IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - AD 2021

CORAM: YEBOAH, CJ (PRESIDING)

DOTSE, JSC

BAFFOE-BONNIE, JSC

APPAU, JSC

PWAMANG, JSC

TORKORNOO (MRS.)

HONYENUGA, JSC

CIVIL MOTION
NO. J7/13/2020

24TH MARCH, 2021

DANIEL OFORI ……. PLAINTIFF/APPELLANT/APPELLANT/RESPONDENT

VRS

1. ECOBANK GHANA LIMITED …… 1ST DEFENDANT/RESPONDENT/RESPONDENT/ APPLICANT
2. SECURITIES AND EXCHANGE COMMISSION
3. GHANA STOCK EXCHANGE

RULING

THE MAJORITY DECISION OF THE COURT WAS READ BY PWAMANG, JSC

PWAMANG, JSC:-

This is an application by the 1st defendant/respondent/respondent/judgment debtor (the 1st defendant) praying the court to review a part of our unanimous decision dated 17th

June, 2020 rendered in respect of its application for the court to determine the mode for calculating interest on an amount of GHS6,162,240.00 being an investment the plaintiff/appellant/appellant/judgment creditor (the plaintiff) made with it. The application is one of several applications filed after judgment had been given in the substantive case involving the parties so a brief background of the case is important for an understanding of this delivery.

On 27th May, 2008 the plaintiff sold his shares in Cal Bank Ltd to a customer of the 1st defendant who instructed the 1st defendant to pay the plaintiff for the shares. The total amount was GHS13,762,240.00 and it was paid to the plaintiff on 30th May, 2008, but he did not carry the money away. On the same day he made the 1st defendant to issue some bankers' drafts for his benefit and with an amount of GHS6,162,240.00 he requested the 1st defendant to open a fixed deposit investment account for him. Three days after these transactions, the 1st defendant revoked the bankers' drafts on the ground that the Bank of Ghana queried the sale of the plaintiff's shares to its customer. About two weeks thereafter the Bank of Ghana cleared the trade in the shares but the 1st defendant still refused to honour the plaintiff's bankers' drafts and nothing at all was said about his investment. The plaintiff sued in the High Court but lost and he appealed to the Court of Appeal who affirmed the judgment of the High Court so he further appealed to the Supreme Court. On 25th July, 2018 the Supreme Court gave judgment in his favour and ordered the 1st defendant to pay his monies with interest.

The evidence of the plaintiff at the trial was that the 1st defendant complied with his request and opened a fix deposit account for him in the amount of GHS6,126,240.00 and that the 1st defendant sent him bank statements for sometime before stopping. But the 1st defendant in its pleadings denied opening any account for the plaintiff and even denied him being their customer. Upon upholding the plaintiff's case the court accepted his testimony that a fixed deposit account was opened for him by the 1st defendant at an interest rate of 30% per anum, a rate admitted by the 1st defendant as part of interrogatories filed by the plaintiff's counsel in the High Court. The court therefore ordered the 1st defendant to pay the said amount with interest of 30% per anum from

2nd June, 2008 to the date of the High Court judgment. This order was varied upon a review application at the instance of the plaintiff to be, that the 30% rate of interest should be paid up to the date of the Supreme Court judgment.

Following upon that review, the plaintiff filed a motion on notice seeking to amend his entry of judgment filed on the basis of the main judgment. In an attached proposed entry of judgment, the plaintiff calculated the interest rate on the investment amount of GHS6,162,240.00 on the basis of compound interest but this was opposed by the 1st defendant. In its affidavit in answer, the 1st defendant calculated the interest on the investment at simple interest. It was this difference between the parties that the 1st defendant prayed the court to resolve by determining the mode for calculating the interest on the investment amount, whether it should be compound interest or simple interest.

The 1st defendant attached to its affidavit in answer a copy of a document purporting to be a financial instrument covering the investment account it opened for the plaintiff dated 30th June, 2008. It is important to point out at the outset, that after the substantive judgment had been given by the Supreme Court on the basis of the evidence on the record, the 1st defendant applied for a review of the judgment praying to be allowed to withdraw the admissions it made in the trial in the High Court of the plaintiff's investment being a Time Deposit investment at 30% rate of interest and substituting that with this same instrument purporting to be a Call Deposit at 15% rate of interest. A panel of seven judges, then presided by Dotse, JSC on 22nd June, 2019 dismissed that application. In that review decision the court held as follows;

"Having listened to both Counsel in respect of this application for review of part of the judgment of the ordinary bench and having also considered in detail the pleadings filed, as well as the Statements of Case of the parties and all the exhibits attached, especially exhibit AAB6 series for the Applicants, and exhibit C for the respondent this court is of the candid view that this application does

not come within the remit of a review application under Rule 54(a) and (b) of the Supreme Court Rules, C.I.16.

We accordingly reject the invitation made to us to review part only of the judgment of the ordinary bench."

That notwithstanding, the 1st defendant is undaunted and has brought back the rejected document as basis for this application. This document which is a general form that the bank uses for different types of investments for customers states that the investment that 1st defendant made for the plaintiff was a Call Deposit investment at 15% per anum rate of interest. The portions of the form on instructions for either rolling over the investment or paying out accrued interest are not filled and on its face it contains some terms. The 1st defendant relies on this instrument and argues that since on its face the manner for treating accrued interest was not stated, the plaintiff had no justification to calculate the interest at compound interest. The plaintiff counter argued that he entered into an agreement with 1st defendant for a fixed deposit investment at 30% interest per anum so the money ought to attract compound interest since the 1st defendant never paid him any accrued interest over the years but retained both his principal and interest since 2008. He said all this time the 1st defendant was using his money for its business by lending it out to its customers and receiving compound interest from them.

The 1st defendant argued on the basis of the provisions of Rule 1 of the **Courts (Award of Interest and Post Judgment Interest) Rules, 2005 (C.I.52).** It provides as follows;

Rule 1-Order for payment of interest

1. "If the court in a civil cause or matter decides to make an order for the payment of interest on a sum of money due to a party in the action that interest shall be calculated

a. at the bank rate prevailing at the time the order is made, and

b. at simple interest

but where an enactment, instrument or agreement between the parties specifies a rate of interest which is to be calculated in a particular manner, the court shall award that rate of interest calculated in that manner.(emphasis supplied).

There was no challenge on the rate of 30% per anum as the 1st defendant equally used that rate in its calculation but the dispute was what manner was the interest to be calculated? The ordinary bench held as follows;

"The defendant's contention that the parties to the investment in this case which is contained in a written document did not agree anything on the manner of calculating interest is difficult to accept. An agreement for a time deposit is not complete without a term on the manner of calculation of interest since after a year interest would have accrued on the principal. It is either that the investment should be rollover or interest should be paid to the investor's account and the principal re-invested. We use the term time deposit as that was what was stated and admitted in the interrogatories but in his evidence, the plaintiff stated that he requested that his money should be put in a fixed deposit. Therefore, as the plaintiff has argued, this is a proper case where the court is required to imply a term on the manner the principal and interest were to be treated after one year in order to give efficacy to the agreement of the parties. The leading case on implied terms of contracts is *The Moorcock (1889) 14 P.D.64"*

It is plain that the ordinary bench rejected the contention that the investment was a Call Deposit. The ordinary bench proceeded to cite legal authorities and digest decided cases both from the superior courts of Ghana and England to justify its decision to award compound interest in the special circumstances of this case. It is this holding that is under attack by way of this review application.

The thrust of 1st defendant's case in this review application is that the ordinary bench committed a fundamental error as it was bound to accept the instrument on the Call

Deposit it exhibited as the authentic agreement the parties entered into regarding the GHS6,126,240.00 and should have disregarded its finding of fixed deposit and time deposit that was made in the substantive judgment based on the evidence on the record of the court. The applicant in its statement of case discusses the differences in law of banking between Fixed Deposit and Time Deposit investments in general on one hand and Call Deposit investment on the other and argues that if the ordinary bench had based its analysis on Call Deposit, we would not have come to the conclusion we arrived at.

The 1st defendant has deposed as follows at paragraphs 12 to 15 of its affidavit in support of its motion for review;

"12. That contrary to the decision of this Honourable Court, the investment agreements which were part of the documents before the court and exhibited to Exhibit AAA1 as "Exhibit AAAB4" and 'Exhibit AAAb5' clearly showed that the investment was a call deposit.

13. That as a call deposit, the contract between the parties did not have a fixed time of maturity and would only mature upon a call by the investor and that is why the investment agreement did not state a time of maturity and did not state whether it should be rolled over and that portion had been left blank.

14. That this Honourable Court erred in relying on the Respondents unsupported claim that he requested that the money be placed in a fixed deposit when the investment agreement itself clearly stated that it was a call deposit.

15. That this Honourable Court erred in relying on the contention that the investment was fixed deposit to hold that this was a proper case to imply terms into the agreement on manner the principal and interest were to be treated after one year, when the terms of the agreement were clear that it was a call deposit investment with the known feature that it only matured upon a call and did not require terms to be implied into it."

What the 1st defendant is repeating to the court is, that during the trial in the High Court it failed to proffer this evidence of Call Deposit (as a bank, there is little doubt that the 1st defendant had this document in its possession during the trial) and denied any investment dealing with the plaintiff for reasons best known to it and its legal advisors at the time (not the present lawyer in this application). But after judgment has been given against it, it can now admit that the plaintiff was indeed its customer but on different terms and produce that evidence and the court must accept that new contrary evidence and act on it by reversing its decision. This document of purported Call Deposit which has not been subjected to cross-examination is being repeatedly forced on us but the document contains some contradictions which I will discuss *in fra*.

But, the law is firmly against the approach that the 1st defendant is urging that the ordinary bench ought to have adopted, namely replaced the supposed Call Deposit instrument for its admissions and the evidence led at the trial that was accepted by the Supreme Court. It is a fundamental principle of our system of law that a party to a case in which judgment has been given on a set of facts cannot after the judgment seek to change the facts the party herself presented and proffer new facts and arguments for a different finding inconsistent with that in the first judgment to be made. In the case of **Ekpe V Antai (1944) 10 WACA 19** at page 22 Kingdom C J, approved the following fundamental statement of the common law;

"The law of estoppel has been very clearly defined by Lord Shaw in the judgment of the Privy Council in the case of Hoystead v. The Commissioner of Taxation 1926 A.C. p. 165 wherein he says :-

"In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view to obtaining another judgment upon a different assumption of fact; "Secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case,

or new versions which they present as to what should, be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle-namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the Plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppels occurs."

Also, in **Eastern Alloys V Silver Star Ltd; Civil Appeal J4/55/2017 judgment dated 9th May, 2018 (unreported)** Adinyira, JSC said as follows;

"The rule in Henderson v. Henderson, supra, adopted and applied by the courts in Ghana requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to put forward any arguments, claims or defences which they could have put forward for decision ***on the first occasion*** *so that all aspects of the dispute might be finally decided once and for all as it is a rule of public interest that there should be finality in litigation and also in the interest of the parties themselves against piecemeal litigation. The dangers of piecemeal litigation apart from being vexatious may result in a party's cause of action being caught by the statute of limitation as was raised by the respondent against the appellant's action."*

Then, in the case of **Republic V High Court, Ex parte Hesse [2007-2008] SCGLR 1230** at page 1245 Wood C J stated the principle of law as follows;

"This argument suggests that parties are entitled to break up their defences into parts or segments only to present them as and when they wish. Our jurisdiction must frown on such practices. Parties must be held accountable to presenting all of their known and conceivable claims or defences at a go, not piecemeal; for an effectual resolution of all

matters in controversy between them, for there must be an end to litigation. There is an urgent need to discourage piecemeal litigation; it ought not to be granted a foothold in our judicial arena, as it offends all the known principles of law and best practices."

The first opportunity for the defendant to have pleaded that the investment it made for the plaintiff was a Call Deposit at 15% rate of interest was when pleadings were being filed in the High Court. Having failed to do so and going further to make admissions in interrogatories upon which findings have been made and judgment given in the case, the law does not permit the defendant to change its case after the judgment.

So, on authority and principle, the ordinary bench acted correctly according to the law in disregarding the document that the defendant exhibited and it would be a bad precedent for this court to allow a litigant to seek to present a different set of facts after a judgment and request the court to change its judgment. But authority and principle aside, the practicality of judicial adjudication required that the later facts urged after the judgment in this case ought to be rejected. Even if the document the defendant now relies on is to be considered, it bears a date of 30th June, 2008 whereas the evidence at the trial was that the investment was made on 30th May, 2008. Furthermore, it indicates an interest rate of 15% whereas at the trial in the High Court the defendant admitted a rate of 30%. These are inconsistent with the evidence that is on the record so how was the ordinary bench, and even this review bench, to resolve these inconsistencies? That is why on grounds of public interest in bringing litigation to an end at some point, the law does not permit this sort of interminable and indeterminate manner of adjudication of disputes.

In my understanding, the above stated position of the law is the reason that on 22nd January, 2019 the review panel dismissed the first application of the 1st defendant to withdraw the admitted facts and substitute for same with this instrument. Therefore, if the ordinary bench had based its decision on the new evidence contained in the purported Call Deposit instrument or if the present review bench were to accept that instrument, that would amount to reviewing the review decision of the court given on 22nd June,

2019. This is unheard of in any system of law known to me and no authority for thus conducting ourselves has been provided by the defendant.

The review jurisdiction of the Supreme Court is a limited one not to be easily exercised because a losing party is dissatisfied with the reasoning and decision of the regular bench. This point was emphasised in the case of **Tamakloe v Republic [2011] 1 SCGLR 29**, holden 1, where the court by a majority decision of 6-1, held as follows:-

" The review jurisdiction of the Supreme Court was not an appellate jurisdiction, but a special one. Accordingly, an issue of law that had been argued before the ordinary bench of the Supreme Court and determined by that court, could not be revisited in a review application, such as in the instant case, simply because the losing party had not agreed with the determination. Even if the decision of the ordinary bench on appeal from the judgment of the Court of Appeal, were wrong, it would not necessarily mean that the Supreme Court would be entitled to correct that error. That was an inherent incident of the finality of the judgment of the Supreme Court as the final appellate court."

Again, in the Supreme Court case of **Internal Revenue Service v Chapel Hill Ltd [2010] SCGLR 827 at 850** especially 852-853 Date-Bah JSC stated the principles governing the review jurisdiction as follows:-

"I do not consider that this case deserves any lengthy treatment. I think that the applicant represents a classic case of a losing party seeking to re-argue its appeal under the garb of a review application. It is important that this Court should set its face against such endeavour in order to protect the integrity of the review process.

This Court has reiterated times without number that the review jurisdiction of this court is not an appellate jurisdiction, but a special one. Accordingly, an issue of law that has been canvassed before the bench of five and on which the court has made a determination cannot be revisited in a review application, simply because the losing party does not agree with the determination. This unfortunately is in substance what the current application before this court is."

Therefore, though the 1st defendant may be dissatisfied with the decision of the ordinary bench, litigation must come to an end and this is in the public interest.

While this review application was pending for ruling the 1st defendant continued, without the leave of the court, to file documents on the case docket claiming they show that the facts on the record of the court at the time judgment was given in the substantive case were not accurate. But that conduct undermines the effect of the decision of the court in the first review application at the instance of the 1st defendant and is also contrary to law as explained above. One of such documents is suppose to be a search report about payment of dividend on the shares that were the subject matter of the substantive case. That is completely irrelevant in this application since the ownership of the shares at the time of judgment had been resolved in the main Supreme Court judgment of 25th July, 2018 so the party entitled to dividend on those shares should be determined in accordance with that decision any alleged inconsistent conduct subsequent to that judgment notwithstanding. The plaintiff too, in answer to the plaintiff's exhibits attached other documents but the fundamental principle against litigation by piecemeal did not permit us to entertain those documents either as it was too late in the day. Once a judgment is delivered on the basis of a certain set of assumed facts, you cannot withdraw those facts and re-open the case.

Beside the submissions of the 1st defendant which I have answered above, it is being contended that the court has no power to award compound interest under any circumstances of a case except there is a written instrument that states specifically that compound interest shall be paid. This view is said to be based on a reading of Rules 1 and 2 of C.I.52. I have read Rules 1 and 2 of C.I.52 over and over and there is no mention of the words compound interest in them. Mention is made in Rule 1 of "agreement" and it is trite learning, that except expressly provided by statute, an agreement need not to be in writing before it is enforceable. Rule 2 covers Post Judgment interest which does not concern us in this case and it does not even mention manner for calculating interest at all, unlike Rule 1 *supra*. With utmost respect, it is a misreading of the statute to make reference to Rule 2 of C.I.52 in this case.

It is as follows;

Rule 2 - Post Judgment Interest

2. (1) Subject to sub-rule (2) each judgment shall bear interest at the statutory interest rate from the date of delivery of the judgment up to the date of final payment

(2) Where the transaction which results in the judgment debt is

a. contained in an instrument,

b. evidenced in writing, or

c. admitted by the parties

and the parties **specify in the instrument, writing or admission the rate of interest which is chargeable on the debt and which is to ran to the date of final payment, then that rate of interest shall be payable until the final payment (emphasis supplied)**

The established principle of the common law on award of compound interest by a court, which is part of the laws of Ghana by virtue of Article 11 of the Constitution, 1992, is as contained in the **Halsbury's Laws of England Fifth Edition Volume 49 Paragraph 1304** and is as follows;

"Compound interest was not usually allowed except where there was an agreement, express ***or implied to pay it, or where the debtor had employed the money in trade and had presumably earned it, or unless its allowance was in accordance with a usage of a particular trade or business." (emphasis supplied).***

This authority was referred to in the ruling of the ordinary bench but it appears its effect has not been fully appreciated. It is true that at one time in Ghana the power of the court to award interest under the provisions of the Courts Act was limited by the **Courts (Award of Interest) Instrument, 1984 (L.I.1295)** in that it prohibited courts from awarding compound interest. It was the business community of our country who

complained about this injunction arguing that when a party has been denied use of her money by a defendant under certain circumstances, it is only by an award of compound interest that the party can be adequately compensated. The courts supported this view with dicta. In **IBM World Trade v Hansen [2001-2002] SCGLR 393**, Akuffo JSC (as she then was) made a strong case for reform of L.I. 1295 and also the need to remove the injunction against the award of compound interest in the following words at page 409;

" *Moreover, in May 1990 when the trial judge made his order, the prevailing bank rate of interest applied by the court was 30 per cent per annum and the average rate of exchange rate between the cedi and the united states dollar was ¢2.75 to US$1. Eleven years down the line, the applicable rate of interest may be put at 45 per cent per annum and the average rate of exchange is ¢7,200 to US$1. These factors clearly demonstrate the extent to which the value of defendants' money has eroded over the period that it had not only been deprived of the ownership of the money but also the use of it."*

She further said as follows at pages 410-411;

"Finally, I wish to add that, given the fiscal realities that have prevailed in this country over the past two decades and the recalcitrance of too many debtors in the fulfillment of their obligations, it would augur well for the country if the Courts (Award of Interest) Instrument, 1984 (LI 1295), were amended to give the court the power to award compound interest.

Compounding interest on debts is, perhaps, the only effective mechanism, which will allow the amount due, to grow in line with inflation, provided the correct rate of interest is also employed. Economic development depends, to a large extent, on healthy financial interaction and transaction; these, in turn, cannot exist without credibility. It is only when participants in business live up to their legal obligation, and cease using the processes of the courts to evade financial responsibilities that this country can finally launch itself firmly on the road to economic success. Where money is unjustly withheld, then the creditor must be seen to have been justly recompensed by the debtor for the unjust use

of other people's money. Any system that tends to encourage debtors to shirk their responsibilities benefits no one but such delinquent debtors; and poor debt servicing in the business sector only fans, further, the flames of inflation. It seems to me that if the consequences of delinquency were made less appealing than they are now, then the attraction of needless protracted litigation would be significantly reduced."

Also, in **Butt v Chapel Hill [2003-2004] SCGLR 636** Dr. Date-Bah, JSC added his voice to the need to review LI 1295 and allow the court to award compound interest. He said as follows;

"Since the current prevailing bank rates of interest as prescribed by LI 1295 were much higher than the four per cent prescribed in Order 42, r 15 of LN 140A, it was evident that reform of the interest rate regime applicable to judgment debts was long overdue. It was necessary for the Rules of Court Committee to expedite reform of the interest rate regime as required of it by article 157 (2) of the 1992 constitution. Among the issues that would need revisiting was whether the interest that the courts might award should be simple or compound. IBM World Trade Corporation v Hasnem Enterprises Ltd [2001 – 2002] SCGLR 393 per Sophia Akuffo JSC at 410-411 considered."

So, come 2005, C.I.52 is enacted and it repealed L.I.1295 without any provision forbidding the award of compound interest. I take judicial notice of the fact that since the passage of C.I.52 the courts have been awarding compound interests to banks and other litigants who bring themselves within the law as quoted from Halsbury Laws of England *ut supra*. Therefore, the questioning of the power of the court to award compound interest in the absence of express statement to that effect in a written instrument is, with great deference, misconceived. In fact, there was a letter on record from the Bank of Ghana which stated, that by their directives banks are required under certain circumstances to re-invest interest earned on certain deposits if the principal and interest are withheld from the depositor. Is it being suggested that where in the absence of a written instrument a defendant re-invested a depositor's interest and thus earned compound interest, the court has no power to order the payment of such compound

interest that has been earned to the depositor? That such earned compound interest becomes a windfall for the defendant?

Though the 1st defendant did not argue its case basing on the **Money Lenders Ordinance 1951 (CAP 176), and the Loans Recovery Ordinance 1951 (CAP 175)** and the court did not request the parties to address us on these enactments as our rules require, reference is being made to them. It is my firm opinion that we are not entitled to rest our decision on those enactments. In any case, **CAP 176** governs the actions of moneylenders but we are not here dealing with a transaction by moneylenders. Yes, a provisions in **CAP 176** prohibited a moneylender from charging compound interest but section 2 of **CAP 176 (as amended by CAP 189 and CAP190)** defines a Moneylender as;

"Moneylender" means and includes every person whose business is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business, whether or not he also possesses or owns property or money derived from sources other than the lending of money and whether or not he carries on the business as a principal or as an agent; but shall not include-

(a) any society registered under the Co-operative Societies Ordinance; or

(b) any body corporate, incorporated or empowered by special Ordinance to lend money in accordance with such Ordinance; or

(c) any person bona fide carrying on the business of banking or insurance or bona fide carrying on any business, not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money; or

(d) any person or body corporate exempted from the provisions of this Ordinance by Order of the Governor in Council; or

(e) any pawnbroker licensed under the Pawnbrokers Ordinance, where the loan is made in accordance with the provisions of the Pawnbrokers Ordinance, and does not exceed the sum of fifty pounds."

It is plain from the facts of this case that the plaintiff is not a moneylender. He entered into an investment transaction with the 1st defendant, a licensed bank, so this case was clearly not within the purview of **CAP 176 as amended.**

The proper question in this case is whether the ordinary bench committed a fundamental error in awarding compound interest on the facts of the case and I find that the decision of the ordinary bench is in accord with settled legal principles and justified under the circumstances of this case where the plaintiff specifically requested that his money should be placed in an interest earning investment but he was never paid any interest over the period. The plaintiff made reference to the deterioration of the Ghana Cedi against the major foreign currencies. This factor which was used by Akuffo, JSC in the **IBM World Trade Case** supra to justify the need to award compound interest is at play in the circumstances of this case. Whereas the Ghana Cedi was almost at par with the United States Dollar in 2008, today it is approximately GHS5.60 to USD1.

In conclusion, the ordinary bench did not commit any error of law, not to talk of a fundamental one so there is no ground for a review of our decision of 17th June, 2020. Consequently, this application for review too is without merit and is accordingly dismissed.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH
(CHIEF JUSTICE)

BAFFOE-BONNIE JSC:-

I must place it on record that I have read the respective ruling of my esteemed brother Pwamang JSC as well as that of my respected sister Torkonoo JSC, in respect of the Application for review filed by the defendant Judgment Debtor. I identify with the analysis and conclusions canvassed in the opinion of my brother Pwamang JSC. And I have nothing useful to add.

P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

THE DISSENTING DECISION OF THE COURT WAS READ BY TORKORNOO (MRS.) JSC.

TORKORNOO (MRS.) JSC:-

On the 25th July 2018 the Supreme Court delivered its judgment reversing the decisions of both the High Court and Court of Appeal that had been in favour of the defendants in this suit. The final executable orders of the Court were that the plaintiff was entitled to payment of a total amount of **GH¢13,762,240.00** with interest.

This court held that from the record before it, this total amount found to be due to the plaintiff was *'made up of GHS7,200,000.00 bankers draft to Zenith Bank, GHS400,000 bankers' draft to SG-SSB Bank and GHS6,162,240.00 invested in fixed deposit*'.

The court went on to say on page 23 that *'In this case, the admission by 1st defendant did not cover an agreement on the rate of interest payable till final payment, which would have been applicable even after the judgment. Consequently, plaintiff is awarded interest on the sum of GH¢6,160,240.00 to be calculated at the agreed rate of 30% per annum from 2nd June, 2008 up to the date of the judgment of the High Court and at the bank rate prevailing at that date till final payment. Plaintiff is also awarded interest on the sum of GH¢7,600,000.00 at the prevailing bank rate of interest as at the date of the judgment of the High Court to be calculated from 2nd June 2008 to the date of final payment*".

The execution of this judgment has been the cause of several applications with contentions around the periods for computation of pre-judgment and post-judgment interest, and the proper mode for computing the interest.

On 17th July 2020, following an application to determine the proper manner for calculating interest on the judgment sum, the court ruled that "...*the manner for calculating interest on the invested amount of GH¢6,120,240.00 shall be at 30% compound interest from 2nd June, 2008 to the 25th day of July 2018, the day of the main judgment*."

The court ended the decision with the following orders:

1. *The invested capital i.e. the GH¢6,162,240.00 is to attract interest at the rate of 30% at compound interest from 2nd June, 2008 till date of the Supreme Court judgment (25th July 2018), and thereafter at the statutory rate of interest prevailing at the time of the main judgment (25th July 2018) that is, 13.34%, at simple interest, till date of final payment.*
2. *The defendant shall also pay interest on the amount of GH¢7,600,000 at the treasury bill rate of 13.34% from 2nd June 2008 till date of final payment*.

The summary of the first order was stated in these words:

'We hold that the manner for calculating interest on the involved (sic) Amount of shall be at thirty per cent compound interest from 2nd June 2008 to 25th July 2018, the day of the main judgment. We also state that the 1st defendant shall pay interest at 13.34% on ***GH6,120,240.00*** *at simple interest from 25th July 2018 to date of payment'*

It is this decision, orders, and the highlighted mistake in the summary of the final orders that has led to the filing of the current motions. Both plaintiff and defendant are seeking review of the court's decisions and the defendant is seeking stay of execution pending determination of the defendant's application for review. The plaintiff is further seeking clarification of part of the court's orders. This ruling does not deal with the application for stay of proceedings.

I will consider the application of the Defendant first because it seeks to attack the very basis of the ruling of 17th June 2020 in which the ordinary bench of this court ruled that interest on the sum of GH¢6,162,240.00 was to be compounded from 2nd June 2008 to 25th July 2018.

The 1st Defendant brings this application under **Article 133 of the 1992 Constitution**, **Section 6** of the **Courts Act 1993 (Act 459)** and **Rule 54 of the Supreme Court Rules, 1996 (CI 16)**.

Article 133 (1) reads:

The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by rules of court.

Rule 54 of CI 16 provides these conditions as:

The Court may review any decision made or given by it on any of the following grounds-

a. exceptional circumstances which have resulted in miscarriage of justice;

b. discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decision was given

The settled position of the jurisprudence on review of a Supreme Court decision is that, an application for review cannot be utilized in the manner of an appeal to move the Supreme Court to rehear a matter that it has already decided, on account of the decision containing a mistake in law or mistaken appreciation of the evidence on facts.

In **Arthur (No 2) v Arthur (No 2) 2013 - 2014) 1 SCGLR 569** cited by both counsel to us, the court pointed out inter alia that by the terms of Rule 54(a), an applicant who prays for review of a decision of the Supreme Court must first show the existence of exceptional circumstances arising from some fundamental or basic error of law committed by the court to warrant a consideration of the application. The exceptional circumstances must have also resulted in miscarriage of justice that will affect the applicant if the error is not corrected. Even if not grievous, the harm that should be occasioned by the decision made in error should be real and not inconsequential.

My appreciation of the principles derived from the dicta on the review jurisdiction of the Supreme court in cases such as **Afranie 11 v Quarcoo and Another 1992 2 GLR 561** is that the exceptional circumstances that should precipitate the invocation of the court's power to review its own decision should be so pivotal, that the decision complained of would be different but for the error pointed out by the applicant.

As stated in **Quartey v Central Services 1996-97 SCGLR 398 at 399**, *'A review of a judgment is a special jurisdiction and not an appellate jurisdiction conferred on the court; and the court would exercise that special jurisdiction in favor of an applicant only in exceptional circumstances. This implies that such an applicant should satisfy the court that there has been some fundamental or basic error which the court inadvertently committed in the course of considering its judgment; and which fundamental error has thereby resulted in gross miscarriage of justice*.

The 1st defendant urges three sets of exceptional circumstances that have culminated in substantial miscarriage of justice.

1. Error in conclusion on the nature of investment

   The defendant submitted that the Court failed to consider critical evidence that confirmed that the respondent's investment was a call deposit without a fixed maturity period, and not a fixed deposit investment that matured in a year, requiring a roll over of principal with interest.

2. Error in failing to consider Bank of Ghana letter dated 2 October 2019:
   The defendant submitted that a letter from the Bank of Ghana dated 2 October 2019 was placed before the court for consideration in the application that led to the decision under review. This letter answered specific questions on the manner for calculating interest on a call deposit that the court should have considered, but failed to.
3. Error in implying terms into the contract: The defendant also submitted that the investment contract that the court implied a term of compound interest to, was contained in a written document as stated in page 3 of the ruling of 17 June 2020. Thus the duty of the court was to apply precisely the mode of interest calculation that had been agreed in that document, and not to imply terms into the contract.

   The defendant urged that if not reviewed, substantial miscarriage of justice would be occasioned by this decision to not just the defendant, who has to pay out millions of Ghana Cedis beyond the agreed value of the investment placement that the plaintiff was held by the Supreme Court to have made with it, but by the entire banking sector.

   This is because if not reversed, the court's decision would form a precedent for construing terms of investment agreements differently from what parties to investment agreements bind themselves to. The consequences of such a position

would be dire for the entire banking industry. Their submission was that in accordance with known principles of the law of contract, once an investment agreement captures the understanding of the parties and there is even further evidence that the parties subsequently acted in accordance with the agreed understanding, the parties ought to be bound by the terms of their agreement.

Consideration and Analysis

a. Error in conclusion on the nature of investment

A very vigorous ground for Defendant seeking a review of the court's decision is the court's acceptance of the Plaintiff's position that the investment product Plaintiff placed with the Defendant was a fixed deposit.

On page 4 of the decision under review the court stated: '*We use the term time deposit as that was what was stated and admitted in the interrogatories but in his evidence, the plaintiff stated that he requested that his money should be put in a fixed deposit. Therefore, as the plaintiff has argued, this is a proper case where the court is required to imply a term on the manner the principal and interest were to be treated one year in order to give efficacy to the agreement of the parties*'.

According to the defendant, copies of the investment agreement were placed before the court with the application that led to the decision. And these copies constituted critical evidence before the court that it ought to have construed, to arrive at the decision that the investment in question was a call deposit and not a fixed deposit.

A reading of this Court's judgment of 25th April 2018 shows that all of the Plaintiff's eleven claims before the high court were for the determination of, whether the Plaintiff's shares in Cal Bank had been sold to the 2nd defendant in the suit before the high court, and whether the Plaintiff was entitled to value for the payment made for the said shares.

In essence, a determination of the nature of the investment transaction between the plaintiff and 1st defendant/applicant herein, was not one of the reliefs the high court was called on to resolve, and there is no indication that either the high court or court of appeal

considered the nature of investment transaction after hearing the parties. Neither did the Supreme Court include that consideration in the body of its judgment, because it did not constitute an issue for consideration.

However, in the final judgment on the matters in issue, this Court, having overturned both judgments of high court and court of appeal, determined that Plaintiff was entitled to value for an investment placed with the defendant. And in pronouncing the entitlements of Plaintiff, this court made the finding that *'from the record*, the Plaintiff was entitled to the sum of **GHS6,162,240.00** which was to be '*invested in fixed deposit*' with the defendant/applicant herein. This can be found in the closing paragraphs on page 22 of the judgment.

With this finding by the Supreme Court **'from the record**', that the investment placed by Plaintiff with the Defendant was a **'fixed deposit investment**', my clear opinion is that the defendant, no matter how disagreeable it finds this finding, has to abide by the judgment of the Supreme Court. The finding in the 2018 judgment on the nature of the investment plaintiff placed with defendant, unless vitiated on sound grounds, constitutes estoppel on the issue of what kind of investment transaction the GHS6,162,240 was to be applied to, because it is a holding by a court of competent jurisdiction and a final court at that.

As cited from **Quartey v Central Services (supra),** *'a losing party is not entitled to use the review process to reargue his appeal which had been dismissed or to use the process to prevail upon the court to have another or a second look at his case*.'

Having determined the issue of the nature of the investment in the 2018 judgment, this court is also functus officio regarding that issue, and that decision cannot be overturned in a review application two years after the event.

In **Boakye v Appollo Cinemas 2007-2008 SCGLR 458,** where the applicant before the Supreme Court sought to re-apply for restoration of his appeal with further evidence of his medical history, after the court had earlier dismissed an application to restore the

appeal for lack of adequate evidence, the court was firm that having once dismissed an application to restore the appeal, it was itself functus officio on the issue of restoring the appeal.

In addition, the rule in **Henderson v Henderson 1843 Hare 100,** requires that when a matter becomes the subject of litigation between parties in a court of competent jurisdiction, parties put forward any arguments, claims or defences which they could have put forward on the first occasion so that all aspects of the dispute might be finally decided once and for all because of public interest in the need to bring finality to litigation

From **Sasu v Amua Sekyi - 2003- 2004 2 SCGLR 742**, through **Naos Holdings Inc v Ghana Commercial Bank Ltd 2011 1 SCGLR 492,** to **Eastern Alloys Company Ltd v Silverstar Auto Ltd 2017-2020 1 SCGLR 611**, the Courts have applied this rule of law to prevent, in the case of **Eastern Alloys**, re-litigation of a cause of action that had already been determined by a consent judgment; and in the case of **Naos Holdings,** to prevent repeated commencements of litigation over the same subject matter. In both cases, the court was clear that the court was not applying the principle of res judicatam, which requires the subject matter of litigation to have been pronounced on by a court of competent jurisdiction as between the parties and their privies. The doctrine was applied to ensure that parties do not employ multiplicity of court processes to re-flog issues and causes of actions after a decision that determines the issue or terminates the cause of action has been handed out.

It is on this technical basis that I cannot agree with the defendant that the court erred on 17th June 2020 when it failed to construe the exhibits placed before it for the purpose of deciding whether the investment was a 'call deposit', instead of a fixed deposit. That ground of review is dismissed. This analysis takes care of the second ground for review that fixates on the Bank of Ghana letter of 2nd October 2019

Error in implying terms into the contract

With the above finding of the investment transaction being a fixed deposit investment, and the court's holding that the defendant had admitted that its time deposit investment were to attract an annual interest of 30%, could this honorable court automatically imply a term that allowed the compounding of interest on the invested sum?

I must respectfully say that on the face of the record, I believe that the court erred in so doing, and through that error of law, occasioned grave injustice to the defendant.

The court erred because the implying of a term to compound interest is not supported by the clear words of CI 52 and so the decision is per incuriam CI 52. The decision to also imply a term to compound interest on the transaction of the parties is also not supported by the general statutory regime on compound interest in Ghana and especially Cap 176 that was in force in June 2008 when the transaction was undertaken. Third, it is not supported by the very words of the written document that was relied on by the court in its decision under review. Last, it was a decision on the substantive rights of the parties when the court had become functus officio with regard to making determinations on the nature of the transaction between the parties. At the time of the decision on 17th June 2020, the only matter that should have gone into the consideration of the honorable court should have been the legal directions of CI 52 on the manner of computing interest that that CI 52 allowed, because that was the matter the court was called to consider.

It must be appreciated that it is only in the decision of 17th June 2020 that this court determined that the manner for computing interest on the adjudged debt ought to be compound interest, and so this is properly, a new decision of this court that the defendant is urging a review of because of exceptional circumstances that the import of the decision causes, and the fact that it has occasioned miscarriage of justice.

In **NDK v Ahaman Enterprises Ltd and Others J7/4/2016 of 13th June 2016**, Anin-Yeboah JSC as he then was, speaking for this court in the determination of whether a clarificatory opinion constituted a decision that may be reviewed under Rule 54 of CI 16, determined that *'Decisions are not limited to what a court of law in the*

usual course of hearing a matter delivers. Reference may be made to Black's Law Dictionary 9th Edition at page 467 where the word decision is defined thus:-

> *"A judicial or agency determination after consideration of the facts and the law; **especially a ruling, order or judgment** pronounced by a court when considering or disposing of a case".*

It thus follows that when a court is seised with jurisdiction in determining any matter and gives a ruling, be it interlocutory or otherwise the court should be deemed as having given a decision.'

Statutes on compound interest

I will start my consideration of whether a court could imply a term to compound interest on a financial transaction executed in June 2008, when it was called to construe the direction of CI 52 regarding the manner in which interest was to be computed on a June 2008 transaction. This time is of essence because as pointed by the honorable court, the principle underlining the implying of terms of contract, developed from the seminal case of **The Moorcock 1889 14 P.D.64,** is that the term ought to have been without doubt, the presumed intention of the parties of the transaction, and without that term, the transaction could not have had business efficacy.

The principal enactments regulating financial transactions as at that date were the and **Loans Recovery Act 1918 Cap 175**, **the Moneylenders Act, 1941 Cap 176,** the **Companies Act 1962 Act 179, the Securities Industry Act 1993 PNDC Law 333, and Banking Act 2004, Act 673.**

With the exception of **Cap 175 and Cap 176,** all of the above statutes were silent on how interest rates could be affixed on financial transactions in the country, thus making

Cap 175 and Cap 176 the substantive statutes on the subject of interest in 2008, from which parties to a financial transaction could draw their legal rights to interest.

Cap 175 very specifically provided for courts to exercise discretion to re-open a transaction that is harsh and unconscionable on account of excessive charges on principal and interest and for courts to take an account between parties in order to relieve the person subjected to interest and other charges that exceeded what is fairly due under their agreement. This reveals a statutory purpose to ensure that parties to a financial transaction did not exact more than due them in their agreements.

Interestingly, **this 1918 enactment** continues to remain part of the corpus of law in this country, though we seem not to pay much attention to it now. It was applied in **Mensah & Others v Ahenfie Cloth Sellers Association 2010 SCGLR 680**, when this Court, in re-opening a financial transaction under the purview of Cap 175 inter alia, found it to be harsh and unconscionable on account of the application of excessive interest and charges.

Cap 176 is the statute that specifically regulated the charging of compound interest on financial transactions in 2008, and therefore of special application to this decision. Section 13 of **Cap 176** not only prohibited the application of compound interest in Ghana, it made it an offence for anyone who lent money to charge compound interest thereon. It read:

13. Prohibition of compound interest

(1) Subject to this section, a contract made after the commencement of this Act for the loan of money by a money lender is illegal in so far as it provides directly or indirectly

a. for the payment of interest in advance whether by deduction of an amount from the principal sum of money borrowed or otherwise, or

b. ***for the payment of compound interest on the loan****, or*

c. *for the rate or amount of interest being increased by reason of a default in the payment of sums of money due under the contract*

2. *For the purposes of subsection (1), provision may be made by the contract that if default is made in the payment on the due date of the sum of money payable to the moneylender under the contract, whether in respect of principal or interest, the moneylender* ***is entitled to charge simple interest on that sum*** *from the date of default until the sum is paid, at a rate not exceeding the rate payable in respect of the principal apart from the default, and the interest so charged shall not be reckoned for the purposes of this section as part of the interest charged in respect of the loan*

3. *A moneylender who contravenes a provision of this section commits an offence and is liable to a fine not exceeding one thousand penalty units in respect of each loan*

In 1984, the prohibition of the compound mode of computing interest under Cap 176 was supported by **Courts (Award of Interest) Instrument, 1984 LI 1295** which was the precursor of **Court (Award of Interest and Post Judgment Interest) Rules, 2005, CI 52**.

LI 1295 had read simply:

`*Where in any civil cause or matter the Court makes an order for the payment of interest on any sum due to the plaintiff other than any sum claimed by a plaintiff under Order 13 Rule 3 of the High Court (Civil Procedure) Rules, 1954 (LN 140A) the rate at which such interest shall be payable shall be the Bank rate prevailing at the time the order were made by the Court,* ***but no compound interest shall be awarded***. (emphasis supplied).

It was not till 2005, when the **Court (Award of Interest and Post judgment interest) Rules, 2005, CI 52** was enacted to repeal **LI CI 1295**, that the strict statutory prohibition against the application of compound interest by courts was eased to make room for its application under specific conditions.

Even then, my lords, **CI 52** made no provision for the application of compound interest in transactions, such as could allow a court to imply such a term into an investment transaction that made no specific provision for that manner of computing interest.

CI 52 provided only for a court to enforce the specific direction of a statute, instrument or agreement between parties that specifically provided for the manner of calculating interest other than the only manner of calculating interest in CI 52, which is simple interest. It provides:

Rule 1 - Order for payment of interest

1. *If the court in a civil cause or matter decides to make an order for the payment of interest on a sum of money due to a party in the action, that interest shall be calculated*

a. *at the bank rate prevailing at the time the order is made and*

b. at simple interest.

but ***where an enactment, instrument or agreem****ent between the parties* ***specifies a rate of interest which is to be calculated in a particular manner*** *the court shall award that rate of interest calculated in that manner*. (emphasis mine)

Rule 2 - Post Judgment Interest

2. (1) Subject to sub-rule (2) each judgment shall bear interest at the statutory interest rate from the date of delivery of the judgment up to the date of final payment

(2) Where the transaction which results in the judgment debt is

a. contained in an instrument,

b. evidenced in writing, or

c. admitted by the parties

and the parties specify in the instrument, writing or admission the rate of interest which is chargeable on the debt and which is to ran to the date of final payment, then that rate of interest shall be payable until the final payment (emphasis supplied)

Rule 3 - Enforcement of interest payment

Interest payable under these Rules may be levied under a writ of execution

Rule 4 – Interpretation of statutory rate

4 (1) In these Rules statutory rate of interest is the bank rate prevailing at the time the judgment or order is made by the court

(2) Where there is doubt as to the prevailing bank rate, the 91 days Treasury Bill rate as determined by the Bank of Ghana shall be the prevailing bank rate

It can be seen from an examination of **Rule 1(1)(b) CI 52** that first, it allowed another mode of calculating interest apart from the prevailing bank rate in only one circumstance - where an enactment, instrument or agreement between the parties specifies a rate of interest.

Second it allowed another mode of calculating interest apart from simple interest in only one circumstance - where in an enactment, instrument or agreement between the parties that had specified a rate of interest, that enactment, instrument or agreement also **specifies** that the interest is to be calculated in a particular manner

This simple understanding of the plain reading of **Rule 1(1)(b) CI 52** admits of no incongruity or absurdity, neither does it lead to any injustice or some other outrageous consequences. This is because of the clear intention of Rule 1 of CI 52 to allow only the application of simple interest unless there is a specific alternate provision by an enactment, instrument or writing. And the background legislative regime of Cap 176 that prohibited the application of compound interest to financial transactions.

As stated by this court in its first holding in **Republic v High Court Accra (Commercial Division); Ex parte Hesse (Investcom Consortium Holdings SA & Scancom Ltd Interested parties 2007-2008 SCGLR 1230 at 1242**,

'on the construction of statutes, the literalist, that is the ordinary, plain or grammatical meaning, should be adhered to if it clearly advances the legislative purpose or intent and does not lead to any outrageous consequences'.

It is my view that, by deliberately directing that outside of an enactment, instrument or agreement that specifies the particular manner in which interest is to be calculated, a court must award interest in simple interest mode, CI 52 had revealed its legislative intent, and cannot support an order of court that '**implies a term'** to compound interest on a judgment debt.

This is because **specifying a term of agreement and implying a term into an agreement to provide for what is not specified, are mutually exclusive positions**. A court cannot imply a term to apply a particular mode of calculating interest into a transaction if the parties had already and clearly specified the particular manner in which interest on due sums is to be calculated in their transaction. Put another way, an implied term only fills gaps that the parties had themselves failed to express, but could be inexorably presumed to have intended. However, CI 52 is very clear, that it is only when parties have expressed their agreement to a particular manner of calculating interest that the court should apply that manner, and not simple interest. Otherwise, interest is to be calculated in simple interest mode. CI 52 does not allow for the implication of a term to compound interest. By inference from the second part of Rule 2(2) (c), such a term must always be derived from admission, agreement or an enactment.

Interestingly, my lords, the 2018 judgment that the decision under review only sought to shed light on, had occasion to determine how it would apply the two parts of Rule 2(2) (c), which is the 'post judgment' counter part of Rule 1(1) (b). For clarity I will repeat Rule 2(2) here.

(2) Where the transaction which results in the judgment debt is

a. contained in an instrument,

b. evidenced in writing, or

c. admitted by the parties

and the parties specify in the instrument, writing or admission the rate of interest which is chargeable on the debt and which **is to ran to the date of final payment**, then that rate of interest **shall be payable until the final payment** (emphasis mine)

The succinct words of Pwamang JSC found on page 23 of the judgment of 25th July 2018, when determining the appropriate post judgment interest to award on the GHS 6,160,240 that he found subject to an investment transaction are:

'In respect of post judgment interest, Rule 2 states that unless a specified rate of interest is stated in an instrument, writing or admitted by the parties to be applicable ***up to the date of final payment****, judgment debts are to attract interest at the prevailing rate at the time of judgment.* ***In this case, the admission by 1st defendant did not cover an agreement on the rate of interest payable till final payment****, which would have been applicable even after the judgment*. (emphasis mine)

Consequently, Plaintiff is awarded interest on the sum of GH6,160,240 to be calculated at the agreed rate of 30% per annum from 2nd June 2008 up to the date of the judgment of the High Court and at the bank rate prevailing at that date till final payment.'

These words reveal the learned Judge's keen appreciation of the fact that the latter part of Rule 2(2) of CI 52 operates in two parts, just like Rule 1(1) (b). He evaluated that though the parties may have agreed or admitted to a rate of interest, the second part of Rule 2(2) requires that they must also deliberately agree or admit that that rate of interest should be applied until final payment. Without sight of admission that the agreed rate of interest was to continue until final payment, the court reverted to the legislative intent of

CI 52 expressed in Rule 1(1) and ordered the statutory rate of interest from the date of judgment until final payment.

My humble view therefore is that the presumption of an intent to compound interest on the 'fixed deposit' investment for the simple reason that it was to attract interest annually is per incuriam Rule 1(1)(b) of CI 52, and CI 176 which was operative in June 2008.

CI 52 directs that the parties should have deliberately agreed that any agreed or admitted interest rate should be applied in a particular manner before that manner of calculating interest becomes applicable. Further, the position that the parties could be presumed to have intended the compounding of interest just because they were subject to a financial transaction that identified annual interest would be a position that was expressly prohibited by Cap 176 in June 2008.

Instructively, it was not till 9th January 2009 when the **Non-Bank Financial Institutions Act 2008** Act 774 became law, that **Cap 176** was repealed by **Section 47 (1)** of **Act 774**.

Section 47 (1) and (2) of **Act 774** reads:

Repeals, transitional and savings

47. (1) *The Financial Institutions (Non-Banking) Act, 1993 (P.N.D.C.L. 328) and the Money Lenders Ordinance (Cap 176) as variously amended are hereby repealed.*

(2) Despite subsection (1), Regulations, rules, instruments, licences, orders and decisions made under the repealed Acts, shall, in so far as they are consistent with this Act, remain valid and binding and shall be deemed to have been made under this Act.

In summarizing this review of the statutory directions on compound interest, I will say that at the time of the transaction between the parties in June 2008, the substantive law on compound interest in the jurisdiction was Cap 176, and Cap 176 prohibited the

application of compound interest on any financial transaction. As such it is a fundamental error for a court to have found that the parties would have an intention to compound interest on a financial transaction when they have not expressly agreed so to do, because such a presumption would be contrary to law in June 2008.

CI 52, as subsidiary legislation applicable only to judgment debts, also directed that only simple interest could be applied to debts unless a different mode of computing interest was expressly allowed by an enactment, instrument or agreement. To imply a term of agreement simply means that the parties had not expressed the same term.

The Written Agreement

The record from page 3 of the ruling on review confirms that the court gave credence to the transaction being in writing as the basis for implying a term to compound interest to the sum found to be owed.

These are the relevant words from the decision:

'*The defendant's contention that the parties to the investment in this case which is contained in a written document did not agree anything on the manner of calculating interest is difficult to accept. An agreement for a time deposit is not complete without a term on the manner of calculation of interest since after a year interest would have accrued on the principal*. (emphasis mine)

And what could the court identify as the intention of the parties from their writing? Respectfully, the court could not distil any intentions on how interest was to be applied from the writing because the court then went on to say: *'It is **either** that the investment should be rolled over **or**, interest should be paid to the investor's account and the principal re-invested* .

My view is that within this binary position lies the affirmation that on the record, the parties had not expressed any intentions or clear agreement on the date that the time

deposit was to mature, (as defendant continues to urge,) and how principal and interest were to be treated on maturity.

Indeed, it is worthy of note that plaintiff counsel urged in this application that this court did not rely on the agreements submitted by Defendant, but on the admissions identified in the judgment. I can understand the source of his discomfiture, because it is clear that in the exercise of implying terms into the written agreement, this honorable court was imputing intentions into evidence that did not reflect as feeding into any part of the judgment that it was making orders in relation to, and the court was conducting this exercise after all issues regarding the judgment were closed. Despite this discomfiture of Plaintiff counsel, it is clear from the words of the ruling quoted above that the decision of 17th June 2020 considered the 'written document' to arrive at its decision.

So to return to the evaluation of the honorable court, I would say that the lack of clear intention on maturity, roll over, and mode of computation of interest should have held the court back from its decision to imply a yearly roll over of the invested sum, and the compounding of interest on an annual basis, since the judgment of 25th July 2018 indicated no such findings.

The ruling went on to state on page 4 that the reason for implying a term for compounding interest on the debt of GHS6,162,240 was because the implied term was needed to give business efficacy to the fixed deposit investment. The court said:

'Therefore, as the plaintiff has argued, this is a proper case where the court is required to imply a term on the manner the principal and interest were to be treated after one year in order to give efficacy to the agreement of the parties'

On page 5, the ruling said *'From the nature of the investment contract entered into by the parties, its effectiveness depends on the manner the principal and interest were to be dealt with after each year because the reason for the contract was clearly in order for the plaintiff to earn interest on his money and for 1st defendant to have use of the*

funds for its banking business. However, the parties did not set a date for the fixed deposit to cease but the rate of interest was agreed at 30% per annum. So if at that time a third party standing by had asked what would happen to the principal and interest after one year of the fixed deposit running and the money is not returned to the depositor, the question is; what would have been the answer? We have no doubt in our mind that the answer would have been 'of course the principal and interest together should roll over'. In our understanding, the situation would not be different if it were even a call deposit as the 1st defendant contends. After one year of the investment interest of 30% would have accrued on the amount and if the plaintiff did not call for the amount, what would have happened to that interest?'

Respectfully, this position constituted an error on the face of the record, because it amounted to the court creating and finding contractual terms for the parties that were not at all supported by the record. And doing so, after judgment.

The plain words of the agreement submitted by the defendant to the honorable court prior to the decision under review, and which they have made available to this review panel, communicate in distinct terms, how the parties were to deal with the submitted funds. The parties had determined what would give business efficacy to the financial transaction in the standard form issued by the Defendant for its 'Time Deposit Agreement', and the terms did not include the maturing of returns after one year, nor the application of compound interest on an annual basis.

The agreement is presented in this application as exhibit ' 'AAAB4' and ' AAAB5' annexed to the earlier Exhibit 'AAA1' that was 'Notice of Motion' that led to the decision under review. Apart from 'AAAB4' reflecting **15%** rate of interest, and 'AAAB5' reflecting **30%** rate of interest the two versions have the same words so the two differing figures of interest have been placed in the relevant place):

1/~~We~~ Daniel Ofori wish to place with EBG/~~IML~~, the sum of

*GH13,762,240.00….for (no of days**)…….Call……..** from (date)*

…call …….*to mature on…. at…(****15%)(30%) p.a. …..****per annum'*

Kindly

Debit my Current Account No 1101332455014

.....

Accept my Cheque No .....

Address & Phone No of Depositor Mr Daniel Ofori, C/O
White Chapel, Box

.....

Any other contact person & phone No 020211060

.....

At maturity

***Credit my current Account No .....**

***Roll over** .....

....

Ecobank Relationship Officer Signature of
Depositor

TIME DEPOSIT AGREEMENT

1. That Ecobank Ghana or Investment Managers Limited (EBG/IML) is hereby authorized to impose penalties at its own discretion for any withdrawal made prior to maturity or without due notice under this deposit cheque
2. That the depositor will furnish EBG/IML with all required documentation necessary for to determine the validity of the deposit

3. That in addition to any general lien or similar right to which EBG/IML as bankers may be entitled by is EBG/IML may at any time and without notice combine or consolidate all or any of our deposits and accounts with the liabilities to EBG/IML and set-off or transfer any sum or sums standing to the credit including but not limited to cash, cheques, valuables, deposits, securities, negotiable instruments or other assets belonging to with EBG/IML or towards satisfaction or any of our liabilities to EBG/IML on any of our liabilities be active or continent, primary or collateral and several or joint

4. **In the absence of clear disposal instructions, <u>principal plus interest at maturity will be liquidated and credited to the depositors current account</u> at EBG/IML or in the absence of such an account EBG/IML may at its discretion <u>hold the funds in a non-interest bearing suspense account</u> pending further instructions or send payment order or a cheque to the depositor at their last known address** (Emphasis mine)

My lords, I have highlighted the blank notations against maturity and roll over as well as Clause 4. I have done so, because I see that they provide the clear intentions agreed by the parties on the gap that this honorable court decided to fill with implied terms in the decision under review. The written agreement spoke for itself that it did not indicate a maturity date and did not make provision for rolling over.

Even more importantly, the written agreement communicated in plain words in clause 4 that *in the absence of clear disposal instructions, principal plus interest at maturity will*

be liquidated, and credited to the current account of the Plaintiff or be held in a 'non-interest bearing suspense account'.

Thus, though my view is that this court could not make a finding of a one year maturity date just because the transaction was supposed to attract an annual interest rate or the judgment had declared it to be a fixed deposit investment (because the maturity date of a deposit requires evidence on what is agreed), the parties had themselves determined what should happen if there were no clear disposal instructions on maturity. The written agreement did not include a term to roll over the Deposit placement because the line against 'Rollover' was left blank. The written agreement also did not reflect a term on the particular manner to treat the interest, including the compounding of interest, as CI 52 demands to see before a manner of calculating interest other than simple interest would become applicable. But more critically, what the parties intended to do regarding disposal on maturity in the absence of clear instructions was specifically spelt out in clause 4.

I would therefore respectfully hold that to imply not one term, but two terms of contract, that would allow first, roll over of a sum deposited with a bank over an unindicated time period, and two, the application of compound interest to the transaction, after judgment has been given on all the issues between the parties and the court was functus officio when it comes to the jurisdiction to interpret untried issues between the parties, would constitute exceptional circumstances meriting review of the decision.

Miscarriage of justice

In **Martin Alamisu Amidu v Attorney General, Waterville Holdings (BVI) Ltd, Alfred Agbesi Woyome Review Motion No J7/10/23 dated 29th July 2014** and also reported in **2013-2014 1 SCGLR 606,** the eleven member full bench panel of this court spoke decisively on the ultimate purpose and objective of the court's review jurisdiction. Unanimously speaking through Dotse JSC, the court said on page 3 of the judgment after outlining the grounds for review directed in Rule 54 of CI 16: *'The*

interest of ensuring justice is therefore at the core of considerations that might lead to a grant of a review application'.

He went on to state on page 26: *'we are of the considered opinion that in the interest of justice, the review jurisdiction of this court must be exercised, the dominant consideration for the grant or refusal of this review jurisdiction of this court has been justice, based upon the various considerations of justice in the many cases that have been decided over the years. The cumulative nature of these decisions gives us the impression that, the courts are concerned in ensuring that their refusal to grant a review where the need arises does not result into a failure of justice. The court's basic existence is to do justice, and if by a combination of factors, mostly human and sometimes deliberate and intentional a nation has been made to come to terms with the payment of huge and uncontested judgment debts such as in the instant case, then a court of last resort like this supreme court must imbibe the principles of justice which is its primary duty and responsibility by ensuring that the unconstitutional contracts and agreements are not given a glimmer of life and hope*..'

In concluding his opinion in that judgment, Dotse JSC said *'We state that the review jurisdiction must serve as a genuine and real procedural mechanism which should sparingly be used to correct and reverse basic errors inadvertently or unwittingly committed by the ordinary bench to prevent total failure of justice such as the instant case*'

The Supreme Court in **Nasali v Addy 1987-88 2 GLR 286 at 288** said of the review jurisdiction of this court: *'The jurisdiction was exercisable in exceptional circumstances where the demands of justice made the exercise extremely necessary to avoid irremediable harm to an applicant*'

The defendant has shown in the attached exhibits, the quantum difference between what it has to pay after applying simple interest on the sum of GHS6,162,240 between June 2008 and July 2018, and after applying compound interest thereon. The application of compound interest swells the debt beyond one hundred million of Ghana

Cedis. This difference in what the bank has to pay on money deposited with it, definitely constitutes miscarriage of justice that the bank has to suffer, unless the 17th June 2020 decision is reviewed.

But my lords, my humble view is that even greater irredemiable harm would be done to the entire financial industry, if this decision to imply a term of compound interest to a financial transaction outside of express agreement, is allowed to stand. This decision can easily become the vehicle from which unscrupulous transactors with money, with no prior agreement to exact compound interest, will in cases where transactions failed and so long litigation had to be engaged in to resolve rights and entitlements, pounce to demand compounding of interest. The whole economic base of this nation is rendered shaky on this foundation.

As submitted by counsel for defendant, the financial industry is an industry that thrives on stability and certainty, and is indeed the mainstay of the whole national economy.

My lords, on this point, permit me to also draw attention to the fact that simultaneously with the repeal of **Cap 176 by Section 47 (1) of Act 774,** the **Borrowers and Lenders Act 2008 Act 773** was passed on the same 9th January 2009 to provide a framework for dealing with charges and expenses on credit transactions.

Although Act 773 has now been repealed by the Borrowers and Lenders Act 2020, Act 1052 which became law on 29th December 2020, I believe that Act 773 is worthy of note when it comes to considering the effect that implying a term to compound interest on a financial transaction could have on the financial sector as urged by the defendant.

The opening objective of Act 773 is stated as a law to '*provide the legal framework for credit, to improve standards of disclosure of information by borrowers and lenders, to prohibit certain credit practices, to promote a consistent enforcement framework related to credit, and to provide for related matters*'.

In its Section 18 (1), **Act 773** demands express agreement in the charging of interest and other expenses for a credit transaction by imposing a statutory requirement for

'*Disclosure of Information*'. This disclosure of information includes the mandatory disclosure of the exact principal sum involved in any financial transaction, the disbursement schedule and interests and other costs of the transaction.

Section 18 of Act 773 reads:

Pre-agreement disclosure:

> **18 (1)** *A lender shall not conclude a credit agreement with a prospective borrower unless the lender provides the prospective borrower with a pre-agreement statement and quotation in the form specified in the Schedule*
>
> *(2) A pre-agreement statement shall specify*
> *a. the principal amount;*
> *b. the proposed disbursement schedule of the principal debt;*
> *c. the interest rate;*
> *d. other credit costs*
> *e. the total amount involved in the proposed agreement*
> *f. the proposed repayment schedule; and*
> *g. the basis of any cost that may be assessed if the borrower breaches the contract*

3. *A lender who contravenes this section is liable to an administrative sanction imposed by the Bank*

4. *In furtherance of subsection (3), a borrower may sue a lender for damages for loss suffered as a result of the contravention*

From the tenor of Act 773, that was until 29th December 2020 the substantive statute on how interest may be applied to financial transactions along with Act 774, it is my humble view that the defendant's submissions on miscarriage of justice ought to be upheld.

Many of the conditions enumerated in **Afranie 11 v Quarcoo** cited supra can be identified in this matter and I refer specifically to:

a. where the circumstances were of a nature as to convince the court that the judgment should be reversed in the interest of justice and indicated clearly that there had been a miscarriage of justice;

b. the demands of justice made the exercise extremely necessary to avoid irremediable harm to the applicant,

c. fundamental and basic error has inadvertently been committed by the court resulting in a grave miscarriage of justice

d. a decision had been given per incuriam failure to consider a statute or fundamental principle of practice and procedure relevant to the decision

New Evidence

The defendant has since the commencement of this application filed further supplementary affidavits evidencing that contrary to the contentions of plaintiff in this suit from High court to Supreme Court, the plaintiff had retained his holdings in CalBank since 2008. In plain terms, while plaintiff was fighting a cause of action derived from the position that he had sold his shares in CalBank and required the defendant to release the payments to him, he knew that the sale had in truth and fact, and not just law, as found by this court in its judgment, fallen through, as adjudged by the high court and court of appeal. The evidence is meant to show that Plaintiff was actually obtaining divided on the same shares, and continues to do so. In essence, the Supreme Court has given Plaintiff judgment to obtain these sums of money for the sale of his shares, and all of this is based on a falsehood contrived to deceive the court to give it these vast sums now in contention.

The evidence from defendant is that on top of the original holdings, plaintiff had obtained additional shares in new share issues and received dividend running into

millions of Ghana cedis for these shares. My lords, it is as plain as daylight that these pieces of information completely remove the very foundation of the judgment of this court dated 25th July 2018.

But can the allegations form appropriate grounds for reviewing or not reviewing the decision before us?

I am well aware that under Rule 54(b), this court may review its decisions on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decision was given.

However, courts of law are constrained by jurisdiction, as the courts have always held, and the oft-cited decision of the Supreme Court in **Mosi v Bagyina 1963 1 GLR 337** through Akufo-Addo JSC as he then was continues to resonate from page 342 of the report'*where a court or a judge gives a judgment or makes an order which it has no jurisdiction to give or make or which is irregular because it is not warranted by any enactment or rule of procedure, such a judgment or an order is void'.*

In **Frimpong v Nyarko 1998 - 99 SCGLR 743**, this court speaking through Acquah JSC as he then was (of blessed memory) had this to say regarding evidence of falsehood that was brought to the attention of the court, and its effect on processes in the court, when the court could not find jurisdiction to deal with the substantive matter in controversy.

'These matters obviously smelt of fraudulent manipulation of the notice of appeal and thereby raised the preliminary legal issue as to the competence of that document to initiate the appeal. Fraud, as is well known, vitiates everything, and when a court of law, in the course of its proceedings,, has cause to believe that fraud has been committed, it is duty-bound to quash whatever has been done on the strength of that fraud.'(page 743).

He went on to say on page 747 *'But justice is done according to law and not the whims and caprices of the individual judge. Thus in any given situation, the court's authority to waive, amend, rectify or regard as fatal an error committed by a party is dependent upon the scope of the court's jurisdiction to exercise a discretion, if any in the matter. ...A court of law has no authority to grant itself jurisdiction in matters where the relevant statute does not confer such power*.'

The jurisdiction conferred on this court under **Rule 54** of CI 16 that has constituted this panel does not allow us to go beyond looking at the decision of 17th June 2020, which is not the judgment of this court, but a decision on the correct mode of computing interest on the sum adjudged in the judgment of July 2018.

For this reason, I also consider the allegations raised under this application for review as exceptional circumstances that should invite a decision on whether or not the decision of 17th June 2020 ought to be reviewed, and whether or not the application numbered J8/114/2020 which forms part of the stable of applications before us should be granted. Fortuitously, I have read the opinion of my learned senior brother Dotse JSC on application numbered J8/114/2020 which takes into account the falsehood described herein and agree with that decision.

G. TORKORNOO (MRS.)
(JUSTICE OF THE SUPREME COURT)

DOTSE JSC: -

I have read the ruling of my sister Torkornoo JSC, and agree in all material particulars with it. Her ruling was silent on the application for stay of execution and I believe I must express my opinion on that.

V. J. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

HONYENUGA, JSC: -

The facts in these applications are sufficiently set out in the respective opinions expressed. I have perused the various opinions as stated. I am of the respective opinion that I would support the opinion as expressed by my respected Sister, Torkonoo JSC. I agree with the evaluation of the evidence, the reasoning and the conclusion reached by my able Sister. I have nothing useful to add to her opinion that the Review application filed by the 1st Defendant/Applicant be granted so as not to occasion a miscarriage of Justice by the award of compound interest.

C. J. HONYENUGA
(JUSTICE OF THE SUPREME COURT)

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