Cc. 121/11 2011 S. NO.21

IN THE HIGH COURT OF SIERRA LEONE
(COMMERCIAL AND ADMIRALTY DIVISION)

BETWEEN:

SIERRA LEONE COMMERCIAL BANK - PLAINTIFF
AND
ALFRED MALTHUS KOBBA - DEFENDANT

Counsels:

O. JALLOH Esq. for the Plaintiff

A. M. KAMARA Esq. for the Defendant

JUDGMENT DELIVERED THIS 24th DAY OF April 2012 BY HONOURABLE MRS. V. M. SOLOMON J.A.

JUDGMENT

The Plaintiff's action against the Defendant is for the following reliefs to wit:

1. Recovery of the sum of Le 60,252,128.12.
2. Interest on the said sum at the rate of 25% per annum from the 13th day of July 2010 until judgment pursuant to the Law Reform (Miscellaneous Provision) Act Chapter 19 of the Laws of Sierra Leone.
3. Further or other order(s)
4. Costs

The Defendant caused an appearance to be entered on his behalf on the 13th July 2011. By Judges Summons dated 7th October 2011 the Plaintiff filed this application for judgment to be entered as per the claims referred to supra pursuant to Order 16 of the High Court Rules 2007 (hereinafter called "The Rules"). There is an affidavit in opposition deposed to by the Defendant. A Notice to cross examine the Defendant on his affidavit was filed and he was cross examined accordingly.

Mr. O. Jalloh Esq. submitted that the Defendant has no defence to the action herein. He submitted that the Defendant overdrew his credit balance as a result of the system failure of the Plaintiff which was duly communicated to the Defendant as seen in Exhibit "D". The Defendant acknowledged the debt and made a proposal to repay as seen in Exhibit "E"

but has not complied with the repayment schedule. Counsel submitted that Defendant admitted under cross examination that he is indebted to the Plaintiff; and submitted further that once a customer overdraws his credit balance interest in charged on that account. He relied on cases of Lloyds Bank PLC V Vollar (2000) 2 AER. Page 978 and The Office of Fair Trading V Abbey National PLC & Others (2008) EWHC 2325 and finally submitted that a customer need not apply for credit facilities and as long as an account is overdrawn on his credit balance interest accrues. The Defendant has acknowledged owing sum on the withdrawals and pleaded with the Plaintiff to waive interest.

Mr. A. M. Kamara Esq. of Counsel for the Defendant relied on the affidavit in opposition and referred to the proposed defence. He submitted that the Defendant never applied for an overdraft facility and sum owing cannot be ascertained as there was a malfunction in the system of the Plaintiff. He submitted that the Defendant operated a savings and not current account. He finally submitted that there are triable issues which ought to go to trial.

The issue for my consideration is whether this matter can be determined by an Order 16 application that is, summary judgment. The Defendant has not filed a defence albeit, he exhibited a defence dated 18th October 2011 marked "AMK1". The Plaintiff's claim is for recovery of sum of Le60,252,128.12 with Le34,340,000.00 being principal debt and the remainder of Le 25,912,128.12 being interest accrued up to 13th July 2010. The Defendant is a Customer of the Plaintiff and he himself is a Banker by profession. He operated account No: 003-328224-10-00-02 at the Congo Cross branch of the Plaintiff Bank. He also operated another account at the Lightfoot Boston Street Branch. By Letter dated 15th September 2008 marked "D" the Defendant was informed of his indebtedness to the Plaintiff which was in sum of Le42,442,414.39. He replied to aforesaid by Exhibit "E" with heading which reads thus:

"Subject : Payment Proposal".

He wrote in said Letter thus:-

> "The surmounted figure now in question Le 42,442,414.39 as stated *in the Letter and on my statement* is also inclusive of interest accrued on this account since I have been out of job for about six months and the account was not running. Waiving thus interest however will give us an outstanding of about Le34,340,000. This account had an existing balance of Le4,200,000 and was recently (September 2008) *credited with an amount of Le 1,000,000 to show my willingness to repay*. Recovering these two entries and kindly waiving the accrued interest and ongoing gives an outstanding balance of about Le29,140,000.
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> *I am therefore proposing a monthly repayment of (Le 500,000.00) Five Hundred Thousand Leones. I will however credit this account with any funds from time to time despite the monthly repayment commitment.* (Emphasis added).

This letter was signed by the Defendant and sent sometime in September 2008. It clearly shows an acknowledgment of the sum of at least Le34,340,000.00 as at 2008. By further correspondences a demand was made for repayment of said owing as seen in letter dated 7th April 2010 marked "H" but no payments were made. By letter dated 14th April 2010 marked "J" Solicitor for the Defendant requested to be furnished "with all debits and credit vouchers which enable me to verify signature heading to the said account owing." In spite of the aforesaid proposal no payments were made to the Plaintiff Bank.

The present application is for the Plaintiff to be entitled to judgment by summary process. To be entitled to such judgment the Plaintiff is to prove his claim clearly and the defendant's defence is not bona fide and

raises no issues to be tried. In the case of Anglo-Italian Bank V Wells (1878) 38 L.T. page 197 at page 201 per Jessel M.R he stated that judgment can be obtained when the Judge is satisfied that not only is there no defence; but no arguable point to be argued on behalf of the Defendant. By paragraph 14/4/5 of the Annual Practice 1999, a Defendant's affidavit should deal specifically with the Plaintiff's claim and affidavit should state concisely and clearly what the defence is and the facts relied on the support it. In the instant case the Defendant has filed an Affidavit in opposition and has relied on the defence marked "AMK1" which ought to be marked "Proposed Defence" which should not be signed as leave must be sought before it can be filed out of time. The Defendant in his affidavit is seeking leave to file this defence out of time but has not furnished this Court with any reasons for the delay in filing this document. A Defendant ought to show sufficient facts and particulars that there is a triable issue.. I refer to case of S/C App 4/2004 AMINATA CONTEH V APC and previous rulings/judgments of this Court including the following to wit: CC: 183/08 SIERRA LEONE COMMERCIAL BANK LIMITED V BINTA MACFOY judgment delivered in March 2012; FTCC/008/11 INTERNATIONAL COMMERCIAL BANK V IBRAHIM KEITA judgment delivered in February 2012; FIRST INTERNATIONAL BANK (SL) LIMITED V RUB SAYIE (SL) LIMITED unreported October 2011 and FIRST INTERNATIONAL BANK (SL) LIMITED V SULAIMAN INTERNATIONAL and also FIRST INTERNATIONAL BANK V ISSA & SONS ENTERPRISE unreported October 2011, Misc. App. 38/2011 INTERNATIONAL COMMERCIAL BANK (SL) LIMITED V RAKESH. R.S. TAHILRAMI, Misc. App. FTCC 006 SIERRA LEONE COMMERCIAL BANK V MOHAMED HIJAZIE and Misc. App. INTERNATIONAL COMMERCIAL BANK V PERCY WATERS BRIGHT – judgments delivered in January 2012 all of which are of similar facts and circumstances save on the issue of interest which was stated in the contract. The aforesaid cases are all commercial

matters with sums either overdrawn or given out on loans with or without collaterals. In either case interest is either stipulated on the contract or it is determined by this Court.

It is trite law that the mere assertion in an Affidavit of a situation does not, ipso facto, provide leave to defend since the Defendant must satisfy the Court that he has a fair or reasonable probability of showing a real or bona fide defence that is, and his evidence is reasonably capable of belief. In the case of National Westminster Bank PLC V Daniel (1994) 1 AER Page 156 the Court of Appeal per Jessel M.R. who laid a definitive ruling that if the evidence of the Defendant is incredible in any material respect, it cannot be said that there is a fair or reasonable probability that the Defendant has a real or bona fide defence and judgment will be given for the Plaintiff. He enumerated 2 tests:

- Is what the Defendant says credible?
- Is there a fair or reasonable probability of the Defendant having a real or bona fide defence?

He stated that the 1st question must be answered in the affirmative before moving to the 2nd question.

From the aforesaid, there is evidence to show that the Defendant's defence does not raise triable issues to be tried and/or determined. I shall now consider the defence marked "AMK1". It is my view that the Defendant's defence does not raise any triable issues. As submitted by Counsel for the Plaintiff the Defendant has no defence to the action herein. The claim is twofold; principal sum and interest thereon. From Exhibit "E" the Defendant agreed he owed the sum of Le34,340,000/00 in 2008 excluding interest. Judgment can be entered for the sum claimed and interest assessed by this court from the date of issue of the writ.

I find the two cases referred to by Counsel for the Plaintiff very instructive and relevant to these proceeding. Two questions arise in such

applications; does the Defendant have a triable defence on the merits for the matter to proceed to a full trial? The Affidavit in Opposition must "Condescend upon particulars" and should as far as possible, deal specifically with the Plaintiff's claim and state clearly and concisely what the defence is, and what facts are relied on to support it. It should also state whether the defence goes to the whole or part of the claim – see Order 14/4/5 of Annual Practice 1999. Upon perusal of the defence it does not show triable issues and is a mere denial of matters in the particulars of claim. If I juxtapose this defence marked "AMK1" and Letter marked "E" there are similarities. In the latter the Defendant acknowledges the debt and proposes a repayment plan, and in former there are several admissions and general denials of not having knowledge that interest is charged on an overdrawn account and that he never formally applied for an overdraft facility. This sounds to me quite novel for a Defendant who is a Banker by profession and currently employed in another Commercial Bank. Is such a defence credible? I think not. It does not raise issues to be tried.

The Plaintiff has calculated interest at a rate of 25% per annum. From Exhibit "K" – statement of account of the Defendant ran from January to September 2011 with debit of interest rate on the outstanding balance of Le84,169,873.05. The debit balance brought forward was Le68,932,397.13 and interest still accruing. The interest charged is not stipulated. In as much as the account is a saving account when it falls into debit, interest is accrued thereon. It is evident that the Defendant is aware that overdraft facilities and/or overdrawn accounts do bear interest and other charges. I rely on case of Lloyds Bank PLC V Vollar (2000) 2 AER. Page 978 in which Wall J stated to wit:

> "In my judgment the position is very simple and well established as a matter of Banking Law and Practice. It is this, if a current account is opened by a customer with a Bank

with no express agreement as to what the overdraft facility should be, then, in the circumstances where the customer draws a cheque on the account which causes the account to go into overdraft, the customer, by necessary implication, requests the Bank to grant the customer an overdraft of the necessary amount on its usual terms as to interest and other charges."

The question is what is interest? This is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another – see case of DUNN TRUST LTD V FEETHAM (1936) 1. K.B. 22. Interest is charged at common law when there is an express agreement to pay interest and/or where the agreement to pay interest can be implied from the course of dealings between the parties – see case of Re. W. W. DUNCAN & CO (1905) 1. Ch. 307 and Re. MARQUIS OF ANGLESEY, WILLMOT V GARDNER (1901) 2 Ch. 548; or from the nature of the transaction. The aforesaid has supported the Plaintiff's claim that interest is paid on overdrawn accounts and it can be implied from their course of dealing that an overdrawn account will attract interest. This view is strengthened by fact that the Defendant's profession is a Banker who has knowledge and is aware of such practices. And where the rate of interest is not fixed by statute, agreement or usage, there is no hard and fast rule as to the amount to be allowed and the rate of interest may vary according to the practice of that Court and circumstances of the particular case. The usual practice is to allow five per cent in cases of commercial transactions. Having considered the circumstances of this court, this overdraft ran from 2008 and since that time the account ran into debit and interest is charged thereon. The Defendant was fully aware of his indebtedness to the Plaintiff Bank since 2008 and was at liberty to have settled his indebtedness since that time. The Defendant continued to operate said account with the knowledge that interest will be charged on an overdrawn account. From the statement marked "K" no sums have

been paid into account by the Defendant and it continues to accrue interest. Having considered the evidence and the entire circumstances I am of the view that this claim can now be settled that is principal sum paid and rate of interest determined by this court. The defence exhibited "AMK1" does not raise triable issues as by Exhibit "E" the Defendant acknowledges the debt and is seeking a waiver of interest. He cannot be allowed to approbate and reprobate; and considering his position he ought to know and be acquainted with all banking practices and its course of dealings with its customers.

In the premises therefore, I hereby order as follows to wit:-

1. The Defendant is to pay sum of Le 60,252,128.12 to the Plaintiff.

2. Interest on the aforesaid sum from 8th July 2011 to date of this judgment is assessed at 5% per centum per annum.

3. Costs of these proceedings to be borne by the Defendant such costs to be taxed if not agreed upon.

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HON. JUSTICE V. M. SOLOMON J. A.