THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT ABUJA

BEFORE HIS LORDSHIP: HON. JUSTICE M. S. IDRIS

COURT: 28

DATE:-22ND MAY, 2023

FCT/HC/CV/135/2021

BETWEEN

ACCESS BANK PLC---------- CLAIMANT/RESPONDENT

AND

1. NNENNA UBANI
2. NNESCA GLOBAL SERVICES LIMITED } DEFENDANTS/APPLICANTS0

JUDGMENT

This suit commenced vide a writ of summons filed on 20th Jnauary,2021 and a Statement of Defence filed on 14th October,2021.

The facts of the case is that the 2nd Defendant took a loan facility of ₦111, 921, 600.00 from Diamond Bank now Access Bank on January 03, 2014. The said loan was guaranteed by the 1st Defendant who is the Managing Director and Majority Shareholder of the 2nd Defendant. Amongst many terms and conditions of the credit facility, the parties agreed that the interest rate for the loan shall be 22% per annum, but subject to review from time to time in line with prevailing money market conditions. It was further agreed that if the 2nd Defendant defaults in paying any sum of principal, interest or otherwise, it shall be liable to pay a penalty fee of 1% flat on unpaid sum per month. The loan was to be repaid by bullet payments from the contract proceeds and the 2ndDefendant offered security for irrevocable domiciliation of all

sale proceeds into the company account with Diamond Bank now Access Bank.

The agreement also empowered the claimant to demand for repayment of the loan facility or any part thereof outstanding at any time once the Defendant defaults in any repayment.

The Defendant defaulted in the quarterly repayment of the loan principal together with interest, and as a result, the Claimant wrote letters dated 30thJanuary 2017 and 13thJanuary2017 respectively to each of the Defendant through her solicitors. The Claimant also held several meetings before then with the 1st and 2nd Defendants, demanding for liquidation of their outstanding indebtedness. As a result of the meetings, the 2nd Defendant wrote to the Claimant on 18thJanuary, 2017, requesting that they discontinue the running interest rate on the account, and by a letter dated 13thFebruary, 2017, the Claimant in response, informed the 2nd Defendant that its indebtedness at that date was ₦124, 628, 008.67, but that they would accept the sum of ₦112,000,000.00 only as full and final payment in liquidation of the loan, if the reduced indebtedness would be paid within thirty (30) days from the date of the letter. The Defendant failed to accede to the Claimant's concession.

After sometime, the Claimant decided to write off the defendant's loan from its book, which meant that the Claimant stopped charging interest on the outstanding sum with effect from that date. The reason for write off was to avoid further accumulation of interest and provisioning for the non-performing loan.

The Claimant claims that as at May 2017, the Defendant's indebtedness was ₦131, 433, 683. 79.

In their defence, the defendants filed a joint statement of defence, wherein they averred that the 1st Defendant only guaranteed the sum of N78,345,120.00, and that by virtue of the agreement, a request to the 1st Defendant to pay was only to be made if the 2nd Defendant was in default, has been requested to

pay and has failed, refused or neglected to pay, and that the Claimant never did any of this.

The Defendants further averred that by virtue of the terms of the loan offer and the domiciliation arrangement between the 2nd Defendant and the Claimant, the loan was to be repaid from proceeds of the contract for rehabilitation of staff accommodation, mess and offices at NNPC Escravo's Terminal, and the Claimant had a lien on those proceeds, and was deducting same without let or hindrance. The Defendants stated that about 70% of the loan was repaid by the 2nd Defendant, until there was no further proceeds as the contract was frustrated by insurgency/militancy in the Niger Delta, which they duly notified the Claimant and requested the discontinuance of interest on the loan and extending time for full and final payment of the balance. The Defendants pleaded force majeure.

The Defendants denied ever receiving any demand letter for payment by the Claimant or its Solicitor. The Defendant further averred that it did not accept the concession proposed in the Claimant's letter of 13th February, 2017 to it. The Defendants contended that they cannot be said to be in default, as the loan could only be in default if the full proceeds of the contract had been paid by the contract employer and the 2nd Defendant failed to remit the amount due to the Claimant.

The Defendants averred that the total sum recoverable from the 2nd Defendant under the contract finance is N131, 254, 906.36, and that having already repaid the sum of ₦76, 339, 719. 99, the 2nd Defendant is only under obligation to pay a balance of ₦54, 915, 186.37 to the Claimant, upon realization of the final milestone repayment from the contractee.

The Defendants further filed a counter claim against the Claimant wherein they accused the Claimant of charging excessive fees as interest, publishing libelous material against the Defendants on

This Day Newspaper of 18th June, 2019, and breaching the terms of the loan offer.

The Claimant/Defendant to the Counter Claim, filed its Reply to the Statement of Defence and Defence to the Counter Claim on 6th January,2022. In specific response to the allegation of publishing libelous allegation against the Defendants/Counter Claimant, the Claimant stated that its publication on the This Day Newspaper of 18thJune, 2019, was in compliance with the directive of the Central Bank of Nigeria in the exercise of their powers as conferred by law, through its circular dated 22ndApril, 2015, directing all banks to publish the list of delinquent debtors that remain non-performing in at least three national daily newspaper. Hence, its publication was not libelous.

On 1st February, 2022, the matter was set down for hearing, and PW1, one Ajibide Dennis, witness of the Claimant, adopted his witness statement on oath and tendered the following documents:-

1. Request for Review of Interest dated 13th February,2017- Exhibit. 1A
2. Request for Review of Interest Rate dated 18th Jnauary,2017 – Exhibit. 2
3. Demand Letter dated 31st Janaury,2017 –Exhibit. 3
4. Letter addressed to the 2nd Defendant dated 11/03/2020- Exhibit 4
5. Board Resolution – Exh. 5
6. Statement of Account of the 2nd Defendant – Exhibit 6
7. Offer of Credit Facility dated 3rd January,2014 – Exhibit. 7
8. Request for a facility dated 19th December,2014- Exhibit 8
9. Change of Bank E payment dated 19th December,2013- Exhibit 9
10. Certificate of Compliance- Exhibit 10
11. Letter to all Banks dated 15th April,2015Exhibit 11

PW1 was thereafter cross examined by the Counsel to the Defendant

On 23rd February, 2022, the Defendants commenced its defence. On 13th April, 2022, a subpoenaed witness, one Adeyanju Akeem, who claimed to be a chartered accountant of 10 years post qualification experience, tendered a certified true copy of the This Day Newspaper Publication – Exh. DW2; a summary of findings from investigation on loan charges addressed to the Court dated 9th March,2019 – Exhibit.DW3. According to PW1, from his calculation, the total amount which would have been paid to the Claimant by the Defendant based on the loan tenor of 270 days is ₦131, 254, 906.52, and that flowing from the loan contract, the loan was a contract financing type of loan, which payment was be drawn from proceeds of the contract. DW1 maintained that from his findings, the Defendant only has an outstanding of ₦52, 196, 449.96, and that the loan is not in default as the contractee has not completed the bullet payment for the contract.

DW1 was accordingly cross examined. On 25th October, 2022, DW2 adopted her witness statement on oath and was cross examined. She tendered five documentary evidences:

Letter dated 27th December,2019 –Exhibit DW4; Printout of Email exchanged between 10th December,2013 and 7th January,2014-Exhibit DW5; Letter dated 7th Octoner,2013-Exhibit DW6; Thisday Newspaper publication of 18th June,2019-Exhibit DW7; Letter dated 23rd Sptember,2019-Exhibit. DW8.

At the conclusion of hearing, the Defendants/Counter-Claimant and the Claimant, filed their Final Written Addresses, and same was adopted.

In their final written address, the Defendants through their Counsel objected to the admissibility of Exhibits 1-5, 8, 9 and 12, on the grounds that they are photocopies of private document, and that the originals ought to have been tendered, but the claimant merely tendered photocopies reprinted from a computer.

Counsel also objected to the admissibility of exhibits 6 and 7, in that exhibit 6 being the statement of account of the 2nd Defendant, ought to be tendered in accordance with the requirement for tendering a banks books as prescribed by the Evidence Act. Counsel also contended that exhibit 7 is inadmissible for not being executed by at least two directors or a director and a secretary, and for not having the corporate seal of the defendant affixed on it.

Counsel also discredited exhibit 11, in that being a public document, it ought to have been certified, or an original tendered.

Before proceeding further to address other issues raised in the final written addresses of parties, let me at this point quickly address these objections raised by learned counsel to the Defendant.

It is true that exhibits 1-5, 8, 9 and 12 which are private documents ought to be tendered in their original forms. However section 89 (c) of the Evidence Act 2011, permits secondary evidence of private documents to be tendered if the original has been destroyed or lost. When PW1 was about to tender the said exhibits, he was asked the whereabouts of the originals and he replied that they could not lay their hands on the originals, hence their decision to print out the scanned copies. The implication of this is that PW1 had laid foundation to the admissibility of those exhibits by stating that the originals could not be founds, in other words, it may have been destroyed or lost! The objection to exhibits 1-5, 8, 9 and 12 are hereby overruled and the exhibits are admitted in evidence.

On exhibits 6, learned counsel failed to specifically state in what way the Claimant's did not comply with the provision of the Evidence Act in tendering the document which is an entry in a banker's book. In the same vein, counsel did not prove that the signatories to exhibit 7 were not the duly authorized signatories

of the 2nd Defendant. Exhibit 7 clearly shows that the document was executed by the CEO and Company Secretary of the 2nd Defendant, and the 2nd Defendant never denied that they executed the said document. Also, it must be stated that failure to affix a corporate seal on a company's document does not invalidate the document, neither does it render it inadmissible, this is an elementary principle of law. What is more, the said exhibits 6 and 7 are relevant piece of evidences which the law allows for its admissibility! Exhibits 6 and 7 are relevant piece of evidences and are according admitted in evidence.

On exhibit 11, it is obvious that the circular is a document emanating from the Central Bank Nigeria and by virtue of section 102 of the Evidence Act, it is a public document. It is now an elementary principle of law that public documents are only admissible by tendering the original or certified true copy of it.

Though a CBN regulation is regarded as a subsidiary legislation, and hence, is judicially noticed by the Court, it is however instructive to note that if a document (whether circular or letter) emanating from a public institution such as CBN is to be tendered as evidence, it should be in its original form or duly certified.

Exhibit 11 was not tendered in its original form and the certified true copy of it was equally not tendered. It is therefore inadmissible and expunged as evidence.

Back to the written address of the Defendants/Counter Claimant, counsel to the Defendants/Counter-Claimant argued that the Claimant/Counter Defendant is in breach of the terms of the contract finance agreement with the 2nd Defendant which specified that repayment of the loan facility advanced to the 2nd Defendant shall be by bullet payments from the proceeds of the contract financed by the facility. Counsel submitted that until the Claimant can prove that the final milestone payment has been received by the 2nd Defendant, as at the time further deductions were being made on the 2nd Defendant's account, then the

Claimant/Counter Defendant is in clear breach of its own agreement.

Counsel further submitted that the Claimant/ Counter Defendant has not adduced any reason or evidence to sustain the very weighty and far reaching publication it made to the whole world about the Defendants/Counter Claimants on Thisday Newspaper of 18th June, 2019, and that same amounted to libel.

Counsel in conclusion urged the court to hold that the balance due to the Claimant is ₦52, 196, 229.96 out of the ₦131, 254,906.52 (the total principal, interest and fee).

On the part of the Claimant, counsel to the Claimant arguing on the three issues raised, urged the court to enter judgement in favour of the Claimant in the sum of ₦54, 915, 186.37 already admitted by the Defendant in their statement of defence, as the outstanding balance of the amount owed the Claimant.

Arguing in support of the reason behind the Claimant's publication of the Defendant's name on the Thisday Newspaper of 18th June, 2019, counsel stated that the directive by CBN empowering Banks to publish names of delinquent debtors, amounted to subsidiary legislation, and having the force of law, which the court is bound to take judicial notice of. Counsel therefore submitted that the Claimant's publication was not defamatory.

On whether the frustration or non-payment of the contract sum by the contractee, rendered the loan unpayable, Counsel maintained that it was never the contemplation of parties that if for any reason the contract fails or becomes frustrated, the Claimant will not be able to recover its money, that the purpose of the guarantee was to take care of such situation of default arising from non-payment for the contract.

Having critically perused all the evidence tendered by parties and the issues raised and argued in the written addresses of parties, I

am persuaded to formulate the following two issues, which I feel will satisfactorily answer all the issues raised by the parties:

1. Whether from the totality of evidence presented before this Honourable Court, the Claimant has proved that the Defendants are in default of payment of the loan issued to them by the Claimant.
2. Whether the Publication of the Defendants/Counter-Claimants name by the Claimant/Counter-Defendant on This Day Newspaper on 18th June, 2019 amounted to libel.

In answering issue number 1, I must avert my mind to Exhibit 7, which is the Credit Facility Agreement between the Claimant and the 2nd Defendant. To arrive at a just decision, I have taken the pains to dispassionately read the whole of exhibit 7, with the intention of understanding the spirit and intention of the parties to the contract agreement.

It is not the function of the court to make contracts between the parties. The court's duty is to construe the surrounding circumstances including written or oral statements so as to attest the intention of the parties. ***NWAOLISAH v. NWABUFOH (2011) LPELR-2115(SC)***

In ***OMEGA BANK NIGERIA PLC v. O. B. C. LTD (2005) LPELR-2636(SC),*** the Supreme Court held inter alia that the Courts will seek to construe any documents fairly and broadly without being too astute or subtle in finding defects, so that after due consideration of all the circumstances, and if satisfied that there was ascertainable and determinate intention to contract, the Courts will strive to give effect to the contract, looking at the intent and not the mere form.

That the 2nd Defendant obtained a loan of N111, 921,600 from the Claimant is not in dispute. Their relationship is that of a debtor and a creditor, and their relationship is founded on contract.

I think what is in dispute here is the amount that is outstanding and unpaid by the 2nd Defendant based on the loan agreement, and whether the Defendants are in default of payment.

A careful look into the exhibit 7 reveals that the loan of N111, 921, 600 issued to the 2nd Defendant by the Claimant was to run for a tenor of 270 days and at an interest rate of 22% per annum. The repayment plan was bullet payments from contract proceeds, and the security for the loan was an irrevocable domiciliation of the sales proceeds into the 2nd Defendant's account with the Claimant. The security was also supported with a personal guarantee by the 1st Defendant.

The clause on Events of Default in the said exhibit 7 is clear on events that shall amount to default, and which shall cause all outstanding's under the facility to become immediately payable. One of such instances is if the Borrower fails to pay when due any outstanding owed to and advised by the Bank. Infact number (vi) of the said clause further states that the facility shall become immediately payable if a situation arises which in the opinion of the Bank makes it inappropriate for the Bank to continue to extend the facility to the Borrower.

The Defendants have made serious arguments to the effect that because the Repayment Plan & Source Clause in exhibit 7 stated that repayments "shall" be bullets payments from contract proceeds, then the Defendant's cannot be said to have defaulted as the last milestones of bullet payment had not been made by the contractee. The Defendants however tend to forget that though the repayment was expected from the proceeds from the contract, the loan was for a fixed tenor and was guaranteed so that in the event of default caused by frustration or failure in the expected bullet payments, the Claimant could still recover its depositor's fund which it lend out to the 2nd Defendant.

Moreover, is not always that a Court of law would interpret the word 'must' or 'shall' as mandatory. The Court must examine the

context within which the word is used. The word "MUST' is often, interchangeable with the word 'SHALL' and both can mean "MAY" where the context so admits. The authors of the Blacks Law Dictionary are of the view that: "This word "SHALL", is primarily of mandatory effect and in that sense is used in antithesis to "MAY'. But this meaning of the word is not the only one and it is often used in a merely directory sense and consequently is a synonym for the word, "MAY", not only in the permissive sense of that word, but also in the mandatory sense which it sometimes has."

In the case of ***Amadi v. N.N.P.C. (2000) 10 NWLR (Pt.674)76 at 97,*** the Supreme Court had the opportunity of clarifying the matter further, where Uwais, JSC, (as he then was) stated, inter alia:-

> "*It is settled that the word "shall" when used in an enactment is capable of bearing many meanings. It may be implying futurity or implying a mandate or direction or giving permission. See: Ifezue v. Mbadugha (1984) 1 SCNLR 427 at pp 456 - 7 ....if used in a mandatory sense then the action to be taken must obey or fulfil the mandate exactly; but if used in a directory sense then the action to be taken is to obey or fulfil the directive substantially"*

No universal Rule can be laid down for the construction of an agreement as to whether mandatory phrases shall be considered directory only or obligatory. It is the duty of Courts of Justice to try and get at the real intention of the parties by carefully attending, to the whole scope of the contract to be construed.

It is my opinion that the use of the word "shall" in the repayment plan of exhibit 7, was merely directional. The intention was merely to ensure that as long as the bullet payments comes in within the tenor of the loan, it shall be applied towards liquidating the said loan. It could not have been intended to frustrate the ability of the lender to recover her loan from other legitimate

sources upon default in getting bullet payments from the 2nd Defendant's contractee.

By virtue of the agreement of the parties, by the 270th day, the total principal and interests due on the loan ought to have been gotten by the Claimant (the lender), failure of which the clause on events of Default and penalty of 1% per month automatically becomes activated against the 2nd Defendant.

It is therefore my finding that the 2nd Defendant defaulted in repaying the outstanding balance of the principal and interest due to the Claimant under the loan contract. The repayment of the credit facility which had a defined tenor cannot be postponed for an indefinite period of term, at the whims and caprices of the contractee, whom one cannot tell when and whether it will ever complete the bullet payments.

Furthermore, I could not find the force majeure clause pleaded by the Defendant in the loan contract (exhibit 7). It is only just and fair that a debtor must and should pay his debt as at and when due, unless parties have an understanding as to the contrary. I cannot fold my hands and see the Defendants toil with the credit facility of the Claimant, which was advanced to them from depositor's funds.

As a guarantor of the credit facility (to the tune of N78, 345,120.00) the 1st Defendant is equally liable to the Claimant.

See **KHALED BARAKAT CHAMI VS UNITED BANK FOR AFRICA PLC (2010) 3 SCM 59 at 78 F-I**, where ONNOGHEN JSC who said:-

> "*The above position of the law becomes clearer when one understands what a guarantee is. The term has been defined as a written undertaking made by one person to another to be responsible to that other if a third person fails to perform a certain duty e.g. payment of debt. Thus where a borrower (i.e. the third party) fails to pay an outstanding*

debt, the guarantor (or surety as he is sometimes called) becomes liable for the said debt."

In the instant case, the Claimant proved by Exhibit 12 the existence of the contract of guarantee executed by the 1st Defendant to secure the debt of the 2nd Defendant. By Exhibit 7, the Claimant provided the principal loan to that company.

It is important to note that the evidence as presented are not challenged in rebuttal. I hold the considered view that with the failure of the principal debtor to repay the credit facility the liability of the 1st Defendant as guarantor under the guarantee thereby crystallized. The right of the creditor is therefore not conditional as he is entitled to proceed against the guarantor without or independent of the incident of the default of the principal debtor. See **F*.I.B. PLC VS PERGASUS TRADE OFFICER (2004) 4 NWLR (PT. 863) 369 AT 388-389; AFRICA INSURANCE DEVELOPMENT CORPORATION VS. NIGERIA LIQUEFIED NATURAL GAS LTD (2000) 4 NWLR (PT 658) 494 AT 505 – 506***

On the exact balance outstanding on the loan sum and interest, I think the loan agreement is very cleazar on the principal sum, interest rate and penalty fee to be charged in the event of default. Parties did not dispute the fact that the Defendant has so far paid the total sum of ₦76, 339, 719. 99. Moreover, the Claimant made the work of the court much easier by not opposing the sum of ₦52, 196, 229.96, put forward by the Defendants/Counter-Claimants as the outstanding balance in their statement of Defence. The Claimant even urged the court in her final written address to order the Defendants/Counter-Claimants to pay the said outstanding balance of ₦52, 196, 229.96, to the Claimant.

Facts admitted needs no further proof, and it is not the duty of the court to begin to calculate the outstanding balance due on the loan, when the parties have already conceded to a certain sum.

In view of the forgoing, I hereby resolve issue 1 in favour of the Claimant. The Claimant's suit succeeds, and the 2nd Defendant is hereby ordered to pay the outstanding balance of ₦52, 196, 229.96 to the Claimant within 30 days from the date of this Judgement. If the 2nd Defendant fails to make the said payment within 30 days from today or where only part of the outstanding balance is paid by the 2nd Defendant, the 1st Defendant shall be made to bear full responsibility of paying any sum outstanding on the loan.

Interest of 10% peranumon the Judgment sum shall apply starting from 22ndof June, 2023, which is 30 days from today until final liquidation of the judgment sum

In the same vein, the Defendant's Counter-Claim against the Claimant/Counter Defendant for alleged breach of the loan contract must fail. It is the finding of the court that the Claimant/Counter Defendant did not breach any the terms of its loan agreement with the Defendant/ Counter Claimant.

On the Counter Claim of defamation of the 1st Defendant/Counter-Claimant by the Claimant/Counter Defendant, I agree with the Defence put up by the Claimant/Counter Defendant, that the publication of the Defendants name on This Days Newspaper on 8th June, 2018 by the Claimant was done in compliance with the directives of the CBN as contained in the purported exhibit 11 which was expunged for not being certified.

Though the CBN circular which was tendered by the Claimant/Counter Defendant was rejected for being in an inadmissible form, the law is that the Guidelines of the CBN, being matters encapsulated in a document, it is sufficient that the facts or effect of such document is pleaded. Once pleaded, the requirement of reference to it in reliance would have been met. In fact, these Regulations need not be specifically pleaded to be admissible. They are bye laws or subsidiary legislations. The Court must take Judicial Notice of them**. U.B*.N. PLC V. AJABULE***

(2011) 18 NWLR (PT. 1278) PAGE 152 @ 186 PARAGRAPH F-G AND UNION BANK OF NIG. V. OZIGI (1994) 3 NWLR (PT. 333) PG.3.

Clearly therefore, the Regulations and Guidelines of CBN is a subsidiary legislation and by virtue of Section 122 (2) (a) of the Evidence Act, 2011, same is a fact that a Court shall take judicial notice of. Being a subsidiary legislation, the Regulations and Guideline CBN will require no further proof. See generally, the case of ***AMUSA V STATE (2003) LPELR-474 (SC*)**. This court indeed has taken judicial notice of the CBN Circular pleaded by the Claimant/Counter Defendant in its justification of the publication of the name of the Defendants/Counter Claimant on the Newspaper

In view of the above, the argument of the Defendants/Counter Claimants learned counsel that the action of the Claimant amounted to libel, is inane and entirely misconceived.

In summary, the Defendant's counter claim has failed in its entirety and is hereby dismissed accordingly.

HON. JUSTICE M.S IDRIS
(Presiding Judge)

Appearance

BiankaEmmanuel:- Appearing with Emanuel Ugwu for the Claimant

Jude AkebweogheDaniel:- For the Defendant/counter Claimant.