

IN THE HIGH COURT OF JUSTICE OF THE F.C.T.
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT APO, ABUJA
ON TUESDAY, THE 31ST DAY OF JANUARY, 2023
BEFORE HIS LORDSHIP: HON. JUSTICE ABUBAKAR HUSSAINI MUSA
JUDGE

SUIT NO: FCT/HC/CV/3029/2021

BETWEEN:

CATILAS RESOURCES LIMITED
(Previously called Optimum Continental
and Synergy Limited)

CLAIMANT

AND

- 1. IGWE OGECHI**
- 2. NWANKO MAXWELL**
- 3. PATRICK OJO**
- 4. ADEYEMI FOLARIN MICHAEL**



DEFENDANTS

RULING

By a Writ of Summons dated and filed on the 12th of November, 2021 the Claimant brought against the Defendants the following claims under the Undefended List:-

- 1. An Order of this Honourable Court directing the 1st, 2nd and 3rd Defendants jointly and severally to immediately pay to the Claimant the sum of USD30,000.00 (Thirty Thousand United States Dollars) or its Naira*

equivalent at the prevailing exchange rate being the entire sum misappropriated by the 4th Defendant in the course of his employment with the Claimant for which the 1st, 2nd, and 3rd Defendants undertook to fully and personally (sic) liable via the Guarantor's Undertaking Form Employment (sic) dated 25/01/2018.

2. An Order of this Honourable Court directing the 1st, 2nd and 3rd Defendants jointly and severally to pay to the Claimant 10% interest on the Judgment sum till same is finally liquidated.

3. An Order of this Honourable Court directing the 1st, 2nd and 3rd Defendants jointly and severally to pay to the Claimant the sum of NGN3,500,000.00 (Three Million, Five Hundred Thousand Naira) as cost of this action.

In support of the Writ of Summons on the Undefended List, the Claimant filed a 35-paragraph affidavit to which were annexed thirteen (13) exhibits appropriately marked. The Claimant also filed a Written Address as well as other accompanying originating processes.

This Honourable Court, on the 20th of January, 2022, marked the suit as "Undefended" and fixed the 17th of February, 2022 as the return date for hearing. The 2nd Defendant was served with the originating processes on the 28th of January, 2022 while the 3rd Defendant was served on the 27th of

January, 2022. In the Certificate of Service which the Bailiff of this Court filed in Court, he certified that though he could not meet the 1st Defendant personally, he spoke with her on the telephone and she assured him that her Solicitor would come to accept the service on her behalf. Indeed, on the 17th of February, 2022, that is, the return date, learned Counsel Maduakolam Igwe Esq. announced appearance for the 1st, 2nd and 3rd Defendants.

On the same 17th of February, 2022, learned Counsel for the Claimant, after informing the Court that he was unable to serve the 4th Defendant with the originating processes, sought the leave of the Court, *via*, the Motion *Ex Parte* dated and filed on the 15th of February, 2022 with Motion Number M/1628/2022 for an Order of this Court to serve the 4th Defendant by substituted means. The Court heard learned Counsel move the motion and granted the prayers as sought. The 4th Defendant was accordingly served by substituted means on the 2nd of March, 2022. The fact of this service is evidenced by the Certificate of Service filed in Court by the Court Bailiff.

The 1st, 2nd, and 3rd Defendants filed their joint Notice of Intention to Defend dated the 12th of September, 2022 along with the supporting affidavit on the 14th of September, 2022. It must be noted that the 1st, 2nd and 3rd Defendants had filed three Notices of Intention to Defend along with the supporting

affidavits. These were the Notice of Intention to Defend dated and filed on the 7th of February, 2022, another one dated the 6th of June, 2022 but filed on the 10th of June, 2022 and one dated the 12th of September, 2022 but filed on the 14th of September, 2022. On the 21st of September, 2022, learned Counsel for the 1st, 2nd, and 3rd Defendants applied to withdraw the Notices of Intention to Defend filed on the 7th February, 2022 and on the 10th of June, 2022. This Court granted the application and struck out the two earlier Notices of Intention to Defend, leaving only the Notice of Intention to Defend filed on the 14th of September, 2022 as the surviving Notice of Intention to Defend. The 4th Defendant, on the other hand, filed his Notice of Intention of Defend dated the 1st of June, 2022 and the affidavit in support on the 2nd of June, 2022. All the parties were out of time as at the time they filed their Notices of Intention to Defend. Through applications to that effect made by Counsel for the 4th Defendant on the 14th of June, 2022 and by the Counsel for the 1st, 2nd and 3rd Defendants on the 21st of September, 2022, however, the parties regularized their processes before the Court. On the 15th of November, 2022, all the Counsel on behalf of their respective parties adopted their processes. This Court thereupon adjourned to the 31st of January, 2022 for either Judgment or Ruling.

The case of the Claimant is that it outsourced the 4th Defendant to Polaris bank Limited to work thereat as a cashier. The 1st, 2nd, and 3rd Defendants stood as guarantors of the 4th Defendant. On the 8th of May, 2019, in the course of his employment as a cashier at the Wuse Branch of Polaris Bank Limited, the 4th Defendant received the sum of USD30,000.00 (Thirty Thousand United States Dollars) from a customer, Nigerian Society of Engineers, for deposit into one of the accounts of the customer.

According to Saliu Idris, the deponent of the affidavit in support of the Writ of Summons on the Undefended List, the 4th Defendant disappeared without informing any of his colleagues. The 4th Defendant would later return that day after close of work and would, at the Police Station where the management of Polaris Bank Limited reported the incident, admit that he took the above stated sum to one of his friends who claimed he would double the money for him.

It is the case of the Claimant that following the failure of the 4th Defendant to return the money to the coffers of Polaris Bank Limited, Polaris Bank Limited demanded for the money from the Claimant. Pursuant to this demand, the Claimant reimbursed Polaris Bank Limited of the sum of USD30,000.00 (Thirty Thousand United States Dollars) which the 4th Defendant was alleged

to have stolen. Though the 4th Defendant has been arraigned in Court and is currently standing trial for criminal conspiracy, criminal breach of trust and theft by servant before a High Court of the Federal Capital Territory, Abuja *coram* M. B. Idris sitting at Nyanya, the Claimant is desirous of enforcing the Contract of Guarantee it executed with the 1st, 2nd and 3rd Defendants. It has therefore instituted this action claiming the reliefs as evinced on the endorsement as to claims on the Writ of Summons on the Undefended List.

In the affidavit in support of their joint Notice of Intention to Defend to which were attached five exhibits marked **Exhibits A, B, C, D and E**, the deponent to the affidavit, Patrick Ojo, the 3rd Defendant, who deposed to the affidavit on behalf of the 1st and 2nd Defendants, denied a number of paragraphs of the affidavit in support of the Writ of Summons on the Undefended List and proceeded to aver that the Contract of Guarantee executed by the 1st, 2nd and 3rd Defendants did not extend to the Claimant but was limited only to Optimum Continental and Synergy Limited as, according to him, Catilas Resources Limited was different from the Claimant.

It is the defence of the 1st, 2nd and 3rd Defendants that information at the Corporate Affairs Commission disclosed that Catilas Resources Limited with Registered Company (RC) Number 1658523 was distinct from the Claimant

herein, thereby raising strong suspicion that the Certificate of Incorporation which the Claimant exhibited was forged.

The deponent denied that any demand was made on the 1st Defendant who had left the employ of Polaris Bank Limited since 2018. He also denied that no deposit was made into the customer's account and attached **Exhibit E** as proof that the 4th Defendant deposited the sum of USD30,000.00 (Thirty Thousand United States Dollars) into the account of the Nigerian Society of Engineers domiciled with Polaris Bank Limited. He also swore that the claim of the Claimant was not for liquidated money demand, as the Claimant was asking for pre-judgment interest. He concluded that since the case involved alleged fraud and the 4th Defendant was standing trial before a competent Court, it would be in the interest of justice to move the suit to the general cause list.

On his part, the 4th Defendant, in the affidavit in support of his Notice of Intention to Defend which he deposed to in person, averred that he had not been found guilty of misappropriating the sum of USD30,000.00 (Thirty Thousand United States Dollars) to occasion any loss to the Claimant, adding that the only suit against him was still pending before a competent Court. he stated that his address had always been Federal Housing, Gado

Nasko Road, Kubwa, Abuja and not the address the Claimant stated in paragraph 9 of the affidavit in support of the Writ of Summons. He insisted that the Claimant never demanded for the payment of USD30,000.00 (Thirty Thousand United States Dollars). He denied ever confessing that he took the money in question. In conclusion he swore that the present suit was prejudicial to the criminal case pending against him before this Court *coram* M. B. Idris, J sitting at Nyanya. The 4th Defendant attached one exhibit to his affidavit, to wit, a copy of the charge sheet against him.

That is a concise precis of the case of the parties in this suit. To resolve this dispute, therefore, this Court will formulate the following sole issue: ***“Whether the Defendants have not made out defence on the merit to enable this Court transfer this suit from the Undefended List to the General Cause List?”*** In resolving this issue, this Court shall evaluate the facts in the two affidavits in support of the Notices of Intention to Defend of the Defendants against the backdrop of the case of the Claimant.

In erecting a defence on the merit, the 1st, 2nd, and 3rd Defendants claimed that Optimum Continental and Synergy Limited and the Claimant are two distinct entities; that **Exhibit A** attached to the Claimant’s affidavit in support of its Writ of Summons on the Undefended List was forged; that the said

sum of USD30,000.00 (Thirty Thousand United States Dollars) was paid into the account of the customer; that the claim of the Defendant was not one for liquidated money demand since the Claimant is also asking for post-judgment interest; and that the innocence of the 4th Defendant was yet to be decided by the Court as he is standing trial in respect of the alleged misappropriation of USD30,000.00 (Thirty Thousand United States Dollars). The 4th Defendant's defence, on the other hand, revolves round the pendency of the criminal case against him and the fact that his guilty or otherwise has yet be determined.

I shall begin with the argument of the 1st, 2nd and 3rd Defendants that the Claimant's claim for a pre-judgment interest removes the suit from the province of suits contemplated under the Undefended List Procedure which was provided for by Order 35 of the Rules of this Court. Indeed, claims for damages and pre-judgment interests are not liquidated money demands. They are unliquidated money demands; and, being so, entitlement to same must be proved by way of compelling evidence. See the cases of ***Units Environmental Sciences Limited v. Revenue Mobilization, Allocation & Fiscal Commission (2022) 10 NWLR (Pt. 1837) 133 S.C. at 170, paras G – H; U.B.A. Plc v. Oranuba (2014) 2 NWLR (Pt. 1390) 1 C.A. at 40, paras G – H; and MTN Nigeria Communications Ltd. v. Wi Gatap Trade &***

Investment LTD. (2013) 4 NWLR (Pt. 1344) 276 C.A. at 299 – 301, paras F – C.

Relief No. 2 of the Claimant's claim reads thus: "*An Order of this Honourable Court directing the 1st, 2nd and 3rd Defendants to pay to the Claimant 10% interest on the Judgment sum till same is finally liquidated.*" The phrase "...10% interest on the Judgment sum till same is finally liquidated" does not appear to me to be a claim for pre-Judgment interest. In fact, no canon of construction will construe that express and unequivocal relief to mean a claim for pre-Judgment interest. I, therefore, do not agree with the 1st, 2nd, and 3rd Defendants that the claim is asking for a pre-judgment interest on the sum demanded. It should be noted that the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules, 2018 contains stipulations on the payment of post-judgment interest on a judgment sum. For instance, Order 10 Rule 3 provides that "***Where the claim in the originating process is a liquidated demand and a defendant or any of the defendants fail to appear, a claimant may apply to the court for judgement on the claim in the originating process or such lesser sum and interest as the court may order.***" Of immediate relevance is Order 39 Rule 4. This Rule stipulates that "***The court at the time of making any judgment or order or at any time afterwards, may direct the time within which the payment is to be***

made or other act is to be done, reckoned from the date of the judgment or order, or from some other point of time, as the court may deem fit and may order interest at a rate not less than 10% per annum to be paid upon any judgment.”

The Courts have pronounced severally on the significance and necessity of imposing post-judgment interest on Judgment sums. For instance, in ***OAN Overseas Agency (Nig.) Ltd. v. Bronwen Energy Trading Ltd. (2022) 11 NWLR (Pt. 1842) 489 S.C. at 525, paras D – F***, the Supreme Court held that ***“Trial and appellate courts have jurisdiction to award post-judgment interest whether or not it is claimed.”***

The claim of the Claimant in Relief No. 2 is clearly for post-Judgment interest which the Court, by the way, has the discretion to grant even when a party has not specifically asked for it. The averment of the 1st, 2nd and 3rd Defendants in paragraph 15 of the affidavit in support of their Notice of Intention to Defend cannot therefore tantamount to a defence on the merit. I so hold.

I have noted that all the Defendants cited the pendency of the criminal case against the 4th Defendant as a defence on the merit to their several and joint liabilities to the Claimant to the sum of USD30,000.00 (Thirty Thousand

United States Dollars). The 1st, 2nd, and 3rd Defendants referred this Court to **Exhibit E** attached to their affidavit as proof that the money was posted to the account of the customer. **Exhibit E** is the statement of account of the customer, Nigerian Society of Engineers. Indeed, there is a credit entry of USD30,000.00 (Thirty Thousand United States Dollars) on the 8th of May, 2019. The Claimant attached **Exhibit C1** as proof that the 4th Defendant, indeed, stole the stated sum. **Exhibit C1** is an email from Polaris Bank Limited to the Claimant demanding for the “*recovery and repayment of the \$30,000 stolen by your employee*”. **Exhibits E1, E2 and E3** are letters of demand written to the 1st, 2nd and 3rd Defendants by the Claimant demanding for the payment of the sum of USD30,000.00 (Thirty Thousand United States Dollars). These letters of demand were preceded by **Exhibits D1, D2 and D3** which are titled “*Notice under Guarantee Issued on Behalf of Adeyemi Michael Folarin*”. Paragraph 4 of the letters demand begins thus: “*Having being made to pay the sum misappropriated by Mr Adeyemi Michael Folarin...*” Paragraph 5 opens thus: “*Our client, having refunded the sum of USD30,000.00 (Thirty Thousand United States Dollars) misappropriated by Mr Adeyemi Michael Folarin thereby occasioning loss of the above-stated amount...*”

The principle in Undefended List is that a defence on the merit must condescend on the particulars of the Claimant's claims. See the following cases: ***Julius Berger (Nig.) Plc v. A.P.I. Ltd. (2022) 11 NWLR (Pt. 1841) 201 S.C. at Pp. 251, paras. C-E; 254, paras. D-H; Massken Nig. Ltd v. Amaka (2017) 16 NWLR (Pt. 1592) 438 S.C. at 454, paras B – D; Lewis v. U.B.A. Plc (2016) 6 NWLR (Pt. 1508) 329 S.C. at 350, paras A – B; U.B.A. Plc. v. Jargaba (2007) 11 NWLR (Pt. 1045) 247 S.C. at Pp. 270-271, paras. H-A, 273, paras. C-E; Ataguba Co. v. Gura (Nig.) Ltd. (2005) 8 NWLR (Pt. 927) 429 S.C. at 457, paras D – F; Deutches Haus (Nig.) Ltd. v. Union Homes S. & L. Plc (2021) 2 NWLR (Pt. 1759) 148 C.A. at Pp. 167-168, paras. H-H Ofomata v. Onwuzuligbo (2002) 8 NWLR (Pt. 769) 298 C.A. at Pp.319, para. D; 320, paras. B-G; 324, paras. D-E as per the dissenting Judgment of Akpabio, JCA*** among other cases to that effect.

The Defendants have not addressed these exhibits. The settled position of the law is that documents attached to affidavits form part of the affidavit. See ***Zakhem Oil Serve Ltd. v. Art-in-Science Ltd. (2021) 18 NWLR (Pt. 1808) 341 S.C. at Pp.358, paras. A-B; 358, paras. F-G*** and ***Thompson v. Akingbehin (2021) 16 NWLR (Pt. 1802) 283 S.C. at 325, paras E – F.*** Since the Defendants failed, neglected and refused to condescend on the particulars of the contents of those exhibits, they are deemed to have

admitted their contents thereof. I do not, therefore, see how the reliance of the Defendants on the criminal case pending before my learned brother, the Honourable Justice M. B. Idris sitting at Nyanya condescends on the particulars of the claim of the Claimant in relation to the USD30,000.00 (Thirty Thousand United States Dollars). I see no merit in this defence and same is accordingly discountenanced.

On the issue of the authenticity of **Exhibit A** attached to the Claimant's affidavit, to wit, certificate of incorporation and **Exhibit A** attached to the affidavit in support of the 1st, 2nd and 3rd Defendants' Notice of Intention to Defend which also purports to be a certificate of incorporation, I make haste to say that both documents purport to have emanated from the Corporate Affairs Commission. It is on the basis of the existence of two certificates of incorporation for apparently two different companies both curiously bearing identical nomenclature that the 1st, 2nd and 3rd Defendants have made their pitch for forgery.

The law as distilled from a long line of judicial authorities is that where forgery is alleged, the document which is alleged to be fake and the document from which the fake is alleged to have been forged must be placed before the Court. The allegation itself must be pleaded specifically

pleaded and proved. In ***Edun v. Provost, LACOED (1998) 13 NWLR (Pt. 580) 52 at 64, paras. F-G***, the Court held that ***“In a civil proceeding, such as in the instant case, allegation of fraud or forgery must be clearly and specifically pleaded so that the other party will know the case against him. Otherwise, he will be taken unawares by the other side. Allegation of fraud or forgery must also be specifically proved.”*** In ***A.P.C. v. P.D.P. (2015) 15 NWLR (Pt. 1481) 1 S.C. at 66-67, paras. H-B***, the Court stipulated the method of proving allegations of forgery in the following words: ***“In order to prove forgery, or that a document is forged, two documents must be produced, viz:- (a) the document from which the forgery was made; and (b) the forgery or the forged document.”*** See also in this regard the case of ***Agi v. PDP (2017) 17 NWLR (Pt. 1595) 386 S.C. at 457, paras. G-H***.

Forgery is a criminal offence. It is provided for under section 362 of the Penal Code applicable to the northern States of the Federal Republic of Nigeria and the Federal Capital Territory, Abuja. The law is settled that where criminal allegations are contained in a civil action, the standard of proof is the standard applicable to criminal trials, to wit, proof beyond reasonable doubt. Section 135(1) of the Evidence Act, 2011 provides that ***“If the commission of a crime by a party to any proceeding is directly in***

issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt.” In Afolahan v. The State (2018) 8 NWLR (Pt. 1621) 223 S.C. at 239 – 240, paras G - B the Supreme Court held that “The offence for which the appellant is charged is a very serious one, and by virtue of section 135(1) of the Evidence Act 2011, the offence must be strictly proved by cogent and convincing evidence that leaves no iota or doubts or skepticism in the minds of the parties and members of the public, and I daresay this court. The section provides: “135. Standard of proof where commission of crime in issue; and burden where guilt of crime etc. asserted. (1) If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt. (2) The burden of proving that any person has been guilty of a crime or wrongful act is, subject to section 139 of this Act, on the person who asserts it, whether the commission of such act is or is not directly in issue in the action.””

Since this Court cannot, on the basis of the affidavit evidence before the Court, determine which is forged or which is authentic between the certificate of incorporation of Catilas Resources Limited with Registered Company Number 793141 attached as **Exhibit A** to the Claimant’s affidavit in support of its Writ of Summons on the Undefended List and the certificate

of incorporation of Catilas Resources Limited with Registered Company Number Catilas Resources Limited with Registered Company Number 1658523 attached as **Exhibit A** to the affidavit in support of the joint Notice of Intention to Defend of the 1st, 2nd and 3rd Defendants, this Court will have to move this suit to the general cause list. An intricate point of law which requires further proof has been disclosed in the affidavit in support of the Notice of Intention to Defend of the 1st, 2nd and 3rd Defendants.

Before I conclude, I note that the Claimant has brought this suit principally against the 1st, 2nd, and 3rd Defendants as the 4th Defendant's guarantors to recover the USD30,000.00 (Thirty Thousand United States Dollars) alleged to have been stolen by the 4th Defendant. It is well within its right to proceed against the 1st, 2nd and 3rd Defendants as the guarantors of the 4th Defendant even without a prior attempt at exhausting the options of recovering the money from the 4th Defendant. See the cases of ***Umegu v. Oko (2001) 17 NWLR (Pt. 741) 142 C.A. at 155, paras F – H*** and ***Chami v. U.B.A. Plc (2010) 6 NWLR (Pt. 1191) 474 S.C. at 501, paras B - C.***

I however, made haste to add that since this suit is fundamentally an attempt by the Claimant to enforce the Contracts of Guarantee it entered into with the 1st, 2nd, and 3rd Defendants, it falls outside the circumference of suits to

be heard and determined under the Undefended List Procedure. It cannot, therefore, be heard as such. See ***Deutches Haus (Nig.) Ltd. & 1 Other v. Union Homes Savings & Loans Plc (2021) 2 NWLR (Pt. 1759) 148 C.A. at 166, paras. A-D*** where the Court of Appeal held that a claim for enforcement of the terms of a Contract of Guarantee is not maintainable under the Undefended List Procedure.

Moreover, the 1st, 2nd and 3rd Defendants had sworn in paragraph 13 of their affidavit in support of their joint Notice of Intention to Defend that no demand was made on them by the Claimant to pay the said sum. I note that the Claimant stated in paragraphs 25 and 27 of the affidavit in support of the Writ of Summons on the Undefended List that it served the 1st, 2nd and 3rd Defendants with **Exhibits D1, D2 and D3** titled “NOTICE UNDER GUARANTEE ISSUED ON BEHALF (sic) ADEYEMI MICHAEL FOLARIN” and **Exhibits E1, E2 and E3** titled “RE: GUARANTOR’S UNDERTAKING FORM EMPLOYMENT (sic) DATED 25TH JANUARY, 2018. DEMAND FOR THE FULFILMENT OF OBLIGATION”. The issue of service of letters of demand on the 1st, 2nd and 3rd Defendants is, in my considered view, a non-issue. In ***Chami v. U.B.A. Plc (2010) 6 NWLR (Pt. 1191) 474 S.C. at 501, paras C – E***, the apex Court held that “***A contract of guarantee can be enforced against the guarantor directly or independently without the***

necessity of joining the principal debtor in the proceedings to enforce the guarantee. Thus, a surety may be proceeded against without demand from him and without first proceeding against the principal debtor.”

For the reasons of allegation of forgery and the fact that this suit is principally a case of enforcement of the terms of the Contract of Guarantee between the Claimant and the 1st, 2nd and 3rd Defendants respectively, this Court hereby declines to hear and determine this suit under the Undefended List procedure. It shall transfer this suit to the General Cause List. Transferring this suit to the General Cause List will enable this Court to hear and determine conclusively all the facts in issue in relation to the liability or otherwise of the 1st, 2nd and 3rd Defendants under **Exhibits B1, B2 and B3** attached to the Claimant’s affidavit in support of its Writ of Summons on the Undefended List, that is, the Contracts of Guarantee.

Accordingly, this suit is hereby removed from the Undefended List and placed on the General Cause List. All the parties are hereby ordered to file further pleadings and frontload all the documents they hope to rely on. Specifically, the 1st, 2nd and 3rd Defendants are by this Order required to adduce evidence in proof of their allegation of forgery. Similarly, the

Claimant is required by this Order to adduce evidence in proof of the several and joint liabilities of the 1st, 2nd and 3rd Defendants under **Exhibits B1, B2 and B3**. Any party that intends to apply for a subpoena to be issued shall so apply before the next adjourned date. All the processes and frontloaded documents must be in the Court's file before the next adjourned date for hearing of this suit on its merits.

This is the Ruling of this Court delivered today, the 31st day of January, 2023.

HON. JUSTICE A. H. MUSA
JUDGE
31/01/2023