

EMMANUEL K. OWUSU-ASARE FOR THE
RESPONDENT – PRESENT

J U D G M E N T

Introduction

This Originating Motion for Preservation of Funds filed pursuant to *Section 39* of the *Alternative Dispute Resolution Act, 2010 (Act 798)* could have been disposed of much earlier, but for a series of interlocutory matters that this Court had to deal with.

The first was a preliminary objection raised by the Respondents/Respondents (Respondents) to the jurisdiction of this Court among other grounds. The second was an Application filed by the Claimant/ Applicant (Applicant) for the production of certain Bank Statements by the Respondents .

As is apparent from the record, these matters occasioned a number of adjournments which were further compounded by the failure or refusal of the Respondents to comply with timelines given them for the production of the said Bank Statements.

Having now been furnished with the needed information, I think the coast is now clear for the Court to delve into the substance of the Application.

Facts

By its Motion filed on the 1st of December, 2022, the Applicant prayed this Court for the following reliefs:

- “i. an order preserving all the funds standing in the name of the Respondents/Respondents with Zenith Bank Ghana*
- ii. Any other order that this Honourable Court may deem fit”*

From the supporting affidavits before the Court, the following may be summarized as the factual background to the application;

By a Sale and Purchase Agreement dated the 6th day of July, 2022 (*Exhibit AC1*) the Applicant entered into an agreement with the 1st Respondent company for the purchase of gold.

At all times material to the said transaction, the 2nd Respondent who to all intents and purposes is the alter ego of the 1st Respondent represented it in its dealings with Applicant.

By the terms of *Exhibit AC1*, the 1st Respondent was to supply to the Applicant 4 kg of gold within 2 days of payment of the agreed funds. As evidenced by *Exhibit AC 3*, the Applicant had duly paid an amount of *One Hundred and Eighty Thousand United States Dollars (USD\$ 180,000.00.)* being the price of the said quantity of gold, into the account of the 1st Respondent held with Zenith Bank.

The Respondents, despite having acknowledged receipt of the said amount had, as at the date of filing the Application, failed or refused to supply the gold even though they were required to have done so on or before the 25th of July, 2022.

After the several assurances by Respondents which only turned out to be hollow, the Applicant triggered the dispute resolution clause contained in *Exhibit AC 1* and commenced arbitration proceedings against the Respondents in a bid to recover the *One Hundred and Eighty Thousand United States Dollars (USD\$ 180,000.00.)* paid to the Respondent.

Applicant's case is that it nurses a genuine apprehension that the 2nd Respondent who is the controlling mind of the 1st Respondent would, in an effort to hide the said funds from the Applicant, divert the funds into his personal name or any of his alter egos as is his wont. *Exhibit AC 6* has been attached as proof of the 2nd Respondent's notoriety for defrauding other people under similar circumstances.

Applicant therefore invokes the powers of this Court under *Section 39 of Act 798* for an order preserving said funds pending the completion of Arbitral proceedings.

Not surprisingly, the Application is vehemently opposed. The Respondents' opposition as already noted, commenced with a salvo of objections first to the jurisdiction of this Court and then to the joinder of the

2nd Respondent to the action. This Court has already ruled on the said objections in a Ruling dated the 9th of June, 2023. I therefore find no need to rehash the details of same here, save to say that the said objections were overruled.

That said, a reading of the Respondents' affidavit in opposition discloses that the said funds are no longer available in the said account, as the same have been used to make "onward payments to local suppliers of the Respondents". This according to Respondents is to enable them fulfill their obligations under *Exhibit AC 1*.

Respondents therefore urge on this Court to resist the Applicant's invitation to make Orders which cannot be complied with.

Now, as noted in my earlier Ruling dated the 9th of June, 2023, there is no doubt that this Court in appropriate circumstances, has jurisdiction under *Section 39 of Act 798* to make orders for preservation of evidence or property in support of arbitral proceedings. I shall reproduce the relevant portions of the said provision for the sake of clarity.

39. *Unless otherwise agreed by the parties, the High Court has power in relation to an arbitral proceeding to make an order;*
- (a) *for taking of evidence of witnesses*
 - (b) *for the preservation of evidence*
 - (c) *In respect of the determination of any question or issue affecting any property right which is the subject of the proceedings or in respect of which any question in the proceedings arise*

(i) *for inspection, photographing, preservation, custody or detention of property.....*

(2) *Where the case is one of urgency, the court may, on application of the party to the arbitral proceedings, make orders as it considers necessary for the purpose of preserving evidence or assets..."*

I however accept the correctness of the argument of Counsel for Respondents that this Court would not make an idle order. Consequently, the Application must fail if it is found that there is nothing in the said account to be preserved. The oft-cited case of *GENERAL DEVELOPMENT CO. LTD v RAD FOREST PRODUCTS LTD AND OTHERS [1999-2000] 2 GLR 178* amply supports me in this view.

In his arguments before this Court, Counsel for Respondents appeared to rely on the maxim *affirmanti non regant incumbit probatio* which translates as "he who makes positive averments assumes the burden of proving them". His case was that it was the Applicant who bore the burden of satisfying the Court that the funds sought to be preserved were actually sitting in the 1st Respondent's account with Zenith Bank.

I have no quarrel with Counsel's view on this hackneyed legal position, except to say that *Exhibit AC 3* puts beyond doubt the fact that payment of *One Hundred and Eighty Thousand United States Dollars (USD\$ 180,000.00.)* was made by Applicant into the 1st Respondent's account at Zenith bank. It is also significant to note that the Respondents do not deny

receipt of the said amount into that account. Neither do they deny Applicant's assertion that the gold has not been supplied. The Applicant had therefore discharged the evidentiary burden imposed on it in my view. The fact that undisputed facts require no further proof is so trite that it needs no further elaboration.

The Applicant having established these facts, the evidentiary burden shifted onto Respondents and it was proper to require them to produce sufficient evidence in proof of their assertion that the said funds were no longer available in the said account to be preserved. This fact was obviously not lost on the Respondents for it was they, who *mero motu*, exhibited copies of 1st Respondents Bank Statements as *Exhibit PNK 2* to a Supplementary affidavit.

I will decline any comment on whether or not the Respondents have sufficiently proven their claim of having paid out the said funds to local suppliers, as that is not within my remit as far as the present application is concerned. But my examination of Respondents *Exhibit PKN3* shows a transaction where the 2nd Respondent converted about *One Hundred and Sixty Thousand United States Dollars (USD\$ 160,000.00.)* of the amount paid by the Applicant into cedis on the 26th of July 2022. This amount appears to have been moved from the 1st Respondent's Zenith Bank Account.

Even though the details provided therein are not sufficient to show where the money went, the fact still remains that the amount sought to be

preserved is no longer available in the account held by 1st Respondent with Zenith Bank. It therefore goes without saying that the said *One Hundred and Eighty Thousand United States Dollars (USD\$ 180,000.00.)* cannot be preserved.

The Applicant however prays for any further orders that this Court deems fit. I find that *Exhibit PNK 3* reflects a credit balance of *Forty-Two United States Dollars Fifty Cents (USD\$ 42.50)* as at the 12th of April, 2023 on the said account.

Admittedly, this amount is clearly a drop in the ocean when viewed within the context of the amount that Applicant sought to have preserved. It is however my view that the dictates of justice require that this Court still makes an order for the preservation of any funds currently standing to the credit of the 1st Respondent in that account.

This is because I have little doubt that questions will arise in the arbitral proceedings concerning funds in that account.

Conclusion

Accordingly, the Application is granted on the following terms:

It is hereby ordered that all funds currently standing to the credit of the 1st Respondent in *USD Account Number 0006042503294* and held at the Sakaman Branch of **Zenith Bank Ghana Limited** be preserved pending the final determination of the Arbitration.

The Claimant/Applicant is to serve a copy of this Order on the said Bank.

(SGD)

AKUA SARPOMAA AMOAH (MRS)
JUSTICE OF THE HIGH COURT

Cases referred to:

*GENERAL DEVELOPMENT CO. LTD v RAD FOREST PRODUCTS LTD
AND OTHERS [1999-2000] 2 GLR 178*

Statute referred to:

Alternative Dispute Resolution Act, 2010 (Act 798)