IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: YEBOAH, CJ (PRESIDING)
DOTSE, JSC
BAFFOE-BONNIE, JSC
APPAU, JSC
PWAMANG, JSC

CIVIL MOTION
NO. J8/64/2019

11TH MARCH, 2020

DANIEL OFORI ..... APPLICANT

VRS

1. ECOBANK GHANA LIMITED ..... RESPONDENT
2. SECURITIES AND EXCHANGE COMMISSION
3. GHANA STOCK EXCHANGE

RULING

DOTSE JSC:-

On the 10th of July 2019, the Supreme Court, made an order appointing the Director of Finance of the Judicial Service to assist the parties herein in the following terms:-

"BY COURT

By consent, the parties through their respective counsel, Thaddeus Sory for the Applicant and Ama Opoku Amponsah for the Respondent have

consented to the Director of Finance of the Judicial Service being appointed to assist the parties herein resolve the differences arising from interest rate charges from the review decision of this court dated 27th February 2019. Adjourned sine-die."

Before I proceed any further, it is useful to state the background to the said order.

FACTS UNDERLYING THE ORDER

This court on the 25th day of July 2018, delivered a unanimous judgment in favour of the Respondent herein, Daniel Ofori, therein Plaintiff/Appellant/Appellant which overturned the judgment of the Court of Appeal dated 6th June 2013, which was in favour of the Applicants herein, therein, 1st Defendants/Respondents/Respondents, Ecobank Ghana Limited.

The ordinary Bench of this Court specifically ordered the Applicants to pay the amounts due the Respondent at interest rates calculated as at the date of the High Court Judgment.

The Respondent herein, however successfully applied for a review of the judgment of the ordinary Bench, and on the 27th day of February 2019, the Review panel stated in clear terms as follows:

"Accordingly, we review our decision of 25th July, 2018 on this point as follows:-

1. That the 1st Respondents pay interest to the Applicant herein on the sum of GH¢6,162,240.00 out of the sum of GH¢13,762,240.00 at the agreed interest rate of 30% from the 2nd day of June 2008 up until the date of the Supreme Court judgment to wit the 25th day of July 2018.
2. The 1st Respondents are to pay to the Applicant interest on the sum of GH¢6,161,240.00 out of the sum of GH¢13,762,240.00 at the statutory interest rate from the date of judgment of this court (which is 25th July 2018 up to date of final payment).

3. That the 1st Respondents pay interest on the sum of GH¢7,600,000.00 at the prevailing bank rate as at the date of the judgment of the Supreme Court which is 25/7/2018.

Following disagreements which ensued between the Applicants, a Bank of tremendous reputation in the sub-region and the Respondent who appears to us as a genius in investment portfolios management, the parties approached the court to guide them in the resolution of the impasse that had ensued on the interest charges arising from the review decision.

The initial reaction of the court was to refer the parties to Pricewater House (PWC) an International Accounting Firm as the Experts to perform the task with the appropriate expertise. However, following suggestions that the fees charged by (PWC) were on the high side, and the parties themselves being unable to meet the financial demands of (PWC) as a result of which they resiled from further engagements with (PWC), this court made the orders referred to at the proceedings referable to this Ruling, dated 10th July 2019 supra.

BASIC FEATURES OF THE ORDER OF 10TH JULY 2019

1. It was a consent order.

2. It was the Director of Finance of the Judicial Service who was appointed.

3. The Director of Finance **was to assist the parties resolve differences** which had arisen from the interest rate charges applicable as a result of the review decision. However, in the execution of the said order, it was the Deputy Director of the Judicial Service who was delegated by the substantive Director of Finance to perform the task. It should further be noted that, there was no reference to the court of a variation of this order before the delegation of the task to the Deputy Director. My impression is that, the willingness of the parties to accept the Deputy Director stems from the fact that, the said person was primarily to assist them arrive at an acceptable conclusion.

On our part, we have looked at the academic credentials and experience of the Deputy Director of Finance and we have no doubt that he is competent to undertake the task with the assistance of the parties.

Indeed, the Deputy Director, in a prologue to the impugned report, stated as follows:-

> *"Pursuant to the court order dated 12th July 2019, by the Justice of the Supreme Court presided by His Lordship Justice Victor J. M. Dotse on the matter stated above, the parties consented through their respective counsel for the appointment of Director of Finance to assist them in resolving the differences arising from the interest rate charges from the review decision of this court dated 27th February 2019.* ***The Director of Finance upon the receipt of the order instructed me to undertake the assignment.***
>
> ***SCOPE OF WORK***
>
> *To assist the parties herein resolve the differences arising from the interest rate charges from the review decision of this honourable court dated 27th February 2019."*

The report of the Deputy Director, has generated so much controversy between the parties. Arising from this, the Applicants herein, (ECOBANK) applied to this court by a Motion on Notice, filed on 16th October 2019, to challenge the report and seek a determination on the mode of calculating interest on Respondents investment.

SPECIFIC COMPLAINTS OF THE APPLICANTS

The Applicants raised three specific complaints against the report of the Deputy Director of Finance as follows:-

(a) ***"Computation of interest of the amount of GH¢6,162,240.00 as being GH¢89,902,650.26 instead of the right computation of GH¢18,765,287.01***

(b) ***Computation of post judgment interest of the sum of GH¢6,162,240.00 as being GH¢25,120,500.01 instead of the right computation of GH¢832,416.65.***

(c) ***Computation of post judgment interest of the sum of GH¢7,600,000.00 being GH¢23,336,524.60 instead of the right computation of GH¢11,309,624.71."***

The reasons assigned by the Applicants herein against the work of the Deputy Director of Finance apart from the fact that it had been alleged that he did not consult them again after the initial interaction, have been stated by them as follows:-

"That the Applicant respectfully submits that in the absence of an agreement between the parties specifying the manner of calculating the interest, the manner of calculating the interest on the amounts awarded to the Respondent should be based on the default position in the Court (Award of Interest and Post Judgment Interest) Rules, 2005, C. I. 52, specifically Rule I(b) thereof which stipulates that,

> *In the absence of an enactment, instrument, or Agreement between the parties specifying manner of calculating the interest the manner of calculating the interest ought to be at simple interest.*

That is, the interest rate multiplied by the tenor/duration and further multiplied by the Principal amount. (i.e. Principal x Time x Rate).

That further it is instructive to note that the initial paragraph of Respondent's own Exhibit "B" which the Deputy Director of Finance relied on to arrive at his conclusions stipulated as follows:-

> *"We write to inform you that the Bank of Ghana has not prescribed any industry standard for the computation of interest on Fixed Deposit.* ***However, interest earned on Fixed Deposit accounts are calculated on the terms of agreement entered into with a financial institution by the depositor."***

That the Bank of Ghana has per Exhibit "AAAb6" confirmed that the manner of computation of interest on the investment transaction ***between the Applicant and the Respondent is computation at simple interest.***

That in concluding the first leg of the task, the Applicant submits that the Admitted facts on which this Honourable Court relied on in arriving at the interest rate on the GH¢6,162,240.00 due the Respondent did not prescribe the manner in which the said interest ought to be computed and therefore recourse should be made to the Court (Award of Interest and Post Judgment Interest) Rules, 2005 (C I 52) specifically, Rule 1 of C I 52.

That further and in the circumstances of this suit, the prevailing bank rate on the sum of the GH¢6,162,240.00 should be the interest rate for investment placement and not the lending rate since the said sum was an investment placement and not a loan facility.

That the Applicant states that it's Call Deposit Rates, (governing the type of Investment the Parties entered into) for July 2018 for amounts exceeding GH¢500,000 was 13% per annum. Attached herewith and marked as Exhibit "AAAB 11" is the Applicant's interest rates effective 25th July 2018." Emphasis supplied.

The Applicants sum up their argument when they conclude that, the said report, will entitle the Respondent, to receive an unjustifiable amount of GH¢132,072,434.88 as per the wrong computation done by the Deputy Director of Finance as opposed to the computed sum of **GH¢30, 907,328.40**.

It is appropriate at this stage to state that, again with the consent of the parties, this court directed the Applicants to pay to the Respondent this admitted amount of **GH¢30,907,328.40** which the Applicants on their own understanding adjudged the Respondent to be entitled to. The Respondent has since confirmed the payment and receipt of the said amount.

RESPONDENT'S RESPONSE TO THIS APPLICATION

The Respondent reacted strongly to the Applicants application and described it as incompetent, lacking in merit and without any jurisdictional base whatsoever.

In order to appreciate the sheer magnitude of the Respondent's answer to this application, we have decided to quote some of the relevant paragraphs of the affidavit in opposition as follows where the Respondent deposed to as follows:-

5. *"That I have been advised by my lawyers and verify believe same to be true that the application before the court is not only incompetent and does not properly invoke the jurisdiction of the court for the reliefs sought, but lacking in merit for the reason and in terms of substance, the affidavit in support of the application is unfortunately loaded with a pack of misleading information, which, granted same even to be true, does not bolster the merits of the application before the court in anyway.*

7. *That in terms of competence, my lawyers have advised me and I verily believe same to be true that the prayer endorsed on 1st Defendant's motion paper, at the very best, only indicates 1st Defendant's intention to challenge (and in this context maybe considered as an application for leave) the report filed by the Deputy Director for Finance on the 7th day of August 2018 which report is exhibited to the affidavit in support of the application and marked AAABI, such relief not being the proper one to make to this court after a report of the kind (sought to be challenged with leave of the court) is filed, such a report being the report of a Court Expert.*

8. *That upon conclusion of his task as ordered by the Court, the Deputy Director for Finance is required, as a Court Expert, and as he did, to file his report in the registry of the court following which the Registrar sends a copy to each party or the party's lawyer and that at all times material to the instant application, the Court Expert duly filed same and the report was served on the parties by the registry of the Court as evidenced by exhibit A attached hereto.*

10. *That my lawyers have advised me and I verily believe same to be true that a reading of the rules in accordance with which the Court either of its own motion or upon a party's application (as happened in this case) may appoint an expert in any cause or matter in which a question for an expert witness arises, will leave the*

court in no doubt whatsoever that 1st Defendant's instant application is not only incompetent because the rules do not provide for this situation where 1st Defendant seeks the leave of the court to challenge the Court Expert's report (not to cross-examine the Court Expert) but also because granted even that the Court treated 1st Defendant's application as an application to cross-examine the Court Expert such an application to cross-examine the Court Expert such an application remains incompetent for purposes of invoking the jurisdiction of the court for any such order because the application has been timed out.

11. *That my lawyers have therefore advised me and I verily believe same to be true that the options about which I have deposed in paragraph 10 above apart, it is also open to 1st Defendant to have called an expert of its own upon giving me notice of its intention so to do within a reasonable time* ***and that the application before this court having been exposed as woefully and incurably incompetent, this court is not disposed to giving same a hearing on its merits only****." Emphasis supplied.*

With these contrasting divergent opinions from the learned counsel for the parties, the court directed both counsel to reduce their legal agruments into writing which they had complied with.

APPLICANTS ARGUMENTS OF LAW

It is the case of the Applicants as urged upon the court by learned counsel, Ama Opoku Amponsah that, the Director of Finance had been appointed by this court as a *"Referee"* pursuant to the Rules of the court. That explains why in the views of the Applicant, they came by way of an Application to challenge and or seek a rejection of the said report.

The Applicants referred to the tenor of the order dated 10th July 2019 and argued that under those circumstances **the Director of Finance could not have been appointed as a Court Expert pursuant to the Rules of the High Court, C. I. 47 as was contended by the Respondent herein.**

In the best traditions of the Bar, learned counsel for the Applicant, in my view rightly contended that, **if the court comes to the conclusion that the Applicant did not invoke the appropriate process in the particular circumstance, the court should nonetheless exercise it's power within the Rules to prescribe the procedure which in the opinion of the court best suit's the circumstances and justice of the matter. The Applicant therefore urged the court to dismiss the Respondent's preliminary legal objection.**

RESPONDENT'S REPLY TO THE APPLICANT'S ARGUMENTS

Learned Counsel for the Respondent, Thaddeus Sory, contended rather forcefully that, the Applicant's submission referred to supra is untenable, because the objection regards the Deputy Director of Finance as a Court Expert whereas the Respondents contend the Deputy Director is in the proper sense a Referee.

According to learned Counsel for the Respondent, the reference to and reliance by the Applicants, to the case of ***In Re Presidential Election Petition, (No.4) [2013] SCGLR Special Edition, 73 at 219*** per Adinyira JSC is misplaced and not applicable herein.

In order to appreciate the points of substance which perhaps made the Respondent to argue the way he did very forcefully without regard to the antecedents prior to the making of the order in this case, it is necessary to repeat verbatim some of these misleading misconceptions. For example, learned counsel for Respondent replied thus:-

> *"A reading of paragraphs 12 to 14 of 1st Defendant's statement of case will leave the court in no doubt whatsoever that 1st Defendant only draws an inference from the phrase that the DDF is "appointed to assist the parties" and then suggests that the DDF was appointed pursuant to the provisions of rule 78 of C.I. 78. We disagree with 1st Defendant.*

Our submission is that, if therefore it is submitted that the DDF was required to, but he did not, as a Referee, execute his duties in accordance with the provisions of Order 28 of C.I. 47, 1st Defendant must in all candor resort to the provisions of Order 28 of C. I. 47 to deal with any complaint it seeks to address arising out of the execution by the Referee, of the task entrusted to him by the court.

A reading of rule 78 of the rules of the court will disclose that it is a power vested in the court to exercise suo motu. The power is not invoked by application from the parties. The rule therefore makes it clear that it is ***"Where the Court makes an order referring to a referee to or arbitrator for an opinion on a question arising out of a cause or matter before it, the court shall specify the question so referred."***

We submit that in the circumstances where the DDF's report is that of a referee's the 1st Defendant's application is nonetheless incompetent. The point made here is that, a referee's report being new evidence before the court, it lies solely within the province of this court to determine its probative value or otherwise. The Rules of this court do not then permit the parties to apply to challenge same.

It follows then that the application being a non-existing one and incompetent in law, must then be dismissed and same cannot be waived as an irregularity as wrongly urged on this court by 1st Defendant in its supplementary statement of case.

It is further our submission that, granted even that 1st Defendant took the view that there was a casus omissus in the rules of the court regarding the manner for dealing with a referee's report, then 1st Defendant had any of the three options set out in part F above.

The trite position of the law is that this court dispenses with justice in accordance with statute law, common law and the well-known practices of the courts." Emphasis

Learned counsel for the Respondent however concluded his response by urging on this court to refer to the provisions of Order 28, rule 4 of the High Court (Civil Procedure) Rules, 2004 C. I. 47.

ISSUES FOR DETERMINATION

1. What was the scope of the order made on 10th July 2019.
2. Whether the Applicants herein can challenge the report of the Deputy Director without the said report being tendered into evidence.
3. Whether the objection by the Respondent to the method used by the Applicants is legitimate.

ISSUE 1

In our respectful opinion, the order made by this court on the 10th of July 2019 admits of no controversy whatsoever.

The order as it stands speaks for itself. The Director of Finance was to assist the parties, to resolve the impasse that has been generated following both parties inability to agree on the method of calculating the interest rate charges arising from the review decision of this court.

In our understanding, whilst the Director of Finance has some expertise to offer the parties, he was nonetheless neither an Expert nor a Court appointed Referee in terms urged upon the Court by both parties.

This is because, the parties had flatly initially rejected the appointment of (PWC) as the Court Expert.

In our opinion, the way and manner the order of 10th July 2019 was crafted meant that this court wanted to **promote, encourage, and facilitate an amicable settlement of the impasse that has ensued in** respect of the review decision on interest rate calculations.

We are fortified in our opinion by the provisions of Section 72 (1) and (2) of the Courts Act, 1993, Act 459 as amended which provides as follows:-

> *72 (1) "Any court with civil jurisdiction and its officers* ***shall promote reconciliation, encourage and facilitate the settlement of dispute in an amicable manner between persons over whom the court has jurisdiction."***
>
> *(2) "When a civil suit or proceeding is pending****, any court with jurisdiction in that suit may promote reconciliation among the parties, and encourage and facilitate the amicable settlement of the suit or proceedings****." Emphasis*

The above statutory provision firmly supports the view we hold on the scope and effect of the order made by this court on 10th July 2019. Even though this court did not specifically refer to the Courts Act as referred to supra, the wording of the order meant clearly that the Director of Finance was neither the Court Expert nor the Referee that the parties thought he was.

ISSUE 2

In essence, the scope of the appointment of the Director of Finance made it quite imperative that he was to help the parties solve the impasse and this is akin to other alternative methods of resolving the dispute. This is what the provisions of Section 72 of the Courts Act, urges the courts with jurisdiction in such cases to promote.

Thus, the Director of Finance, cannot in any legal sense be said to be an Expert or a Referee in terms of the High Court, Civil (Procedure) Rules, 2005 C. I. 47 Order 28 thereof, or the provisions of the Evidence Act, 1973 NRCD 323. **In our opinion, the**

reference and reliance by learned counsel for the parties on the Rules of Procedure which regulate the scope of work of a court appointed Expert and or a Referee are irrelevant, inapplicable and immaterial.

In our considered opinion, the Director of Finance was to use his experience and expert knowledge to assist the parties negotiate a settlement. It must at this stage be emphasised that one of the cardinal principles of a negotiated settlement as we presume this to be is that the result of a negotiated settlement was not binding on the parties until it was accepted by both of them.

It was at the stage when both parties had accepted it that it becomes binding on the parties and can be enforced and no party can thereafter resile from it. Thus, it can firmly be stated that, a negotiated settlement was only binding on the parties if they had unequivocally accepted the terms of the decision arrived at or proposed. Anything short of the above will not be binding on the parties.

See the cases of ***Zogli and Another v Ganyo [1977] 1 GLR 287 and Ussher v Kpanyinli II [1989-90] 2 GLR 13.***

Under the circumstances, the Applicants herein were right in challenging the report of the Director of Finance.

ISSUE 3

Having challenged the said report, the Applicants must be understood to mean that they do not accept the work and report of the Director of Finance.

It is our considered view that having rejected the work of the Director, the parties must approach the court for the court to proceed with the resolution of the remaining issues. The said order of 10th July 2019 is therefore rescinded to pave the way for the resolution of the remaining issues.

It was the parties themselves who refused to abide the terms offered by PWC. There is an old adage that reads thus *"penny wise, pound foolish".* In otherwords the parties must be prepared to spend good money to seek better resources.

CONCLUSION

In our respectful opinion, the preliminary objection raised by learned counsel for the Respondent herein lacks substance and is accordingly dismissed. Having dealt in substance with the merits of the case as well in this rendition, we are of the opinion that, the Applicants can resile and reject the report of the Director of Finance and it is thus accordingly rejected.

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

ANIN YEBOAH
(CHIEF JUSTICE)

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

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

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