

Balance probabilities standard | Assertor proof burden | Counterclaim plaintiff burden | Fiduciary depository obligations | Mandate compliance required | Consent necessary actions | Collateral ownership unchanged | Default enforcement only | Fraudulent misrepresentation damages | Exemplary reckless conduct | Punitive intentional misconduct | Reversal implies liability | Investment loss compensation | Wanton behavior deterrence | Oppressive conduct disapproval

IN THE SUPERIOR COURT OF JUDICATURE

IN THE HIGH COURT OF JUSTICE (COMMERCIAL DIVISION 6)

HELD IN ACCRA ON FRIDAY THE 12TH DAY OF DECEMBER, 2025

BEFORE HER LADYSHIP JUSTICE SEDINA AGBEMAVA

SUIT NO: GJ/0737/2023

VIHAMA ENERGY COMPANY LIMITED & ANOR. PLAINTIFFS

VRS.

FIRST ATLANTIC BANK DEFENDANT

JUDGMENT

On the 5th of December, 2022 the Government of Ghana, through the Ministry of Finance introduced a programme known as the Domestic Debt Exchange Programme (DDEP).

The aim of this programme was to ostensibly restructure the country's domestic debt, especially government bonds, which had reportedly become unsustainable. The underlying hope of this programme was to help the nation out of its debt crisis and help sustain what was whispered to be a wobbly economy.

Eligible bondholders were therefore invited to voluntarily exchange their existing bonds for new ones at a lower interest rate and a longer maturity period. These bondholders included banks, insurance companies, fund managers and specialised deposit taking institutions.

I think I am allowed some judicial latitude to state that this particular restructuring was confronted with a lot of challenges and censure. The bite of the DDEP manifested itself in Pensioners (notably including a former Chief Justice of the Republic) seen picketing at the Ministry of Finance because this programme inflicted significant losses on them as bondholders.

I do not suppose that institutional bondholders like the Defendant herein were spared the negative financial toll the Debt Exchange Programme inflicted.

The Plaintiffs herein must have had a fair idea of the negative impact of this exchange programme on their bonds and it is against this background that they emphatically refused to be part of the Domestic Exchange Programme when the Defendant proposed to tender bonds it held on behalf of the Plaintiffs to the DDEP.

In the year 2020, the Plaintiff contracted an overdraft facility from the Defendant in the sum of **Thirty-Seven Million Ghana Cedis. (GH¢37,000,000.00)** The facility was set to expire in Twelve (12) months.

This facility was secured with bonds owned by an entity known as PetroGulf Ghana Limited.

The first was ESLA Bonds, (ESLA-31) valued at **Thirty-Eight Million, One Hundred and Thirty-Seven Thousand and Twenty-Seven Ghana Cedis. (GH¢38,137,027.00)**

The second one was Government of Ghana Bond (GOG-26) valued at **Three Million, Five Hundred and Ninety Thousand Ghana Cedis (GH£3,590,000.00).**

After the expiration of the facility, the Defendant again renewed it, this time round an overdraft facility in the sum of **Thirty-Seven Million Ghana Cedis. (GH¢37,000,000.00)**

and a Foreign exchange purchase facility in the sum of **Two Million United States Dollars (US\$2,000,000.00)**.

This offer was made on the 21st of December, 2021 and was for a period of Twelve (12) months. It was also secured with the same ESLA 31 and GOG-26 Bonds used to secure the first overdraft facility. The depository partner for these bonds was Amber Security.

Nothing extraordinary happened during the subsistence of this facility until the 21st of December, 2022 when the Defendant wrote to the Plaintiff reviewing the facility downwards.

The Defendant also demanded the payment of the outstanding balance on the existing facility set to expire in Two (2) days from when Defendant wrote to the 1st Plaintiff.

The 1st Plaintiff, seemingly puzzled by the inexplicable decision of the Defendant requested a suspension of the decision because of the deleterious effect it threatened to have on its business operations. The Defendant relented and restored the facility that same day.

The overdraft facility was further extended from the 29th of December, 2022 for Sixty (60) days.

The Plaintiffs aver that as a condition for the extension of the facility, it was agreed amongst the parties that in the event of a collateral shortfall, the 1st Plaintiff would provide, at the Defendant's request, a registered mortgage to make up the shortfall.

On the 27th of January, 2023 Petrogulf Ghana transferred ownership of the bonds ESLA 31 and GOG-26 to the 2nd Plaintiff. The reason for this is quite evident. It can be discerned from the record that at the time, individuals were not obliged to tender their bonds under the DDEP Programme.

The Plaintiffs also changed their depository partner from Amber Security to the Defendant, who then took custody of the 2nd Plaintiff's bonds.

2nd Plaintiff also assigned the bonds to the Defendant as collateral for the overdraft facility. All these processes were completed by the 6th of February, 2023.

According to the Plaintiffs, on the 7th of February, 2023 the 2nd Plaintiff received a phone call from the Group Head, Energy Banking of Defendant Bank.

He requested that the 2nd Plaintiff tender his bonds to the Domestic Debt Exchange Programme in order to maintain it as security for the facility. This request was met with a flat refusal from the 2nd Plaintiff.

The Group Head then called on him in his office round about 3:00 pm that same day to further prevail upon him to surrender his bonds.

The 2nd Plaintiff said he offered to replace the security, either by a landed property valued at **Seventy-Two Million United States Dollars, (US\$72,000,000.00)**, shared equally with Republic Bank or use a cash deposit of **Four Million and One Thousand, Two Hundred and Fifty-Four United States Dollars and Ninety-Three Cents (\$4,001,254.93) and One Million and Forty-Five Thousand, One Hundred and Forty Three Ghana Cedis, Sixty-Three Pesewas, (GH¢1,045,143.63)** held by Defendant Bank.

Defendant, acting by its officer, Chris Kan Dapaah agreed on the land property as the new security. This agreement was confirmed by an Executive Director of the Bank, Dan Marfo.

2nd Plaintiff asserts that to his astonishment, before this meeting could be concluded, a letter was dispatched to his office informing him that the Defendant had taken up ownership of his bonds and decided to tender them under the DDEP.

It is 2nd Plaintiff's contention that this action constituted a usurpation of his bonds. Plaintiffs' total indebtedness to the Defendant as at 7th February, 2023 was **Fifteen Million Ghana Cedis (GH¢15,000,000.00)** and 1st Plaintiff had **Four Million and One Thousand, Two Hundred and Fifty-Four United States Dollars and Ninety-Three Cents (\$4,001,254.93) and One Million and Forty-Five Thousand, One Hundred and Forty**

Three Ghana Cedis, Sixty-Three Pesewas (GH¢1,045,143.63) in cash deposits held by Defendant which could have been used to defray the debt.

2nd Plaintiff says he immediately informed Defendants officer Chris Kan Dapaah who was with him when the letter was delivered to immediately recall the letter and the instructions to the Central Securities Depository to tender his bonds under the DDEP.

The said letter had misstated that the Plaintiffs had refused and neglected to repay their indebtedness to the Defendant. On the contrary, Plaintiffs had dutifully complied with all obligations under the facility, which was yet to expire.

It is the case of the 2nd Plaintiff that during a follow-up meeting with Defendant on the 16th of February, 2023, he repeated his demands to recall the Defendant's letter of 7th February, 2023 and the attendant instructions to the CSD on tendering his bonds. Defendant however failed to address his concerns and instead surreptitiously wrote a letter on the 17th of February, 2023 distorting the discussions held at the meeting the day prior. In that letter, according to the Plaintiffs, the Defendant attempted to lessen the letter's implication by claiming that the settlement of the bonds was yet to be finalised.

2nd Defendant contends that unbeknownst to him, the Defendant had informed the Central Securities Depository to release the bonds to him because the Plaintiffs had performed their obligations towards it. Plaintiffs aver that this was a fraudulent misrepresentation because at all material times, the Defendant was aware that the overdraft facility was still in effect.

The letter was therefore a deceptive means for the Plaintiff to gain access to the 2nd Defendant's bonds in order to tender it to the DDEP. This was done without recourse to him and was done without his consent, approval or signature.

The Defendant by tendering his bonds had changed both the form and substance. Whereas his original bonds were earning an interest of 20.5% and 19% respectively, those tendered under the DDEP were earning a paltry 10%.

On the 2nd Plaintiff's reckoning, his ESLA Bonds set to expire on 29th December, 2031 and the GOG Bonds set to expire on 13th July, 2026 was expected to give him a return on investment of **One Hundred and Eighty-One Million, Three Hundred and Sixty-Six Thousand, One Hundred and One Ghana Cedis, Eighty-Two Pesewas (GH¢181,366,141.82) and Three Million, One Hundred Thousand, Seven Hundred and Fifty-Seven Ghana Cedis, Seventy-Five Pesewas (GH¢3,100,757.75)** respectively, however the Defendant's illicit conduct had deprived him of said returns.

Plaintiffs contend that there is no justification for the Defendant's illicit conduct which has caused them embarrassment, loss of capital and profits.

The above narration is what has led to the Plaintiffs claim against the Defendant for

- a. An order for the payment of **Forty-One Million, Seven Hundred and Twenty-Seven Thousand and Seventy-Two Ghana Cedis (GH¢41,727,072.00)** being the value of the 2nd Plaintiff's bonds submitted by the Defendant under the DDEP.
- b. General Damages for loss of profits.
- c. Exemplary damages for fraudulent breach of contract and fraudulent breach of trust.
- d. Punitive Costs inclusive of legal fees.

The Defendant filed a robust statement of defence to the action consisting of One Hundred and Nine paragraphs.

It denied all of the averments of the Plaintiffs, which it perceived as a personal vendetta against it in trying to protect its legitimate interests.

The Defendant explained that as a creditor to the Plaintiffs, its secured debt to the Plaintiff was at the risk of becoming unsecured due to the rollout of the DDEP.

I find paragraph 4 of the Defendant's statement of defence very instructive and hence I will reproduce it verbatim.

"In its dealings with the Plaintiffs, the Defendant Bank always acted reasonably to accommodate the business needs and challenges of the Plaintiffs. However, when the economic circumstances -beyond the control of the Defendant Bank- changed, the Defendant Bank immediately became exposed to incredible financial and regulatory risks and the 1st Plaintiff as CEO of 2nd Plaintiff (sic) refused to cooperate with the Defendant".

According to the Defendant, at the time of the launch on the 5th of December 2022, individual bondholders were expressly excluded from tendering their bonds.

After the launch however, the Bank of Ghana issued certain policy and regulatory reliefs for the banks participating in the DDEP, ostensibly to cushion the impact.

It is the Defendant's case that the Bank of Ghana encouraged all Banks to fully participate in the programme and granted the reliefs listed below;

- a. Making the new bonds fully deductible in determining financial exposure of banks to counterparties but old Bonds were excluded.
- b. 0% risk weights attached to the new bonds for Capital Adequacy Ratio (CAR) computation whilst the Old Bonds attracted 100%.
- c. Access to Bank of Ghana's repurchase window which was open exclusively to the New Bonds and;
- d. Access to Bank of Ghana's Emergency Liquidity Assistance also exclusively open to the new bonds.

What has been left unsaid and can be inferred from the Defendant's euphemistic averment is that the Bank of Ghana brought its influence to bear on these institutions to compel them to partake in the programme.

In other words, the Bank of Ghana exerted pressure on the targeted institutions, giving them no other option but to participate in the programme.

Defendant says it was exposed to significant financial and regulatory risks as a result of these policy guidelines from the Central Bank if it continued to hold onto the old bonds as security.

Its ability to maintain its banking license was also at risk from the Bank of Ghana. It therefore tendered the bonds out of necessity.

In effect, the Defendant's whole defence hinges on the regulatory and financial risks it faced if it continued holding onto the Old Bonds as collateral for the overdraft facility without tendering it in to the DDEP.

The Defendant asserts that it had a legal right pursuant to a lien it exercised over the bonds and rightfully exercised its rights under the lien and assignment of the bonds.

It is its claim that Plaintiffs fraudulently misrepresented themselves to Defendant by making false claims of replacing the security when it was never their intention to do so. The Plaintiffs further exposed it to unavoidable risks and caused it financial loss.

The Defendant is insistent that the present suit by the Plaintiffs is frivolous and a vexatious abuse of the Court's process with the sole aim of punishing the Defendant for legitimately exercising its rights under the lien and assignment over the 2nd Plaintiff's bonds.

It therefore counterclaimed against the Plaintiffs and the Central Securities Depository for the underlisted reliefs.

- a. An order for general damages for fraudulent misrepresentation against the Plaintiffs jointly and severally.
- b. An order dismissing the Plaintiff s action for being an abuse of the Court's process.
- c. An order for exemplary and punitive damages against the Plaintiffs for abuse of the Court's process.
- d. A declaration that the Defendant to Counterclaim was negligent in tendering or processing the tender of the 2nd Plaintiff's Old Bonds under the DDEP.
- e. A declaration that the tender of the 2nd Plaintiff s Old Bonds is void and ineffective.

- f. An order compelling the Defendant to Counterclaim and the issuer of the GoG DDEP bonds to reverse the tender of the 2nd Plaintiff's old bonds under the DDEP.
- g. In the alternative to (f) a declaration that the 2nd Plaintiff is the owner of the new bonds issued to him by the issuer (principal of the Counterclaim Defendant) under the DDEP.
- h. An order compelling the Plaintiffs and the Counterclaim Defendant jointly and severally to pay the legal costs of the Defendant.

Issues were thus joined after the Plaintiff filed a defence to the Counterclaim.

On the 7th day of May 2024, the Defendant to counterclaim on application was non-suited as an unnecessary party to the action. This action was therefore fought between the Plaintiff and the Defendant solely.

Issues were set down for adjudication as follows;

1. Whether or not the Defendant was entitled to transfer 2nd plaintiff's Government of Ghana Bonds (GOG-26) and ESLA Bonds (ESLA-31) to the Domestic Debt Exchange Programme (DDEP) without the consent and concurrence of the 2nd Plaintiff.
2. Whether or not Plaintiffs breached any obligations or conditions of the 2nd overdraft facility.
3. Whether or not Plaintiffs promised Defendant to provide an enhanced security in the form of a house as collateral for the extension of the 2nd overdraft facility and if that was a fraudulent representation.
4. Whether or not 2nd Plaintiff did not sign the extension facility until 7th February, 2023.
5. Whether or not the extension fee of 1% of the facility was debited from 1st Plaintiff's account held with Defendant.
6. Whether or not Defendant fraudulently misrepresented to the Central Securities Depository (CSD) to release the bonds to 2nd Plaintiff on the basis of the fact that Plaintiffs had paid and performed their obligations towards Defendant.
7. Whether or not Defendant's 8th February, 2023 letter to the CSD was a ploy to gain access to 2nd Plaintiff's bond.

8. Whether or not the current bonds under the Domestic Debt Exchange Programme are the same as the 2nd Plaintiff's Government of Ghana Bonds (GOG-26) and ESLA Bonds (ESLA-31).
9. Whether the 2nd Plaintiff is entitled to the payment of the face value of **Forty-One Million, Seven Hundred and Twenty-Seven Thousand and Twenty-Seven Ghana Cedis (GH¢41,727,072.00)** since the reversal of the 2nd Plaintiff's bonds on 29th December, 2023.
10. Whether the 2nd Plaintiff incurred any loss of profits since the reversal of the bonds by the CSD.
11. Whether the Plaintiffs can maintain an action for fraudulent misrepresentation allegedly made to the CSD rather than to the Plaintiffs.

At the close of the case, the parties were ordered to file their final addresses for the Court. As at the time of writing the judgment, Plaintiff has complied with the order whilst the Defendant has failed and neglected to file its address for the Court.

The 2nd Plaintiff as the Chief Executive Officer of the 1st Plaintiff testified on behalf of the Plaintiffs and the Defendant also testified by a lone witness, the Group Head of Energy Banking.

In civil trials, the standard of proof required is on a balance of probabilities and it is a vital principle of evidence that proof lies on the party who asserts. In **In re: Krah (decd) Yankyerah v Osei Tutu [1989-90] 1 GLR 638**, it was held that the burden of proof lay on the one who must succeed in the action.

It has been further held in **Barkers-Wood v Nana Fitz [2007-2008] SCGLR 879** that the common law had always followed the common sense approach that the burden of persuasion on proving all facts essential to any claim lies on whoever is making the claim.

In this matter, the Defendant has put in a Counterclaim, which is also essentially an action and the Defendant assumes the same burden of proof in relation to the Counterclaim which

Plaintiff assumes in the main action. I think this principle governing Counterclaims is hackneyed, there is no necessity to belabour it.

The legal framework which regulated the Domestic Debt restructuring was tendered in evidence by the Defendant as Exhibit '15'. Plaintiff argues that under this framework, as a depository participant, the Defendant's obligations were fiduciary in nature.

To this end the Defendant was legally bound to act strictly in accordance with the 2nd Plaintiff's mandate and to safeguard the investment entrusted to it.

The Defendant's unilateral decision to tender the bonds without the consent of the owner was a fundamental breach of its mandate and fiduciary trust as no such discretion was warranted by the facility agreement or any other instrument.

The Defendant's own pleadings and evidence bear testimony to the reasons why they tendered the 2nd Plaintiff's bonds.

Part of the reasons was because Plaintiff had allegedly defaulted "severally" on its obligations on the second overdraft and therefore had an outstanding debt on the account. Having made this assertion, the burden of persuasion fell on the Defendant to prove this fact. It tendered Exhibit '4' in proof of this assertion.

Exhibit '4' is the cedi account of the 1st Plaintiff with an opening balance of -17,291,662.88 and a closing balance of -2,102.70

At first blush, it would seem from the account statement which is Exhibit '4' that the Plaintiffs had indeed defaulted on their obligations to the Defendant.

Cross examination on this document however reveals that this Exhibit was tendered to mislead the Court.

It was not the Exhibit which proved the Plaintiff's alleged several defaults on its account. My reason for saying so will soon become apparent.

On the 27th of May 2025, Defence Witness testified under oath in cross examination as follows:

Q: In your paragraph 57, you stated that the 1st Plaintiff has cleared its indebtedness to the Bank by paying the full outstanding debt on 6th April, 2023. How was the payment made?

A: We received an instruction from the client to pay off the outstanding debt.

Q: When was this instruction given?

A: I am not sure of the exact date but it would have been before we carried out the debit on the account.

Q: In which account did you carry out this debit?

A: I will have to check, I cannot remember.

Subsequent questions in cross examination will show that at this point, the witness was only deflecting in a bid to bury the true facts as they existed.

The cross examination continued with the witness being boxed into a corner. This is what ensued;

Q: You debited the dollar account of the 1st Plaintiff to pay off the debt, you will agree with me?

A: Yes, my lady.

Q: I am putting it to you that it is this same account that you refused to use as collateral earlier when you sought to change 2nd Plaintiff's bonds as collateral for the repayment of the facility?

A: For the exact account that is being referenced, I cannot remember that account. I will have to check.

Q: I want you to take a look at page 2 of your Exhibit 4 and confirm to the court whether the debit of the 1st Plaintiff's account is recorded in the said statement.

A: No my Lady. In this account, it is a credit so that wiped out the debit.

Q: When was this credit recorded in Exhibit 4?

A: 6th April, 2023.

Q: Per Exhibit 4, the account which was credited was the cedi account and the one which was debited was a dollar account, not so?

A: I have to check to see the account that was debited. I cannot recollect the exact account.

Q: The narration recorded on 6th April 2023 in Exhibit 4 shows that the forex (USD) was purchased at a rate of 10.5500 cedis, not so?

A: The rate is correct.

Q: Therefore there is no dispute with regard to the nature of the account in which the funds were debited from?

A: At that point in time, the debit would have been okay to do considering the circumstances at the time.

Q: This debit was from 1st Plaintiff's dollar account, I am putting it to you?

A: As I said, I will have to check where that original debit came from.

From the evidence reproduced above, it can be seen that the witness was deflecting, evading and doing his best at circumventing direct answers to simple questions put to him. He was in charge of Plaintiffs account or at the very least, supervised that account.

He could not be totally oblivious to the dealings on the account, especially where the clear narration on Exhibit '4' showed that forex had been bought or credited to the cedi account at a certain rate.

It is a safe inference to make that the forex could have only been transferred from a forex account and nowhere else and it was from the 1st Plaintiff's forex account held with Defendant.

The reason for the witness fudging the facts was because he had earlier testified that the Defendant could not fall on the money in the forex account which could not be used as collateral for the facility because it was a sort of grant from the Bank of Ghana and was only meant for a specific purpose.

Clearly, having used that same money in the forex account to clear the overdraft facility laid bare the falsehood of that assertion.

It is further evident that Exhibit '4' is clearly unreliable as proof of the Plaintiffs' persistent default of the facility, which would have justified the Defendant's takeover of the bonds which had been used as collateral.

At any rate, the Defendant was unable to point to any exhibit which listed the several alleged defaults of the Plaintiffs.

There was therefore no compelling reason for the Defendant to have taken over the 2nd Plaintiff's bonds and tendered them under the DDEP without his consent.

The Defendant's security with the Plaintiff was not at risk, neither had the Plaintiff caused the Defendant any financial loss.

The assertion by the Defendant, therefore that it was exposed to significant financial and regulatory risks if it continued to hold onto the old bonds as security is not borne out of the evidence and I so hold.

The bonds which were given as security for the loan was only a collateral. I think I can stick my neck out and say that the definition of a collateral security is fairly consistent worldwide.

Legally, it generally refers to property or a pledge by a borrower for the repayment of a loan, something a lender may fall on if the borrower defaults.

It therefore does not transfer ownership to the creditor and so the Defendant in this instance was only entitled to enforce the collateral (the bonds) only when the Plaintiffs defaulted in their obligation to it.

The Defendant could therefore not deal unilaterally with the security interest as if it owned it.

That was not a right open to it under the contract it entered into with the Plaintiffs.

I am of the opinion that the Defendant took the impulsive decision to tender the 2nd Plaintiff's bonds without its consent to the DDEP because of a misapprehension of censure from the Central Bank if it refused to tender bonds it held as a Depository Partner.

Even though the DDEP was initially touted as a voluntary debt exchange, it can be seen that some coercive measures were imposed by the Central Bank to deter holdouts, especially concerning corporate bodies.

These were couched in attenuated language but any discerning person could perceive the underlying threat.

This observation notwithstanding, I have already found that the Defendant faced no clear and present danger if it failed to tender the 2nd Plaintiff's bonds.

It is not disputed that the Defendant was the Depository Partner for the 2nd Plaintiff's bonds. In this capacity, the Defendant was to all intents and purposes an agent or an intermediary between the Central Securities Depository and the owner of the bonds.

This therefore goes with all the duties and obligations associated with the responsibility.

From the undisputed evidence received by the Court, the 2nd Plaintiff had declined the invitation to tender the bonds or participate in the DDEP.

Even whilst he was still being prevailed upon by the Defendant's officer, he received correspondence from the Defendant that the bonds had been tendered to the programme.

This was done without his knowledge or consent. This piece of evidence was corroborated by the Defence witness who agreed that he was with the 2nd Plaintiff in his office when the letter informing him about the tendering of his bonds by Defendant was received.

Plaintiff submits that the tendering of the bonds was not a legitimate enforcement action but a reckless and fraudulent overreach of authority.

I concur with Plaintiff Counsel's submission that that action was reckless. This is because as a depository partner, Defendant knew or ought to have known that it could not breach the mandate given it by the Plaintiffs concerning the bonds, neither could it act beyond the authority it had to deal with said bonds.

The evidence is undisputable that the 2nd Plaintiff adamantly refused to allow his bonds to be tendered under the DDEP.

Even when Defence witness went to his office to further entreat him to reconsider his decision, he remained intractable. There was no equivocation in relation to his refusal.

The Defendant therefore breached its contract with the Plaintiffs when it went ahead to submit the 2nd plaintiff's bonds under the Domestic Debt Exchange programme.

Even though the tendering was reversed, it does not absolve the Defendant of liability. The reversal action in itself is a tacit admission by the Defendant that its action in tendering the 2nd Plaintiff's bonds was in itself wrongful.

The Bonds were restored to their original form during the pendency of the suit. The Plaintiffs however submit that they suffered loss as a result of what I have found to be the Defendant's wrongful action.

Plaintiffs argue that from February 2023 till the bonds were restored on the 29th of December, 2023 the 2nd Plaintiff suffered deprivation of the use, income and benefit of his investment.

Plaintiffs stated in sworn testimony that the bonds ESLA-31 yields an annual return of 20.5% whilst the GOG-26 Bonds yield 19% annually. This evidence was uncontroverted and I accept it as such.

2nd Plaintiff has calculated that the total coupon payments due him from the date of tendering to the date of reversal amounts to **Sixteen Million, Eight Hundred and**

Seventy Nine Thousand Nine Hundred and Nineteen Ghana Cedis and Twenty Pesewas. (GH¢16,879,919.20) Out of this sum, an amount of Eight Million, Four Hundred and Thirty-Nine Thousand, Nine Hundred and Fifty-Nine Ghana Cedis (GH¢8,439,959.62) has been paid leaving an outstanding sum of Eight Million, Four Hundred and Thirty-Nine Thousand, Nine Hundred and Fifty-Nine Ghana Cedis (GH¢8,439,959.62).

This charge remains unanswerable by the Defendant. It is not disputed that the interest rates on the new bonds tendered as GOG-27 (GOG-BD 17/08/27-A6139-1838-10.00) and GOG-28 (GOG-BD-15/08/28-A6140-1838-10.00) was 10%. There is no doubt that the interest rates were significantly reduced from 20% and 19% respectively to 10%.

This is the loss suffered by the 2nd Plaintiff when the Defendant wrongfully tendered its bonds to the DDEP without authorisation.

I hereby find that the 2nd Plaintiff is owed an outstanding balance of **Eight Million, Four Hundred and Thirty Nine Thousand, Nine Hundred and Fifty Nine Ghana Cedis and Sixty-Two Pesewas. (GH¢8,439,959.62)** on its GOG-26 and ESLA-31 for the year 2023.

The Defendant is therefore liable for the payment of this sum for causing the 2nd Plaintiff significant loss on its investment.

The Defendant in its counterclaim seeks general damages against the Plaintiffs jointly and severally for what it terms fraudulent misrepresentation.

The Defendant's relief is premised on its testimony that the Plaintiff's promised to provide another security as collateral for its overdraft facility but failed to do so and actually had no intention of providing the enhanced security.

The Defendant was unable to support its assertion with any evidence. The evidence on record will rather show that on the 8th of February, 2023, the Defendant in a letter to

the CSD requested the release of the bonds to it, on the basis that the Plaintiffs no longer owed it any obligations.

From the evidence, by the 8th of February, 2023 the Plaintiffs 2nd overdraft facility with the Defendant was yet to expire.

It was therefore a false representation to the CSD when the Defendant asked the lien on the bonds to be lifted because there were no more outstanding obligations to be performed by the Plaintiffs.

Any allegations of false misrepresentation will, on the contrary be laid at the doorstep of the Defendant and not the Plaintiff. The Defendant was well aware that the statement made to the CSD did not represent the truth of the facts as existed at the time.

It knowingly made a false statement to the CSD in order to secure access to the 2nd Plaintiff's bonds and I so find.

On the balance of probabilities, the Plaintiffs succeeds on their claims. The first relief sought by the 2nd Plaintiff was resolved before the trial concluded and hence the claim is no more maintainable.

2nd Plaintiff's bonds had been restored to him in its original form. That being the case, the issue was no longer up for determination as it was now a moot point.

I have earlier found that the 2nd Plaintiff is entitled to the sum of **Eight Million, Four Hundred and Thirty Nine Thousand, Nine Hundred and Fifty Nine Ghana Cedis and Sixty-Two Pesewas (GH¢8,439,959.62)** being the loss he suffered when his bonds were tendered without his consent.

Plaintiff seeks exemplary damages for fraudulent breach of trust and punitive damages.

Plaintiffs in support of their claim submit that this is a proper case for the award of exemplary damages because throughout the case, the Defendant's conduct, in addition to being unlawful was tainted with fraud, bad faith and a reckless disregard for the proprietary and contractual rights of the Plaintiffs.

I believe that is a fair assessment made by the Plaintiffs regarding the conduct of the Defendant. From an assessment of the evidence, I have been unable to find any justification for the Defendant's conduct, in the face of the clear and unequivocal refusal by the 2nd Plaintiff to participate in the DDEP.

As has been forcefully urged on the Court by Counsel on behalf of the Plaintiffs, such conduct is oppressive and arbitrary and cannot be excused as a mere oversight.

In the estimation of the Plaintiffs, it was consciously done with very little regard for the truth.

The evidence supports this submission and I have taken into account the outrageous conduct of the Defendant. The reckless and high-handed manner in which it dealt with the 2nd Plaintiff's bonds ought not be encouraged. Exemplary damages should serve as a deterrent to any such future behaviour.

In the case of **Agricultural Development Bank v Ali [2022] GHACA 108**, Dzamefe J.A (as he then was) in the majority opinion, explained exemplary damages thus;

"Exemplary damages are awarded if the Defendant acted in a wanton fraudulent, reckless, oppressive or malevolent manner against the Plaintiff.

This damage is punitive and is an additional damage awarded with reference to the conduct of the Defendant, to signify disapproval, condemnation or denunciation of the Defendant's tortious act, and to punish the Defendant.

Punitive damages go beyond compensating the aggrieved party and are specifically designed to punish Defendants whose conduct is considered grossly negligent or intentional.

They are also called exemplary damages when they are intended to set an example to deter others from committing similar acts.

Exemplary damages are assessed in the legal process to punish a Defendant for negligence. The Defendant is usually a Company or other large entity.

Punitive damages are awarded in addition to actual damages in certain circumstances. It is considered punishment and are typically awarded at the Court's discretion when the Defendant's behaviour is found to be especially harmful.

The Courts may choose to award punitive damages only if the Plaintiff can prove that the Defendant engaged in an intentional tort and or engaged in wanton and wilful misconduct.

Punitive damages requires evidence that the Defendant proceeded intentionally with an unlawful action after knowing that the act was likely to cause injury."

From the above quoted principle, the Courts award exemplary damages as a show disapproval of a party's egregious conduct.

I am satisfied that the Plaintiff has succeeded in proving the wanton behaviour and wilful misconduct of the Defendant. I will therefore award exemplary damages in the sum of **Two Million Ghana Cedis (GH¢2,000,000.00)** against the Defendant.

The Defendant's Counterclaim is also dismissed as I find that the claims are not made out. Costs of **One Hundred Thousand Ghana Cedis (GH¢100,000.00)** to the Plaintiffs.

(SGD)
SEDINA AGBEMAVA J
JUSTICE OF THE HIGH COURT

COUNSEL:

- 1. ROBERT NKANSAH BOATENG WITH KWEKU KYERE HOLDING BRIEF FOR ALFRED PAPA DARKWAH FOR THE PLAINTIFFS – PRESENT**
- 2. AMANDA OSEI-OWUSU WITH PAUL SIMPSON KOSI BEING LED BY AUGUSTINE KIDISIL FOR THE DEFENDANT – PRESENT**

LIST OF CASES

1. IN RE: KRAH (DECD) YANKYERAH VRS. OSEI TUTU [1989-90] 1 GLR 638.
2. BARKERS-WOOD VRS. NANA FITZ [2007-2008] SCGLR 879.
3. AGRICULTURAL DEVELOPMENT BANK VRS. ALI [2022] GHACA 108.