IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT JABI

THIS THURSDAY, THE 26TH DAY OF OCTOBER, 2023

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: CV/1451/2020

BETWEEN:

STANBIC IBTC BANK PLC …….……. CLAIMANT

AND

1. **SENIOR STAFF ASSOCIATION OF UNIVERSITIES TEACHING HOSPITALS, RESEARCH INSTITUTES OF NIGERIA, UNIVERSITY OF ABUJA TEACHING HOSPITAL, GWAGWALADA, ABUJA, FCT.**
2. **MR TAIGER MAI BERI**
3. **MR. SALAMI ONIMISI HASSAN**
4. **MRS. EKPENYONG MANDU UBONG**

DEFENDANTS

JUDGMENT

The Plaintiffs claims against the Defendants as endorsed on the writ of summons and statement of claim are as follows:

a. **Payment of the sum of N132, 194, 356.94 (One Hundred and Thirty Two Million, One Hundred and Ninety Four Thousand, Three Hundred and Fifty Six Naira, Ninety Four kobo) being the principal balance of the Defendants' total indebtedness to the Claimant as at 2nd December, 2019 and continues (sic) default interest and other charges thereon until it is fully liquidated.**
b. **Payment of 19% interest per annum from the date of this suit until judgment and 10% interest thereafter until final liquidation.**

c. Payment of N10, 000, 000 (Ten Million Naira) cost of action and other damages suffered in the cause of prosecuting this action.

From the records of court, all the defendants were duly served the originating court processes and one **I.A. Adejembi**, **of counsel,** duly entered appearance on their behalf but never filed a defence. Indeed on the record, counsel for the defendants appeared twice and implored court to grant them time to settle the matter out of court, but despite the indulgence granted to the defendants to settle the matter, nothing positive came out of this settlement initiative and they still refused to file a defence. It is equally sad to note that counsel then altogether stopped coming to court without seeking the necessary leave to do so as allowed by the Rules of Court.

Hearing then commenced. In proof of their case, the claimant called only one witness, **Omoniyi Oshodi**, who is a relationship Manager with the claimant. He deposed to a witness statement on oath of 28 paragraphs dated 17th March, 2020 which is largely a rehash of the contents of the statement of claim which he adopted at the hearing and tendered in evidence the following documents:

1. Letter dated 7th January, 2014 titled application for loan by 1st defendant was admitted as **Exhibit P1.**
2. Term loan letter dated 11th March, 2014 was admitted as **Exhibit P2.**
3. Board Resolution of 1st defendant dated 12th March, 2014 was admitted as **Exhibit P3.**
4. Three (3) sets of personal guarantee by 2nd, 3rd and 4th defendants were admitted as **Exhibits P4a, b** and **c.**
5. 2 sets of bundle of letters titled "letter of loan application, authority to deduct loan repayment from salary at source and standing order instruction" written by different members of 1st defendant's association dated 14th March, 2014 were admitted as **Exhibits P5a (36 applications) and 5b** (**86 applications**).
6. Letter of undertaking of 1st defendant dated 29th June, 2016 was admitted as **Exhibit P6.**
7. Letter titled "Authority to Debit our Current Account No. 0009229522 dated 12th March 2014" was admitted as **Exhibit P7.**

8. Two (2) letters by 1st defendant dated 21st march, 2014 titled "Authority to debit our current account no. 0009229522" and "credit instruction: Account No. 0009229522" was admitted as **Exhibits P8a and b.**

9. Letter by 1st defendant titled "Re: Loan facility of N231, 684, 790.25" was admitted as **Exhibit P9.**

10. Letter by 1st defendant titled "Application for restructure of our N231, 684, 790.25 facility with your Bank" dated 14th July, 2015 was admitted as **Exhibit P10**.

11. Letter titled "An Appeal Letter" dated 14th November, 2017 was admitted as **Exhibit P11.**

12. Two (2) letters from claimant to the Executive Officers and Promoters of 1st defendant dated 3rd April, 2017 and 28th November, 2018 was admitted as **Exhibits P12 a and b.**

13. 1st defendant's statement of account No. 0010069762 together with the Certificate of Compliance was admitted as **Exhibit P13a.**

14. 1st defendant statement of account No. 0009229522 together with the certificate of compliance was admitted as **Exhibit P13b.**

15. Two (2) demand letters written to the 1st and 2nd defendants dated 24th April, 2019 and 26th April, 2019 were admitted as **Exhibits P14 a and b.**

PW1 then urged the court to grant all the reliefs prayed for by the claimant.

As stated at the commencement of this judgment, despite the service of the originating court processes and hearing notices at different times, learned counsel to the defendants after filing his memorandum of appearance appeared in court twice and then stopped coming to court. The defendants on their part never even appeared in court.

On application of counsel to the claimant, the right of defendants to cross-examine PW1 and to present their defence was then foreclosed and final addresses were then ordered. The defence counsel was equally served with the final address of claimant with a hearing notice, but he chose or elected, again, not to respond.

Now, I recognize that fair hearing is a fundamental element of any trial process and it has some key attributes; these include that the court shall hear both sides of the divide on all material issues and also give equal treatment, opportunity

and consideration to parties. See **Usani V Duke (2004) 7 N.W.L.R (pt.871) 16; Eshenake V Gbinijie (2006) 1 N.W.L.R (pt.961) 228.**

It must however be noted that notwithstanding the primacy of the right of fair hearing in any well conducted proceedings, it is however a right that must be circumscribed within proper limits and not allowed to run wild. No party has till eternity to present or defend any action. See **London Borough of Hounslow V Twickenham Garden Dev. Ltd (1970) 3 All ER 326 at 343.**

The Defendants here have been given every opportunity to respond to the case made out by Plaintiff against them but they have exercised their right by not responding. Nobody begrudges this election. It is only apposite to reiterate that nobody is under any obligation to respond to any court process once properly served if he so chooses. I leave it at that.

In the final address of Claimant, one issue was raised or arising for determination, to wit:

Whether or not the Claimant has made a case entitling it to the Reliefs sought?

On the state of the pleadings and evidence led by the plaintiff in this case, the sole issue raised by learned counsel to the plaintiff has succinctly captured the pith or crux of the contest that remains to be resolved shortly by court and it is therefore on the basis of this issue that I would now proceed to consider the evidence and submissions of counsel.

ISSUE 1

Whether or not the claimant has made a case entitling it to the reliefs sought?

I had at the beginning of this of this judgment stated the claims of Claimant. Similarly I had also stated that the Defendants despite the service of the originating court processes did not file any defence nor adduce evidence in challenge of the evidence adduced by Claimant and the trial court is in such circumstances entitled to or is at liberty to act on the claimant's unchallenged evidence. See **Tanarewa (Nig) Ltd V Arzai (2005) 4 N.W.L.R (pt.919) 593 at 636 C-F; Omoregbe V Lawani (1980) 3-7 SC 108; Agagu V Dawodu (1990) N.W.L.R (pt.160) 169 at 170.**

Notwithstanding the above general principle, the court is however still under a duty to examine the established facts of the case and then see whether it entitles the claimant to the relief(s) prayed for. I find support for this in the case of **Nnamdi Azikwe University B Nwafor (1999) 1 N.W.L.R (pt.585) 116 at 140-141** where the Court of Appeal per Salami J.C.A. (as he then was) expounded the point thus:

"The plaintiff in a case is to succeed on the strength of his own case and not on the weakness of the case of the defendant or failure or default to call or produce evidence… The mere fact that a case is not defended does not entitle the trial court to overlook the need to ascertain or prove the facts adduced before it establish or prove the claim or not. In this vein, a trial court is at no time relieved of the burden of ensuring that the evidence adduced in support of a case sustains it irrespective of the posture of the defendant…."

A logical corollary that follows the above instructive dictum is the attitude of court to the issue of burden of proof where it is not satisfactorily discharged by the party upon which the burden lies. The Supreme Court in **Duru V Nwosu (1989) 4 NWLR (pt.113) 24** stated thus:

"… a trial court ought always to start by considering the evidence led by the plaintiff to see whether he had led evidence on the material issue he needs to prove. If he has not so led evidence or if the evidence led by him is so patently unsatisfactory, then he had not made out what is usually referred to as a prima-facie case, in which case the trial judge does not have to consider the case of the defendant at all."

From the above, the point appears sufficiently made that the burden of proof lies on the claimant to establish its case on a balance of probability by providing credible evidence to sustain the claim irrespective of the presence and/or absence of the defendants. See **Agu V Nnadi (1999) 2 N.W.L.R (pt.589) 131 at 142.**

Now from the pleadings in this case which streamlines and defines the issues in dispute and which in the extant case was not challenged, the substantive material question is fairly straightforward relating to whether the claimant has established that the defendants are indebted to it in the amount claimed. From the pleadings, the case of the plaintiff is that the indebtedness arose out of a loan facility of **N258, 864, 790.25** (Two Hundred and Fifty Eight Million, Eight

Hundred and Sixty Four Thousand, Seven Hundred and Ninety Nine Naira, Twenty Five kobo) granted to 1st defendant on 11th March, 2014 which has to be fully repaid not later than 36 months from the date of first draw down on monthly instalments of **N10, 156, 004.16** (Ten Million, One Hundred and Fifty Six Thousand, Four Naira, Sixteen Kobo) only. **The 2nd – 4th defendants** secured this loan facility with their personal guarantees.

It is the case of the claimant that the **36 months tenor** has since lapsed but that the Association or 1st defendants outstanding indebtedness as at 22nd February, 2019 stands at **N126, 006,378.12** (One Hundred and Twenty Six Million, Six Thousand, Three Hundred and Seventy Eight Naira, Twelve kobo) which has remained unpaid despite several demands.

On the basis of these highlighted unchallenged facts on the pleadings and evidence, it is clear that there logically exist a banker/customer relationship between parties and it is essentially contractual in nature and this may arise in a number of ways in the course of carrying on the business of Banking. See **UBN V Ajabule & Anor (2001) LPELR – 8239 (SC) at 39; UBN V Chimaeze (2014) LPELR – 22690 (SC) at 420. In Bank of the North V Yau (2001)LPELR-746 (SC) at 45-46**, the Supreme Court instructively streamlined or identified the contractual relationship that may arise in the course of carrying on business of banking and the need to be clear on which of the contractual relationship forms the basis of an action thus:

"In the course of carrying on business of banking, a bank enters into several contractual relationships and performs various roles. It is important in an action between bank and customer to be clear which of the several contractual relationships forms or form the basis of the action. In this case, it is pertinent to note only four of these possible relationships, namely: (i) the relationship of creditor and debtor that arises in regard to the customer's funds in the hands of the bank; (ii) the relationship of creditor and debtor that arises when the bank loans money to the customer or allows him to overdraw on his account; (iii) the relationship that arises from the role of the bank as a collecting bank of cheques drawn on other banks or branches of the same bank by a third person, and (iv) the possible role of the bank as a holder for value of a negotiable instrument.'' See also Eco Bank V. Anchorage Leisure Ltd & Ors (2018) LPELR-45125 (SC) at 28-31 (F-A). In whatever manner the relationship of a banker and customer arises, the law imposes a duty on the bank to exercise reasonable

and skill in carrying out the customer's instruction or in the performing of its own side of a contract."

The facts of the extant case projects the relationship of creditor and debtor that arises when the Bank loans money to the customer. It is in the context of this precisely defined contractual relationship of creditor and debtor that the crux of this dispute will now be determined.

Now on the unchallenged evidence before the court, PW1 on behalf of claimant testified that 1st defendant through **Exhibit P1** dated 7th January, 2014 applied for a loan facility of **N300, 000, 000.00** (Three Hundred Million Naira). That the Claimant approved, offered and granted the 1st Defendant the loan facility in the sum of **N258, 864, 790.25** (Two Hundred and Fifty Eight Million, Eight Hundred and Sixty Four Thousand, Seven Hundred and Ninety Naira, Twenty Five Kobo), vide **Exhibit P2**. The facility was accepted on behalf of the 1st Defendant by the 2nd and 3rd defendants as Chairman and Secretary of the 1st Defendant by appending their signatures on the acceptance page of **Exhibit P2**. The 1st defendant through the 2nd and 3rd defendants further accepted the loan facility through a Board Resolution dated 12th March, 2014 vide **Exhibit P3**.

PW1 further testified that sequel to the granting of the facility, a loan account number 0010069762 vide **Exhibit 13A** was created for the 1st defendant for proper accounting of the loan repayment. He stated that for every repayment sum made by the 1st defendant towards liquidating the loan, its current account number 0009229522 (**Exhibit 13B**) is debited with the said sum and its loan account number 0010069762 is equally credited with the said sum.

PW1 further testified that part of the security for the loan facility was the personal guaranty of 2nd, 3rd and 4th Defendants vide **Exhibits P4A, P4B** and **P4C** respectively and that the purpose of the loan was for the members of 1st defendant, who all executed loan application letters, addressed to 2nd defendant vide **Exhibits P5a and P5b.** As stated earlier, these loan applications were executed by different members of 1st defendant in compliance with the express mandate of **Clause 8.2** of the letter of Offer, **Exhibit P2.**

It is the evidence of PW1 that the Defendants failed to liquidate their indebtedness to the Claimant and the Claimant at different occasions held meetings with the Defendants toward getting the Defendants pay down or liquidate their indebtedness to the Claimant. When all entreaties failed, the

Claimant had to write demand letters to the Defendants vide **Exhibits 12A and 12B** respectively but the Defendants still did not settle their indebtedness.

PW1 further testified that when the Defendants refused and neglected to liquidate their indebtedness, the Claimant instructed its Solicitors to recover the outstanding indebtedness of the Defendants to the Claimant, wherein its Solicitors wrote letters of demands vide **Exhibit P14a and P14b.**

PW1 stated at the conclusion of his evidence that the Defendants, jointly and severally are indebted to the Claimant in the sum of **N132, 194, 356.94** (One Hundred and Thirty Two Million, One Hundred and Ninety Four Thousand, Three Hundred and Fifty Six Naira, Ninety Four Kobo) as at 12th December, 2019 as captured in 1st Defendant's loan account number 0010069762, **Exhibit P13a.**

All the above pieces evidence of PW1 on the relationship with defendants and the disbursements made to them on their application which is yet to be paid back long after the tenor of the facility had lapsed and backed up with documentary evidence were not challenged at all by the defendants who were given every opportunity to do so.

Where evidence given by a witness as in this case is not challenged or contradicted by any other admissible evidence, the trial judge is bound to accept and act on the evidence, even if it had been minimal evidence. See **Adeleke V Iyanda (2001) 13 NWLR (pt.729) a at 22-23 A-C.**

Indeed the law has always been that where evidence given by a party to any proceedings is not challenged by the opposite party who has the opportunity to do so, it is always open to the court seized of the proceedings to act on the unchallenged evidence before it. See **Agagu V Dawodu (1990)7 N.W.L.R (pt.160)67.** This is so because in civil cases, the only criterion to arrive at a final decision at all times is by determining on which side of the scale, the weight of evidence tilts. Consequently where a defendant chooses not to adduce evidence, the suit will be determined on the minimal evidence produced by the plaintiff. See **A.G. Oyo State V. Fair Lakes Hotels Ltd (No.2) (1989) 5 N.W.L.R (pt 121)255; A.B.U V Molokwu (2003) 9 N.W.L.R (pt 825) 265.**

As a consequence of the findings above, there is therefore no difficulty in finding that the defendants are indeed indebted to the plaintiff on the facility granted to them but the difficulty for me is the quantum of the indebtedness in view of the lack of clarity on the actual outstanding balance due.

Now on the evidence, it is not in doubt that **Exhibit P2**, the term loan offer is the agreement between parties which regulates the relationship and provides the basis for the mutual reciprocity of legal obligations between parties.

As stated earlier by this agreement vide clause 4.3, the loan was to be paid back in 36 months in monthly instalments of **N10, 156, 004.16** (Ten Million, One Hundred and Fifty Six Thousand, Four Naira, Sixteen kobo) each commencing in the month following use of the loan in part/full.

Now if this agreement or **Exhibit P2** was the only agreement that situates the relationship, it would have given the court clearer perspective in determining or situating the real sums outstanding.

The claimant however in its pleading and evidence indicated that this **facility** was **restructured at various times** but the nature of the restructure was not delineated or explained and this muddied the waters as is said in popular parlance. In **paragraph 13** of the claim and **paragraph 15** of the evidence of PW1, the claimant stated as follows:

> **"That the loan facility was at various terms restructured by the claimant Bank upon applications by the 1st defendant. Consequent upon this, the 1st defendant undertook via a letter of undertaking to part liquidate the loan facility and to liquidate any outstanding indebtedness at the expiration of the loan. The said letter of undertaking by 1st defendant addressed to the manager Stanbic IBTC Bank Plc, Gwagwalada branch is hereby pleaded and shall be relied upon at the trial…"**

Now, if there was a **restructure of the existing facility (Exhibit P2)** what are the new terms of this restructuring? A restructure presupposes some change(s) even if minimal to the existing facility. The interest charged on the loan may be reduced, for example or even waived off. This clearly will impact the volume of the indebtedness making it necessary that the nature of the restructure agreed must be explained.

Indeed by this letter pleaded by claimant dated 26th June, 2016 which was admitted as **Exhibit P6**, the claimant actually approved **a "restructure"** out of the many restructuring they approved of. At the risk of prolixity, the claimant in **paragraph 13** and **paragraph 15** of the evidence of PW1 stated that **"the loan facility was at various times restructured."**

In the said **Exhibit P6**, the defendants stated as follows:

> **"In line with the approval you granted for the restructure on 29th June, 2016, we are by this letter undertaking to part liquidate the loan from proceeds of our collections from the ex-members and to liquidate any outstanding indebtedness at the expiration of the loan."**

I have referred to the above to situate the fact that the restructuring clearly would have impacted the original agreement but the failure to tender the various agreements or one single agreement situating the restructure or to explain its terms and remit has created confusion with respect to how or what should provide the clear parameters to situate the outstanding indebtedness.

From the pleadings and evidence, there is no **clarity absolutely** as to what the defendants have so far paid back. If it is accepted that what was paid is the difference between the outstanding sums claimed and the initial facility given, there is here equally no clarity with respect to what part of the outstanding forms the interest element or the default charge element which is said to be continuously accruing.

Indeed, from the pleadings and evidence, there appears to be different monthly repayment rates of the loan and interest due on the facility. In the initial letter of offer, **Exhibit P2**, the amount to be paid was **N10, 156, 004. 16** monthly.

By the **unclear restructuring** done, the amount was altered at different times. By **paragraph 16** of the deposition of PW1, the restructured amount to be paid monthly was now **N7, 224, 789.35**. There will even appear to have been an earlier restructuring because by paragraph 20 of the deposition of PW1, the monthly remittals is said to be **N9, 022, 959.38**. All these amounts as demonstrated are different from what is contained in clause 4.3 of the initial letter of offer, **Exhibit P2.**

The conundrum for the claimant here is that PW1 in his entire 28 paragraphs deposition simply repeated what is in the claim and the summary of the outstanding sums in the statements of accounts vide **Exhibits P13a** and **b** but he did not proceed to give clear particulars as to how they arrived at the figures they are claiming.

The statement of account of 1st defendant may have been tendered but there is nothing either in the pleadings or evidence by way of providing clear particulars or parameters before the court on how they really arrived at the

amount claimed. It is trite principle of general application that a bank statement of account is not sufficient explanation of debit and lodgments in a customer's account to charge the customer with liability for the overall debit balance shown in the statement of the account.

Any bank claiming a sum of money on the basis of overall debit balance of a statement of account must adduce both documentary and oral evidence to show how the overall debit was arrived at. See **Yusuf V ACB (1986) 1-2 SC 49; Wema Bank Plc V Alhaji Idowu Fasasi Osilaru (2007) LPELR – 8960.**

At the risk of sounding prolix, a statement of account by configuration is clearly not sufficient explanation of debits and lodgments. Evidence must necessarily be adduced on its contents. Since interest charges and other charges are not liquidated, there should be a breakdown and an analysis of how much of the debt is interest to enable the court appreciate what is before it without having to do private calculation or computation in chambers, an exercise which the law disapproves. See **B.E.G.H Ltd V U.H.S Ltd (2011) 7 NWLR (pt.1246) 246; Habib (Nig.) Bank Ltd V Gifts Unique (Nig.) Ltd (2004) 15 NWLR (pt.896) 408; Trade Bank Plc V Chami (2003) 13 NWLR (pt.836) 158 and First Bank (Nig.) Ltd V A. Mamman (Nig.) Ltd (2001) FWLR (pt.31) 2890.**

The claimant unfortunately in this case did not provide the necessary oral evidence to back up how they arrived at the outstanding sums claimed. Investigation is obviously not the function of the court, therefore it is not the duty of the court to in chambers begin or embark on a voyage of discovery to determine how the amount or figure(s) claimed was arrived at. See **Wema Bank V Osilaru (supra).**

Perhaps, the point needs be underscored, again, at the risk of prolixity that our superior courts have made the point abundantly clear that in order for a claim for debt outstanding in a customer's account with its banker to succeed, the banker has to prove how the debit balance claimed from the customer was arrived at. The plaintiff Bank has to demonstrate through oral evidence given by an official who is familiar with the accounts, how the debit balance was arrived at. See **Bilante Int'l Ltd v NDIC (2011) 13 NWLR (pt.1270) 1; Anyakwo V ACB Ltd (1976) 2 SC 41**. The grant of figures or outstanding sums in the debit account of a customer is not a function of automatic application but more a product of demonstrating the process of how the balance was arrived at. I think that is a fair precept or approach.

In the absence of proper pleadings backed by particulars and credible oral evidence explaining in detail how the figures claimed were arrived at, it would be difficult in such unclear circumstances for the court to grant the figures claimed, notwithstanding that the case was not defended.

If a facility is granted, as in this case, **on terms** and **these terms were severally restructured**, I incline to the view that the terms of the restructure, must in the minimum be demonstrated in court and then the remit of compliance or default with the new terms established. This then puts the court in a commanding height to grant the figures claimed. It is the primary duty of the claimant to plead and lead supportive evidence before the burden will then shift to the defendants. Once they fail in that duty to lead credible supportive evidence on the issue upon which the success of their case depends on, that will then amount to a failure of proof. See **Gemanam V Nyoughur (1988) 2 NWLR (pt.536) 141 at 152.**

It is true that the defendants at various times admitted their indebtedness. I don't really think that is an issue in this case. I agree that the issue of indebtedness is settled. The only question is the amount due?

Exhibit P9 which is not dated for example shows that the defendants as at when they wrote the letter put their indebtedness at **N169, 418, 039.94**. By **Exhibit P10** dated 14th July, 2015, the defendants put their indebtedness at **N153, 844, 644.87**.

The narrative above establishes the point that the outstanding sums on defendants indebtedness was not constant perhaps because of the monthly repayments been made. These amounts stated above are higher than even the final **outstanding sum** prayed for in this case which again goes to show the fluidity of the outstanding indebtedness.

To again underscore the profound lack of clarity on the outstanding indebtedness, the total amount claimed by the demand letters of the bank vide **Exhibits P12a** and **12b** are even different from that by the claimants solicitors in their own letter of demand vide **Exhibits P14a and b** even if they were written at different times.

By **Exhibits P12a** dated 3rd April, 2017, the total indebtedness was **N107, 050, 898.48**. By **Exhibit P12b** dated 28th November, 2018, the amount increased to **N139, 814, 648.97**.

By **Exhibit P14a** and **b** written by claimants solicitors dated 24th April, 2019, the total outstanding indebtedness as at 22nd February, 2019 reduced to **N126, 006, 378.12**. What all these show basically is that a lot was happening on this account that needs be explained. That is why the call for oral evidence to explain how the debit balance was arrived at becomes inevitable and imperative.

The bottom line is that the **admissions** on the indebtedness of defendants here are clearly not helpful at all with respect to the issue or question of the quantum or the true state of the outstanding indebtedness.

An admission ordinarily should put an end to proof. This is because by an admission, parties no more join issues on the matter. Since proof presupposes a dispute and since admission drowns the element of dispute, proof becomes superfluous. See **Akaninwo & Ors V Nsirim & ors (2009) 9 NWLR (pt.1093) 439.**

The above scenario has no application at all to the question of proof of the outstanding indebtedness which by all account was not admitted anywhere.

As stated earlier, the point must be made clear that there is absolutely no dispute on the question of defendants indebtedness. I have found already that they are indebted to claimant. The challenge simply is that they have not established creditably the outstanding indebtedness and this clearly impacts the success of **Relief 1** which unfortunately will not be availing.

Having found the principal relief unavailing, the other reliefs on interest, cost of action and damages cannot now be availing. The law is once the principal is taken away, the adjunct would also have to go away. Also, the question of the guarantee is now largely academic. The 2nd to 4th defendants on the evidence guaranteed the loan facility vide **Exhibits P4a-c.** There is no contest on that; the law is settled that the liability of a guarantor becomes due and mature immediately the debtor/borrower becomes unable to pay its/his outstanding debt. See **Nwankwo V E.D.C.S. (UA) (2007) 5 NWLR (pt.1027) 377**. Having not established the principal claim, there is really no value to talk for now about the guarantees.

This case clearly has considerable merit particularly on the question of the indebtedness of defendants. It cannot be right or fair that the defendants have reneged on the agreement by not keeping up to their commitments having enjoyed fully the facility. Agreements will have no meaning if parties do not keep strict fidelity to the terms of the Agreement.

There is therefore not only a legal but moral responsibility on the defendants to live up to their commitments without any further delay.

In the circumstances, it does not accord with the interest of justice to dismiss this action. Our Rules of Court fortunately has provided a fair mechanism for situations like these to give the plaintiff another chance to properly present the same grievance. Situations as presented in this case thus allow for the invocation of the provision of **Order 38 of the Rules of Court, 2018** which provides as follows:

"Where satisfactory evidence is not given entitling the Claimant or Defendant to the Judgment of the Court, the Court may *suo-motu* or on application, non suit the Claimant but the parties legal practitioner shall have the right to make submissions about the propriety or otherwise of making such order."

The word **"or"** which is a disjunctive participle appears above allowing the court to *suo-motu* exercise the power to make the order of non-suit without the necessity of calling for input by legal practitioners. The making of an order of non suit is discretionary but it is one to be exercised judicially and judiciously and with utmost circumspection, the overriding consideration being that of ensuring that justice is served ultimately. It would be injudicious to dismiss this case in the circumstances and thereby preventing the realization of the commitments freely given by both Defendants in this case.

The justice of the matter demands that the Claimant be given another chance, if they so desire, to ventilate the grievance relating to the outstanding indebtedness. What the order of non suit does is salutary and in the interest of justice leaving the Claimant at liberty to commence the action again. See **Okpala V. Ibeme (1989)2 N.W.L.R (pt.102)208; ACB V. Yesufu (1980)1-2 SC 49.**

On the whole, I accordingly in the final analysis and for the avoidance of doubt make an order **of non-suit**. No order as to cost.

……
Hon. Justice A.I. Kutigi

Appearances:

1. ***Maxwell Chiemeke, Esq., with Michael Onoja Patrick, Esq. and Danat Walshak Barminas Esq. for the claimant.***

2. ***I.A. Adejembi, Esq., for the Defendants.***