

C.C. 152/10

2010

G No. 14

IN THE HIGH COURT OF SIERRA LEONE
CIVIL AND COMMERCIAL DIVISION

BETWEEN:

GUARANTY TRUST BANK (SL) LTD - PLAINTIFF

AND

SEIDYA GROUP (SL) LTD - DEFENDANT

COUNSEL:

C J PEACOCK ESQ for the Plaintiff Bank

MS BINTU ALHADI and MS S BROWNE both of the Sierra Leone Bar in attendance on behalf of the Bank

N D TEJAN-COLE ESQ and later, C F EDWARDS ESQ for the Defendant Company

BEFORE THE HONOURABLE MR JUSTICE N C BROWNE-MARKE
JUSTICE OF APPEAL.

JUDGMENT DELIVERED THE 2 DAY OF OCTOBER, 2012.

1. By Judge's Summons dated 6 April, 2011 the Plaintiff Bank has applied to this Court for Leave to enter Final Judgment against the Defendant company for reliefs numbered one and two in the statement of claim. Reliefs 1 and 2 in the writ of summons dated 27 May, 2010 are for the recovery of the sum of Le2.4billion being loan facility granted the Defendant by the Plaintiff, and for interest thereon at the rate of 21% per annum. The period for which interest should be awarded is not stated. Hearing into the Summons was delayed for some time, and at one stage, it appears SOLOMON, JA had to, on 10 June, 2011, adjourn the hearing sine die. I say appears, because it is not clear, as recorded by me on page 1 of my minutes, whether it was the hearing into the Judge's Summons herein, or that into the Notice of Motion dated 4 May, 2011, which was adjourned sine die. It was finally resurrected by an Order of this Court dated 7 February, 2012. Prior to hearing into this Summons, I had on 16 February, 2012 and on 2 March, 2012 respectively, granted the Injunction sought by the Plaintiff. The second Order was indeed made on

2 March, 2012 and not 29 February, 2012 as appears in the drawn-up Order. On 5 March, 2012 the Plaintiff Bank filed the required Undertaking as to Damages.

2. Hearing into the Judge's Summons herein commenced on 28 March, 2012 but was delayed due to a change in Solicitors on the part of the Defendant company, and certain irregularities in the appointment of the new Solicitor. On 30 March, 2012, Mr Peacock was able to finally move the Court. He began doing so, but as I pointed out to him, the Plaintiff could only recover the sum claimed in the writ of summons, though Defendant's indebtedness according to Mr Peacock had risen to Le3,401,157,867/84 as of that date. The writ of summons would therefore have to be amended. This was in effect, an Order of the Court. He promised to do so, but up-to the hearing on 9 July, 2012, Mr Peacock had not done this. The amended writ of summons was only signed by the Deputy Master and Registrar, Mr Mansaray that day as evidenced by Mr Peacock's "CJP1" exhibited to his affidavit of 10 July, 2012.
3. In the intervening period, out of court negotiations had been going on between the parties. The amended writ of summons was eventually filed and exhibited to an affidavit deposed and sworn to by Mr Peacock on 10 July, 2012 as noted by me at the hearing on 11 July, 2012 - page 16 of my minutes. And as of the earlier date, i.e. 10 July, 2012, the Defendant company's Chief Executive Officer, had signed the draft terms of consent, but Mr Peacock needed time to file it. I adjourned to the next day, 12 July, 2012 for the hearing to proceed. By then, Mr Peacock had filed two more affidavits deposed and sworn to by him. He also moved the Court for the Orders sought in the amended Judge's Summons. I shall now go through the documents filed by him.
4. In the affidavit deposed and sworn to on 28 March, 2012 by Dephon Carey, Deputy Manager at the Plaintiff Bank, the Defendant's total indebtedness to the Bank, is certified to be Le3,401,157,867/84. This total amount was arrived at by putting together the Defendant's indebtedness in its current account then standing at Le589,524,966/27 and its indebtedness in the loan account then standing at Le2,811,632,901/57. The method used is evidenced in the statements of account and letter exhibited to Mr Carey's affidavit, as DC1, 2 & 3 respectively. The sum claimed in the writ of summons was therefore

amended to reflect this total sum. The amended writ of summons is exhibited to Mr Peacock's affidavit of 10 July, 2012 referred to above, as "CPJ1."

5. In his affidavit of 11 July, 2012 but filed on 12 July, 2012, Mr Peacock exhibited as "CJP1" a letter dated 10 July, 2012 addressed to the Defendant company's Managing Director, by Ms Alhadi. Before going on to Ms Alhadi's affidavit, I wish to reiterate for the umpteenth time for the benefit of Counsel, that exhibits to an affidavit in any particular Application must be numbered or lettered sequentially. It is wrong to use the same numbering twice, as Mr Peacock has done: It is improper to use the numbering or lettering "CJP1" twice, as he has done, in the same Application.
6. To return to Ms Alhadi's affidavit, it reads in part: *"Further to the meeting held today with you in the presence of your Solicitor Crispin Feio Edwards, we write to confirm that the Bank has agreed to grant a concession of Le500million and a restructure of the outstanding Term Loan facility, presently Le2,707,498,349.66.....subject to Seidya Group repaying all the past due obligations on its account presently Le723,612,420.25 on or before 30 September, 2012. The repayment of the past due obligations of Le723,612,420.25....will be made as agreed in three instalments as part of the terms for the Bank to enter a Consent Judgment with Seidya Group as follows.....Upon the receipt of the final repayment of the past due obligations not later than September 30, 2012, the Bank would grant the above concession of Le500million. Please note that interest will however continue to accrue on the outstanding balances on both the current Account and Term Loan at an agreed interest rate of 18% per annum. We thank you for your usual cooperation."* The letter is signed by both Ms Alhadi and Mr Aziegbe, Executive Director.
7. At the bottom, we find the following indorsement: *"ACCEPTANCE I Alimu Barrie, the Managing Director of Seidya Group (SL) Limited, hereby accept the terms and conditions contained in this letter."* Thereafter appears the name Alimou Barrie, his signature and the designation, C.E.O. In what appears to be Mr Barrie's handwriting as well, is the date 10/02/12. This letter is copied to both Messrs Edwards and Peacock.

8. I have quoted this letter at length because of proposed statement of defence exhibited as "AB1" to Mr Barrie's affidavit deposed and sworn to 19 April, 2012 (but filed only filed on 7 May, 2012) on behalf of the Defendant company. His earlier affidavit of 28 March, 2012 could not be used because of irregularities in the filing of the Notices of Appointment and of change of Change of Solicitors. Paragraph 2 of the proposed defence, is as follows: "*The Defendant admits paragraph 2 of the Particulars of Claim but will aver that he has paid the principal sum of the loan in the sum of Le2,400,000,000.....and that what is being claimed is accrued interest which is now being charged at 36% instead of 21%.*" In paragraphs 5&6 respectively of this proposed defence, the Defendant avers that: "*....the Plaintiff has been deducting monies from his account to service other loan account of third party outside the mandate given to the Plaintiff. The Defendant will aver that the Plaintiff has created a loan account and a separate overdraft account and charging interest on both accounts.*"
9. As against this defence, we must look at the agreements made between both parties. We must therefore go back to Ms Alhadi's affidavit deposed and sworn to on 6 April, 2011 in support of the Judge's Summons. Therein, she deposes as follows: "*...By letter of offer dated 29th September 2008; and facility approval memorandum bearing the same date, duly executed between the Plaintiff and Defendant herein, the loan facility of Le2,100,000,000/00 was granted to the Defendant by the Plaintiff at an interest of 21% per annum.....On the 30th October, 2008 one Alhaji Alimu Sanu Barrie gave written Guarantee and Indemnity on behalf of the Defendant to the Plaintiff.....on the 30th October, 2008 the Plaintiff gave the Defendant an overdraft facility in the sum of Le300,000,000 for which an overdraft facility agreement was duly executed between the parties.....the Defendant as borrower and Alhaji Alimu Sanu Barrie as surety/mortgagor executed a tripartite legal mortgage to the Plaintiff in respect of the loan and overdraft facility duly granted.....the Defendant has not settled the loan and overdraft facility plus accrued interest thereon since the deadline date and up till now.....the Plaintiff's Solicitor did write to the Defendant's Solicitor by letter dated 9th February, 2011 that if the Defendant fails to comply with his verbal undertaking to forward a proposed payment plan of the debt*

with a view to enter a Consent Judgment, then the matter will be proceeded with on the adjourned date..." All of the documents referred to by Ms Alhadi, are exhibited to her affidavit. In order to secure the overdraft facility and loan, the tripartite legal mortgage was executed by the Plaintiff Bank, the Defendant company and Alhaji Barrie respectively, and duly registered. It provided that Alhaji Barrie's leasehold property situate off Leceister Peak Road would be mortgaged to the Plaintiff Bank as security for the facilities granted the Defendant company. The agreed interest rate on all outstanding liabilities was 21%.

10. Mr Carey has, as I have said above, exhibited the Defendant company's statement of account, to his affidavit of 28 March, 2012. They show that the debit balances in both the overdraft account and term loan account stood at Le589,524,966.27 and Le2,811,632,901.57 respectively as of 2 March, 2012. If as the Defendant company avers in its proposed statement of defence, that the Plaintiff had without authority increased the interest accruing in respect of both accounts to 36% without its consent, here was an opportunity to prove to the Court that this was so. In civil proceedings, evidence is weighed on a balance of probabilities. He who asserts must prove. What this Court has to decide in Order 16 proceedings is as set out in Order 16 Rule 3(1) of the High Court Rules, 2007 (HCR, 2007) *"Unless on the hearing of an application under rule 1, either the Court dismisses the application or the defendant satisfies the Court with respect to the claim or the part of a claim, to which the application relates, that there is an issue or question in dispute which ought to be tried or, that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the Plaintiff against the Defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed."* On the evidence before me, including the Defendant's affidavit and proposed defence, I do not believe that there is a question or issue which ought to be tried; or, that there ought to be a trial of the Plaintiff's claim or a part thereof. Mr Edwards agreed on 13 July, 2012 at the hearing before me, that the Defendant company was prepared to act in accordance with the terms of the letter dated 10 July, 2012 signed by Mr Barrie. I am of the view, and I so hold that the Plaintiff is entitled to Judgment in the terms I shall hereafter state.

11. But before I do so, I must point out that I cannot grant interest upon interest. It is my view that once Judgment has been given, interest on any outstanding payment due from a debtor to its creditor, can only be allowed at the statutory rate, or, at a rate to be determined by the Court, or, at a rate agreed by the parties. Also, this Court can, in accordance with the provisions of Order 43 Rule 8 HCR, 2007, Order payment by instalments and with interest, with execution to be levied in respect of any default only at such times as this Court shall Order. However, in this case, I am guided by what the parties have agreed to, and my duty is to give effect to that agreement in such a way that litigation will come to an end, save for any further proceedings for enforcement of the terms of the Judgment. I have also to take into consideration that because of the delay in giving this Judgment, the time scheme agreed by the parties in the letter of 10 July, 2012 cannot be adhered to.

12. The Plaintiff shall have Judgment as follows:

- I. The Defendant company shall, as agreed between them, pay to the Plaintiff Bank the respective sums of:
 - a) Le100million on or before 31st October, 2012;
 - b) Le150million on or before 30th November, 2012;
 - c) Le473,612,420.25 on or before 31st December, 2012.
- II. If the said respective sums set out above are paid on or before the due dates, accrued interest in the sum of Le500million shall be waived from Defendant's indebtedness to the Plaintiff as agreed between the parties. The Defendant shall not be entitled to any extension of time within which to make any of the above payments without an Order of this Court. A default in making payment on any of the due dates without first obtaining an Order from this Court, shall automatically result in the total sum of Le723,612,420.25 falling due immediately and the Plaintiff shall be at liberty to enforce Judgment in respect of the said sum of Le723,612,420.25 without further Order from this Court, AND shall also be at liberty to reinstate the interest waived. These respective sums of money shall be paid into an escrow or like account so as to avoid confusion or, the likelihood that they may be mixed up with

payments to be made in respect of the Defendant's continuing liability spelt out below.

- III. The Defendant remains indebted to the Plaintiff in the total sum of Le2,707,498,349.66 which sum is secured by the Tripartite Legal Mortgage dated 12 August, 2008 and is duly registered as No.138/2008 at page 145 in volume 79 of the Record Books of Mortgages kept in the Office of the Registrar-General, Freetown. Interest will continue to accrue on the said sum at the annual agreed rate of 18% with effect from 10 July, 2012, the date both parties reached agreement. If the Defendant company fails to service the Term Loan and the Overdraft facility respectively as agreed, the Plaintiff shall be at Liberty to enforce the said Tripartite Legal Mortgage, or, to seek a further Order from this Court under Liberty to Apply granted hereunder.
- IV. The Defendant shall pay the Costs of the action, such Costs to be taxed if not agreed.
- V. There shall be Liberty to Apply for the purpose of giving effect to, or for explaining further, any of the above Orders, or any part thereof.



THE HONOURABLE MR JUSTICE N C BROWNE-MARKE