THE COMMUNITY COURT OF JUSTICE OF THE

ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

In the Matter of

ECOWAS BANK FOR INVESTMENT AND DEVELOPMENT v. CROSS RIVER STATE

Application No: ECW/CCJ/APP/14/19 Judgment NO. ECW/CCJ/JUD/01/21

JUDGMENT

ABUJA

5TH FEBRUARY, 2021

IN THE COMMUNITY COURT OF JUSTICE OF

SUIT NO: ECW/CCJ/APP/14/19

JUDGMENT NO. ECW/CCJ/JUD/01/21

ECOWAS BANK FOR INVESTMENT AND DEVELOPMENT .... APPLICANT

AND

CROSS RIVER STATE .... RESPONDENT

COMPOSITION OF THE COURT:

Hon. Justice Edward Amoako **ASANTE** - Presiding/Judge Rapporteur

Hon. Justice Gberi-Be **OUATARRA** - Member

Hon. Justice Januaria T. Silva Moreira **COSTA** - Member

ASSISTED BY:

Mr. Athanase **ATANNON** - Deputy Chief Registrar

REPRESENTATION OF PARTIES:

Counsel for the Applicant:

Chief B.C. **IGWILO,** (SAN)

Hammed **OGUNBIYA**, Esq.

T.G. **OKECHUKWU,** Esq.

D.C. **OBALUM,** Esq.

INDEMNITY PARTNERS

Counsel for the Respondent:

Mr. Greg **OKEM**

Director, Civil Litigation

Ministry of Justice, Cross River State- Calabar

Substituted for:

Tawo E. **TAWO,** (SAN)

Ahmed H. **IBRAHIM**, Esq.

I. JUDGMENT:

1. This is the judgment of the Court read virtually in open court pursuant to Article 8(1) of the Practice Directions on Electronic Case Management and Virtual Court Sessions, 2020.

II. DESCRIPTION OF THE PARTIES:

2. The Applicant, ECOWAS Bank for Investment and Development ("EBID") is a financial institution and an arm of the Economic Community of West Africa States (ECOWAS). It carries on business of banking from its head office, 128 Boulevard du 13 Janvier, BP: 2704 Lome, Togo, with the primary object of promoting investment, economic development and entrepreneurial activity in the sub-Region.

3. The Respondent is the Government of Cross River State of the Federal Republic of Nigeria created under the 1999 Constitution of the Federal Republic of Nigeria (as amended). It conceived a mixed use business and resort development known as TINAPA, located in Calabar, the Cross River State Capital, near the Calabar Free Trade Zone ("the TINAPA") and approached the Plaintiffs for facility to part finance the project.

III. INTRODUCTION:

4. The subject matter of the suit is recovery of debt owed the Applicant by the Respondent which it has refused and or neglected to pay despite several demands. The facility extended to the Respondent by the Applicant is shareholders' funds needed by the Applicant for critical intervention for development of the ECOWAS sub-region.

IV. PROCEDURE BEFORE THE COURT:

5. The Applicant's initiating application dated 2nd April, 2019 was served on the Respondent on the 8th April, 2019. Having defaulted in filing her response on time, the Respondent on the 29th July, 2019, filed Application for Extension of Time to file defence together with the defence and same were served on the Applicant on the 8th August, 2019.

6. On the 7th February, 2019, the Applicant filed a reply to the defence of the Respondent and same was served on the Respondent on the 12th February, 2019. The Applicant on the 20th March, 2020 filed Application for leave to adduce/present oral evidence which was served on the Respondent on the 23rd March, 2020.

7. On the 10th July, 2020, the Respondent filed an Application for leave to amend her defence together with the Amended Defence and both were served on the Applicant on the same 10th July, 2020.

8. On 29th September, 2020, evidence of the Applicant's witness, Onagunju Ashimolowo was filed and served on the same date on the Respondent. The

Applicant's Final Written Submissions consequent to the amended statement of defence by the Respondent was filed on the 20th November, 2020.

9. The final case hearing was on the 30th November, 2020 through virtual court hearing where the parties relied on their processes already filed and made further submissions in support of their respective cases before the case was adjourned for judgment.

V. APPLICANT'S CASE:

a. Applicant's summary of facts:

10. The Applicant is a banking institution since December 1999 as a holding company with two specialized subsidiaries, namely; ECOWAS Regional Development Fund ERDF for Financing Public Sector; and ECOWAS Regional Investment Bank ERIB) for financing the private Sector. The Applicant became a single entity, styled as EBID by subsuming ERDF and ERIB pursuant to the Decision of the 13th Session of the ECOWAS Authority of Heads of State and Government dated 14th June, 2006, authorizing the amalgamation of the two subsidiaries.

11. According to the Applicant, by virtue of a Loan Agreement in writing dated 20th May, 2005 between the Applicant (per its hitherto subsidiary, ERDF) and the Respondent acting through her Governor at the material time Mr. Donald Duke, ERDF granted a loan facility in various convertible currencies in an amount of Six Million Five Hundred and Twenty Five Thousand Three Hundred and Seventy One (UA6,525,371) Units of

Account equivalent to Ten Million United States Dollars to the Respondent, at her request.

12. The purpose of the loan was to part finance the TINAPA Business Resort, Cross River State, constructed by Julius Berger ("JB") as main infrastructure contractor whose invoices, the Applicant settled at the request or orders of the Respondent.

13. The duration of the loan as stipulated under Section 3.01 of the Loan Agreement was seven (7) years after a grace period of two (2) years, commencing from the date of the execution of the Agreement and was to be fully liquidated in fourteen (14) equal and semi-equal instalments with a default clause to the effect that in case of failure to honour any of the agreed repayment schedule, the Applicant was free to demand for the repayment of both the principal sum and interest from the Respondent.

14. Per Section 3.02 of the Agreement, sub titled "*Payment of Interest*" and Section 3.03, sub titled "*Payment of EBID Commission*" the Respondent was obliged to pay interest at the rate of (6.5%) percent per annum on the principal amount of the loan disbursed and outstanding from time to time, and also pay the Plaintiff commission at the rate of one percent (1%) per annum on the principal amount of the loan disbursed and outstanding from time to time, notwithstanding the grace period.

15. It was also the agreement of the parties that all fees and out of pocket expenses, including loan document processing fee, insurance premium, tax obligations, enforcement of security and recovery of the facility in the

event of default and other expenses incurred towards the completion of the facility shall be for the Respondent's account.

16. The Applicant further avers that as part of the compulsory mandate provided for by the clause tagged *"Guarantee"* in the loan agreement, the Defendant covenanted to give an Irrevocable Standing Payment Order to the Accountant-General of the Federation of Nigeria to the satisfaction of the Plaintiff in accordance with the Plaintiff's loan repayment schedule but the Defendant failed and or neglected to do so before disbursement of the facility.

17. It is the case of the Applicant that in total disregard to the terms of the contract, the undertakings made by the Respondent and in violation of the express terms and conditions upon which the loan facility was granted, the Respondent has since the grant consistently and persistently failed, refused and or neglected to fulfil her obligations in the loan agreement by not repaying both the principal sum and the interest as was mutually agreed upon.

18. According to the Applicant, when the Respondent defaulted in the repayment of the loan, several in-house efforts, including remind notices, request for payment, meetings and visits to the Respondent's seat of government at Calabar were made on the Respondent to compel her to settle her outstanding indebtedness to the Applicant but to no avail. The Applicant's correspondences commencing from 3rd of July, 2015 to the 13th of July, 2017 and numbering eight (8) in number have all been pleaded and tendered into evidence.

19. When all the internal efforts of the Applicant failed to yield the needed results, and upon the failure, refusal and or neglect by the Respondent to meet their repayment obligation to the Applicant, the Applicant's external solicitors, Indemnity Partners, were instructed to pursue the recovery of the indebtedness. In compliance with the said instructions, Messrs Indemnity Partners; by several letters demanded of the Respondent, immediate liquidation of its indebtedness of $6,999.679 (USD) to the Applicant which the Respondent neglected and or refused to settle. The Applicant's Solicitors letters to the Respondent dated 5th October, 2017 and 18th January, 2018 respectively were both tendered into evidence.

20. As at the 31st August 2018, the sum outstanding as total arrears against the Respondent was a sum of $6,445,846.00 (USD) only representing the current situation of TINAPA Free Zone Project Loan in the Applicant's book.

b. Applicant's pleas in law:

21. The Applicant pleaded the Loan Agreement dated 20th May, 2005 as the principal legal document governing the transactions between the parties.

c. Reliefs/orders sought by the Applicant:

22. The Applicant, seeks the following reliefs:

*i) A **DECLARATION** by this Honourable Court that the Loan Agreement No. 7/AP/LAFRDF/04/05 between Government of Cross*

River State of the Federal Republic of Nigeria and for the partial financing of the TINAPA Free Zone and Resort project dated 20th May, 2005 is valid, binding and subsisting between parties.

ii) ***AN ORDER*** *of this Honourable Court directing the Respondent to execute an Irrevocable Standing Payment Order mandating the Accountant General of the Federation of Nigeria in satisfaction of the Defendant's present and future indebtedness to the Applicant pursuant to Clause 7.05 tagged "Guarantee" of the Loan Agreement between the Respondent and the Applicant dated 20th May, 2005.*

iii) ***AN ORDER*** *of this Honourable Court mandating the immediate repayment of the sum of USD6, 455,846, or such sums as may be adjudged due to the Applicant on the Respondent's account with the Applicant representing the total arrears as at 31st August, 2018 according to the revised terms of the loan and amortisation schedule.*

iv) *Payment of accrued interest by the Respondent at the agreed rate of 6.5% per annum on the principal amount of the loan disbursed and outstanding from time to time, or such sums as may be adjudged due to the Applicant on the Respondent's account with the Applicant representing the total arrears as at 31st August, 2018 according to the revised terms of the loan and amortisation schedule.*

v) *$27,703.00 (Twenty Seven Thousand, Seven Hundred and Three USD) being Solicitors' fees for this action.*

vi) ***AND FOR FURTHER ORDER OR ORDERS*** *as this Honourable Court of Justice may consider just and appropriate to make in this circumstances.*

VI. RESPONDENTS' CASE:

a. Respondent's summary of facts:

23. The Respondent admits the Applicant's averment to the effect that the ERDF granted the loan facility in various convertible of the amount of (Six Million Five Hundred and Twenty Five Thousand Three Hundred and Seventy One (UA6, 525,371) unit of Account equivalent to Ten Million United States Dollars ($10,000,000) to the Respondent with predated exchange rate less than N130 to $1 as part finance for the infrastructure component of Tinapa Business Resort Limited (TBRL).

24. The Respondent further states that while the sum total needed for the financing of the infrastructural component of Tinapa Business Resort Limited (TBRL) as at the time stood at Two Hundred and Forty-One Million Dollars ($241,000,000) the Applicant was only approached to finance part of the cost of the project in an amount of Thirty Five Million Dollars ($35,000,000) to which only the equivalent of Ten Million Dollars ($10,000,000) was approved.

25. The Respondent states that the repayment schedule was restructured in the year 2010 running through an additional ten (10) years with effect from 1/7/2010 to 1/1/2020. The letter of amortization and repayment schedule

and the acceptance letter from the Applicant, approving the rescheduling of the loan in accordance with the amortization table were pleaded.

26. The Respondent states that all the repayments it made was in accordance with the Loan Agreement save and except the defaults. On the issue of penalties, the Respondent, however, states that the stipulated *Notice of the Intention* to apply any of the penalties in default of repayment as stated in the contract was never given by the Applicant. As a result, the Respondent was ambushed with the implementations of **ALL** the penalties.

27. The Respondent denies the Applicant's averment that it was part of their agreement that all fees and out of pocket expense, including loan document processing fee, insurance premium, tax obligations, enforcement of security and recovery of the facility shall be paid from the Respondent's account.

28. The Respondent denies the Applicant's averment that it disregarded the terms of the contract and violated some express terms and conditions upon which the loan facility was granted to the extent that it consistently and persistently failed, refused or neglected to fulfil its obligations in the loan agreement by not repaying both the principal sum and the interest as was mutually agreed and further states as follows:

i. That the Respondent made repayment of the principal and interest sum until January 1, 2010 when it defaulted in service payment.

ii. The said default on the Respondent repayment obligations was due largely to inadvertence of her previous administration, which was resolved at the meeting held on the 29th day of March 2010 to the

1st day of April 2010 by the parties and in attendance was a representative of the Debt Management Office, Abuja as an observer resulting in an *Aide Memoire* signed by all the parties in attendance.

iii. The facility was then reorganized leading to the restructuring of the outstanding balance in the sum of UA5, 692,376 running through an additional ten (10) years with effect from 1/7/2010 to 1/1/2020.

iv. After the restructuring, the Respondent settled repayments of the principal and interest from 1/7/2010 and has since paid eight (8) installments in the sum of UA3, 277,080 up to 1/1/2014.

29. The Respondent also contends that the letters relied on by the Applicant making claims of its demands to the Respondent, including the alleged letters from its solicitors, were not received or acknowledged by the Respondent.

30. The Respondent denies the Applicant's claim that as at the 31st August 2018, the sum outstanding as total arrears against the Respondent was in the sum of $6,445,846.00. Respondent contended that, having settled repayments of the principal and interest in the sum of UA3, 277,080 up to 1/1/2014 from the restructured outstanding balance of UA5, 692,376, there could not be an outstanding balance of sum $6,445,846.00 against her.

31. On the issue of guarantee, the Respondent states that she met and fulfilled all conditions required for the drawdown of the loan facility including an

Irrevocable Standing Payment Order to the Accountant-General of the Federation of Nigeria to the satisfaction of the Applicant.

32. The Respondent states that in addition to granting this Court jurisdiction in case of dispute between the parties, Section 10.04 of the loan agreement also provides room for amicable settlement which she is rigorously pursuing.

b. **Reliefs/orders sought by the Respondents:**

33. The Respondent, on the basis of the foregoing is seeking the following reliefs:

i. ***A DECLARATION*** *of this Honourable Court that the outstanding sum claimed by the Applicant is unsubstantiated, wrong and invalid.*

ii. ***AN ORDER*** *dismissing the Applicant's Application with substantial costs.*

iii. ***AND OR FOR FURTHER ORDER OR ORDERS*** *as this Honourable Court of Justice may deem appropriate in this circumstances.*

VII. JURISDICTION:

34. It is provided for under the new Article 9(6) of the 2005 Supplementary Protocol (A.SP.1/01/05) on the Court which substituted the old Article 9 of the 1991 Protocol, A/P1/07/91 that:

"The Court shall have jurisdiction over any matter provided for in an agreement where the parties provide that the Court shall settle disputes arising from the agreement".

35. Pursuant to the above provision, the parties in the instant suit, by Section 10.04 of their Loan Agreement dated 20th May, 2005, tagged *"Settlement of Disputes"* agreed as follows:

"Any conflicts, controversies or claims arising from or connected with the provisions of this Agreement shall be settled amicably or, in the event of failure of the amicable settlement procedure, submit to the ECOWAS Court of Justice".

The Court, therefore has jurisdiction to hear the case.

VIII. ADMISSIBILITY:

36. The Respondent in conceding to the Court's jurisdiction in case of dispute between the parties under their contract, submits that Section 10.04 of the Loan Agreement also provides room for amicable settlement which she is rigorously pursuing.

37. Again, the Respondent is contending that, its inability to initially pay off the facility led to it being reorganized leading to the restructuring of the outstanding balance to run through an additional ten (10) years with effect from 1/7/2010 to 1/1/2020. The Respondent, therefore, contends that having restructured the loan facility to run a new ten (10) year tenure from July 1, 2010 to January 1, 2020, the institution of the present suit on the 2nd April, 2019 renders the action premature.

38. On the issue of the Respondent desirous of pursuing amicable settlement out of court, this Court notes that one of the hallmarks of civil litigation is that the parties have the option to settle a case out of court at nearly any point, including after a trial court decision. To this extent, the admissibility of the instant case is incapable of placing any known limitation to the parties' efforts in pursuing amicable out of court settlement even after trial.

39. On this issue of the action being prematurely instituted, the answers provided by the Applicant's witness when he was under cross examination are very instructive. The following transpired during cross examination of the Applicant's Witness and captured at pages 18–19 of the *Verbatim Report* dated 30th of November, 2020:

OKEM: *Very well, so by the restructuring we are supposed to pay up by the 1st of July, 2020 alright. So, now, it will be correct to say that when you went to Court in April, 2019, 2nd of April, 2019 precisely, the action was so to speak* ***premature****, because the timeline given to pay off had not elapsed.*

PW: *My Lord my response is the fact that that statement is not totally correct.*

OKEM: *But it is partially correct.*

PW: *Yes, the mutual agreement between the Bank and the client My Lord is that from that date of restructuring, the client will be making two yearly installments. The first one on 1st of July every year, and the second one on the 1st of December, of every year. These never happened in any of those years, hence*

we as a Bank had to resort to talking to the Court to intervene in this matter My Lord.

40. Indeed, the dominant principle has always been that in all loan agreements, under the default clause as provided for in the instant agreement between the parties that upon default in repayment of any instalment, the principal and all accrued interest fall due and the lender is at liberty to demand payment of same. The records is also replete with evidence of the Applicant demanding payment of all outstanding indebtedness of the Respondent when it defaulted in the repayment schedule after the restructuring of the facility. The Court, therefore, cannot fault the Applicant for not waiting until the expiry of the restructured tenure before activating its contractual right to approach this Court for recovery, especially when the Respondent had demonstrated its failure and or unpreparedness to comply with the terms as agreed upon when the facility was restructured. It is the considered view of this Court that in the circumstances of this case, the Respondent's assertion that the instant suit is premature at the time of filing is untenable and same is dismissed. Consequently, the instant suit is admissible.

VIII. MERITS:

a. The Loan Agreement No. 7/AP/LAR/FRDC/ERDF/04/05:

41. The Applicant prays the Court to declare valid, binding and subsisting, the Loan Agreement in writing dated 20th May, 2005 between the parties and for the partial financing of the Tinapa Free Zone and Resort Project in Cross River State a copy of which is annexed *(ANNEXURE "2")*. The Respondent, in her Amended Statement of Defence, admitted that the Applicant granted her the loan facility for part financing of its Tinapa

Business Resort Limited (TBRL) pursuant to the Loan Agreement of 20th May, 2005 on terms contained in *ANNEXURE "2"*.

42. It is trite law of evidence that, when a party had made an averment and that averment is not denied, no issue is joined and no evidence be led on that averment since there is no burden to discharge. On the basis of the Respondent's admission, this Court declares that the Loan Agreement No. 7/AP/LARFRDF/04/05 dated 20th May, 2005 between the parties for part financing of the Respondent's Tinapa Project is valid, binding and subsisting between the parties.

b. On the issue of Irrevocable Standing Payment Order (ISPO):

43. It is the case of the Applicant that as part of the compulsory mandate provided for by the clause tagged *"Guarantee"* in the loan agreement, the Respondent covenanted to give an *Irrevocable Standing Payment Order* ("ISPO") to the Accountant-General of the Federal Republic of Nigeria to the satisfaction of the Applicant in accordance with the loan repayment schedule but the Respondent failed and or neglected to do so before disbursement of the facility.

44. According to the Applicant, and in accordance with the Loan Agreement, the ISPO would have guaranteed repayment of the loan directly from the Respndent's share of the federation account of Nigeria. In other words, it was to enable the Federal Government of Nigeria to offset the loan gradually as its payments fell due and built up.

45. In response, the Respondent argues that all conditions precedent for the drawdown of the loan facility, including the execution of the ISPO were met by her, invariably denying the Applicant's claim that the ISPO was not done. The Respondent put the Applicant to a strict proof of the non fulfilment of any condition precedent to the disbursement of the facility. To the extent of the denial, the Applicant bears the burden of proving on balance of probabilities that the Respondent indeed failed and or neglected to execute the order with the Ministry of Finance ("MOF") Federal Government of Nigeria (FGN) in favour of the Plaintiff.

46. The Applicant sought to prove this by tendering in evidence two letters from the Debt Management Office ("DMO"), of FGN, evidencing FGN's refusal of accepting responsibility for any liability arising from the parties' transaction. The letters, dated February 24, 2010 and December 3, 2010 are at pages 23 and 24 of Document No. 4 (Applicant's Reply to the Respondent's Statement of Defence). The assigned reason for refusing to accept any liability by the FGN, as contained in the DMO's letter of February 24, 2010, authored by its Director-General, Abraham Nwankwo, and addressed to the President of EBID stated in paragraph two (2) thereof that *"DMO has held several discussions with representatives of your institution where all parties concerned understood that this loan, which was contracted by the Cross River State Government, was neither guaranteed nor accessed by the Federal Government of Nigeria (FGN) and, therefore, does not form part of the outstanding liabilities of the FGN"*. It is pertinent to note that the letter under reference was copied to the Governor of the Cross River State, the Governor of Central Bank of Nigeria and the Honourable Minister of Finance of FGN. These

correspondences from the DMO of the FGN speak eloquently for themselves on this vital matter.

47. On the other hand the Respondent who positively asserted that she complied with the condition precedent adduced no such evidence to support her case of compliance and due execution of the ISPO with the FGN after the Applicant has proven that the FGN has denied receiving any such order from the Respondent. The ISPO was to be executed in a documentary form and if the Respondent's case of its execution were to be true, such evidence would be supported by documents executed at the Ministry of Finance of FGN. This inability of the Respondent to produce any credible evidence on the matter robs her case of any credit and belief to the effect that she indeed met all the conditions precedent to the drawdown of the loan facility, particularly, the ISPO. As stated, the rationale for the execution of the ISPO was to serve as a guarantee to the Applicant for the loan facility and to enable FGN to offset the loan on behalf of the Respondent as its payments fell due. The FGN would not have refused responsibility for the liability had the order been duly executed with its Ministry of Finance by the Respondent. This fact alone belies the truth in the assertion by the Respondent that the ISPO was duly executed with FGN. The Respondent failed to prove this assertion to contradict the Applicant's position of non-execution of the order which has been corroborated by documentary evidence from FGN.

48. The documents tendered in evidence tend strongly to show that the ISPO was not executed by the Respondent before the drawdown of the loan facility as agreed between the parties. The Court finds that the Applicant's claim under this heading for non-execution of the order by the Respondent

has been proved on the balance of the probabilities whilst the case of the Respondent stood unproved. The execution of the ISPO was very vital to the transaction between the parties as it was meant to serve in satisfaction of the Respondent's indebtedness to the Applicant pursuant to Clause 7.05 tagged *"Guarantee"* of their Loan Agreement.

49. Notwithstanding the above findings of the Court, the Applicant's prayer to order the immediate execution of same is impossible. Since the Applicant is claiming for the immediate recovery of any outstanding indebtedness on the strength of this judgment, the execution of the ISPO becomes otiose. Again, since the Respondent's indebtedness has already accrued, the issuance of the ISPO on the FGN will amount to serving them the indebtedness of the Respondent contrary to the purport and dictates of guaranteeing a loan facility which ought to have preceded the drawdown of the facility. To this extent, the Applicant's relief to order the immediate execution of the ISOP is refused.

c. On the issue of arrears of USD6,445,846 owed by the Respondent to the Applicant:

50. The parties are agreeable on the fact that the Respondent did apply for a loan of Thirty Five Thousand United States Dollars (USD 35,000,000.00) but the Applicant accepted to lend and indeed disbursed in various convertible of the amount of (Six Million Five Hundred and Twenty Five Thousand Three Hundred and Seventy One (UA6, 525,371) unit of account equivalent to Ten Million United States Dollars (USD10, 000,000) in pursuant to Loan Agreement.

51. Also not in dispute is the obligation of the Respondent to repay the loan in seven (7) years after a two-year moratorium, starting from the date of signing the Agreement in fourteen (14) equal and semi-equal instalments. Another salient term of the Agreement, which is equally not in contention is the discretion given to the Applicant that in case of the Respondent's failure to honour the agreed repayment schedule, the Applicant was free to demand for the repayment of the principal sum, interest and further apply all the penal measures provided for under the clause tagged *"Penalties Applicable in case of Default in Repayment"* stipulated in Section 10.01 of their Agreement upon notice.

52. The Applicant is contending that the Respondent has since the grant of the facility, consistently and persistently failed, refused and or neglected to fulfil its obligations in the loan agreement by not repaying both the principal sum and the interest as was mutually agreed upon and as at *"the 31st August 2018, the sum outstanding as total arrears against the Defendant is a sum of $6,445,846.00 (USD) only representing the current situation of TINAPA Free Zone Project Loan in the Applicant's book"*.

53. The Respondent's response to the allegation of the non-payment of its indebtedness was that some repayment of the principal and interest sum was done until January 1, 2010 when she defaulted in her repayment obligations due largely to inadvertence of the previous administration. According to the Respondent, this situation led to the facility being *"reorganized leading to the restructuring of the outstanding balance in the sum of UA5, 692,376 running through an additional ten (10) years with effect from 1/7/2010 to 1/1/2020"*.

54. The Respondent disputes the quantum of the total indebtedness being claimed by the Applicant to the tune of *$6,445,846.00 (USD)*on two grounds; firstly, that some payment made in the year 2014 pursuant to the restructuring of the loan facility was not accounted for, and secondly, *"the stipulated Notice of the Intention to apply any of the penalties in default of repayment as stated in the contract was never given by the Applicant and as a result the Respondent was ambushed with the implementations of* ***ALL*** *the penalties"*.

55. It is on records, the plethora of evidence adduced by the Applicant that immediately the Respondent defaulted in the repayment of the loan, series of activities took place to notify and demand Respondent's compliance with its contractual obligation to repay the loan facility. Among these activities were several in-house efforts, including remind notices, request for payment, meetings and visits to the Respondent's seat of government at Calabar were all made on the Respondent to compel her to settle her outstanding indebtedness to the Applicant but to no avail.

56. The Applicant's Solicitors, Indemnity Partners, were instructed to pursue the recovery of the Respondent's indebtedness when all the internal efforts of the Applicant failed to yield the needed results. Two letters were served on the Respondent by the said solicitors dated 5th October, 2017 and 18th January, 2018 respectively.

57. Though the Respondent in paragraph 1.8 (i) of her Amended Statement of Defence (Document 8) stated that *"the letters relied on by the Applicant making claim of its demands to the Respondent were not received or acknowledged by the Respondent"*, the Court fails to agree with the Respondent on this assertion. This is because, at least the letters from the

Applicant's solicitors were served on the Respondent vide DHL Courier Service which produced receipts in acknowledgement of service of the two letters on the Respondent. Again, when the Applicant's Witness, Mr. Olagunju Ashimolowo testified on oath on the 30th November, 2020, the Respondent's Counsel, G.I Okem, Director Civil Litigation Ministry of Justice, Cross-Rivers State, had the opportunity to cross examined him and as per page 16 of the *Verbatim Report* of the day in question, the following transpired:

> **OKEM:** *Very well, now apart from the head Memoirs you have made specific reference to,* ***you recall there were several Demand letters both from you and from your Counsel.***
>
> **PW:** *That is correct my Lord.*

58. To this extent, Counsel invariably admitted that Applicant's letters were indeed served on the Respondent and the probative value of such correspondences commencing 3rd of July, 2015 to the 13th of July, 2017 and totaling eight (8) in number, and those of its solicitors cannot be over emphasized.

59. It is also on records that, after the restructuring of the loan facility, several loan recovery missions were embarked on by the agents of the Applicant to the Respondent's seat of government, Calabar which resulted in production of about six (6) *Aide Memoirs*, duly executed by the representatives of the parties, listed and annexed to Applicant's Process No. 9 filed on 29th September, 2020 as (*Annexures "i" to Annexure "iv"*). It is instructive that in all these *Aide Memoirs*, the quoted cumulative indebtedness of the Respondent consisted of not only the principal and the

original interest but also all other incidental charges including penal interest.

60. Consequently, the Court finds that in all these documentations and meetings between the parties, the computed and quoted figures at all stages, as and when the documents were made, constituting the outstanding indebtedness of the Respondent, comprised the principal, interest, commission and penalties. Be that as it may, the Court is also of the view that it is in the interest of justice for the Respondent to pay both the normal and the penal interests to the Applicant, since the Respondent did not immediately refund the money after the demands from the Applicant, interest must be paid on the amount due at the agreed rate of interest, from the date of the default, until the date of final payment.

61. From the date the Applicant demanded the refund, without the Respondent challenging the validity of the application of the penal clause in their agreement, the Respondent had had use of money which, by rights, belonged to the Applicant. In the result, after a diligent perusal of the respective cases of the parties, the Court cannot find any reason why the Applicant should not levy the penal interest against the Respondent, the Court accordingly dismisses the claim of the Respondent that she was not notified of the intention of the Applicant to exercise its discretion to apply the penalties when she defaulted in the repayment of the loan facility.

62. Having dismissed the Respondent's grounds of challenging the computation of its total indebtedness to the Applicant, the only remaining issue under this heading is the entitlement of the Applicant to the amount being claimed. The parties are in agreement that the facility was

restructured at the request of the Respondent sometime in the year 2010 when the outstanding balance stood at "*UA5, 692, 376*" to run an additional ten (10) year term.

63. When the Respondent defaulted in meeting its obligation both before and after the restructuring of the facility, there were several visits to the Respondent's seat of government in Calabar by the representatives of the Applicant to meet the officials of the Respondent for the resolution of the matter. To this end, a total of six (6) *Aide Memoires* listed and annexed to Document No. 9 as **Annexure "i" to Annexure "iv"** were referred to and relied upon when the Applicant's Witness gave oral evidence on the 30th November, 2020.

64. The latest of the *Aid Memoires*, dated from 27th June to 3rd July, 2017 (Annexure "iv") covered the proceedings of the loan recovery mission undertaken by a delegation of the Applicant to the Respondent State at Calabar. The Respondent was represented by her Executive Governor, Senator (Prof.) Ben Ayade, the Commissioner for Finance of the Respondent, Asuquo Ekpenyong and the Permanent Secretary in the person of Mr. Gabriel Ikang whereas the Applicant's team was headed by its Director, Internal Audit and Evaluation of Operations, Mr. Olagunju Ashimolowo.

65. At the paragraph 4.0 tagged "*Conclusion*", the parties stated that "*At the end of the meetings, the following conclusions were agreed upon:*

- *That Cross Rivers State shall make a payment of at least 50% of the outstanding arrears which stood at UA 3, 269,596 equivalent to*

USD4, 479,347 as at 1st July, 2017. This is expected to be done before 31st July 2017 subject to the Governor's approval;

- *That the Government of Cross Rivers State shall formally request EBID to restructure the facility after the commitment has been paid.*

The Commissioner for Finance of the Respondent then appreciated the patience and the understanding of the management of the Applicant and signed the *Aide Memoire* on behalf of the Respondent whereas the Director of Internal Audit & Evaluation of Operations signed for the Applicant.

66. The Respondent failed and/or refused to honour payment of its indebtedness to the Applicant as spelt out by the terms agreed between the parties and contained in the *Aide Memoire* dated from 27th June to 3rd July, 2017 (*Annexure "iv"*) which kept attracting both the normal and penal interest. The failure of the Respondent persisted and as at the 31st August 2018, the sum outstanding as total arrears against the Respondent has accumulated to "*a sum of $6,445,846.00 (USD) only representing the current situation of TINAPA Free Zone Project Loan in the Applicant's book.*"

67. The above position was reiterated when the Applicant's Witness was being cross-examined after he gave oral evidence as follows:

OKEM: *No Witness perhaps you are not aware. What you are claiming before this Court is as of 31st August, 2018, not 2020. Yes, so my question is between 2016 and 2017, the sum of 3 Million Dollars had jumped to 6 Million Dollars which is a space of just about in clear*

terms, perhaps about less than two years, because it is not exactly two years; December 2016 to 31st August 2018. That is my question.

PW: *My Lord, the explanation I gave is the fact that there is provision in the agreed loan Agreement that for every delay in payment, there will be a penal interest, there will also be the original interest of the Bank that will be charged. So what accounted for this difference is because of the accumulation of unpaid interest and also the capital and the principal that was not paid within that time and now.*

68. It follows from the analysis above that the Respondent is liable to pay the amount claimed by the Applicant in the sum of $6,445,846.00 (USD) representing the situation of TINAPA Free Zone Project Loan in the Applicant's book as at the 31st August 2018 and the Courts so holds. Consequently, the Court dismisses the claim of the Respondent that the outstanding sum claimed by the Applicant is unsubstantiated, wrong and invalid.

d. Solicitors" Fees in the Instant Suit

69. The Applicant is claiming the sum of Twenty Seven Thousand, Seven Hundred and Three United States Dollars ($27,703.00) being Solicitors' fees for this action. It is contended that the parties agreed that all fees and out of pocket expenses, including loan document processing fee, insurance premium, tax obligations, enforcement of security and recovery of the facility in the event of default and other expenses incurred towards the completion of the facility shall be for the Respondent's account.

70. In the contemporary business world, parties need not provide in their contract that fees of solicitor and other expenses incurred in the recovery of the granted facility in the event of default shall be for the defaulter's account. Payment of such expenditure follows failure of the Respondent to honour its contractual obligation in the repayment of the facility. The Court considers it worthwhile to follow this universally accepted practice in the field of commercial transactions which enable a lender to recover monies spent in the recovery of any defaulted loan facility.

71. Thus apart from the interest, the Applicant is also entitled to recover the amount legitimately spent in the process of recovering the facility from the Respondent. It is recoverable as special damage resulting from the breach of the covenant to repay the facility and it is presumed to be within the contemplation of the parties that the Applicant would spend money to recover the facility granted to the Respondent when all efforts failed to compel its repayment.

72. However, as already stated, solicitor's fees is recoverable as special damage which must be particularized and evidence led to substantiate the claim. The Applicant in the instant case not only failed to particularize the claim, but also there was no proof in respect of its claims for fees allegedly spent on its solicitors. The usual components of solicitor's fees are the legal fees, filing fees, transportation and other administrative charges. The Court takes judicial notice that filing before this Court can be done electronically and is free. Again the hearing in this matter was virtually conducted which attracts no transportation expenses. What may be left is the actual legal fees charged by the Applicant's solicitors for the recovery of the indebted sum. It was therefore incumbent upon the Applicant to have

substantiated its claim for a colossal amount of Twenty Seven Thousand, Seven Hundred and Three United States Dollars ($27,703.00) as representing solicitors' fees. The failure of the Applicant to prove its claim for solicitors' fees impoverishes the Court to grant any such prayer and therefore, same is accordingly refused.

X. COSTS:

73. Article 66 (11) of the Rules of Court provides that if costs are not claimed, the parties shall bear their own costs. The records show that the Applicant did not ask for costs. For this reason, the parties are to bear their respective costs.

XI. OPERATIVE CLAUSE:

74. For the reasons stated above, the Court sitting in public after hearing the parties:

As to jurisdiction:

a. Declares that it has jurisdiction.

As to Admissibility:

b. Declares that the application is admissible.

As to compliance with Rules of the Court.

c. Finds compliance by the Applicant with Article 28(3) of the Rules of the Court.

d. Finds compliance by the Applicant with Article33 (2) of the Rules of the Court.

On Merits of the case.

e. Declares that The Loan Agreement No. 7/AP/LAR/FRDC/ERDF/04/O5 is valid, binding and subsisting between the parties.

f. Finds the Respondent liable to the Applicant in the sum of USD6, 455,846, representing the total arrears on their loan agreement as at 31st August, 2018

g. Finds the Respondent liable for payment of all accrued interest at the agreed rate of 6.5% per annum on the principal.

h. Refuses to grant the Applicant its claim for Solicitor's fees because there was no proof thereof of it either orally or by documentary means which must be easily available to it.

i. Refuses the Applicant's claim to order immediate execution of the ISPO.

j. Dismisses all claims of the Respondent.

XII. ORDERS:

k. Orders the Respondent's immediate repayment of the sum of USD6, 455,846, to the Applicant.

l. **Further orders** the Respondent to pay the agreed interest of 6.5% per annum on the sum of USD6, 455,846 commencing the 31st August, 2018 until date of final payment.

ON COST

Orders parties to bear their respective costs.

XIII. COMPLIANCE AND REPORTING: