IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA, A.D.2013

CORAM: DR. DATE BAHJSC (PRESIDING)
ANIN-YEBOAH JSC

P. BAFFOE-BONNIE JSC

A. A. BENIN JSC

J. B. AKAMBA JSC

CIVIL APPEAL.
No J4/19/2013

26TH JULY, 2013

JCS INVESTMENT LTD **PLAINTIF/RESPONDENT /APPELLANT**

VRS.

ACTIVITY VENTURE FINANCE CO. LTD **DEFENDANT/APPELLANT /RESPONDENT**

JUDGMENT

DR. DATE-BAH JSC:

The plaintiff, whose business is the provision of private investment fund management, brought action on 7th October 2008 against the defendant on a fund management agreement between them which the plaintiff claimed the defendant had breached. Under the agreement, the plaintiff was to manage and invest such of the defendant's investment funds as were allocated to the plaintiff. The defendant, by a letter to the plaintiff dated 12th June 2008, purported to terminate this agreement without cause, citing clause 14.1.2 of the Agreement.

The plaintiff claimed that in the event of a termination of the agreement between the parties, the clause cited above provided for payment of the following:

i. *"the Fund Manager's quarterly fee for the immediate preceding quarter; and*
ii. *Balance of the Fund Manager's Annual Operating Expenses for the year of termination as approved in the Fund Manager's Annual Budget…"*

Relying on this provision, the plaintiff claimed, through the endorsement on its writ of summons: $180,000, together with interest on the amount from 12th June 2008 till date of final payment. Its statement of case indicated that the amount claimed was made up of the following:

i. "US$62,000 being the Plaintiff's quarterly fee for the immediate preceding quarter before the termination and

ii. US$118,000 being the balance of the Plaintiff's Annual Operating Expenses from 12th June 2008 to December 2008."

The defendant insisted that, on a true and proper interpretation of clause 14.1.2, the plaintiff was only entitled to the fund manager's fee of US $62,000 for the immediately preceding quarter. It resisted the claim for $118,000 by pleading that as at the date of the termination of the agreement, there was no balance of the Fund Manager's Annual Operating Expenses since the Plaintiff had not prepared and submitted the Fund Manager's Annual budget for approval.

The main issue in this case is thus whether the plaintiff is entitled to the claim of $118,000 which is contested by the defendant. During the trial, the plaintiff failed to lead evidence to prove an approval of an annual budget for its operating expenses. Because of this failure of the plaintiff's to prove with credible evidence the approval of an annual budget for its operating expenses, the Court of Appeal held that it was not entitled to the $118,000 that it had claimed. Marful-Sau JA said, on this issue (at p. 350 of the Record):

> "As things stand now from the record of appeal, there was no evidence to support the claim of $118,000 as constituting a balance of the Fund Manager's Operating Expenses. Indeed no such expenses were established by the Respondent. The learned trial judge seemed to have given in to Respondent's testimony that the operating expenses were part of the Manager's fees which was paid without a budget because it had been fixed and determined by Schedule 3 of the Agreement. The learned trial judge in evaluating the evidence on record concluded that DW1, Sampson Asumadu corroborated Respondent evidence on the claim for the $ 118.000. I have

examined the evidence of DW1 carefully and I found that DW1's testimony only corroborated the evidence that the Respondent did not submit a budget before the Fund Manager's fee was paid. From the record of appeal DW1 never corroborated that the Respondent submitted annual budget containing operating expenses which it was entitled to the balance thereof upon termination. Even though DW1 at page 174 of the record of appeal agreed that the operating expenses was captured in the management fees, his evidence generally at page 166 yo 167 indicated that the Appellant was to pay the operational expenses if a budget was submitted and approved and since no budget was submitted no operational expenses was paid."

The plaintiff, being dissatisfied with this position of the Court of Appeal, has appealed to this Court. The grounds of appeal on which it relies are as follows:

a. "The Court of Appeal erred when it held that the Respondent led no evidence either directly or indirectly to establish that there was an annual budget containing the annual operating expenses.
b. The Court of Appeal erred when it held that there was no evidence to support the claim of US$118,000.00 as constituting a balance of fund manager's operating expenses.
c. The Court of Appeal erred when it held that the trial judge wrongly deduced from the evidence that DW 1's testimony corroborated Respondent's evidence that it was entitled to the sum of US $118,000.00.
d. The Court of Appeal erred when it failed to find that the Respondent was entitled to operating expenses in the sum of US$118,000.00."

The plaintiff submitted to this Court, when arguing grounds (a), (b) and (d), that there was ample evidence on record to demonstrate that it was entitled to the sum claimed as the balance of operating expenses even though no annual budget was tendered in court. Its case was that the evaluation of the evidence on record showed that the operating expenses of the plaintiff formed part the Fund Manager's fee. The plaintiff had never been asked to account for which part of the Fund Manager's fee was used as operating expenses. Thus the plaintiff alone determined how much it used as its operating expenses without any questions from the defendant. The plaintiff further claimed that the evidence showed that by the course of dealing between the parties there had never been the need to tender an annual operating budget to substantiate a claim for operating expenses, despite the terms of the Agreement. It complained that the conclusion reached by the Court of Appeal would cause an absurd and unjust interpretation of the parties' contract under which the plaintiff would have been in a better position if the agreement had been terminated for cause, rather than without cause, as on the facts of this case.

We are not persuaded by the case put forward by the plaintiff. We have carefully scrutinized the record and have not found sufficient evidence to found what the plaintiff in effect claims to be a variation or waiver of the express terms of the contract. The plaintiff relied on the following testimony of PW1 in cross-examination (at p. 133 of the record):

> "Q. Now Patricia under the referred 14(1) to (5) you were supposed to present an annual budget for approval
>
> A. Yes my Lord but when we started …..

Q. No wait. Now did you present a budget, for which was approved by the Board of the Defendant's Company?

A. No my Lord. Because when we started we provided a 3-year annual budget. And then all the payments that we received, the subsequent years, Activity never requested for a budget. So they set the precedent that the fixed management fee was inclusive, however, we spent it. It was up to JCS. And so that was the assumption we took."

The subsequent behaviour of the parties is not necessarily a good guide to the interpretation of the text of the contract. We do not find that this testimony is a good basis for faulting the plain meaning interpretation put on clause 14.1.2 by the Court of Appeal. The plaintiff's arguments on grounds (a), (b) and (d) are accordingly dismissed.

The plaintiff's argument on the remaining ground of appeal was similar to that rejected in relation to the grounds already dealt with. It will be recalled that ground (c) of the appelllant's appeal was: "The Court of Appeal erred when it held that the trial judge wrongly deduced from the evidence that DW 1's testimony corroborated Respondent's evidence that it was entitled to the sum of US $118,000.00." The appellant contended that the terms of the agreement clearly showed that the appellant was solely responsible for certain operational expenses, while the respondent was solely responsible for others. Its submission was that operational expenses came from the Fund Manager's fee paid to the appellant by the respondent. In paragraph 51 of its Statement of Case, it submits that:

> "That the Appellant did not submit an annual budget for operating expenses to the Respondent did not mean that the Appellant did not incur any operational expenses. These operational costs as enumerated above were borne by the Appellant. The Appellant did not submit an annual budget in relation to these expenses since by the terms of the Agreement and by the course of dealing between the parties these were to be borne by the Appellant out of the Fund Manager's fee."

The Court of Appeal had stated in its judgment as follows(at pp 350-1):

> "As things stand now from the record of appeal, there was no evidence to support the claim of $118,000.00 as constituting a balance of the Fund Manager's Operating Expenses. Indeed no such expenses were established by the Respondent. The learned trial Judge seemed to have given in to Respondent's testimony that the operating expenses were part of the Manager's fees which was paid without a budget because it has been fixed and determined by Schedule 3 of the Agreement. The learned trial Judge in evaluating the evidence on record concluded that DW1, Sampson Asumadu corroborated Respondent evidence on the claim for the $118,000.00. I have examined the evidence of DWI carefully and I found that DWI's testimony only corroborated the evidence that the Respondent did not summit a budget before the Fund Manager's fee was paid. From the record of appeal DWI never corroborated that the Respondent submitted annual budget containing operating expenses which it was entitled to the balance thereof upon the termination. Even though DWI at page 174 of the record of appeal

agreed that the operating expenses was captured in the management fees, his evidence generally at page 166 to 167 indicated that the Appellant was to pay the operational expenses if a budget was submitted and approved and since no budget was submitted no operational expenses was paid.

The following evidence of DW1 under cross-examination at pages 166 and 167 is clear on the finding above:-

> "Q. Now, the Fund Management Fee includes her operational expenses, that is the cost of running the Fund, that is operational expenses, is it not?
>
> A. My Lord I cannot say yes, My Lord. And the short cut is that the Management Fee is a predetermined fee which is already determined. So it is given to the Fund Manager for the services.
>
> Q. Now do you pay the Fund Manager's operational expenses?
>
> A. My Lord we only pay if there is a budget submitted and approved by the Board.
>
> Counsel for Plaintiff: Come again
>
> Witness: My Lord I am saying if there is any operating expenses to be paid, then it should be submitted to the Board and approved and is paid.
>
> Q. And in 2007, did you pay any operational expenses?
>
> A. My Lord we paid monthly fees. Not operational expenses".

We find that this evidence supports the conclusion reached by the Court of Appeal, based on the plain meaning of the relevant contractual provision, and its decision is unassailable. Accordingly, on this ground also, the appeal is dismissed. The learned trial judge's finding to the contrary was an aberration and was rightly reversed by the Court of Appeal.

In sum, we are of the view that the Court of Appeal's judgment is flawless and it is hereby affirmed.

(SGD) **DR. S. K. DATE BAH**
JUSTICE OF THE SUPREME COURT

(SGD) **ANIN YEBOAH**
JUSTICE OF THE SUPREME COURT

(SGD) **P. BAFFOE BONNIE**
JUSTICE OF THE SUPREME COURT

(SGD) **A. A. BENIN**
JUSTICE OF THE SUPREME COURT

(SGD) **J. B. AKAMBA**
JUSTICE OF THE SUPREME COURT

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