

IN THE HIGH COURT OF JUSTICE OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT MAITAMA, ABUJA

BEFORE HIS LORDSHIP: HON. JUSTICE H. MU'AZU

ON WEDNESDAY 6th DAY OF OCTOBER, 2021

BETWEEN:

SUIT NO. FCT/HC/CV/283/2021

SOLOMON BROOKS LIMITED CLAIMANT

AND

- (1) MOBINET GROUP HOLDINGS LIMITED**
- (2) MOBINET BLUE 34 LIMITED**
-DEFENDANTS.**
- (3) ANDREW NIYI OTIKO**
- (4) OLASENI GBENGA JOSEPH**

JUDGMENT

By a Writ of Summons, dated and filed on the 3rd day of February 2012, the Claimant claims against the Defendants as follows:-

- (1) AN ORDER mandating the Defendants to refund the total principal loan sum of Two Hundred and Fifty Thousand US dollars (\$250,000.00) disbursed to the Defendants in thirteen (13) different trenches from

6th November 2017 to 23rd April, 2018 pursuant to a convertible loan facility and an amended convertible loan facility dated the 6th November 2017.

- (2) AN ORDER mandating the Defendants to pay the accrued revised interests sum of Three Hundred and Fifteen Thousand US Dollars (\$315,000.00) outstanding as December, 2020 arising from the disbursed loan sum of Two Hundred and Fifty Thousand US Dollars (\$250,000.00) made to the Defendants.
- (3) AN ORDER mandating the Defendants to pay any further accruing revised interest sum arising from the disbursed loan sum of Two Hundred and Fifty Thousand US Dollars (\$250,000.00) from January 2021 till judgment is delivered in this matter.
- (4) AN ORDER awarding a Ten percent (10%) post judgment monthly interest on the entire principal loan sum and accrued interest assessed in this matter from the date of judgment till final liquidation.
- (5) AN ORDER awarding the sum of Five Million Naira only (₦5,000,000.00) against the Defendants as cost of this suit.
- (6) AN FOR SUCH OTHER ORDERS as the Honourable Court may deem fit to make in the circumstance of this suit.

The Writ of Summons is supported by an affidavit deposed by MR UFUOMA S. EBRUKE the Managing Director of the Claimant.

In the affidavit in support of the Writ of Summons, the Claimant avers that the 2nd Defendant is one of the numerous subsidiaries of the 1st Defendant incorporated in Nigeria with Company Registration No: 1279575 whose registered address is at No: 314, AkinOgunlewe Street, Victoria Island, Lagos. The copy of a search report conducted on the website of the Corporate Affairs Commission (CAC) evidencing the 2nd Defendant's registration details is hereby annexed as Exhibit OLI A. That the 3rd Defendant is the Chief Executive Officer (CEO) and alter ego of the 1st and 2nd Defendants and it is in charge of their day to day activities and further averred that the 4th Defendant is the Chief Operating Officer (COO) of the 1st and 2nd Defendants and also partakes in their day to day activities.

In paragraph 7 to 9 to the affidavit in support, the Claimant averred that on 6th November 2017, the 1st Defendant for itself and on behalf of its subsidiary companies applied for and entered into a \$250,000.00 (Two Hundred and Fifty Thousand United State Dollars) convertible loan facility agreement with the Claimant for a period of five (5) years commencing from 1st January 2018 to 31st December 2022. A copy of the said loan agreement is attached as Exhibit OLI B.

He also stated that the said loan facility was for a short term funding, basically to aid the Defendants Disaster Recovery and SIMPAY Projects in Africa, amidst other business expenditures. Moreso he executed the said loan agreement on behalf of the Claimant while the 3rd and 4th Defendants executed the agreement on behalf of 1st and 2nd Defendants including other subsidiary companies.

He further avers that under the loan agreements the Claimant was at liberty to disburse the loan sums in tranches in either British pounds (GBP) or Nigeria Naira (NGN), but the exchange rate to convert any disbursed funds was agreed to be the United States

Dollars (USD) rate published on XE.com and abokifx.com respectively and also avers that he knows as a fact that from 6th November 2017 to 23rd April 2018, the Claimant paid 13 different tranches of money totaling the Principal loan sum of \$250,000.00 (Two Hundred and Fifty Thousand United State Dollars) as contained in page 2 of the main agreement under the heading Loan Disbursement Schedule. From November 6th 2017 to April 23, 2018 form the first to the 13th March in that manner. These averments are contained in paragraph 10 and in 11 of the affidavit.

In paragraph 12 and 13 of the affidavit he stated that the loan was disbursed to the Defendant at an interest rate of 40% per annum which was agreed to be paid in United States Dollars (USD) at any current exchange rate and that the accrual dates of interest payable by the Defendants are contained in page 3 of the main agreement of the Claimant and Defendants. That is Exhibit OLI B.

Claimant also avers that as at December 31st 2019, the Defendants had serially defaulted in their obligation to pay the accrued interest sum on the loan with no reasonable justification whatsoever. Although, in September, 2019 the Defendants paid a part payment of USD4,960 (Four Thousand Nine Hundred and Sixty US Dollars) accrued interest on the loan to the Claimant without more. And as a result of the Defendants' multiple event of default on the loan obligation, the Defendants pleaded with the Claimant for amendment of the modality in which they will pay the accrued and outstanding interest sum, including future accrual till the duration of the loan term. And that after much deliberation the Claimant conceded to the Defendants' request and on 13th January, 2020 the parties herein executed an amended agreement of the convertible loan facility, as in Exhibit OLI C which varied few paragraph of the main agreement and made provision for a revised interest payment for the Defendant as contained at page 2 thereof.

Furthermore, he averred that despite the soft landing offered to the Defendants in the amended agreement, the Defendants have continued to fail and neglect to pay their accrued interest sum on the loan. That sometime in November, 2020 the Claimant briefed the law firm of Oli and partners on the matter and on 27th November 2020, a demand letter was written to the Defendants through the 3rd Defendant via his email address and same was successfully delivered and the Defendants in response through their solicitor, Aquitas Legal Practitioners sent a letter to the Claimants wherein a period of (7) days was solicited to look into the matter and revert.

Consequently, the Claimant avers that the Defendant's have no defence to the Claimant's case in this matter and Further illustrated that the debt sum is liquidated in nature being the undisputable, uncontestable and irrefutable principal loan sum and accrued interest sum clearly calculated and arrived at with mathematical accuracy.

In response, the Defendants filed a Memorandum of Conditional Appearance dated the 15th of July 2021 alongside a notice of intention to defend supported by an affidavit deposed to by the 4th Defendant.

In his affidavit, he avers that, he is the Chief Operations Officer (COO) of the 1st and 2nd Defendants, and he has the consent of the Defendants to depose to the affidavit on their behalf after perusing the Claimants affidavit in support of the Writ of Summons. That save for where it is expressly admitted, the averment contained in the Claimants affidavit are false, untrue, deceptive, misleading and are vehemently denied.

That contrary to paragraph 1 of the Claimant's affidavit, the Claimant is registered only under the Companies and Allied

Matters Act and has itat address No.2, Asheik Jarma Street Jabi-Abuja and not registered under any other law.

That they admits paragraph 2 of the Claimant's affidavit in support of the Writ of Summons and further states that the deponent Mr. Ufuoma S. Ebruke has been the sole person acting on behalf of the Claimant and has insisted on payments accruing to the Claimant be made to him and further admits paragraphs 3, 5, 6, 8, 10, 11, 12, 13, and 18 of the Claimants affidavit.

Consequently, paragraph 4 of the Claimant affidavit is admitted only to the extent that the 2nd Defendant is a company in Nigeria with Company Registration No: 1279575 whose registered address is No. 314B, Akin Ogunleye Street, Victoria Island, Lagos but vehemently deny that the 2nd Defendant is one of numerous subsidiaries of the 1st Defendant.

Paragraph 7 of the Claimants affidavit is also admitted only to the extent that the 1st Defendant entered into a \$250,000.00 (Two Hundred and Fifty Thousand United State Dollars) convertible Loan Facility Agreementwith the Claimant for a period of 5(five) years commencing from 1st January 2008 to 31st December.

The Defendants aver that it was the Claimants that approached the 1st Defendant for an equity investment into its operations across Africa and it was concluded that a 5year convertible debt would be the mode of investment and the capital to be invested was \$250,000.00 and that the maturity date is 31st December 2022 and the said loan will be converted into 2% share of the 1st Defendant's company as fully paid.

That paragraph 9 of the Claimant's affidavit is denied and in response the Defendants states that the 3rd and 4th Defendant only signed the said Agreements as Directors of the 1st Defendant and

vehemently deny paragraph 14, 16, 17, 18, 19, 22, 23 and 24 of the Claimants affidavit.

The Defendant further aver that due to financial and technical challenges as well as the Covid-19 global pandemic which occasioned a worldwide lockdown, it was difficult for the 1st Defendant to satisfy some accrued interests. There were also delays of SIM overlays from the factories in the Far East Asia which reduced the 1st Defendant ability to generate enough revenue to both keep its business going and make payments to the Claimant through Mr. Ebruke and that based on the above, the Claimant and the 1st Defendant amended the convertible Loan Agreement of executing an Amendment to Agreement for issuance of USD \$250,000.00 convertible loan facility.

Consequently, they agreed to alter the interest payment date and amount and the loan disbursed to the 1st Defendant by the Claimant has not yet matured till 31st December 2022.

They further aver that despite the above and the challenges faced, the 1st Defendant had made various payments in satisfaction of the interest to the Claimant through the Claimant's Managing Director and that on 6th February 2020 the 2nd Defendant caused a transfer to the tune of \$9000.00 (Nine Thousand US Dollars) credited to the Managing Director of the Claimant, Mr. Ufuoma Ebruke as partial satisfaction of the accrued interest. Also on the 11th of March 2020, the 1st Defendant transferred the sum of ₦1,050,000.00 (One Million, Fifty Thousand Naira only) through the 4th Defendant to the Claimant through its Managing Director as partial satisfaction of the interest that has accrued and has attached the copies of the sums mentioned above to the Claimants Managing Director and marked as Exhibits A, B and C respectively. As such he avers that not all the interest on the entire loan has accrued and become payable and the present suit as presently constituted is not in a liquidated nature.

He further avers that the Agreement which forms the basis of this suit does not make provision for repayment of the principal sum and the Claimant is only entitled to 2% of the 1st Defendant's shares on 31st December 2022 when the said loan matures and not the principal loan sum.

That on the 8th of April 2021, he was informed by the Defendants lead Counsel at a meeting held at his office at No.34 Kumasi Crescent, Wuse II Abuja at about 3:30pm of the following which he verily believes to be true and correct.

- a. That he has equally perused the originating process in this suit.
- b. That the 2nd 3rd and 4th Defendants are not privy to the agreement which forms the basis of this suit.
- c. That the Claimant lacks the locus standi to institute and maintain this action having not been registered in compliance with the relevant laws. And that the instant suit is premature and speculative and it cannot be determined under the laws of the Federal Republic of Nigeria and that the Writ of Summons discloses no reasonable cause of action, being a subsisting agreement that is not yet ripe for complete enforcement. Consequently, that the Defendants have a valid and formidable defence on the merit to the instant suit and that the instant suit is frivolous, vexatious, gold-digging and filed in utmost bad faith. The aforementioned are contained in paragraphs 29(a-h) and 30 of the affidavit in support of Notice of intention to defend.

Counsel for the Defendants also filed a Written Address in support of the Notice of Intention to defend where alone issue for determination was formulated to wit.

Whether the Defendants have disclosed a defence on the merit to enable this Honourable Court transfer the instant suit to the general cause list. They adopted their written address as their oral argument.

The Defendants also filed a notice of Preliminary objection seeking the Court for the following orders.

- (1) An order of this Honourable Court striking out the name of the 2nd, 3rd and 4th Defendant from this suit.
- (2) An order of this Honourable Court striking out/dismissing this suit for want of jurisdiction.

And for such further orders or other orders as this Honourable Court could deem fit to make in the circumstances.

The notice of Preliminary objection was filed alongside a 13 paragraph affidavit where in the deponent avers that the convertible loan agreement was executed only between the Claimant and the 1st Defendant and for the benefit of only the Claimant and the 1st Defendant and that the 2nd, 3rd and 4th Defendants are not parties/privies to the said convertible loan agreement and the 1st Defendant distinct from the 2nd Defendant and the 3rd and 4th Defendants are only employees of the 1st Defendant. These averments are as contained in paragraphs 6, 7, 8, and 9 of the affidavit in support of the preliminary objection.

Counsel for the Defendants raised a sole issue for determination.
Thus:-

“Whether this suit is not liable to be dismissed for being grossly incompetent and thereby robbing this Honourable Court of it jurisdiction to entertain same.”

Counsel adopted his Written Address as his oral argument.

In response, the Claimants filed a counter affidavit in opposition to the Defendant’s Notice of Preliminary Objection dated and filed on the 6th of July 2021 alongside a written address and Exhibits marked as follows:-

1. A copy of the Claimant’s Memorandum of Association marked as Exhibit OLI 1.
2. A copy of the Amended Agreement of the convertible facility as Exhibit OLI 2
3. The first Defendant’s company structure both parent and subsidiaries as Exhibit OLI 3.
4. A copy of the initial Loan Agreement as Exhibit OLI 4.
5. Writ endorsed for service outside jurisdiction as Exhibit OLI 5.

In the Counter affidavit, the Claimant avers that paragraph 3 of the Defendant’s affidavit is true save that the Claimant is not engaged in the business of money lending as falsely alledged by the Defendant which is why the loan is tagged convertible loan facility. The loan agreement is called ‘convertible’ because parties

agreed that on the maturity date of the loan ie 31st December 2022, the Defendants will convert the principal loan sum (\$250,000.00). In 200 shares of the 1st Defendant as contained in page 4 of Exhibit OLI 2.

They deny paragraph 6 and 7 of the Defendant's affidavit stating that the 3rd and 4th Defendant's actually executed the loan agreement in their official capacity as Chief Executive Officer and Chief Operating Officer respectively on behalf of the 1st Defendant and its subsidiaries including the 2nd Defendant and that the said loan was for the benefit of the 1st and 2nd Defendant including other subsidiaries as expended by the 3rd and 4th Defendants.

They denied paragraph 11 of the Defendants affidavit stating that it is a sheer deceit and attached Exhibit OLI 2 for further illustration.

In paragraph 16 of the counter affidavit, they aver that in the entire paragraphs of the Defendant affidavit in support of their preliminary objection, the Defendant never denied not been indebted to the Claimant in respect of accrued and payable interest sum under the Loan Agreement at the hearing of the Preliminary Objection. Claimant also adopted their Written Address as oral argument and formulated their issues for determination based on the grounds raised by the Defendant in support of their Preliminary Objection thus:-

“1. Whether or not the Claimant's suit did not disclose any cause of action against the 2nd, 3rd and 4th Defendant to warrant their names been struck out from this suit.

2. Whether or not the Claimant is a money lender under the Money Lenders Acts for the purpose of making the subject loan transaction illegal and unenforceable.

3. Whether or not this suit is premature with no cause of action arisen against the Defendants for the purpose of clothing the Claimant with the locus standi to institute this suit against the Defendants.
4. Whether or not the Claimant Originating Writ of Summons in this suit is not properly endorsed for service outside the jurisdiction of this Honourable Court.
5. Whether this Honourable Court lacks the jurisdiction to hear and determine this suit in the circumstance and as presently constituted.

In response to the Claimants Counter affidavit the Defendants again filed a further affidavit in support of the Preliminary Objection. Wherein they aver that the Claimants didn't only ask for the accrued interest on the convertible loan facility but also the principal sum being the sum of \$250,000.00 (Two Hundred and Fifty Thousand US dollars). This is in denial of paragraphs 6 and 7 of the Claimant's Counter Affidavit and to buttress this assertion they attached the Claimant's Writ of Summons particularly relief 1 and is marked as Exhibit FA 1.

Also in denial of paragraph 10 of the Claimant's Counter affidavit, the Defendant's aver that the 3rd and 4th Defendants have not been established to have indulge in any fraudulent act in any ramification rather mere names calling and ranting and that the Claimant is intentionally but vainly struggling to divert from the defects in his claims which is obvious and glaring to this Honourable Court.

The further Affidavit was filed alongside a reply on points of law.

Consequently, the matter was adjourned to 23rd of September 2021 for judgment. Judgment was not delivered on that day because of the judges' annual vacation but was further adjourned to 06/10/2021 for judgment.

As stated in the proceeding part of this judgment, the Defendants in this matter filed a Notice of Preliminary Objection challenging the competence of the suit and the jurisdiction of the Court to entertain same. For the reason that challenge to jurisdiction is a threshold issue and it is settled that once raised, the Court should as a matter of duty and priority hear and determine it first, the Court shall proceed to consider the Defendants objection. Thereafter, and if necessary, the substantive claim.

In the Defendants/objectors Preliminary Objection dated 13/4/2021, they seek for;

1. An order of this Honourable Court striking out the names of the 2nd, 3rd, & 4th Defendants from the suit.
2. An order of this Honourable Court striking/dismissing this suit for want of jurisdiction.

The objectors, prayers are predicated on the following grounds to wit:

- (a) The 2nd, 3rd, & 4th Defendants are not parties/privy to the contract which forms the basis of the instant suit and therefore cannot be sued.

- (b) The contract agreement which forms the basis of this suit were strictly executed between the Claimant and 1st Defendants.
- (c) The Writ of Summons discloses no cause of action against the 2nd, 3rd, & 4th Defendants.
- (d) The instant suit is premature
- (e) The Claimant lacks the Locus Standi to institute and maintain this action.
- (f) That the contract agreement which forms the basis of the suit is illegal and unenforceable.
- (g) Failure of the Claimant to endorse the Originating Process in accordance with the provisions of the Sheriffs and Civil Process Act renders The Originating Process incurably defective.

In the Objectors Written Address in support of the Preliminary Objection a sole issue for determination of the Court was formulated to wit.

“Whether this suit is not liable to be dismissed for being grossly incompetent and thereby robbing this Honourable Court of its jurisdiction to entertain same?”

Learned Objectors Counsel argued the issue under sub headings, to wit:

- (a) Privity of Contract regarding 2nd, 3rd, & 4th Defendants.

- (b) On the suit not disclosing a cause of action against the 2nd, 3rd & 4th Defendants.
- (c) On Claimants Locus Standi & unenforceability of the argument.
- (d) On suit being premature.
- (e) Failure to endorse Originating Process in accordance with the provisions of the Sheriffs and Civil Process act.

Also as stated in the proceeding part of this judgment the Claimant/Respondent filed a Counter Affidavit and a Written Address in opposing the Preliminary Objection of the Defendants. The Claimant in the address raised 5 issues for the determination of this Court. These issues are similar to the sub heading under which the Objectors sole issue for determination was argued. That being the case I need not reproduce it.

I shall adopt the sub headings (not necessarily in the order were made) in dealing with the Preliminary Objection of the Defendants/Objectors.

- 1 - Failure to endorse originating process in accordance with the provision of the Sheriffs and Civil Process Act.

It is pertinent to answer the following question. Has the Claimant complied with the provisions of the Sheriffs and Civil Process Act by endorsing on Writ of Summon that it was to be served outside jurisdiction.

I have carefully perused the Originating Process of the Claimant in the Courts file and I find that, just like Exhibit OLI 5 attached to the Claimants Counter Affidavit, it is endorsed thereon.

“This Writ of Summons is to be served out of the Federal Capital Territory, Abuja and in the LagosState of Nigeria”

This meets the requirement of the provisions of the Sheriffs and Civil Process Act and I accordingly resolve the question in favour of the Claimant. Why the Objectors failed to see the obvious I don't understand.

On the 2nd heading to wit

“On the suit being premature.

On this it is the contention of the Objectors that the instant suit is premature as the wordings of the convertible Loan Agreement is to the effect that the Agreement is for a period of 5 years, with a maturity date set at 31st December 2022. That the aggregate facts to have given the Claimant a right and causes of action have not all accrued.”

In response, the Claimants argued that the Defendants have failed to discharge their obligation in the convertible loan agreement and the awarded loan agreement as to payment of interest which are due. The Claimant relied on the two agreements and the authority in **CHEVRON NIG LTD V. LONESTAR DRILLING NIG LTD (2001) 11 NWLR (Pt.723) 186 at 193.**

I have carefully considered the argument from both parties, looking at page 5 Exhibit OLI 2 attached to the Counter Affidavit, it is clearly stated on the heading “in the event of default” that an event of default will occur where.

“The borrower (1st Defendant) fails to pay any amounts owing under the Agreement as and when due. . . .”

Also, it further states that “at the time of occurrences of an event of default, the lender (Claimant). . . may declare the loan together with any accrued interest immediately due and payable.”

In view of the above it is my finding that the Claimant, need not wait till the maturity date of the convertible loan agreement before he can commence an action in line with the provision of the Agreement as quoted above.

The question is resolved in favour of the Claimant against the objectors. This matter is not premature.

The 3rd heading is

“On Claimants Locus Standi & unenforceability of the Agreements.”

The Objector’s Counsel submitted that the Claimant lacked the locus standi to institute and maintains the instant suit as presently constituted being an action for recovering of loan by the Claimant who is not a registered money lender.

The Learned Counsel maintained that the Court can only exercise jurisdiction over a suit when the Claimant has standing to sue.

Counsel relied on Section 5 of the Money Lenders Act Cap 525 Laws of the FCT Vol.3 2007.

In response, the Claimant’s Learned Counsel argued that the Claimant is not in the business of money lending as such need not

register as a money lender, also it is not a loan where the money borrowed will be returned, it convertible loan agreement where the sum will be converted to the shares of the borrowers equity.

Rely on the authority in **NWANKWO V. NZERIBE (2004) 13 (Pt.896) 422 at 434** Learned Counsel maintained that there are 3 exceptions to the requirement for registration under the Money Lenders Act ie. Banks, Insurance Companies and Persons or companies whose ordinary object of business is not money lending (like the Claimant) as seen in Exhibit OLI 01 (The memo of Association of the Claimant).

It was held in **AFULAYAN V. ADIMOHA (2020) 1 NWLR (Pt.1706) 558 atp.585** that

“Even if the Respondent in isolated case lent to evenstrangers (which is not the case here) it does not qualify him as a money lender under the law. The business of lending money must be systematically done, repeatedly and continuously.”

There is no evidence before this Court showing that the Claimants lend money out as a business he engaged in.

In view of all the above, I find that the Claimant is not a money lender requiring license under the Money Lender Act as argued by the objectors.

I resolve this issue also against the Objectors.

The last two headings are similar in that both have the same effect and resolving one in one way takes the other along. They are

(4) Privity of Contract regarding the 2nd, 3rd, and 4th Defendants and

(5) On the suit not disclosing a cause of action against the 2nd, 3rd and 4th Defendants.

The contention here is that the convertible loan agreement was between the Claimants and the 1st Defendant, the 2nd, 3rd and 4th Defendants were not privy to the contract which is the basis of this suit. And urged the Court to strike out their names.

On the 2nd leg it is the further contention of the Defendants that the affidavit in support of the Claimants Writ of Summons reveals that the grouse of the Claimant centers around the convertible loan Agreement which is argued before the 2nd, 3rd & 4th Defendants were not privy to.

Counsel submitted that there is no grievance for the Claimant to ventilates against the 2nd, 3rd, & 4th Defendant from the evidence in the affidavit in support of the writ of summons. In other words no cause of action was disclosed.

The Defendants placed reliance on many authorities including **AONDO V. BENUE LINKS (NIG) LTD (2019) LPELR 39655 (CA), BASINCO MOTORS LTD V. WOEMANN LINE & ANOR (2009) 13 NWLR (Pt.1157) 149 at 180 UWAZURONYE V. GOVERNOR OF IMO STATE & ORS (2013) 8 NWLR (Pt.1355) 28 at 50, OKONTA & ANOR V. EGBUNA (2013) LPELR-21253 (CA).**

In response, the Claimant argued that under paragraphs 7, 8, 9 and 10 of the Counter Affidavit and the convertible loan agreement (OLI 2) where it clearly states that the agreement is between the 1st Defendant and its subsidiaries on the one part and the Claimant on the other part. And by Exhibit OLI 3 the Organogram of the

1st Defendant the 2nd Defendant is its subsidiary thereby a borrower under the Agreement on.

The Counsel for the Claimant further argued that 3rd and 4th Defendants are the soul and mind of the 1st Defendant and its subsidiaries. He argued further that the 3rd and 4th Defendants are the brain behind the refusal, failure and/or neglect of the 1st Defendant and its subsidiaries to pay the Claimant all accrued, due and payable interest under the loan agreement.

Counsel relied on the authority in **M. M. A INC V. N. M. A (2012) 18 NWLR (Pt.1333) 506 at 545-546 PARA E-C. ALADE V. ALI (NIG) LTD (2010) 19 NWLR (Pt.1220) 11 at 130.**

I have carefully considered the Arguments of both parties and it is settled that the 2nd Defendant is a company registered in Nigeria and a subsidiary of the 1st Defendant as seen in OLI 3 (the Organogram of the 1st Defendant and paragraph 7 of the Counter Affidavit of the Claimant, a fact that has not been denied. By the decision of the **UNION BEVERAGES LTD V. PEPSI COLA INTL LTD (1994) 3 NWLR (Pt.330) 1 at 22** where the Court held that.

“If the companies are to all intent and purposes one each could be held liable for action of the other. If even one company can be said to be the agent or employees, or for/or simulacrum of another the two companies would be treated as one.”

And the fact that the convertible loan agreement is for the 1st defendant and its subsidiaries (including the 2nd Defendant) it is a case where the Defendants objection to privity of contract and non disclosure of cause of action cannot succeed.

Accordingly I hold that the 2nd Defendant's name is not liable to be struck out as prayed.

On the other hand, the same cannot be said of the 3rd and 4th Defendants who are the Chief Executive Officer and the Chief operating Officer of the 1st Defendant respectively.

The Loan Agreement which is the basis of this suit was executed by both officers on behalf of the 1st Defendant and its subsidiaries. There is an alleged default or infraction to the terms of the agreement, it is the 1st defendant and its subsidiary who are legal persons and thereby beneficiaries of the contract that should be suit.

I agree with the objections that the 3rd and 4th Defendants are not privy to the contract and thereby no cause of action can exist against them. See **CHARTERED BRAINS LTD & ANOR V. INTERCITY BANK PLC (2009) LPELR 8697 (CA)** where it was held that.

“It is therefore clear - - - that a limited liability company or an incorporated company is a different legal entity from its management. It has a separate and distinct life and existence. In other words, the officers and members of an incorporated company are covered by the company's veil of incorporation and that veil cannot be lifted for the purposes of attaching legal responsibility or liability to its officers who are carrying on the usual business of the company.”

In line with finding above accordingly, the 1st relief on the Preliminary Objection of the Defendants succeed in part. The

names of the 3rd and 4th Defendant are hereby struck out. While relief 2 is dismissed.

I shall now proceed to consider the matter as filed. As stated at the beginning of this ruling. The Claimant, by a Writ of summons filed under the Undefended List Procedure, seeks for an order against the Defendants in these words.

- (1) An order mandating the Defendants to refund the total principal loan sum of Two Hundred and Fifty Thousand US Dollars (\$250,000.00) disbursed to the Defendants in thirteen (13) different tranches from 6th November 2017 to 23rd April, 2018 pursuant to a Convertible Loan facility and an Amended Convertible Loan facility dated 6 November, 2017.
- (2) An Order mandating the Defendants to pay the accrued revised interest sum of Three Hundred and Fifteen Thousand US Dollars (\$315,000.00) outstanding as at December, 2020, arising from the disbursed Loan sum of Two Hundred and Fifty Thousand US Dollars (\$250,000.00) made to the Defendants.
- (3) An Order mandating the Defendant to pay any further accruing revised interest sum arising from the disbursed loan sum of Two Hundred and Fifty Thousand US Dollars (\$250,000.00) from January, 2021 till judgment is delivered in this matter.
- (4) An Order awarding a ten percent (10%) post judgment monthly interest on the entire principal loan sum and accrued interest assessed in this

matter from the date of judgment till final liquidation.

- (5) An Order awarding the sum of Five Million Naira only (₦5,000,000.00) against the Defendants as cost of this suit.
- (6) And for such other orders as the Honourable Court may deem fit to make in the circumstances of this suit.

The writ was filed along with a 24 paragraph affidavit deposed to by Mr. Ufuoma S. Ebruke.

In reaction to the claim the Defendants on the 15/6/2021 filed a Notice of Intention to defend supported by a 31 paragraph affidavit deposed to by Mr. Gbenga Olaseni (4th Defendant).

I have carefully considered the Writ of Summons and the averments in the affidavits of the parties. The cardinal issue that calls for determination is whether or not the Defendants have made out a case to justify a grant of issue to defend the suit and for that reason transfer the suit from the Undefended List to the General cause list for trial.

Order 35 of the Rules of this Court 2018 has made provisions guiding hearing and determination of a suit commenced under the Undefended List Procedure.

Order 35 Rule 3 (1) provides:-

“Where a party served with the writ delivers to registrar, before 5 days to the day fixed for hearing, a notice in writing that he intends to defend the suit, together with an affidavit

disclosing a defence on the merit, the Court may give him leave to defend upon such terms as the Court may think just.

- (2) Where leave to defend is given under this Rule, the action shall be removed from the Undefended List and placed on the ordinary Cause List and the Court may order pleadings or proceed to hearing without further pleadings.

Flowing from the above provisions, the crucial question therefore is whether or not the affidavit of the Defendants discloses a defence on the merit vis-à-vis the Claimant's claim to justify the suit being transferred to the ordinary cause list for trial or judgment entered for the Claimant.

The phrase "affidavit disclosing a defence on the merit" has received judicial interpretation on a number of cases. In **AKINYEMI V. GOVERNOR , OYO STATE (2009) FWLR (Pt.140) P.1821** the Court of Appeal held that "to constitute a defence on the merit, the Defendants' affidavit must disclose either facts that raise substantial issue of law or disputed material facts that can only be resolved after a full trial."

In **ATAGUBA & CO V. GURA NIG LTD (2005) ALL FWLR (Pt.256) P.1219**, The Supreme Court held that the Defendant's affidavit must not contain mere general statement that the Defendant has a good defence to the claim, it must be supported by particulars that if proved will constitute a defence.

Being so guided, the Court will proceed to consider the averments in the affidavit of the parties.

In the affidavit in support of the writ of Summons the Claimant avers that on the 6th of November 2017 the 1st Defendant for itself

and on behalf of its subsidiaries (of which by the ruling of this Court the 2nd Defendant is one) entered into a \$250,000.00 convertible loan facility agreement with the Claimant for a period of 5 years commencing from 1st January 2018 to 31st December 2022. A copy of the said loan agreement is attached as Exhibit OLI B. It was further averred that the Claimant disbursed the loan sum to the Defendants in 13 tranches from the 6th of November 2017 to 23rd April 2018 all totaling the agreed \$250,000.00.

That the loan was disbursed to the Defendant at an interest rate of 40% per annum which was agreed to be paid in US Dollars at any current exchange rate and that the accrual dates of interest payable by the Defendant as contained on page 3 of the main agreement OLI B.

The Defendants by 31st of December have serially defaulted in their obligation to pay the accrued interest sum on the loan except the sum of \$4960.00 in September 2019 with no reasonable justification whatsoever.

That as a result of the multiple event of default on the loan obligation the Defendant pleaded with the Claimant for amendment of the modality in which they will pay the accrued and outstanding interest sum, including future accrual till the end of duration of the loan term. That the Claimant agreed and on the 13th of January 2020 the parties herein executed an amended agreement of the Convertible Loan facility. A copy of same was attached as Exhibit OLI C which varied few paragraphs of the main agreement and made provision for a revised interest payment for the Defendants as contained at page two of the Amended loan Agreement.

And that despite the revised payment schedule the Defendants continued to default in payment of accrued interest sum on the loan. A demand letter was sent to the Defendant by the Claimants

Counsel and Counsel to the Defendants responded requesting 7 days to look into the matter and revert.

In response the 4th Defendant as deponent admitted that the sum of \$250,000.00 was disbursed to the Defendant as par the main convertible loan agreement.

The loan was disbursed at an interest of 40% per annum agreed to be paid on US Dollars at current exchange rate.

That it was the 1st Defendant that was party to the loan agreement. And that it was the Claimant that approached the 1st Defendant for an equity investment and a 5 year convertible debt would be the mode of investment and the capital to be invested was \$250,000.00. Upon the maturity of the loan by 31/12/2022 loan will be converted to 2% share of the 1st Defendants Company as fully paid.

That due to some difficulties, it was difficult for the 1st Defendant to satisfy some accrued interest. As a result the 1st Defendant and that Claimant amended the convertible loan agreement by executing an “Amendment to Agreement for issuance of USD 250,000.00 convertible loan facility.”

It was averred further that the loan disbursed for the 1st Defendant by the Claimant was not yet matured till 31/12/2022.

That inspite of the difficulties the 1st Defendant had made various payments in satisfaction of the interest to the Claimant through the Claimant’s Managing Director Mr. Ufuoma S. Ebruke. \$9,000.00 on 6/02/2020, ₦1,050,000.00 on 11/3/2020 & ₦2,640,000.00 on 4/09/2020 as in Exhibit A, B, & C attached to the affidavit of the Defendants.

That the Agreement which forms the basis of the suit did not make provision for repayment of the principal sum.

It must be state here that some facts contend on the affidavit were similar to the ones in the affidavit in support of the Preliminary Objection that has been dismissed. Thus, I shall not reconsider them.

From the affidavits of both parties some facts are settled and need no further proof.

- (1) The Claimant and the 1st Defendant entered into a Convertible Loan Agreement on the 6th of November 2017 in the sum of \$250,000.00 which is a form of investment for two percent (2%) equity of the 1st Defendant which shall mature on the 31st December 2022.
- (2) It was agreed that an interest of 40% will be paid by the 1st Defendant per annum as contained in the interest payment schedule in the main agreement which was later amended in the amendment agreement of 13th January 2020 in the “interest Rate and interest payment schedule. Column
- (3) The Amended Agreement was executed following the event of Defendant in payment of accrued interest by the Defendant/Borrower.

It is important to look at the relief sought to consider whether the affidavit in support of the notice of intention to defend has disclosed a defence on the merit to warrant the grant of issue to defend the action.

The 1st relief is for an order of Court mandating the Defendants to refund the total principal loan sum of \$250,000.00 pursuant to the Convertible Loan Agreement (as amended).

The affidavit of the Defendant has mentioned that there is nothing in the the Agreement that supports a refund of the principal sum. It is settled and trite that where parties agreed and draw up the terms of their agreement in a written contract they are bound by its terms. The Court of Appale in **JALBAIT VENTURES (NIG) LTD & ANOR V. UNITY BANK PLC (2016) LPELR – 41625 (CA)** held that “the terms of agreement (reach by parties) are as binding on the parties as they are bringing on the Court and the Court must treat as sacrosanct the terms freely entered into by the parties.”

I have perused Exhibit OLI B and found this provision on page 5. It is titled “Event of default.” Under the heading it is provided thus.

“(a) An event of default will occur where

- The borrower fails to pay any amounts owing under this agreement.

- The Borrower fails to perform or obvious any of its obligation under this agreement and does not remedy the failure within 5 business days after receipt of notice or

-
-
-
-
-

(b) Notwithstanding any other provision of this agreement, at the time of the occurrence of

an event of default, the Lender (Claimant), without limiting any other rights it has, may by notice to the borrower declare the loan together with any accrued interest immediately due and payable, in which case those amounts will become immediately due and payable.”

Two questions are pertinent here.

1. Is the Borrower in default of terms of the agreement?
2. Can the Lender/Claimant demand for refund of his investment/loan sum?

From the above provision in the convertible loan agreement both questions must be anywhere in the affidavit term. The provision is that the “Borrower may declare the Loan together with any accrued interest immediately due and payable.” Thus, to my mind, is clearly giving the Claimant the right to demand the refund of the loan facility and interest accrued in the event of default as provided in the terms of the agreement.

I do not agree with the contention of the Defendants that the loan sum is not due or premature.

Accordingly, I find that the Defendant’s affidavit has not disclosed any defence on the merit to this relief/claim.

Considering the next relief which seeks an order mandating the defendants to pay the accrued revised interest sum of \$315,000.00 outstanding as at December 2020.

The Defendants has disclosed that some payments has been made to defray the interest accrued in the sum of \$9,000.00,

~~₦~~1,050,000.00 & ~~₦~~2,640,000.00 as in paragraphs 21, 22 & 23 respectively.

This is a fraction of what is due by the revised interest payment schedule by December 2020 which is in the sum of \$315,000.00.

In line with the finding on the previous claim, I find that the Defendants only disclosed a defence in the 3 amounts stated above and not for the entire sum due by the terms of the convertible loan agreement which binds parties.

Accordingly, I shall invoke the provision of Order 20 Rule 4 of the rules of this Court which provide:-

The Court may, on application (which is what the Undefended List Procedure is) at a material conforms or at any other stage of the proceedings where an admission of facts have been made either on the pleadings or otherwise, make such judgment as upon such admission a party may be entitled to, without waiting for the determination of any other questions between the parties”

The Court enters judgment for the Claimant in the sum Claimed in relief 2 short of the 3 sums provided on Exhibit A, B, & C. The naira components are to be converted into dollars on the prevailing exchange official exchange rates. i.e ~~₦~~410.8, ~~₦~~3,690,000.00 divide by 410.8 equals \$9,639.72. This in addition to the \$9000 paid on the 6th of February 2020 will amount to \$18,639.00.

The judgment sum is \$296,361.00.

The Defendant is granted leave to defend the balance of \$18,639.

On the 3rd relief which seeks for an Order mandating the Defendants to pay any further accruing revised interest sum arising from the disbursed loan from January 2021 to date judgment is delivered.

Flowing from the findings, that Exhibit OLI B is binding on parties and the grant of reliefs 1 & 2 (partially). This Court finds that the Claimant is entitled to interest payment schedule in the Amended Convertible Loan Agreement (Exhibit OLI C) which is \$15,000.00 each for the months of January to September 2021 (9 months) amounting to \$180,000.00.

According, I hold that the Defendants' affidavit does not disclose a defence on the merit to warrant the court transferring the claim to the general cause list. I so hold.

On the 4th relief which prays for an order awarding a 10% post judgment interest on the judgment sum from date of judgment till final liquidation is merited in view of the forgoing findings. Accordingly interest of 10% per annum is awarded against the Defendants on the judgment sum from the date of judgment till the final liquidation of sums. In line with Order 39 rule 4 of this court rules.

On the 5th relief seeking an award of ₦5,000,000.00 as cost of this suit.

By the authority in **LONE STAR DRILLING NIG LTD V. NEW GENESIS EXEC (2011) LPELR-4437 (CA)** the Court holds.

“The claim for cost of litigation was not in any way itemized, particularized and proved. At best, as it is on the writ of summons, it is a claim for general damages calling for the exercised of the

trial Court's discretion judicially and judiciously. Since there was no prima facie evidence establishing that claim of ₦500,000.00 as cost, the trial Court should have transferred that claim to the General cause list for proof."

The claim for cost of Litigation is transferred to general cause list for proof.

In sum and for ease of references Claimant's claim for cost of suit and the balance of the partially granted 2nd relief for accrued sum interest in the sum of \$18,639.00 are transferred to the General Cause list.

Judgment is entered for the Claimants against the 1st and 2nd Defendant jointly in (15) the sum of \$250,000.00 and severally as per the 1st relief.

- (2) In the sum of \$296,361 as per partial grant of the 2nd relief.
- (3) In the sum of \$180,000.00 being accrued interest for the period between January 2021 to September 2021 in line with the agreed revised interest payment schedule.
- (4) 10% interest on the total judgment sum till final liquidation of the judgment sum.

In regards to the matters transferred to the General Cause List for trial, parties are hereby directed to file and exchange pleading in accordance with the provisions of the Rules of this Court, 2018.

This is the decision of the Court.

Molokwu – We are grateful.

**SGND.
HON. JUDGE
6/10/2021.**

LEGAL REPRESENTATION

- (1) Igbinoghene Faith, Esq. for the Claimant/Applicant.
- (2) Frank Molokwu, Esq. for the Defendants.