IN THE CIRCUIT COURT "A", TEMA, HELD ON THURSDAY, THE 4TH DAY OF JANUARY, 2024, BEFORE HER HONOUR AGNES OPOKU-BARNIEH, CIRCUIT COURT JUDGE

SUIT NO. C11/214/23

FIRST GHANA MOTORS CO. LTD ----- PLAINTIFF/APPLICANT

VRS.

GEORGINA ATINDE ----- DEFENDANT/RESPONDENT

PARTIES ABSENT

KWASI BLAY, ESQ. FOR THE APPLICANT ABSENT

PAUL K. DANSO AMOAKO, ESQ. FOR THE RESPONDENT PRESENT

SUMMARY JUDGMENT

FACTS

This is a ruling on a Motion on Notice for Summary Judgment brought under **Order 14 Rule 1** of the High Court (Civil Procedure) Rules, 2004, C. I 47, filed by the plaintiff/applicant (hereinafter called "the applicant") praying this Court to enter Summary Judgment against the defendant/respondent (hereinafter called "the respondent") for the sum of Forty-Seven Thousand Nine Hundred and Thirty-Seven United States dollars (US$47,937) or its Cedi equivalent with interest and costs.

The background to the application is that the applicant caused a writ of summons with an accompanying statement of claim to be issued against the defendant/respondent (hereinafter called "the respondent"), on 18th July 2023, claiming the following reliefs;

a. Recovery of the sum of US$ 47,937.000 as the outstanding balance of the sale of Two FAW Branded Trucks to the defendant in 2020 and 2021 for which the defendant has stated the sum outstanding.
b. Interest thereon at the prevailing bank rate from 2021 to date of final payment.

On 5th September 2023, the applicant filed a Motion on Notice for Summary Judgment pursuant to **Order 14 Rule 1** of C.I. 47 as amended. The applicant in its affidavit in support of the motion deposed that it issued a writ of summons with an accompanying statement of claim against the respondent and the respondent has entered an appearance to same. The applicant states that the respondent has no defence to the claim of the applicant and that she is justly and truly indebted to the applicant. The applicant therefore maintains that there is no need to go through the whole gamut of trial.

The antecedents of the case as stated by the applicant is that by an agreement entered into with the respondent in December 2020 and January 2021, the respondent purchased two units of FAW branded Tipper Trucks at a price of Seventy-One Thousand United States dollars (US$71,000) each on terms. The respondent made payments and as of August 28, 2022, the respondent had an outstanding balance of Fifty-Seven Thousand One Hundred Fifty-Seven United States dollars (US$57,157.00) to clear and submitted proposals for payment. In support, the applicant annexed the said proposal for payment as **Exhibit "A"**. The applicant further states that it rejected the respondent's proposal as spelt out in **Exhibit "A"** and invited to respondent to make full payment within a period of fourteen days from the date of receipt of a response from the applicant's lawyers, dated 1st September 2022 failing which the applicant would commence legal proceedings for the recovery of any outstanding amount. In support, the applicant annexed as **Exhibit "B**", the said response. The applicant states that the respondent has since made payment leaving an outstanding balance of US$47,937.00 to pay and that the respondent would not pay the said amount unless ordered by this Court to do so.

Before service of the motion on notice for summary judgment on the respondent, on 18th September 2023, the respondent filed a statement of defence and counterclaim. The respondent in the statement of defence and counterclaim admits the transaction between the parties. The respondent resists the application for summary judgment and

maintains that the quotation, sales, and payment of the two (2) units of FAW Branded Trucks in the United States Dollars in the purchase agreement and the plaintiff's insistence that the respondent pays the outstanding balance in the United States Dollars is illegal.

The respondent in further denial of the claim of the plaintiff states that the purchase price of the two (2) units of FAW Branded trucks amounted to One Hundred and Forty-Two Thousand United States Dollars (US$142,000) or its Cedi equivalent. The respondent says that at the time of the purchase agreement, the exchange rate of One Dollar ($1) to the Ghana Cedis was Five Ghana Cedis, Eighty Pesewas (GH₵5.80), and the price of the two (2) units of FAW Branded Trucks was One Hundred and Forty-Two Thousand United States Dollars ($142,000) or its Cedi equivalent was Eight Hundred and Twenty-Three Thousand, Six Hundred Ghana Cedis (GH₵823,600). The respondent says that she has paid an amount of Six Hundred and Thirty-Two Thousand Ghana Cedis (GH₵632,000) being the purchase price for the two (2) units of FAW Branded Trucks leaving a balance of One Hundred and Ninety-One Thousand Ghana Cedis (GH₵191,000) due and owed to the applicant. The respondent maintains that the illegal price and the applicant's insistence on payment of two (2) units of FAW Branded Trucks in foreign currency has occasioned the alleged breach. The respondent therefore counterclaims against the applicant as follows;

a. An order that the plaintiff should transfer ownership in one (1) unit of FAW Branded Trucks to the defendant that for all intent and purpose defendant has fully paid for one (1) FAW Branded Trucks;
b. A declaration that the plaintiff's insistence on payment of the two (2) units of FAW Branded Trucks in foreign currency specifically in United States Dollars is illegal.
c. A declaration that the amount owed and due the Plaintiff is One Hundred and Ninety-One Thousand Ghana Cedis (GH$191,000.00).

d. An Order of perpetual injunction restraining the Plaintiff whether by itself, agents, servants, assigns, whosoever claiming through it from interfering with the interest and running of defendant's business;
e. General damages;
f. Cost including legal fees.

RULING

I have determined this application for summary judgment based on the pleadings filed, the application for summary judgment with the supporting affidavit, the annexures, and all processes so far filed in the suit. **Order 14 Rules 1 and 3** of C.I 47, respectively provides as follows;

"(1) when in an action, a defendant has been served with a statement of claim and has filed appearance, the plaintiff may on notice apply to the court for judgment against the defendant on the ground that the defendant has no defence to a claim included in the writ or to a particular part of such a claim or that the defendant has no defence to such a claim or part of a claim except as to the amount to any damages claimed."

(3) A defendant may show cause against the application by affidavit or otherwise to the satisfaction of the Court

The purpose of summary judgment as stated by the Supreme Court in the case of **Sam Jonah v. Duodu-Kumi** [2003-2004] SCGLR page 50 at page 54, is to facilitate the early conclusion of actions where it is clear from the pleadings that the defendant has no cogent defence to the action. It is also intended to prevent a plaintiff from being delayed when there is no fairly arguable defence to the action. It has also been held that the discretion of the court to grant summary judgment must be exercised judiciously and with great circumspection in order not to shut the door of justice on a defendant unless it is manifestly clear that the defendant has no defence to the action. See the case of **Sheppards & Co. V. Wilkinson and Jarvis** (1889) 6 T.L.R. 13 per Lord Esher.

Thus, where a defence set up shows that there are triable issues, the court must grant leave for the respondent to defend the action. In the case of **Sananu v. Salifu [2009] SCGLR 586 at 591 per Baffoe Bonnie JSC,** the Supreme Court held that;
"A defence set up need only show that there is a triable issue, and leave to defend ought to be given unless there is clearly no defence in law and no possibility of a real defence on the question of fact… Thus, even though a statement of defence may have been filed, the court is not precluded from entertaining an application for summary judgment under Order 14 Rule 1".

In the case at bar, the respondent has entered an appearance and filed a defence and counterclaim to show that she has a valid defence to the action. Counsel for the applicant maintains that the respondent has no valid defence to the action and in support, attached letters admitted and marked as **Exhibits "A" and "B",** as the respondent's admission of liability and proposal of payment. Learned Counsel for the respondent in his oral submission before the court raised issues of admissibility of the said letters exhibited by Counsel for the applicant. From **Exhibit "A"** attached to the application for summary judgment, the letter is marked as *"Without Prejudice"*. **Exhibit "B"** is also the response of Counsel for the applicant to the said "*Without Prejudice"* letter.

The position of the law is that letters exchanged between lawyers or parties designated as "without prejudice" are not intended to create legally binding and enforceable agreements. In the case of **Ghana Consolidated Diamonds Ltd. V. Tantrum and Ors** [2001-2002] 2 GLR 150, Benin JA, writing on such letters stated that:
"Such letters exchanged between solicitors or parties or both "without prejudice' in the course of resolving differences between litigants, actual or prospective, are not intended to create any binding enforceable agreements. …If a letter is written "without prejudice" it amounts to saying the other person may accept it or not as he wishes, and if he does not accept it, the writer thereof suffers no consequence for it since it cannot be used in evidence against him."

Again, in the case of **Jebeille v. Norwich Union Fire Insurance Society Ltd.** [1961] 1 GLR 252-257, Ollenu J (as he then was) stated that:

"The law as I understand it, is that letters written during bonafide negotiations or attempts to settle or compromise a dispute cannot, on the grounds of public policy, be given in evidence as admissions…If it were not so, attempts at extra-judicial settlement of disputes will not have favourable consideration by parties, as it will expose them to risks of being trapped by their opponents and operate to their own detriment. But that protection which the law affords to letters written without prejudice does not extend to independent facts admitted during the negotiation for a settlement…In other words, letters marked "Without Prejudice" cannot be admitted to prove admissions made on the actual subject of a dispute which the parties negotiated to settle and in connection with which settlement or attempted settlement the parties negotiated to settle and in connection with which settlement or attempted settlement they wrote the letter expressly or impliedly offering a compromise; but written admissions or statements of facts made in the course of the settlement, which do not directly or by necessary implication have bearing on the subject-matter of the dispute, are admissible, even though the correspondence in which they were made clearly marked "Without Prejudice"

In the instant case, the applicant relies on the *"without prejudice"* letters to state that the respondent is justly indebted to the applicant. Thus, the court cannot rely on such letters to determine the indebtedness of the respondent to the applicant since the letters are not enforceable and binding agreements between the parties.

The respondent in her defence also raises issues about the legality of the price quoted in United States dollars and the applicant's insistence that the respondent pays the amount in United States dollars and counterclaims among other things for a declaration that the amount owed and due the plaintiff is One Hundred and Ninety-One Thousand

Ghana Cedis (GH₵191,000) rather than the amount of Forty-Seven Thousand Nine Hundred and Thirty-Seven United States Dollars (US$47,937.00) being claimed by the applicant. The respondent maintains that its perceived breach of the purchase transaction is a direct consequence of the illegal stance taken by the applicant in this case.

Under **Order 11 Rule 8** of the High Court (Civil Procedure) Rules, 2004, C.I. 47, illegality which is a defence is one of the matters to be specifically pleaded by demonstrating facts amounting to illegality. In the case of **National Investment Bank Ltd. v. Silver Peak Ltd.** [2003-2004] SCGLR 1008, the Supreme Per Dr. Dateh-Bah JSC (as he then was) in delivering the judgment of the Supreme Court on the issue that given the fact that residents of Ghana are obliged by law to pay their foreign currency debts to other Ghana residents in Cedis, is the interest rate applicable to such foreign currency debts to be the appropriate rate applicable to the relevant foreign currency or is to be the rate applicable to Cedis debts, the Court held at page 1013 that:
"…The Exchange Control (Amendment) Law, 1986 (PNDCL 149) amends, inter alia, section 5 of the Exchange Control Act, 1961 (Act 71), to prohibit payment in external currency to, or for the credit of, a Ghana resident for services rendered or goods or property purchased or exchanged. Similarly, PNDCL 149 inserts a new section 1A into Act 71 by which it is unlawful for a Ghana resident to receive in Ghana any external currency as payment for services or for the sale of goods or property. Thus, not only would it be illegal for the appellant to pay the respondent except in cedis, but it would have been illegal for the respondent also to have received payment except in cedis. Accordingly, even if the learned trial judge had not indicated the Cedi equivalent of the foreign exchange debt in his judgment, the appellant's obligation would have been converted into cedis, by operation of law, before lawful payment could be made…'

In the instant case, the applicant has endorsed only the United States Dollar amount on the writ of summons without the Cedi equivalent but on the motion paper claims the amount or its Cedi equivalent. The respondent has raised issues about the pricing in

foreign currency and the exchange rate used by the respondent. The respondent has therefore put her total indebtedness to the applicant in issue. Also, the respondent having raised the issue of illegality in the price quotation and insistence on payment in dollars by the applicant, the Court cannot brush aside the defence raised and the counterclaim for a declaration that the applicant's insistence on payment in United States Dollars is illegal and proceed to enter summary judgment for the applicant on the total sum of US$47,937.00 without giving the respondent the opportunity to be heard on the issue raised.

On the amount of One Hundred and Ninety-One Thousand Ghana Cedis (GH₵191,000), the respondent admits to owing the plaintiff. There is therefore no triable issue on that since the applicant in the motion paper claims the Cedi equivalent. I therefore enter summary judgment on the amount not disputed with interest on the said amount at the prevailing commercial bank rate till the date of final payment. On the outstanding balance of the amount endorsed on the writ of summons, the respondent has raised a triable issue on the legality of the insistence of payment in United States Dollars, the rate of exchange agreed upon between the parties as applicable to the transaction and the quantum of her indebtedness to the applicant.

Based on the foregoing, I hereby grant the application for summary judgment in part for the applicant to recover an amount of One Hundred and Ninety-One Thousand Ghana Cedis (GH₵191,000) being the debt admitted by the respondent with interest on the said amount from January 2022 at the prevailing commercial bank rate till date of final payment.

The respondent is granted leave to defend the action on the part disputed for the respondent to prove her counterclaim. The application for summary judgment is accordingly granted in part.

The suit shall take its normal course on the remainder of the claim and the counterclaim of the defendant/respondent.

No order as to costs.

SGD.

H/H AGNES OPOKU-BARNIEH

(CIRCUIT COURT JUDGE)