined by Counsel for the Defendant:-

Q: Any amount you disbursed to the Defendant is recorded in the Bank's statement, is that nor so?

A: Yes, my Lady.

Q: Any Guarantee that crystalizes which the Defendant is not able to pay is transferred into his Bank Statement, is that not so?

A: Yes, my Lady.

Q: And when you sold the truck jointly owned by the Bank and the Defendant, the money realized was paid into his account and recorded in his statement to reduce his indebtedness. Is that so?

A: No, because a margin account is opened for such transaction. The reason why margin account is opened for such transaction is that, when a customer defaults the account become irregular. So, the vehicle amount that was paid was deposited into a margin account, and it was used to pay down the vehicle loan.

Q: The paying down of the loan is captured in the Bank's statement, is that not so?

A: Yes, my Lady.

Q: And at the end of the day the actual indebtedness of the Defendant is contained in the statement. Is that not so?

A: Yes, my Lady.

The bank statement of a customer is a record of all transactions made on the account by the customer. The Plaintiff's claim is capable of proof by producing the bank statement of the Defendant which would have a record of monies disbursed to the Defendant, the repayments made by him as well as the record of the proceeds realized from the sale of the Truck by the Plaintiff. It is required by law that each party to a suit must adduce evidence on the issues to be determined by the Court in accordance with the prescribed

standards by statute. This position of the law is buttressed by various provisions of the Evidence Act 1975 (NRCD 323). Section 14 of the Evidence Act states:

> *"Except as otherwise provided by law, unless and until it is shifted, a party has the burden of persuasion as to each fact the existence of which is essential to the claim or defence he is asserting."*

On the issue of proof in civil cases the Supreme Court in the case of ***Klah vrs. Phoenix Co. Ltd [2012] SCGLR 1139*** as cited by Counsel for the Defendant, stated thus:-

> *"Where a party makes an averment capable of proof in some positive way e.g. by producing documents, description of things, reference to other facts, instances and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on oath or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances from which the Court can satisfy itself that what he avers is true."*

From the analysis above it is obvious that the indebtedness of the Defendant to the Plaintiff has not been proved by the Plaintiff. The Plaintiff has not been able to discharge its evidential burden as to exactly how much is owed to Plaintiff by the Defendant. I am therefore unable to hold the Defendant is indebted to the Plaintiff in the sum of GHS1,459,376.01 in view of the absence of proof. I am however inclined to accept the Defendant's evidence as below:

Exhibit 2: Email from Plaintiff to Defendant dated 19th November 2021 communicating a credit of GHS863,234.93 leaving a debit balance of -GHS459,360.08.

Exhibit 2A: Text message from Defendant to Plaintiff dated 19th November 2021 communicating a credit of GHS863,234.93 with a debit balance of -GHS459,360.08.

On this basis I cannot hold the Defendant is liable to the Plaintiff the debt of GHS1,49,376.01.

Whether or not the Defendant is entitled to his Counterclaim

Defendant's Counterclaim against the Plaintiff has been stated above. From the agreement between the parties, the Plaintiff is the owner of the truck in the Finance Lease and being owners, they have the right to sell the Truck provided the provisions of the Borrowers and Lenders Act were met. As already indicated above upon the occurrence of the event of default, the Plaintiff's right to recover its outstanding debt or realization of security under the contract which was governed by the Borrowers and Lenders Act (Act 773) accrued. The Plaintiff side-stepped the requirement of Act 773 in realization of the security and auctioned the asset below the reserved price.

In assessing damages for the statutory breach, no evidence was provided to prove that the Defendant was incurring GHS2,000.00 per day in securing alternative transport or that the Truck the was fetching the Defendant GHS2,000.00 per day. I however take into account the evidence of the reserved price of GHS480,000.00 as against the sale of GHS450,000.00 and award the GHSS30,000.00 as part of the award build-up. I also take into

account the Defendant's testimony that at the time of the seizure his stake in the Truck in monetary terms was GHS274,052.00 to bring the award build-up to GHS303,052.00.

CONCCLUSION

From the analysis above both parties have been unable to prove their respective claims to guide the court as to how much each party is entitled to. I find it rather intriguing that

a Plaintiff financial institution would come to court to prosecute the recovery of a debt without evidence. What makes it more disturbing is the fact that a demand was made for the agreements between the parties by the Defendant but which were not provided to him. Again, the Plaintiff could not produce the bank statements of the Defendant in prove of the outstanding liability of the Defendant to assist the Court. Having failed to do so I am unable to ascertain the actual debt owed. A bank should be able to keep proper records of all transactions of its customers.

I therefore award to the Plaintiff, the recovery of sum of GHS459,360.09 and interest thereon at the contractual rate of 27% per annum from 19th November, 2021 till date of judgment.

To the Defendant, I also award general damages of GHS304,052.00 against the Plaintiff for breach of its statutory duty to the Defendant.

Each party should bear the cost of this litigation.

(SGD.)

SHEILA MINTA, J.

JUSTICE OF THE HIGH COURT

REPRESENTATIONS

PARTIES:

PLAINTIFF – ABSENT

DEFENDANT – PRESENT

COUNSEL:

JOSEPH GYAMFI JNR. WITH ELLIOT ABRA FOR PLAINTIFF – PRESENT

COUNSEL FOR DEFENDANT – ABSENT

AUTHORITIES

1. ***FIDELITY INVESTMENT ADVISORS VRS. ABOAGYE ATTA [2003-2004] 2 GLR 188***
2. ***FATTAL VRS. WOLLEY [2013-2014]2 SCGLR 1070 AT 1076***
3. ***TAKORADI FLOUR MILLS VRS. SAMIR FANS [2005-200] SCGLR 882***
4. ***FAIBI VRS. STATE HOTELS CORPORATION (1968) GLR 471***
5. ***OKUDZETO ABLAKWA (NO. 2) VRS. ATTORNEY GENERAL & ANOTHER [2012] 2 SCGLR 845***
6. ***BOYEFIO VRS. NTHC PROPERTIES [1996-971] SCGLR 531]***
7. ***KLAH VRS. PHOENIX CO. LTD [2012] SCGLR 1139***