

IN THE HIGH COURT OF SIERRA LEONE(FAST TRACK COMMERCIAL AND ADMIRALTY DIVISION)IN THE MATTER OF THE COMPANIES ACT OF 2009ANDIN THE MATTER OF THE BORROWERS AND LENDERS ACT 2019ANDIN THE MATTER OF A DEED OF DEBENTURE BETWEEN LEBANO PLAST LIMITED AND FBN (SL) LIMITED

BETWEEN:

FBN BANK (SL) LIMITED

- PLAINTIFF

AND

LEBANO PLAST LIMITED

- DEFENDANT

Counsel:

D. D. Baah (Ms) and J. Gabiddon (Ms) for the Plaintiff

W. Kamara (Ms) for the Defendant

JUDGEMENT DELIVERED THIS 19TH DAY OF JULY 2022 BY HONOURABLE MRS. JUSTICE JAMESINA E. L. KING J.A**Introduction**

1. The Plaintiff by an Originating Summons dated 6th May 2021 supported by the affidavit of Augusta Y. Kamara sworn to on 6th May 2021 together with the exhibits attached thereto is seeking the following orders:
 1. That the Defendant do immediately pay all monies due and owing to the Plaintiff under the covenants in a Deed of Debenture dated 16th day of April 2019 in which the Defendant is the Borrower for the repayment of the principal sum and interest totaling Le464, 470, 635/84 (Four Hundred and Sixty Four Million Four Hundred and Seventy Thousand Six Hundred and Thirty Five Leones and Eighty Four Cents) as at 19th February 2021 and payment in the meantime of

interest at the rate of 21.21% per annum, based on the following documents:

- (i) The Deed of Debenture dated 16th day of April 2019 registered as No. 52/2019 at page 13 in Volume 98 of the Record Books of Mortgages in the office of the Registrar-General in Freetown
 - (ii) Registered Charge No. SL131118LEBAN1801317 dated 15th day of May 2019 in the Charges Register kept with the Corporate Affairs Commission and registered as number 20-00000388 – 888 dated 9th November 2020 at the Sierra Leone Collateral Registry.
2. In the alternative an Order that the said Debenture be enforced and that the Defendant delivers up to the Plaintiff and the Plaintiff (through an appointed Receiver under the Debenture) takes possession of, hold and/or dispose of the assets charged thereunder and that the Plaintiff exercises all of its rights and powers of a holder of a floating charge under the said Debenture.
 3. That this Honourable Judge grants any further or other relief that may be necessary to this action.
 4. That the costs of this Application be provided for.

Background

2. According to affidavit evidence of Augusta Y. Kamara, the Relational Manager of the Plaintiff Bank, the Bank offered an overdraft facility to the Defendant which was accepted evidenced in the Facility Agreement dated 25th January 2019 (Exhibit AK1).
3. By a Deed of Debenture dated 16th April 2019 (duly registered as No.52/2019 at page 13 in Volume 98 of the Record Books of Mortgages kept in the office of the Registrar-General in Freetown, duly registered as Charge No. SL 131118LEBAN1801317 dated 15th day of May 2019 in the Charges Register kept with the Corporate Affairs Commission; and duly registered as number 20-00000388-888 dated 9th November 2020, Sierra Leone Collateral registry), the Defendant Company created in favour of the Plaintiff Bank, a first ranking fixed charge on specified assets listed in the said Debenture and a floating charge on the undertaking and assets (present and future) of the Defendant Company.

4. The said Debenture, Registration Certificate of Charge and Registration of Notice of Charge are Exhibits AK2, AK3 and AK4 respectively. The said Debenture contained provisions of enforcement in the event of default by the Borrower and several events of default by the Defendant Company have occurred since the Defendant Company executed the said Debenture, and it has defaulted in the repayment of the overdraft facility and ceased paying money into its account to service the said facility.
5. In June 2020 the Plaintiff's inspection and valuation of specified assets charged under the said Debenture revealed that some of the assets were missing, putting the security in jeopardy and the Plaintiff Solicitors duly informed the Defendant's Solicitors about the state of the charged assets. (19th June 2020 AK6)
6. Letters were written to the Defendant by the Plaintiff Bank requesting it to regularize its debt position (18th September 2019 AK5), to liquidate its indebtedness, provide information to restructure the banking facility (28th October 2020 AK7) but the Defendant has not cooperated and its promise to further liquidate through rental income has also now failed. The latest demand letter addressed to the Defendant from the Plaintiff Solicitors is dated 19th February 2021 marked AK8.
7. The Defendant is in possession of the said Charged Assets and the deponent maintains that they will be in jeopardy if not delivered up to the Plaintiff. The Defendant Company is in default of payment of the principal sum of and interest and the total debt owed by the Defendant amounts to Le464,470,635/84 as at 19th February 2021 and also incurring interest at the rate of 21.21% per annum. See statement of account marked AK9.

The law

8. I will refer to the provisions of the law referred to and relied on by Counsel for the Plaintiff. Firstly, Halsbury's Laws of England Third Edition Volume 6 on Companies at paragraph 466 under the rubric "Form of Debenture" which states as follows

"A debenture, although it need not be, is generally issued under the company's seal; but it is doubtful whether the statutory right of a mortgagee to see where the mortgage is by deed applies to a series of

debentures of a company. As a rule, a debenture contains a covenant to pay, generally at some named place, such as the company's office, and this covenant is on most cases accompanied by some charge or security, in which case the instrument is usually called a "mortgage debenture". Debenture sometimes contain a fixed charge, and usually contain a charge by way of floating security upon the property and undertaking of the company, including, as a rule its uncalled capital."

9. I will also refer to Section 142 of the Companies Act No. 5 of 2009 in dealing with charges created under a Debenture which states:

"A company may borrow money for the purpose of its business or objects and may mortgage or charge its undertaking, property and uncalled capital, or any part thereof, and issue debentures, debenture stock and other securities whether outright or as security for any debt, liability or obligation of the company or of any third party."

10. Section 145(2) & (3) of the Companies Act also state:

"Debentures may be secured by a fixed charge on certain of the company's property or a floating charge over the whole or a specified part of the company's undertaking and assets, or by both fixed charge on certain property and floating charge.

A charge securing debentures shall become enforceable on the occurrence of the events specified in the debentures or the deeds securing the debenture."

11. Section 63(1) of the Borrowers and Lenders Act 2019 states as follows:

"63(1) After default, a borrower and a lender are entitled to exercise-

- (a) any right under the provisions of this part; and*
- (b) any other right provided in the security agreement or any other law, except to the extent if it is inconsistent with the provisions of this Act.*

12. In addition to the above, section 2 of the Borrowers and Lenders Act gives the lender the discretion to upon default of the borrower, appoint a receiver or receiver and manager, apply to the court for the appointment of a receiver and manager to take possession of and protect the property, collect the rents

and profits derived from the property and enforce the security interest on behalf of the lender. Counsel has also referred the Court to section 336 of the Companies Act on duties, powers of receivers and managers appointed.

Decision and Conclusion

13. This Court has considered the written submission of Counsel for the Plaintiff dated 6th May 2021 as well as oral submission made. The Defendant's Counsel did not make submissions to the Court on behalf of the Defendant. There is in the court file a Notice of Motion dated 31st May 2022 by the Defendant's Solicitors seeking an order declaring that Halloway & Partners/Winstina O. Kamara have ceased to be the Solicitors acting for the Defendant in this matter. This application in the said Notice of Motion was never made and it is hereby struck out. The said Solicitors continue to be on record for the Defendant and requisite notices of the hearing were served on them and adjournments were taken to give them an opportunity to respond to the Originating Summons but they failed to do so. There are affidavits of service in respect of service of notice of hearing on the Defendant's Solicitors.
14. Having regard to the evidence as presented by the documents exhibited, this Court finds that a valid contract existed between the parties. The Defendant on 25th January 2019 accepted and signed the credit facility of the Plaintiff on the terms and conditions therein stated. Both parties executed a registered debenture dated 16th April 2019 in favour of the Plaintiff registered in the Book of Mortgages in the Office of the Registrar-General as a charge over all fixed assets, plants machines and equipment listed in the schedule thereto as security for the credit facility granted in the sum of Le500,000,000. This arrangement was duly registered with the Registrar of Companies and the Sierra Leone Collateral Registry.
15. I note clauses 9 – 11 of the said Debenture which deals with enforcement of security, set off and receiver. The said Debenture contained provisions to the effect that the Debenture is immediately enforceable at any time after the occurrence of an event of default and in the event of a breach by the Borrower of any of its obligations under the Facility agreement.
16. Paragraphs 5 - 11 of the affidavit in support of the application lists out the several events of defaults that have occurred, key of which is that the

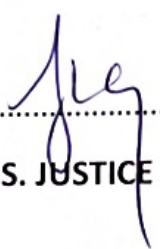
Defendant has defaulted in the repayment of the overdraft facility notwithstanding several demands made by the Plaintiff and their Solicitors. The overdraft facility provides for interest at the rate of 21.21% per annum. The Defendant has not heeded the several demands for payment and notifications about its default in breach of its obligations.

17. The Plaintiff has therefore satisfied this Court on a balance of probabilities that it is entitled to immediate payment of the sum of Le464,470,635/84 due and owing to the Plaintiff as at 19th February 2021, interest thereon at the rate of 21.21% per annum from the said date until payment and costs.
18. In the premises, I therefore enter judgment in favour of the Plaintiff and make the following orders:

1. That the Defendant do immediately pay all monies due and owing to the Plaintiff under the covenants in a Deed of Debenture dated 16th day of April 2019 the principal sum and interest totaling Le464, 470, 635/84 (Four Hundred and Sixty-Four Million Four Hundred and Seventy Thousand Six Hundred and Thirty-Five Leones and Eighty-Four Cents) as at 19th February 2021 and interest thereon at the rate of 21.21% per annum until payment.

2. That should the Defendant default in payment of the sums in Order 1 above within 7 days of this order, the Defendant shall immediately deliver up to the Plaintiff and the Plaintiff (through an appointed Receiver under the Debenture) shall take possession of, hold and/or dispose of the assets charged thereunder and the Plaintiff shall exercise all of its rights and powers of a holder of a floating charge under the said Debenture.

3. Costs of the action awarded to the Plaintiff in the sum of Le15,000,000.


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HON. MRS. JUSTICE JAMESINA E. L. KING J.A.