

IN THE SUPERIOR COURT OF JUDICATURE IN THE COMMERCIAL DIVISION
(COURT 1) OF THE HIGH COURT OF JUSTICE ACCRA, HELD ON THURSDAY

THE 19TH DAY OF OCTOBER, 2023

BEFORE HER LADYSHIP JUSTICE SHEILA MINTA

SUIT NO. CM/RPC/0038/2020

JEBSEN & JESSEN (GMBH & CO. KG) - PLAINTIFF

(A TRADING COMPANY INCORPORATED

UNDER THE LAWS OF GERMANY)

KEHRWIEDER 11

20457 HAMBURG

GERMANY

VRS.

TATORI CONSTRUCTION CO. LTD. - DEFENDANT

HOUSE NUMBER C20300

DZORWULU SAPALE STREET

ACCRA - GHANA

JUDGMENT

In this case the Plaintiff, a trading company registered under the laws of Germany supplied to the Defendant, also a limited liability company incorporated under the laws

of Ghana, some vehicle tyres in the total sum of US\$1,135,208.00. This supply was made at the request of the Defendant sometime in 2014 and for which two invoices and Bills of Lading were issued with the terms of payments contained therein which required payments to be made within One Hundred and Eighty (180) days after date of issuance of respective invoices. The said tyres were duly received by the Defendant together with the invoices and Bills of Lading but according to the Plaintiff, the Defendant has failed to honour its obligations towards it and for which a Writ of Summons and Statement of Claim was filed on 9th October, 2019 for the following reliefs:-

- a. The recovery of the principal amount of One Million, One Hundred and Thirty-Five Thousand, Two Hundred and Eight United States Dollars (US\$1,135,208.00)
- b. Interest on the principal amount of One Million, One Hundred and Thirty-Five Thousand, Two Hundred and Eight United States Dollars (US\$1,135,208.00) at the prevailing commercial bank interest rate.
- c. General damages for breach of contract.
- d. Costs.

On 20th January, 2020 the Defendant filed its Statement of Defence in which an admission was made that indeed the Defendant received the said tyres but added that it was agreed that payments could only be made upon receipt of payments from its corporate customers who purchase same on credit basis. The Defendant denied owing the Plaintiff the said amount claimed but failed to provide evidence of any payments made.

ISSUES FOR TRIAL

At the close of the pleadings the following issues were set down by the parties with the assistance of the Pre-Trial Judge were as follows:

1. Whether or not by the terms of the agreement between the Plaintiff and Defendant, the parties agreed to a credit sale of the vehicle tyres to the Defendant?
2. Whether or not the invoices pursuant to which the goods were supplied to the Defendant, invoices numbered 91006091 and 91006308, contained the terms of payment?
3. Whether or not the Plaintiff varied, reviewed, revised, or made changes to the terms of payment contained in the invoices pursuant to which the goods were supplied?
4. Whether or not there are other terms of payment for the goods supplied, separate and distinct from those contained in the invoices pursuant to which the goods were supplied?
5. Whether or not per the terms of the credit sales agreement, payment of the vehicles supplied was dependent on the proceeds Defendant received from other companies which it supplied the vehicle tyres?
6. Whether or not the Defendant has made any payments to the Plaintiff for the goods supplied?
7. Whether the Plaintiff is entitled to its reliefs?

For a very simple case as this, trial commenced on 5th June, 2023 and ended on 12th June, 2023. Counsel for the Plaintiff filed his Written Address on 14th July, 2023. At the time of writing this judgment Counsel for the Defendant has not filed his Address. From the pleadings and the evidence before the Court it is not in dispute that the Plaintiff supplied the said goods to the Defendant and same were duly received by the Defendant. These depositions are contained in the Defendants pleadings and paragraphs 4 and 6 of its Witness Statement. The Defendants story is that the parties agreed to a credit sale for the Defendant to pay to the Plaintiff the said sum of US\$1,135,208.00 only upon the

subsequent sale and receipt of payment from third parties. I will discuss issues 1 and 2 first followed by issues 3, 4, and 5 which will be merged and discussed together and then Issue 6. Issue 7 resolves upon the discussion of the other issues.

ISSUE 1- Whether or not by the terms of the agreement between the Plaintiff and Defendant, the parties agreed to a credit sale of the vehicle tyres to the Defendant?

ISSUE 2 - Whether or not the invoices pursuant to which the goods were supplied to the Defendant, invoices numbered 91006091 and 91006308, contained the terms of payment?

By the Plaintiff's case the supply of the tyres to the Defendant were made pursuant to the issuance of the invoices No. 91006091 and 91006308 and bills of lading issued to the Defendant and attached **Exhibits "A" and "B" series** in support of its claim. According to the Plaintiff the invoices contained the conditions and terms of payment to the effect that payment was to be made 180 days after date of the invoice. The said goods have been duly supplied and received by the Defendants since 2014 but till date payment has not been made to the Plaintiff by the Defendant. The Defendant's story is that prior to the supply of the tyres by the Plaintiff to it, it had indicated to the Plaintiff that payment could only be made when the said tyres were sold to its third-party customers and payments made to the Defendant. Beyond this deposition there was no evidence to back this claim. There is admission of the receipt of the goods and at the value claimed.

On the 12th June, 2023 when the Defendant's witness was being cross-examined by Counsel for the Plaintiff the following were recorded:-

Q: You admit that in 2014 the Plaintiff supplied the Defendant Company with vehicle tyres worth US\$1,135,208.00. Is that not so?

A: That is so

Q: Those invoices with the general sales conditions contained the terms of payment of the tyres supplied to the Defendant. Yes, or no?

A: Yes, my Lady.

Q: So, you would agree with me that by the terms of payment contained in the invoices, the Defendant was to pay net cash for the tyres within 180 days after date of issuance of the respective invoices. Is that not so?

A: That is not so.

Q: Kindly take a look at Exhibit "A1" of the Exhibit "A" series attached to the Plaintiff's witness statement, kindly look at the payment terms under the conditions. It states that net cash 180 days after date of invoice. Is that so?

A: That is on the invoice.

The Defendant's second defence to the Plaintiff's claim is that it has made some payments to the Defendant and therefore does not owe the Defendant the sum of US\$1,135,208.00. Sadly, the Defendant failed to produce any evidence of the payments it has made to the Plaintiff. **Section 11 (1) of the Evidence Act NRCD 323** states thus:-

"For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue".

From the evidence before the Court and as indicated earlier, clearly the Defendant received the said invoices and the bills of lading together with the said goods. The law is

trite that he who asserts must prove. See the case of *Memuna Moudy & Ors vrs. Antwi [2003-2004] SCGLR 967* and the old case of *Bank of Ghana vrs. West Africa Ltd. vrs. [1963]1 GLR 176 @ 181* which states that the party who asserts the positive carries the burden to lead evidence in proof of his claim or assertion. In *Majolagbe vrs. Larbi [1956] GLR 190* it was also stated that :-

“Where a party makes an averment capable of proof in some positive way, e.g., by producing documents, description of things, reference to other facts, instances, or circumstances, and his averment is denied, he does not prove it by merely going into the witness-box and repeating that averment on oath, or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the Court can be satisfied that what he avers is true.”

Again, in *Okudzeto Ablakwa (No. 2) & Anor vrs. Attorney-General & Obetsebi-Lamptey (No. 2) [2012]2 SCGLR 845*, the Supreme Court per Brobbey JSC (as he then was) stated at page 871 thus:-

“The established rule is that where a person makes an allegation, which is capable of proof by documentary evidence, he will not succeed in proving it by mere oral assertions or allegations”.

The Plaintiff has been able to adduce evidence that the terms as agreed is what is contained on the invoices but the Defendant in its evidence before the court was unable to produce any credible evidence to challenge the Plaintiff's claim that payment was to be made within 180 days after date of invoice as contained in the invoices sent to the Defendant. I can only reasonably conclude that Issues 1 and 2 are resolved in favour of the Plaintiff.

- ISSUE 3 - *Whether or not the Plaintiff varied, reviewed, revised, or made changes to the terms of payment contained in the invoices pursuant to which the goods were supplied?*
- ISSUE 4 - *Whether or not there are other terms of payment for the goods supplied, separate and distinct from those contained in the invoices pursuant to which the goods were supplied?*
- ISSUE – 5 *Whether or not per the terms of the credit sales agreement, payment of the vehicles supplied was dependent on the proceeds Defendant received from other companies which it supplied the vehicles tyres?*

Now the discussions on issues 3, 4 and 5 can be said to be have been answered in the analysis made above. Bare allegations have been made by the Defendant that the there was some other arrangements by the parties governing the terms of the payment of the goods supplied. There was however no evidence adduced before the Court that varied the terms and conditions contained in the invoices issued. Not even an email between the parties on another payment terms different from those contained in the invoices. As again affirmed in the case of *Zabrama vrs. Segbedzi [1991]2 GLR 221* where the Supreme Court stated that:-

“A person who make an averment or assertion which is denied by his opponent has the burden to establish that his averment or assertion is true. And, he does not discharge this burden unless he leads admissible and credible evidence from which the fact or facts he asserts can properly and safely be inferred. The nature of each averment or assertion determines the degree and nature of that burden.”

This principle espoused in a multitude of cases from the Supreme Court disables me from resolving issues 3 and 4 in favour of the Defendant.

The Defendant further contends that there was an understanding between the parties that payment of the said goods was dependent upon the receipt of proceeds of its sale by the Defendant from other third-party companies who were not parties to the agreement between the Plaintiff and the Defendant. What I also find intriguing is the fact that it has been some nine years since the Defendant took delivery of the goods. It is the Defendant's testimony that it has not received any payment from those third-parties and so the Plaintiff should not be entitled to proceeds of the goods supplied it? I do not think so.

Objectives of most business entities is for economic growth and if transactions entered into by business people always end the way this one did; most companies will be out of business and certainly not healthy for any economy. I agree with the words of Sophia Akuffu JSC (as she then was) in the case of ***IBM World Trade Corporation vrs. Hasnem Enterprise [2001-2002] SCGLR 393 at 411*** cited by Counsel for the Plaintiff, to wit:-

"Economic development depends to a large extent, on healthy financial interaction and transaction; these, in turn, cannot exist without credibility. It is only when participants live up to their legal obligations, and cease using processes of the courts to evade financial responsibility that this country can finally launch itself firmly on the road to economic success. Where money is unjustly withheld, then the creditor must be seen to have been justly recompensed by the debtor for the unjust use of other people's money. Any system that tends to encourage debtors to shirk their responsibilities benefits no one but delinquency debtors; and poor debt servicing in the business sector only fans, further, the flames of inflation. It seems to me that they are now, then the attraction of needless protracted litigation would be significantly reduced."

As stated earlier it is sad that this simple matter could not be resolved and had to linger on in the Courts for all this period. I am again unable to resolve issue 5 in favour of the Defendant for lack of evidence and good conscience.

Finally, on ISSUE 6:

Whether or not the Defendant has made any payments to the Plaintiff for the goods supplied?

From the evidence before the Court it is not in doubt that the value of the goods supplied to the Defendant by the Plaintiff was US\$1,135,208.00. The Defendant in its pleadings and testimony merely averred that some payments have been made but did not deny the owing the said sum. Having made this allegation of some payments haven been made, the onus lies on the Defendant to adduce evidence in prove of how much payment has been made and when same was made. Unfortunately, this evidence of proof of payments made to Plaintiff is lacking in the Defendant's evidence adduced at trial and I further resolve this issue in favour of the Plaintiff.

CONCLUSION

From the analysis above the Defendant has been unable to put up a credible defence to challenge that of the Plaintiff's, who has discharged its legal and evidential burden imposed on it by law in respect of its reliefs (a) and (b) endorsed on its Writ. I hold that the Plaintiff is entitled to the sum of US\$1,135,208.00 from the Defendant for goods sold to it as per its relief (a) and (b).

1. I therefore enter judgment in favour of the Plaintiff against the Defendant for the recovery of the principal sum of US\$1,135,208.00 as per its relief (a).

2. I further hold that interest be paid on the said sum of US\$1,135,208.00 at the prevailing commercial bank rate calculated at simple interest from May 2014 till date of judgment (relief (b)).
3. The Plaintiff's claim for damages (relief (c)) is covered having regard to the fact that interest has been awarded on the judgment debt which compensates for the lack of use of the Plaintiff's funds for the period.
4. Cost of Fifty Thousand Ghana Cedis (GH¢50,000.00) awarded in favour of the Plaintiff against the Defendant.

(SGD.)

SHEILA MINTA, J.

JUSTICE OF THE HIGH COURT

REPRESENTATIONS:

PARTIES:

ABSENT

COUNSEL:

**ALEX DODOO, ESQ., BEING LED BY ABDUL-LATEEF SHAIBU, ESQ., HOLDING
BRIEF FOR KWADWO GYASI NTRAKWAH, ESQ., FOR PLAINTIFF - PRESENT**

COUNSEL FOR DEFENDANT – ABSENT

AUTHORITIES:

1. **MEMUNA MOUDY & ORS VRS. ANTWI [2003-2004] SCGLR 967**
2. **BANK OF GHANA VRS. WEST AFRICA LTD. VRS. [1963]1 GLR 176 @ 181**
3. **MAJOLAGBE VRS. LARBI [1956] GLR 190**
4. **OKUDZETO ABLAKWA (NO. 2) & ANOR VRS ATTORNEY-GENERAL & OBETSEBI-LAMPTEY (NO. 2) [2012]2 SCGLR 845**
5. **ZABRAMA VRS. SEGBEDZI [1991]2 GLR 221**
6. **IBM WORLD TRADE CORPORATION VRS. HASNEM ENTERPRISE [2001-2002] SCGLR 393 AT 411**
7. **SECTION 11 (1) OF THE EVIDENCE ACT NRCD 323**