IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE (GENERAL JURISDICTION) ACCRA HELD ON TUESDAY, THE 9TH DAY OF JULY, 2024 BEFORE HIS LORDSHIP JUSTICE PATRICK BAAYEH (J)

TIME: 9:13AM

SUIT NO. GJ/0073/2024

AURUM GLOBAL PARTNERS LTD : PLAINTIFF

VRS.

RHEMA MINNING LTD : DEFENDANT

JUDGMENT

MOTION ON NOTICE FOR SUMMARY JUDGMENT

Plaintiff/Applicant (now referred to as Plaintiff) mounted this action against the Defendant/Respondent (now referred to as Defendant). On 25th October, 2023 claiming the reliefs endorsed on the Writ of Summons as;

(a) ***An order for the payment of one hundred and fifty thousand Euros (€150,000) by the Defendant to the Plaintiff.***

(b) ***Interest on the €150,000 at the prevailing commercial bank rate on the said amount owing and due until date of final payment.***

(c) ***Cost including legal fees. When personal service on the Defendant failed, the Plaintiff applied for substituted service which was granted on 12th December, 2023.***

The Defendant subsequently entered appearance and filed its Defence on 28th February, 2024.

The Plaintiff is now seeking an order of this court to sign Summary Judgment against the Defendant. In the supporting affidavit sworn to on behalf of the Plaintiff, the Plaintiff gave the

facts that gave rise to the suit. The Plaintiff's case as disposed to in the affidavit in support that the parties entered into an agreement in which the Plaintiff invested an amount of €150,000 into Defendant's mining project at Dadwen in the Western Region of Ghana. (Exhibit Val). The agreement provided that the Plaintiff would be the sale off taker of the gold produced by the Defendant at 200% discount. The Plaintiff in pursuant to the agreement made a payment of €150,000 to Defendant on 16th February, 2023 (Exhibit VG2) but the Defendant has failed to supply Plaintiff with gold from its mines. Upon a visit to the mining site of the Defendant, the Plaintiff realized that work had not even started on the site contrary to the agreement. That by a letter dated 5th December, 2022, the Defendant's indebtedness to Plaintiff and proposed a payment schedule to retire the debt (Exhibit Va3). In eleven instatements commencing from 28th February, 2023 to 31st December,2023. That the Defendant failed to go by its own proposed payment schedule and wrote again through its lawyers proposing a new payment schedule (Exhibit VAH) which was to pay the 1st installment on 30th July, 2023 instead of 28th February, 2023. The Defendant once again defaulted to make the first payment on 30th July, 2023 and as of September, 2023, the Defendant had not paid even the first installment to retire the debt to Plaintiff. The Plaintiff therefore instructed its lawyers to write a demand letter to the Defendant (Exhibit VG5). In spite of the demand notice of the Plaintiff to Defendant, the Defendant, the Defendant has failed or refused to pay the Plaintiff. The Defendant is opposed to the motion for Summary Judgment and has filed affidavit in opposition.

It is the case of the Defendant that Plaintiff is not entitled to enter Summary Judgment because the application is moved by bad faith and specifically that the Plaintiff has surreptitiously introduced a new relief into the proceedings which reads "(c) An order of in injunction restraining the Defendant, its agents, assigns and all persons claiming through the Defendant from removing any equipment or assets from the mining site in Dadwen Nzema until the outstanding amount as paid by the Defendant to the Plaintiff". That the writ of summons and statement of claim filed by Plaintiff on 25th October, 2023 did not include the above relief (c). That Plaintiff cannot by the use of a motion for Summary Judgment amend or introduce a new relief.

It is the case of the Defendant that these are triable issues to be determined by the court and for that matter Summary Judgment cannot be granted.

That the contract between the parties provided that the sum to be invested by Plaintiff was $150,000 and not €150,000 and that Applicant (Plaintiff) has manually edited the contract sum contained in the agreement to read €150,000 instead of $150,000.

That subsequent to the execution of the contract a sum of 1,092,405.00 was remitted to the Defendant as the initial investment. Additionally, an extra amount of Ghc15,000 was contributed. That considering the cumulative total of the initial investment along with reinvested dividend of Ghc40,000, the total investment sum amounts to Ghc1,146,405.00 only and that this is the sum duly acknowledged by the Defendant per its solicitor's letters (Exhibit VG3). It is the case of the Defendant that while the Defendant acknowledged the existence of an investment made by the Plaintiff, there is a fundamental divvgence regarding the specific sum involved. Since the Defendant did not acknowledge being indebted in the sum of € 150,000 but acknowledged a total investment amount of GH¢1,146,405.00 made by the Plaintiff. Further that the payment as evidenced by Plaintiff's Exhibit VG2, was made in Ghana Cedis and not in Euros as being claimed by the Plaintiff. That Defendants Zenith bank account No. 6012210473 into which Plaintiff paid the money is a local Bank Account that exclusively transacts in Ghana Vedis and so cannot faciliated transactions in foreign currencies.

It is the contention of the Defendant that Plaintiff's attempt to terminate the contract based on an alleged breach by the respondent is unfounded because the purported breach has not been defined and besides the agreement explicitly authorizes penalties for breaches and so Plaintiff's application is an improper attempt to unilaterally terminate the contract without valid cause.

In Plaintiff's supplementary affidavit, pt refuted the allegation of the Defendant that the contract sum was in dollars. That at all material time, the contract sum was in Euros but was wrongly typed as dollars and that was corrected in …….. in the presence of all the parties before the contract was signal.

That at the bank, the CEO of the Defendant company and his Bank relationship manager informed Plaintiff that Defendant had an outstanding obligation on its Euro account and a deposit of the amount in Euros into Defendant's Euro account by Plaintiff would be used to settle their outstanding credit on its Euro account at the time. That the Plaintiff and Defendant together with bank relationship manager agreed that the Plaintiff's Euros in tendered to deposit into Defendant's euro account will be sold to the bank in a special forensic transaction at the rate of 7.28 and the equivalent be credited to the local cedis account of the Defendant with account No. 6012101473 which had no outstanding balance on it. That after this transaction on 16th February, 2022 and the Defendant acknowledged receipt of €150,000 in correspondence between Plaintiff and Defendant (See Exhibit SA3 series) dated 5th and 6th June, 2022. I tis Plaintiff's case that the sum of GH¢1,0191,405 acknowledged in the Defendant's solicitors letter Exhibit VG5 was the Cedis Equivalent of the €150,000 at the then rate.

Plaintiff says after the investment amount was made into Defendant's account, the Defendant halted its operations, relocated and its machinery and shut down its office which was known to the Plaintiff without giving notice of their new office tot eh extent that the writ of summons and statement of claim had to be deserved by Substituted Service before Defendant entered appearance.

Before I deal with the substance of this application. I wish to feal with an objection raised by counsel for the Defendant that the Plaintiff did not seek leave of the court before filling its supplementary affidavit in support and for that matter it should be struck out.

I hold the view that Plaintiff needed not to have applied to file supplementary affidavit and having so filed, nothing prevented the Defendant to also file a supplementary affidavit in opposition. Application for Summary Judgment under order 14 of C.I 47 is very silent on the filing of supplementary affidavit. All what is proved for under Order 14 rule 2 92) of C.1 47 is that;

> " ***The notice shall be supported by an affidavit verifying the facts on which the relevant claim or part of a claim is based and stating that the Defendant in the***

deponents belief there is no Defence to the claim or part of the claim, or no Defence except as to the amount of any damages claimed".

Thus Order 14 Rule 3 (1) also provides that;

" ***A Defendant may show cause against the application by affidavit or otherwise to the satisfaction of the court".***

These provisions under order 14 are while order 50 of C.I 47 in the case of contempt proceedings were

it is provided under O.50 Rule 3 93) of C.1 47 that;

" ***Without prejudice to the power of the court under order 16 Rule 7 no grounds except the grounds set out in the affidavit in support of the motion shall be relied upon at the hearing of an application for an order committal".***

If the committee of the Rules of court wanted no other affidavit to be used except either with leave of the court or amendment as under order 50 in the case of contempt proceedings, the committee would have made that clear.

I am aware that out of abundance of caution lawyers, as a practice, ask for leave to file supplementary affidavits in such matters but legally they do not need to do so. In the instance, counsel for the Defendant could have also filed a supplementary affidavit in response to the Plaintiff's supplementary affidavit in support or even raise that issue as a preliminary issue for determination but not to wait for the matter to be heard and only raise it in his arguments.

Order 14 Rule of C.1 47 provides for Summary Judgment as follows "where in an active 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, to a particular part of such claim or that the Defendant has no Defence to such a claim or part of a claim, except as to the amount of any damages claimed".

Thus, the essence of a Plaintiff applying for Summary Judgment is to facilitate the early conclusion of actions where it is clear that from the pleadings of the Defendant, he has no serious Defence to the Plaintiff's action. It is intended to prevent the Plaintiff being, delayed where there is no arguable Defence. See the case of **SAM JOHAH VRS. DUODU KUMU (2003-2004) SCGLR 50.**

In the instant case the counsel for the Defendant has argued that there are triable issues in that the contract entered into by the parties provided for the contract sum of $150,000 but the Plaintiff has used ink to change it to €150,000.

To this the Plaintiff contended that the contract sum or the amount of Plaintiff's investment has always been in Euros and that the correction was done before the parties signed the contract. The Plaintiff has further explained that per Exhibit VG2 the currency is stated in Euros and converted to Cedis.

It is the case of the Plaintiff that when Plaintiff went to pay the investment amount of €150,000 into Defendant's account, the CEO of Plaintiff, in the presence of the ECO of the Defendant, were sold by the Relationship Manager at Zenith Bank that there was existing standing balance on the Defendant's Euros account and if the money is paid into it, such deposit will be used to offset the existing obligation. The parties with the relationship Manager agreed to have a special forex transaction where the Plaintiff agreed sell the €150,000 to the bank for cedis which was then credited to the Defendant's cedis account. Indeed, Exhibit VG2 indicated that the amount deposited in Defendant's account was €150,000 converted to cedis at the ratio of 7.28 to arrive at the cedis equivalent of GH¢ 1,092,000.

Thus, the credit advises Exhibit VG2 dated 16th February, 2022 clearly indicates that the Euros deposited into the Defendant's account was €150,000 converted to its cedis equivalent.

Besides after this transaction of 16th February, 2022 and when there was default and Plaintiff demand the return of its investment counsel for the Defendant responded and even proposed a payment schedule but stated the amount in cedis.

This is no doubt therefore that the parties had all along intended that the currency of investment would be in Euros as contained in the agreement signed by the parties Exhibit VG1.

In the agreement (Exhibit VG1) it is provided in paragraph 2 that "upon the visit to your site, Ghana Gold Expo (now Aurum Global Partners Ltd.) or Plaintiff, have agreed to invest €150,000 to your ongoing project and return of each breaking day, buy gold at 20% discount". It is further provided that " Gold Expo shall be the sale off taker of each production" and that any delay or inability to supply gold to Gold Expo shall result in seizure of Rhema Machinery or any valuable asset".

It was when the Defendant company failed to supply the Plaintiff with gold that the Plaintiff demanded for the return of its instruct which resulted in the letter for Defendant's solicitor's proposing a payment schedule in Exhibit VG3 of ……counsel for the Defendant again wrote deferring Defendant's own schedule of payment by another six months so that instead of the first trench to be paid on 28th February, 2023, the new date proposed in Exhibit VG4 for payment by 1st instalment was 30th July, 2023.

Plaintiff issued the instant suit on 25th October, 2023 by which time the Defendant had not paid a single pesewa contrary to Defendant's own proposed terms of payment.

Counsel for the Defendant has argued that since the contract provided that in case of delay in supply of gold to Plaintiff shall result in the seizure of Defendant's machinery or any valuable assets and since the basis of this suit is that Defendant has delayed in supplying the Plaintiff with gold to Plaintiff's remedy is to seizure Defendant's assets or machinery.

It is a fact that Exhibit VG1 provides that in case of delay, Plaintiff shall seize Plaintiff's machinery valuable assets yet when Plaintiff make a demand of its investment, the Defendant was ready to and indeed proposed repayment schedule even though Defendant failed to fulfill that promise. Secondly, I do not see how Plaintiff, without any court order would go and seize Defendant's machinery or assets. In my view Plaintiff would be at liberty to go after Defendant's assets of Defendant assets or any other property or assets of Defendant if judgment is given in

favour of the Plaintiff in execution of the judgment. to that extent I do not see anything wrong with the Plaintiff going to court without going to seize Defendant's machinery.

In the case of SADHWANI VRS. AL-HASSAN (1999-2000) 1GLR 19, the court of Appeal stated what was required in applications to sign Summary Judgment. the court ……..;

" …………an application to sign Summary Judgment, what is required of a trial Judge is that he or she examine whether there does exist determine whether there exist a Bonafide or good Defence that is Defence known in law. In my view any such bonafide or good Defence or a Defence certificate a triable issue fit to be tried. It could be an issue of fact or law".

Further in the case of **ABIUAMS LTD. VRS. PLATUM GAS GH. LTD** Supreme Court Civil Appeal No. J14/292016, dated 31st May, 2017, the court speaking through BENIN JSC (as he then was) said;

> " ***The Defendant may have case against the Plaintiff's application (for Summary Judgment on merit e.g. That he has a good Defence to the claim on merits or that a difficult point of law is involved or dispute as to the facts which ought to be tried or dispute as to the amount which required the taking of an account to determine, or any other circumstances showing reasonable grounds of a beneficial Defence. There are numerous cases which need not be cited for the principles have become well-***known and ***accepted and are briefly considered in Rule (1) (a) of order 14 of CI 47***.

In summary, the court must be satisfied that on the facts and law the Defendant ought to be given the opportunity to be heard on merits, where his Defence raises. Reasonable and arguable points and is not intended to merely cause delay and is not a sham. A complete Defence is not required at this stage but mere denied is not sufficient. The Defendant must give sufficient facts and particulars to show that there is a bonafide defence."

See also **BASSAST NEDAM GH BV VRS. HORIZON & MARINE COAST (2010) SCGLR 435.**

In the instant case I have carefully read the Defence filed by the Defendant. The Defendant is not denying that the Plaintiff invested €150,000 in its Nzema Dadwen mines and was to be the sale off taker of any grid produced by the Defendant. the Defendant by its actions admit that it has defaulted in supplying Plaintiff with gold in terms of the agreement signed by the parties in Exhibit GV1. In my view the Defendant has not raised any serious triable issue to be tried. Defendant has not shown that there is a red question of either law or fact fit to be tried.

Defendant has also not demonstrated any state of facts which will lead to the inference that at the trial of the action Defendant may be able to establish a Defence to the Plaintiff claim. It is my view therefore that this is a proper case that Plaintiff ought to be allowed to sign final judgment. The application for Summary Judgment is therefore granted. Consequently, Plaintiff is to recover the sum of €150.000 or its cedi equivalent. Plaintiff is also granted interest on the above sum from 16th February, 2022 to date of final payment at the commercial bank lending rate.

I award Plaintiff cost of GH¢ 40,000 against the Defendant.

I realize that Plaintiff did not endorse of its writ of summons an order for injunction restrain the Defendant from removing any assets from its mining site but has been included in the motion for Summary Judgment. Since Plaintiff did not endorse its writ of summons an order for injunction. I am unable to grant Plaintiff that relief. Cost of GH¢40,000.00 to Plaintiff.

(SGD)

JUSTICE PATRICK BAAYEH (J)
(JUSTICE OF THE HIGH COURT)

<u>COUNSEL</u>

DAVIDINA ABA DADSON HOLDING THE BRIEF OF LUCIE BLAY FOR THE PLAINTIFF/APPLICANT

JAMES GAWUGA NKRUMAH WITH KAREN NTI-DADZIE FOR THE DEFENDANT/RESPONDENT