

IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE, INDUSTRIAL AND LABOUR DIVISION 2 HELD IN ACCRA, ON FRIDAY THE 5TH DAY OF MAY 2023, BEFORE HER LADYSHIP JUSTICE ANANDA J. AIKINS (MRS) JUSTICE OF THE HIGH COURT.

SUIT NO. HRC/65/2015

1 . GREENLINE LOGISTICS LTD.

2 . SORAYA ANGLOW

BOTH OF WESTPORT BUILDING,
13 AXIM RD
HARBOUR BUSINESS AREA, TAKORADI



PLAINTIFFS

VRS

1 . MR. FRANKY BOTHA

2 . AEL MINING SERVICES (GHANA) LIMITED

BOTH OF NO.6 ODOI KWAO STREET
AIRPORT RESIDENTIAL AREA, ACCRA



DEFENDANTS

COUNSEL FOR THE PLAINTIFFS: EZIUCHE NWOSU, ESQ

COUNSEL FOR DEFENDANTS: OPOKU AMPONSA, ESQ.

JUDGMENT

The plaintiffs originally sued the defendants on the 20th of April 2015 and amended their claim on two occasions, that is, on the 2nd of June, 2017 and on 5th February, 2021. Per their further amended statement of claim filed on the 5th day of February, 2021, the plaintiffs sought the following reliefs against the defendants:

- a) A declaration that the defendants have been grossly discriminatory in their dealings with the plaintiffs since the 1st defendant assumed office, causing huge economic losses to the 1st plaintiff's business and continuing untold injury and suffering to the 2nd plaintiff.
- b) GH¢4 million damages for discriminatory practices against the plaintiffs.
- c) A declaration that the 2nd defendant is in a breach of the Minerals and Mining (General regulations) 2012B, LI 2173 of Ghana, and being a subsidiary of AEL South Africa, is also in breach of the King Code of Governance Principles (the code) and the King Report on Governance for South Africa (King iii) to which AEL South Africa and all its branches or subsidiaries are bound.
- d) Gh¢2.5 million for mental torture and psychological trauma caused the 2nd plaintiff by the degrading and humiliating treatment meted out to her by the 1st defendant.
- e) Injunction restraining the defendants from practicing further acts of discrimination or other fundamental human rights infractions against the plaintiffs or other Ghanaian outfits or persons.

f) Costs.

The defendants denied liability for the claims of the plaintiffs and at close of pleadings and on 28th day of January, 2018, the following issues inclusive of additional ones filed by the defendants were set down by the court for determination:-

- (1) Whether or not the defendants have been discriminatory in their dealings with the plaintiffs in favour of foreign-owned companies since the 1st defendant assumed office?
- (2) Whether or not the 1st defendant has meted out degrading treatment in violation of the 2nd plaintiff's fundamental human rights to be treated with dignity as enshrined in the 1992 Constitution?
- (3) Whether or not the defendants have taken away some of the plaintiffs' business of bulk emulsion transport of ammonium nitrate?
- (4) Whether or not the 2nd defendant induced the 1st plaintiff to construct a specialized warehouse
for use by 2nd defendant to store its ammonium nitrate stock?
- (5) Whether or not AEL South Africa ever sent request for proposal to the 1st plaintiff?
- (6) Whether or not document submitted, upon a request for proposal, by the 1st plaintiff was independent of an already existing contract executed by the parties in 2014?
- (7) Whether or not the defendants are in breach of Minerals and Mining (General) Regulations, 2012B, LI 2173, the King Code of Governance Principles (the code) and the King Report on Governance for South Africa (King III).

(8) Any other issues from the pleadings

The additional issues were as follows:

- (1) Whether or not the 2nd defendant is a subsidiary of AEL South Africa?
- (2) Whether or not the 2014 contract executed by the parties still subsists?
- (3) Whether or not the scope of the 2014 contract executed between the parties required plaintiff's to provide clearing, handling transshipment and delivery of the 2nd defendant's products.
- (4) Whether or not the plaintiffs have ever rendered warehousing services to the 2nd defendant?

CASE OF PLAINTIFFS

The case of the plaintiffs is that they however have had very cordial relationship with the 2nd defendant ever since the year 1994 when plaintiffs conveyed the first blocks used to construct the 2nd defendant's office at Bogoso. The plaintiffs claimed that the cordial relationship continued until the 1st defendant assumed office as the Managing Director of the 2nd defendant.

The plaintiff claimed that after the assumption of office by the 1st defendant, the defendants have "implemented systematic discriminatory policies to the manifest injury of the plaintiffs and in favour of competing foreign-owned business outfits in violation of the 1992 constitution"

The plaintiffs also said that the 1st defendant has meted out degrading treatment to the 2nd plaintiff and thus abused her fundamental human right to be treated

with dignity, also in violation of the 1992 constitution. The plaintiffs further claimed that the defendants have clandestinely taken away the plaintiff's warehousing business with the defendants and have shared the said business among two foreign-owned companies in violation of the plaintiffs' economic and other associate rights under the 1992 constitution.

The further complaint of the plaintiffs was that the defendants have also stealthily and without cause taken away the plaintiffs' business of bulk emulsion transport (of ammonium nitrate) to various sites in Ghana and given same to Gateway Logistics in violation of the plaintiffs' economic and other associated rights under the 1992 constitution. And after taking away the plaintiffs' business the defendants are paying the new companies much more than they ever paid the plaintiffs.

In paragraph 12 of their amended statement of claim the plaintiffs gave a long list of particulars of the alleged violation of their fundamental human rights.

THE CASE OF DEFENDANTS

As already noted above, the defendants denied any liability for the claims of the plaintiffs. They stated also that the 2nd defendant is a company incorporated in Ghana and that AEL South Africa is not the parent company of the 2nd defendant.

The defendants also said that they had never given or requested for warehousing services from the plaintiffs and also that they have never taken away business from the 1st plaintiff and given same to two foreign based or foreign owned companies.

The defendant further stated that per a written contract dated December, 2009, the 2nd defendant company engaged the 1st plaintiff company to provide loading,

off-loading and transportation services only in respect of the 2nd defendant's products, that is, emulsion and that the said contract was extended to 31st December, 2014 by way of formal contract extension letters dated 31st January, 2013, 31st March, 2013 and 19th January, 2014.

The defendants also stated that in the year 2014, the 1st plaintiff and the 2nd defendant executed a new contract under which the 1st plaintiff was to provide services in the form of clearing, handling, transshipment and delivery of the 2nd defendant's products. However upon a month prior written request and agreement on tariffs, the 1st plaintiff would store the 2nd defendant's products under the 1st plaintiff's control at a distribution Centre situated at Hanger No.5 Air force station, Takoradi.

It was also the case of the defendants that they had never requested for nor indicated to the 1st plaintiff to provide warehousing services to the 2nd defendant and that the 1st plaintiff has never rendered such services to the 2nd defendant. They also stated that they were unaware of any alleged two (2) foreign owned companies that it had given the 1st plaintiff's alleged warehousing business to.

The defendants moreover stated that the 2014 contract that the 2nd defendant had with the 1st plaintiff subsisted for its entire duration and that the 1st plaintiff continued to render services to the 2nd defendant under the said contract until it expired.

BURDEN AND STANDARD OF PROOF

In all civil litigation, it is trite that the primary burden of proof which is made up of the burden of persuasion and the burden of producing evidence in support of pleadings or averments, is always on the party who makes the initial averment.

The evidence produced must be satisfactory enough to convince the court on the particular issues for determination. See sections 10 (1) and (2) and 11 (1) and (4) of the *Evidence Act, 1975 (NRCD 323)*. It is the plaintiff who initially bears this primary burden because he/she initiates the action against the defendant and where the plaintiff adduces sufficient evidence in discharge of this primary burden, the onus then shifts onto the defendant under section 14 of the Evidence Act supra to also adduce sufficient evidence in rebuttal, in order to avoid a ruling against him on the particular issues.

In this instant case, the plaintiffs herein bear the burden to prove what they allege against the defendants. Our apex court in *Ackah v. Pergah Transport Ltd., & Anor [2010] SCGLR p 736* stated that the basic requirement of the law on evidence is that a party who bears the burden of proof has to produce the requisite credible evidence of the facts in issue otherwise his claim may fail. Also in *Zabrama v. Segbedzi [1991] 2 GLR 221* it was held that a party has the burden to establish that his averments or assertions are true when such assertions/averments are denied by his opponent and in *Majolagbe v. Larbi [1959] 2 GLR 190* it was stated by Ollenu J as he then was that mounting the witness box and merely repeating one's averments on oath does not amount to proof of the said averments. There was therefore the need to produce other evidence of facts and circumstances from which the court can ascertain that the averments of a party are indeed true.

ANALYSIS OF ISSUES.

ISSUE 1 - *Whether or not the defendants have been discriminatory in their dealings with the plaintiffs in favour of foreign-owned companies since the 1st defendant assumed office?*

The plaintiff claimed that the defendants have been discriminatory in their dealings with the plaintiffs and that defendants have favoured foreign-owned companies.

The 2nd plaintiff who testified for and on behalf of herself and the 1st plaintiff, gave the names of the foreign owned companies as Stellar Logistics Ghana and Gateway Logistics Ghana Ltd. The witness claimed that the defendants had taken away the contracts it had with the 1st plaintiff and given same to these two foreign-owned businesses.

The witness however admitted under crossexamination that the said two companies are registered in Ghana (see page 3 of the record of proceedings of 28th July, 2020 and pages 5 & 6 of the record of proceedings for 30th JULY, 2020. The witness gave the court no evidence about the shareholding structure of these two companies and therefore the court cannot make a finding of fact that these companies are foreign-owned companies.

The plaintiffs also failed to lead evidence to show any discriminatory acts that the defendants had done to show their favoritism for these two companies and also failed to pinpoint any specific contract they had with the defendants which had been taken away from them and given to these two companies and therefore this court cannot find as a fact that the defendant had been discriminatory in their actions towards the plaintiffs.

ISSUE 2 – Whether or not the 1st defendant has meted out degrading treatment to the 2nd plaintiff in violation of her fundamental human right to be treated with dignity as enshrined in the 1992 Constitution?

The 2nd plaintiff claimed she went to see the 1st defendant in his office and that just about the time they were about to begin discussions, her phone rang for a

few seconds and while she searched for it to put it off, the 1st defendant rained insults on her and virtually got her out of his office. She said she found this treatment by the 1st defendant to be demeaning. This assertion was denied by the 1st defendant who said that the 2nd plaintiff showed up at his office without appointment yet he received her because of his friendship with the 2nd plaintiff's husband. He said he politely asked the 2nd plaintiff to turn off her phone because same kept ringing consistently. He said he walked 2nd plaintiff to her car after they had finished their discussions.

The 2nd plaintiff also complained that she was not invited to the high table at the 2nd defendant's twentieth anniversary party and that this was degrading. With all due respect to the 2nd plaintiff, this court believes that she failed to adduce credible evidence that she was treated in a degrading manner by the 1st defendant because the fact that she was not invited to the high table at the 2nd defendant's party and also the fact that she was asked to turn off her phone so that there will be no disturbance during her discussions with the 1st defendant does not mean that she had been treated in a degrading manner and in any case, she even failed to substantiate her claim that she was shouted at by the 1st defendant in his office.

ISSUE 3 – *Whether or not the defendants have taken away some of the plaintiff's business of bulk emulsion transport of ammonium nitrate?*

The plaintiffs claimed that the contract they had with the defendants i.e exhibit 'F' was cleverly truncated by the defendants through the tender proposal (exhibit G) which they were made to submit by the defendants and that their contract was given to Stellar Logistics by the defendants.

The defendants on the other hand asserted that the 1st defendant executed a contract dated 1st November, 2009 with the plaintiffs and that this contract was for the transportation of the 2nd defendant's products and that this contract was subsequently extended by extension letters dated 31st January, 2013, 31st March 2013 and 19th January, 2014. After that the parties entered into a three-year contract for the plaintiffs to provide the 2nd defendant with services in the form of clearing, handling, transshipment and delivery of the 2nd defendant's products.

The evidence on record before this court is that the 2nd plaintiff admitted under cross-examination that this contract which was executed in 2014 and which was tendered by the plaintiffs as exhibit 'F' actually run its full course from 2014 till 2017 (see pages 4 of the record of proceedings for the 13th July, 2020). Indeed it is clear from the evidence before the court that the plaintiffs failed to lead any convincing evidence to substantiate their claim that exhibit 'F' was truncated by the defendants and that some aspects of the said contract were awarded to other companies like Stellar Logistics and Gateway Ltd.

ISSUE 4- Whether or not the 2nd defendant induced the 1st plaintiff to construct a specialized warehouse for use by the 2nd defendant to store its ammonium nitrate?

The plaintiffs' evidence on this issue can be found in paragraphs 6-9 of their witness statement filed on the 23rd of April, 2018.

Apart from the plaintiffs repeating their averments on oath that they were asked by the defendants to build a modern warehouse facility for the professional storage and handling of the 2nd defendant's stock of ammonium nitrate in Ghana, the plaintiffs provided no credible evidence to back this claim. Indeed judging by the track record of the parties in putting all their transactions into writing as agreements, this court finds it incredulous that the plaintiffs would construct a million dollar warehouse for the use of the 2nd defendant without any documentary evidence backing the request to build. Indeed the plaintiffs failed to exhibit even a single correspondence or communication between them and the defendants to substantiate their claim that they built their warehouse with the understanding that same would be rented and used by the defendants. My finding of fact on this issue is that there is no truth in the assertion made by the plaintiffs that they were induced by the defendants to construct a specialized warehouse for the use of the 2nd defendant.

Issues 5 & 6 – whether or not AEL South Africa ever sent request for proposal to the 1st plaintiff and whether or not documents submitted by the 1st plaintiff upon the request for proposal, was independent of an already existing contract executed by the parties in 2014?

Paragraph 12 of the plaintiffs witness statement is to the effect that in the year 2014 they were asked by the defendants to submit a tender for the existing contracts they had with the defendants and that they protested at this request, however they were assured by the 1st defendant that they had nothing to worry about and that the tender was a mere formality to regularize the defendant's records in view of the new management the 1st defendant had come to head.

The plaintiffs say that they filled the tender documents on the basis of that assurance and yet the defendants refused to award them the contract in respect of the said tender process. They also claimed that the defendants, in the said tender process, took away their contract and awarded same to Stellar Logistics.

The defendants denied this assertion and stated that the request for proposal documents which the plaintiffs tendered as exhibit 'G' was independent of the contract it already had with the plaintiffs, that is, exhibit 'F'.

The court has looked at both exhibits 'F' and 'G'. Exhibit 'F' is the contract that was signed by both the 1st plaintiff and the 2nd defendant in the year 2014. Clause 2.2 of the said contract makes it clear that the 1st plaintiff (the Distributor) was to provide services to the 2nd defendant in respect of the clearing, handling, transshipment and local delivery of all the 2nd defendant's products in Ghana and in adjoining territories. Exhibit 'G' which is the request for proposal is clear per its section A that AEL Mining Services Ltd. was looking for a service provider to provide warehousing and inventory management service in Ghana.

According to the defendants this request for proposal was issued by AEL Global Supply Chain in South Africa and that this was independent of AEL Ghana. The defendants also maintained that this request for tender was independent or separate from the contract that existed between the 1st plaintiff and the 2nd defendant i.e exhibit F which was already being performed by the 1st plaintiff at the time the request for tender was issued by AEL South Africa.

Indeed the 2nd plaintiff admitted that fact under cross-examination and she also admitted that the contract between 1st plaintiff and the 2nd defendant (exhibit F) ended in 2017 meaning that when this matter was instituted by the plaintiffs

against the defendants, they (the parties herein) were still performing their obligations under the said contract. It is therefore clear that the bid submitted by the plaintiffs in response to the request for proposals (exhibit G) was independent of the contract (exhibit F) that was subsisting between the 1st plaintiff and the 2nd defendant at that time and this contract(exhibit F) was performed by the plaintiffs till its expiry in the year 2017.

ISSUE 7 – *whether or not the defendants are in breach of the minerals and mining (General) Regulations, 2012B, LI 2173, the King Code of Governance Principles (the Code) and the King Report on Governance for South Africa?*

There was really no evidence led by the plaintiffs on this issue. The plaintiffs could not prove to this court that the contract they had with the defendant was taken away and given to another. They acknowledged that they performed the said contract till its expiry in the year 2017.

The plaintiffs’ litany of complaints about not being invited to sit at the high table at the 2nd defendant’s party and the alleged suggestions by the 1st defendant to the plaintiffs to consider a joint venture business arrangement with an entity by name Scan Global cannot be considered as discriminatory acts by the defendants and they also cannot be described as acts that breached the regulations on the Minerals and Mining (General) Regulations 2012B, LI 2173 and also the King Code of Governance Principles and the King Report on Governance for South Africa. The plaintiffs did not point to any sections of the Mining Regulations (LI 2173) which the defendants had breached neither did they specify which portions of the King Code for South Africa and the King Report which the defendants had breached. My finding of fact on this issue is that the plaintiffs could not establish any breach or breaches committed by the defendants.

I now turn to the defendant's additional issues. The first of these is the issue of *whether or not the 2nd defendant company is a subsidiary of A.E.L South Africa?*

Though the 1st defendant in his testimony under cross examination insisted that the 2nd defendant company is "a stand alone entity with its own board of directors", his answers in cross-examination on 19th July, 2021 largely show that AEL South Africa has control over the 2nd defendant company even though the 2nd defendant is a duly registered company under Ghanaian law. The entity in South Africa is the head office of the AEL Group worldwide. (See the plaintiffs' exhibit 'A')

The 1st defendant also admitted that he came to Ghana on secondment from the head office in South Africa and has returned back to the same head office in South Africa after a seven year stay in Ghana and he also admitted that other top officials of the 2nd defendant like Ian Thompson, Clint Strydom, Elizabeth Burns and Denvor Govender who worked in Ghana for various periods of time were all posted to Ghana by the Head Office in South Africa. My finding of fact on this issue is therefore that the 2nd defendant company is a subsidiary of AEL South Africa.

The 2nd additional issue is *whether or not the 2014 contract executed by the parties still subsists?*

This 2014 contract signed by the 1st plaintiff and the 2nd defendant was tendered in evidence by both sides. It was the plaintiffs' exhibit 'F' and the defendants' exhibit 3. A careful read of this contract shows that it was for a duration of 3 years with a commencement date of 1st March, 2014 and ending on the 31st of December, 2017.

Both the 2nd plaintiff and the 1st defendant in their testimonies before the court admitted that this contract run its full course even though the plaintiffs commenced this action against the defendants in the year 2015. Despite this law suit the evidence on record is clear that both parties to the 2014 contract duly discharged their respective obligations under the contract till it came to its natural end in the year 2017.

The third and fourth additional issues are whether or not the scope of the 2014 contract executed between the parties required plaintiffs to provide clearing, handling, transshipment and delivery of the 2nd defendant's products? And whether or not the plaintiff has ever rendered warehousing services to the 2nd defendant?

The evidence on record shows that the 2014 contract was clear in its terms. The 1st plaintiff was to provide the 2nd defendant with services in the form of clearing, handling, transshipment and local delivery of the 2nd defendant's products through the 1st plaintiff's distribution network to AEL's agents in adjoining territories. See clause 2 of the said contract (exhibit 'F'). The appendix or annexure B which was attached to the agreement shows the tariffs that were agreed upon by the parties. There is no mention of warehouse tariff in the said annexure. Also the plaintiffs did not furnish the court with any evidence of services it had rendered to the 2nd defendant in terms of the provision of warehousing services for the 2nd defendant's products and therefore my finding of fact is that the 1st plaintiff under the 2014 contract (exhibit 'F') only provided clearing, handling, transshipment and local delivery of the 2nd defendant's products to the agents of the 2nd defendant and indeed the tariffs listed in

annexure B of the said contract show the prices the parties agreed to be paid by the 2nd defendant for the said services.

CONCLUSION

On the totality of the evidence before me, I am of the opinion that the plaintiffs have failed to establish their case on the balance of probabilities and are therefore not entitled to the reliefs they claim. The case of the plaintiffs is dismissed with cost of GH¢10,000.00 awarded against them in favour of the defendants.

(SGD.)

ANANDA J. AIKINS (MRS.)

JUSTICE OF THE HIGH COURT

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