IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, A.D.2013

CORAM: DR. S.K. DATE-BAH JSC (PRESIDING)
ANIN-YEBOAH JSC
P.BAFFOE-BONNIE JSC
A. BENIN JSC
J.B. AKAMBA JSC

CIVIL APPEAL.
No J4/22/2013

26TH JULY, 2013

ROYAL BENEFICIARIES ASSOCIATION - PLAINTIFF/APPELLANT /RESPONDENT

VRS.

1. MRS. VIVIAN MENSAH
2. ALICE BADU
3. VIVIAN OWUO
4. DAVID B. MENSAH
- DEFENDANTS/ RESPONDENTS/ APPELLANTS

JUDGMENT

ANIN YEBOAH JSC:

This is an appeal from the judgment of the Court of Appeal dated the 13/05/2010. The facts of this case appear not to be in any serious controversy. The Plaintiff/Respondent/Appellant herein, who for the sake of brevity shall be referred to in these proceedings as the Appellant, commenced an action at the High Court (Commercial Division) Accra against the Defendants/Appellants/ Respondents herein who shall be referred to as the Respondents henceforth.

The claim endorsed on the writ of summons was as follows:-

1. Repayment of an amount of 210 million cedis representing 14 weeks of 15 million cedis still unpaid.

2. Interest on the above amount at the current bank interest rate, from the 21st of August 2006, to the date of final payment.

3. Any other reliefs that may deem fit by this honourable court.

It should be noted that the main relief is not all that clear whether the action falls within contract or tort if read in isolation. The defect, however, was cured in our view by the statement of claim which was filed together with the writ of summons. Even in the statement of claim there was no averment to the effect that the Respondent was a registered association carrying out business which it was required to do under the law incorporating it. Since this serious omission was ignored by the Appellant no issue was joined on it up to this stage of the proceedings.

The Respondent pleaded that it borrows money from commercial banks to offer financial assistance to its members and in one such transaction which is the subject of this appeal it offered financial assistance to the first appellant herein whereby the second, third and fourth appellants who are also members of the Association stood as guarantors for the first appellant. It was pleaded as part of the Respondents claim that financial assistance of ¢500,000,000 was offered to the 1st Appellant to repay same in fifty - two weekly instalments of 15 million

cedis. As the first appellant defaulted in paying for fourteen weeks, the Respondent resorted to legal action.

The appellants filed a common statement of defence and jointly counterclaimed against the respondent to declare the transaction as illegal and running contrary to the Moneylenders Ordinance, Cap 176 and prayed the court to set aside the transaction and re-open the whole transaction in respect of the interest exacted on the facility. It was however admitted in the statement of defence that the first appellant received the amount of ¢500 million from Respondent Association and that the other three appellants stood as guarantors for the facility. The appellants disputed outstanding balance and pleaded, as stated earlier, that the whole transaction was illegal and offended the *Moneylenders Ordinance, Cap 176* and the *Loans Recovery Ordinance, Cap 175 (1951 Rev).*

As expected, few issues were set down by the court at the application for directions stage. At the trial High Court, the respondents through its President, one Mrs. Joana Ewurabena Ocran Agbeve, gave evidence to establish that all the defendants were members of the Association (which is the Respondent herein). She initially repeated all the allegations pleaded in the statement of claim but denied that out of the ¢500,000,000.00 which was allegedly advanced to the first appellant herein, ¢15,000,000 was deducted as processing fees, ¢5,000,000 was for legal fees and ¢15,000,000 was also deducted as collateral fee. She contended that the interest on the financial assistance to the first appellant was reasonable and maintained that the Respondent never engaged in any money lending business whatsoever. The Respondents as plaintiffs called no further evidence and closed their case.

On record, the first and second appellants gave evidence and called one Mr. Anthony Ofori Badu who was at the time material to these proceedings the head of the Support Service Division of Ghana Commercial Bank Limited as a witness. The evidence of the first appellant established that Philomena introduced her to the President of the Respondents' Association, one Ewurabena Ocran as someone who could assist her. Upon ascertaining where the first appellant had her shop she promised to assist her and eventually gave her the amount of money, that is

¢500,000,000 she had requested less the processing fee of ¢5,000,000, legal fee of ¢15,000,000.00 and ¢15,000,000.00 as collateral.

The terms and conditions were that, the first appellant was to pay ¢15,000,000.00 per week for fifty-two weeks. This was evidenced by Exhibit "A" tendered by the Respondents.

The evidence established that after repayment of the facility for thirty-eight weeks the first appellant defaulted which culminated in the legal action for the outstanding balance which amounted to ¢210,000,000 endorsed on the writ of summons.

At the trial court, the learned judge found that most of the issues had been resolved from the evidence led in view of the documentary evidence on record. The learned judge resorted to resolving the critical issue of whether or not the Respondent was a money lender under section 29 of the Moneylender Act, 1941, known as the Moneylender Ordinance (Cap 175).

Reliance was placed on virtually all the notable cases like ***Yeboah v Bofour [1971] 2 GLR 199 CA Ayiwa v Badu [1963] I GLR 86 SC, Litchfied v Dreams [1906] I KB 58 and Hong v Choong Fah Rubber Manufacturing [1962] AC 208*** to assist the learned trial Judge to conclude that based on the evidence and the law the Respondents' company was carrying out the business of money lending even though it was incorporated as a Company Limited by guarantee under the Company's Code, Act 179 of 1963.

The learned trial judge in sum held that:

> ***"The transaction is therefore illegal, null and void and same is unenforceable. I will accordingly dismiss the plaintiff action.I will therefore enter judgment in favour of the 1st defendant in terms of relief (a) and (b) of her counterclaim."***

The respondent herein felt aggrieved and lodged an appeal to the Court of Appeal, Accra. On the 13/05/2010 the Court of Appeal allowed the appeal and proceeded to also dismiss the counterclaim in its entirety. It is from that judgment that this appeal is before us.

The appellant has appealed on several grounds to seek the reversal of the judgment of the Court of Appeal. These grounds are as follows:

a. The judgment is against the weight of evidence.

b. The learned justices of the Court of Appeal erred and misdirected themselves when they held that the Plaintiff is registered as a Company Limited by guarantee and not a business venture or involved in banking of any kind could grant loans and charge interest.

c. The Court erred when it held that that the plaintiff is not a moneylender when there is abundance evidence on the record that plaintiff lends money to people and charges interest.

d. The learned justices erred and misdirected themselves as to what is *"proof in law"* when they held that the plaintiff's witnesses by repeating and/or parroting that they made expenses without giving details and particulars of the so called expenses constituted proof in law.

e. The trial court did not give adequate consideration to the Defendants' case thereby held that the interest charged on the loan is not harsh, excessive and unconscionable.

f. The Court erred in making orders in favour of plaintiff a Company Limited by guarantee in the face of clear evidence that the plaintiff is carrying on business for profit in breach of the provisions of the Companies Code, 1963 (Act 179).

Learned counsel for the appellants argued grounds (a) (b) and (c) together. According to counsel, under section 1 of Moneylenders Act Cap 179, once the defendants established by evidence that the consideration for a higher sum being repaid, the plaintiff is clearly caught by the said provisions. Reliance was placed on one of the local case of ***Dua v Afriyie [1971]1 GLR 260*** to support the above statutory provision. It is interesting to note that at the trial High Court the learned judge had found as a fact that the Plaintiff was engaged in business of

money lending. This primary finding of fact was made after evaluating the entire evidence on record as he was enjoined by basic rules of law to do.

On appeal the learned judges formed a contrary view of the findings. In professing to give reasons for doing so the reasons advanced in the judgment were most unconvincing in law. This was what the Court said:

> ***"It also appeared to me that the evidence of the high rate of the default in repayment by beneficiaries as evidence by the numerous cases against them swayed the trial court to speculate that the appellant was engaged in the business of money lending. The inability of beneficiaries to repay the monies given them could be due to the several factors including mismanagement, misapplication and bad business none of which has been proved in this case. And it is common knowledge that Commercial banks whose operations are controlled by the Central Bank also experience default in repayment of loans to customers. We are unable to accept that conclusion reached by the trial judge because there is no empirical evidence to support it."***

The above was the pronouncement by the Court of Appeal seeking to depart from the findings of the trial Judge who had on the evidence found as a fact that given the rate of interest or the amount granted it was clear that the plaintiff was engaged in money lending transaction. No convincing reasons whatsoever were given by the learned justices of the Court of Appeal in arriving at a different conclusion on the primary findings of fact that the plaintiff who was engaged in money lending transaction.

It has never been the proposition of law governing appeals in this country, which is by way of rehearing, that an appellate court cannot depart from the findings of facts made by the trial court. If however, the appellate court is departing from the findings of facts made by the trial court it behoves the appellate court to advance convincing reasons for doing so. The recent case on this point is that of

Agyenim-Boateng v Ofori & Yeboah [2010] SCGLR 861 in which this court made it clear as follows:

> ***"What the Court of Appeal set aside in the case of Fofie v Zanyo (supra) were not inferences drawn from facts but the very findings or specific facts of the trial judge. The Supreme Court, therefore, in that case ruled that since the conclusions of the trial court were supported by the evidence, most of which were supplied by the plaintiff and his witnesses, there was no lawful warrant for the Court of Appeal to differ from the findings of the trial court"***

What the Court of Appeal in this case did was to set aside the primary findings made by the learned trial judge or the incontrovertible evidence on record out of which he found against the plaintiff that it was doing business of money lending. We am of the opinion that the Court of Appeal was in error in doing so based on the *Agyenim-Boateng's* case (supra).

From the findings made, the learned trial judge inferred that the Plaintiff on the evidence was carrying out money lending business after he considered the amount of money which the respondent advanced as a loan to the 1st appellant, the interest which the Ghana Commercial Bank charged the respondent and the interest which the respondent had charged the appellant. These findings were made after careful perusal of Exhibits 1 and 2 which established clearly that the respondent took three billion at the interest rate of twenty-seven percent per annum. The learned judge considered the amount received by the appellant herein as ¢425,000,000.00 repayable at ¢15,000,000 a week for fifty two weeks, which on the pleadings were admitted and called for no further evidence. See ***Kusi & Kusi v Bonsu [2010] SCGLR 60***.

By simple mathematical calculation, the appellants would have paid ¢750,000,000 for the fifty-two weeks which obviously was excessive under the circumstances where a Company Limited by guarantee is offering "financial assistance" to its

members. Notwithstanding this, the Court of Appeal held inter alia that the Plaintiff was exempted under section 29 (c) of the Money lenders Act.

On these grounds we are of the respectful view that the Court of Appeal was clearly in error in not advancing compelling reasons from departing from the findings made by the trial judge which from the pleadings and the documentary evidence before the court, the respondent was clearly lending out money and raking in excessive interests therefrom. The above reasons could dispose of grounds (a) (b) and (c) which were argued together.

In arguing the other grounds learned counsel for the appellant referred us to the more recent case on the subject which is ***Mensah v Ahenfie Cloth Sellers Association [2010] SCGLR*** decided on 21/07/2010 some couple of months after the Court of Appeal had given its decision in this appeal. It must be pointed out that the facts of the Mensah case falls on all fours with this present one under consideration. In that case reference was made to the decision of the Court of Appeal but it was criticised by this court. This court found as a fact as follows:-

> ***"From the facts, it cannot be denied that the business of the association, qua association was to raise loans and lend it out to its members. The core or main business of the association was to raise money and lend it out to its members."***

The Supreme Court in the *Mensah case* was of the view that the interest rate which was fixed at fifty-two percent was clearly excessive and harsh and faulted the two lower courts for holding otherwise even if Ghana Commercial Bank Limited had granted the association a loan with interest rate fixed at 29% per annum.

It must be noted that all the statutory provisions governing transactions in the subject were reviewed by this court in that case. For the avoidance of confusion of thought in such transactions which occur on regular basis which find their way to our courts, this court gave guidelines to assist all courts to arrive at a decision

based on the relevant and applicable statutes and also subjected all the leading cases, local and foreign to review. Unfortunately, as said above, this appeal which was decided by the Court of Appeal was earlier in time and did not have the benefit of the guidelines deducible from the decided cases and the statutes set out in the Mensah case.

It was made clear that it was for the borrower, that is the appellant herein, to establish that the respondent herein, was engaged in money lending business and from the evidence on the record in this case, the respondent was clearly into that business. Having set aside the findings of facts made by the learned judges of the Court of Appeal and restoring the primary findings of facts made by the trial judge the onus of establishing that the respondent was engaged in money lending transaction was discharged by the appellant.

The evidence on record also established beyond doubt that the respondent charged excessive interest on the loans granted to the appellants and customers under the guise of friendly assistance and was therefore squarely caught by the revised Money Lenders Act, 1941 (cap 176).

Thirdly, having presumed that the respondent was carrying out the business of moneylending it had to rebut the presumption. The evidence shows that the respondent was unable to rebut the presumption by the evidence led. The fact that the money was meant for financial assistance (as stated earlier) is no evidence of rebuttal given all the circumstances of the case. The facts of this case pointed to only one conclusion that the excessive interest charged on the 'financial assistance' was not so but was money lending transaction.

It was therefore the duty of the respondent to establish by evidence that the company was exempted under section 29 of the Money Lenders Act, 1941 (cap 127).

From the evidence in the exhibits tendered and the admission from the respondent could not place the respondent within the exemptions covered by the section under consideration. A company incorporated under the Companies Act

(Act 179) to carry out business as required by the regulations as a business limited by guarantee has no business soliciting for loans from Commercial Banks at the interest rate of 29% and lending same to its members at over 50%. This is clearly excessive for any Company Limited by guarantee as a non-profit making company by virtue of its incorporation. The respondent from the evidence failed to bring itself within the exemption that it was not carrying out business of money lending.

From the foregoing it does appear that the whole transaction was clearly unconscionable under the circumstances. This court like the other courts below is empowered by section II of the moneylenders Act 1941 (Cap 176) and section 1 of the Loans Recovery Act 1918 (Cap 175) to re-open the transaction giving rise to this action.

It is apparent that the appellant had paid fifteen million cedis for every week and had indeed paid for thirty eight weeks out of the fifty-two weeks which was agreed as the terms of the contract. It must be pointed out that by simple calculation of the outstanding balance the appellant had paid ¢570,000,000 and was left with only ¢210,000,000.00 to be paid to the respondent.

Given the amount of money paid by the appellant to the respondent, a so-called Company Limited by guarantee, we are of the view that the whole transaction which is obviously unconscionable should be re-opened for the court to impose its terms favourable under the circumstances. From the facts we are of the opinion that the payment of the amount of the ¢570,000,000 was enough given the fact that the transaction was against the objects of incorporation of the respondent's company.

The appeal is therefore allowed and relief (c) of the counterclaim which was dismissed by the Court of Appeal is hereby granted.

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

(SGD) DR. S. K. DATE BAH

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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