

IN THE SUPERIOR COURT OF JUDICATURE IN THE COMMERCIAL DIVISION
(COURT 1) OF THE HIGH COURT OF JUSTICE ACCRA, HELD ON THURSDAY, THE
30TH DAY OF MAY, 2024 BEFORE
HER LADYSHIP JUSTICE SHEILA MINTA

SUIT NO. CM/RPC/0040/2020

JEBSEN & JESSEN

-

PLAINTIFF

VRS.

**SAVANNAH PROCESSING &
PLANTATION INDUSTRY LTD.**

-

DEFENDANT

JUDGMENT

INTRODUCTION

A request was made by the Defendant Company sometime in January 2014 to the Plaintiff for the supply of heavy-duty equipment to it. The said equipment ordered were supplied to the Defendant Company with an accompanying invoice and Bill of Lading by the Plaintiff. The Defendant took delivery of the said equipment. And according to the Plaintiff, till date the Defendant has failed to liquidate its indebtedness of US\$1,134,000.00 for the equipment received by the Defendant. By the Defendant's case the said request was made and the said equipment supplied by the Plaintiff but same were inferior in quality and had technical faults which cost the Defendant over US\$520,000.00 to put them in working condition. It is the Defendant's story that these challenges caused it to incur losses in the sum of GHS500,000.00 in its operations and also counterclaimed against the Plaintiff for GHS950,000.00.

SUMMARY OF PLAINTIFF'S CASE

The Plaintiff subsequent to the request of the Defendant supplied to it a Caterpillar 320D Hydraulic Excavator, a Caterpillar 980H 4X4 Wheel Loader and Caterpillar 140 4X4 Motor Grader (Caterpillars) at the total price of US\$1,134,000.00. Pursuant to the supply of these equipment proforma invoices with contract No.300004055 and No.91005133 together with the General Terms of Sale and Bill of Lading No. VSPO13ANTTEA0004 and proforma invoice were issued Defendant and payment was to be made 180 days after date of invoice. This amount according to the Plaintiff remains outstanding and unpaid since the Defendant has refused to pay. Hence this Writ for the following reliefs against the Defendant:-

- a. Recovery of the principal amount of One Million, One Hundred and Thirty-Four Thousand United States Dollars (US\$1,134,000.00) owed by the Defendant to the Plaintiff.
- b. Interest on the principal amount of One Million, One Hundred and Thirty-Four Thousand United States Dollars (US\$1,134,000.00) at the prevailing commercial bank interest rate from 19th July 2014 till date of final payment.
- c. General damages for breach of contract.
- d. Costs.

SUMMARY OF DEFENDANT'S CASE

The Defendant's testimony is that it approached the Plaintiff for the supply of the said equipment in 2014 worth GHS134,000.00 to augment its construction works. According to the Defendant the said equipment were received in 2014 but could only use the heavy equipment after expending some amount of money to transport and fix same. The Defendant's story is that they were of inferior quality from China contrary to the agreement between the parties and also came with multiple technical faults. In support of this assertion it tendered **Exhibit "1"** being a letter dated 15th December, 2014 titled "*Equipment Diagnosis*" from Macgorven Motors to Defendant. **Exhibit "2"** is an invoice dated 18th December, 2014 from Macgorven Motors to Defendant with a part total cost of US\$25,000.00 and **Exhibit "3"** is another document dated 1st April, 2015. According to the Defendant **Exhibits "4", "5", "6", "7", "8", "9", "10" and "11"** are copies of payment slips evidencing payments made to Plaintiff. Some are bank transfers by Deliman and Co Limited to Plaintiff. The Defendant's story is that substantial payments had been made and therefore does not owe the Plaintiff but prayed the Court for the accounts

between the parties to be reconciled. The amount paid to the Plaintiff is however not stated throughout the evidence of the Defendant.

The Defendant again posited that it had to engage technicians to handle the equipment and transport same from Accra to Tamale for which it incurred the debt of US\$525,000.00

The Defendant also Counterclaimed as follows:-

- i. A declaration that Plaintiff is under an obligation to reimburse Defendant in the sum of nine hundred and fifty thousand Ghana Cedes (GHS950,000.00) being the total expenses incurred by Defendant in repairing, hiring of equipment from other industries to carry out its activities from February 2014 when the equipment supplied by Plaintiff could not function properly.
- ii. Interest on the aforesaid of nine hundred and fifty thousand Ghana Cedis (GHS950,000.00 from February, 2014 to date of final judgment.
- iii. Cost.

At the close of pleadings, the following issues were set down by the Court and both Counsel:-

1. Whether or not Plaintiff supplied defective Caterpillar 320D Hydraulic Excavator, Caterpillar 980H Wheel Loader and Caterpillar 140K 4x4 Motor Grader (Caterpillars) to Defendant contrary to the terms of the agreement between Plaintiff and Defendant?
2. Whether or not the Defendant expended the sum of Nine Hundred and Fifty Thousand Ghana Cedes (950,000.00) to fix the defects in the equipment before using same?
3. Whether or not by the terms of the agreement Plaintiff and Defendant, the parties agreed that the Defendant would liquidate its indebtedness within 180 days?
4. Whether or not the Plaintiff's demand for the full payment of One Million, One Hundred and Thirty-Four Thousand United States Dollars (US\$1,134,208.00) from the Defendant even though the said equipment were defective is conscionable?
5. Whether or not Plaintiff is entitled to the reliefs endorsed in his Writ of Summons.
6. Whether or not the Defendant is entitled to the reliefs set out in its Counterclaim?

Trial in this matter ended in February 2024 and both parties were ordered to file their respective written addresses. Counsel for the Plaintiff filed his on 10th April 2024 and Counsel for the Defendant was given several opportunities to file his address but at the time of writing this judgment his address had not been filed before the Court.

BURDEN OF PROOF

The Plaintiff's claim is being challenged by the Defendant with a Counterclaim against Plaintiff and so both parties have burden of proof of their respective claims. The burden of persuasion is primarily on the Plaintiff or the Counterclaimant, as the case may be to adduce sufficient and credible evidence in support of their assertions. Sophia Adinyira JSC as she then was in the case of *Ackah vs. Pergah Transport & 2 Ors. [2010] SCGLR 729 at 736* defined evidence in the following words:-

"It is a basic principle of the law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility without of which his claim may fail. The method of producing evidence is varied and it includes the testimonies of the party and material witnesses, admissible hearsay, documentary and things (often described as real evidence) without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the court or tribunal of fact such as jury. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact is more reasonable than its non-existence. This is a requirement of the law on evidence under Sections 10 and 11 of the Evidence Act".

Again, in the case of *Takoradi Flour Mills vs. Samir Fans [2005-200] SCGLR 882*, the Supreme Court held that:-

"It is sufficient to state that this being a civil suit, the rules of evidence require that the Plaintiff produces sufficient evidence to make out his claim on a preponderance of probabilities as defined in Section 12 (2) of the NRCD 323. In assessing the balance of probabilities, all the evidence, be it that of the Plaintiff or the Defendant, must be considered and the party in whose favour the balance tilts is the person whose case is more probable of the rival versions and is deserving of a favourable verdict"

See also the case of *Faibi vs. State Hotels Corporation (1968) GLR 471*. In the case of *Okudzeto Ablakwa (No. 2) vs. Attorney General & Another [2012] 2 SCLR 845* the court held at p. 867 that:

"If a person goes to court to make an allegation, the onus is on him to lead evidence to prove that allegation, unless the allegation is admitted. If he fails to do that, the ruling on that allegation will go against him. Stated more explicitly, a party cannot win a case in court if the case is based

on an allegation which he fails to prove or establish. This rule is further buttressed by section 17 (b) which, emphasizes on the party on whom lies the duty to start leading evidence..."

With the guidance of the burden of proof required under the law as stated above which the parties are to discharge in proof of their respective claims, I will proceed to discuss the issues in the order as set above.

ISSUE 1

Whether or not Plaintiff supplied defective Caterpillar 320D Hydraulic Excavator, Caterpillar 980H Wheel Loader and Caterpillar 140K 4x4 Motor Grader (Caterpillars) to Defendant contrary to the terms of the agreement between Plaintiff and Defendant?

It is not in doubt that the equipment subject matter of this litigation were supplied by the Plaintiff to the Defendant at Defendant's request in 2014 at the cost of US\$1,134,000.00 as per the Plaintiff's **Exhibit "A Series"**, being Proforma Invoice which contained the General Terms of Sale dated 10th January, 2014 and Invoice for the said equipment and Bill of Lading also dated 20th January, 2014. The Defendant's problem is that the equipment supplied were inferior in quality and had multiple technical faults which caused the Defendant to expend more money to fix. In proof of this aspect of Defendant's story it attached Exhibit "1" which is a letter dated 15th December, 2014 from Macgorven Motors to the Defendant titled "Equipment Diagnosis", Exhibit "2" is also an invoice dated 18th December, 2014 from Macgorven Motors to the Defendant. There is no evidence of payments made for any parts in the first place and secondly there is no evidence on the record connecting the purported purchased parts to the equipment in issue.

On 27th February, 2024 the following was recorded when the Defendant's witness was being cross-examined by Counsel of the Plaintiff.

Q: The terms required that the Defendant makes payment for the equipment the Plaintiff supplied 180 days after the date of the invoice. Is that not so?

A: Yes, my Lady.

Q: The Defendant has received the equipment failed and or refused to make payment to the Plaintiff for the equipment supplied, yes or no.

A: No, my Lady. When the equipment was received, the equipment was supposed to be an European Specification and when the equipment got here we realized that it was a Chinese Specification, a caterpillar manufacturing company in China. And we made that known to the Plaintiff, and when these equipment were taken to the site, we had a lot of problems with them. And we made it known to the Plaintiff. So before we could fix the equipment our payment deadline had already passed, so we couldn't have met the payment deadline. And this caused and frustrated the project we were to execute on time.

The Court was also expecting the Defendant to produce evidence of its communication to the Plaintiff of these defects as soon as the goods were received. However, beyond the depositions of Defendant's Witness and his testimony during cross-examination, there is no documentary evidence of any report being made to the Plaintiff about the supply of the alleged defective equipment. Proof is not merely by repeating one's averments. In *Klah vrs. Phoenix Insurance Ltd.* [2012]2 SCGLR 1139, the apex Court stated that "where a fact is capable of positive proof and the same is denied, a party does not prove same by mounting the witness box and merely repeating his averments on oath. He does so by producing cogent and credible evidence to satisfy the Court that the averments are true." At the examination of the evidence before the Court the Defendant's story of having received defective equipment does not seem credible enough for this issue to be held in favour of the Defendant.

ISSUE 2

Whether or not the Defendant expended the sum of Nine Hundred and Fifty Thousand Ghana Cedes (950,000.00) to fix the defects in the equipment before using same?

From the discussions above, the Defendant's have not been able to prove its case that the equipment received were defective. Again, in the Defendant's quest to build up the defective equipment story it attached invoices with no evidence of payments for the said specific defective equipment. On credible evidence, see also what the Supreme Court had to say in the case of *Ackah vrs. Pergah Transport Limited & Others* [2010] SCGLR 728:-

"It is a basic principle of the law of evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail. The method of producing evidence is varied and it includes the testimonies of the party and material witness, admissible hearsay, documentary and things (often described as

real evidence), without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the court or tribunal of fact such as a jury.”

This standard of producing credible evidence has not been met by the Defendant and therefore this issue again cannot be resolved in favour of the Defendant.

ISSUE 3

Whether or not by the terms of the agreement Plaintiff and Defendant, the parties agreed that the Defendant would liquidate its indebtedness within 180 days?

It is not in doubt that the equipment were shipped by the Plaintiff and the Defendant took delivery of same. The Plaintiff's case is that the equipment were invoiced and the Defendant signed for the invoice which contained the term that payment was to be made within 180 days after the date of invoice. Having signed the invoice and taken delivery of the goods meant that the Defendant had agreed to make payment 180 days after date of invoice. The Plaintiff attached the said invoice with the terms of conditions stipulated on same. The Defendant has not provided any evidence to the contrary as regards the terms of payment.

The Defendant's witness on 27th February, 2024 testified before the Court during his cross-examination by Counsel for the Plaintiff as follows:-

Q: *You will agree with me that the goods were supplied pursuant to a proforma invoice and an invoice with the general terms of sale. Is that not so?*

A: *Yes, my Lady.*

Q: *You will agree with me that supply was accompanied by a Bill of Lading.*

A: *Yes, my Lady.*

Q: *The terms of payment for the supply of the heavy equipment was contained in the proforma invoice as well and the invoice.*

A: *Yes, my Lady.*

Q: *You remember you signed the proforma invoice as Managing Director of the Defendant Company.*

A: *Yes, my Lady.*

From the above, I can naturally come to the conclusion that the parties had agreed that the cost of the equipment supplied be paid within 180 days after the date of invoice. The issue is therefore resolved in favour of the Plaintiff.

ISSUE 4

Whether or not the Plaintiff's demand for the full payment of One Million, One Hundred and Thirty-Four Thousand United States Dollars (US\$1,134,208.00) from the Defendant even though the said equipment were defective is conscionable?

I have held earlier on that the Defendant has failed to establish the fact that the equipment supplied by the Plaintiff were defective. The Defendant did not reject the equipment and cannot now say that the agreement to pay for same is unconscionable. In the case of *Yehans International GH Ltd vrs. Jacob Gbati & Tema Community One, Civil Appeal No. H1/118/2013 (CA) dated 26th June, 2014* cited by Counsel for the Plaintiff, the Court held that it would not allow a buyer escape from paying outstanding balance since the goods were not rejected and I am absolutely following the Court of Appeal on this reasoning. This issue is also resolved in favour of the Plaintiff as the Court finds no unconscionable circumstances surrounding the transaction. The Plaintiff is therefore entitled to the contract sum of US\$1,134,000.00.

ISSUE 5

Whether or not Plaintiff is entitled to the reliefs endorsed in his Writ of Summons.

The Plaintiff claims from the Defendant the principal sum of the US\$1,134,000.00 being the cost of the equipment supplied to Defendant in 2014, interest on the said sum from 19th July, 2014 till date of final payment and damages for breach of contract. According to the Plaintiff no payment has been made by the Defendant to it since the equipment were supplied. The Defendant denied owing the Plaintiff and stated in paragraph 13 of its Witness Statement as follows:-*"The Defendant had over paid the Plaintiff and therefore pray this Honourable Court for an order for reconciliation of account of Plaintiff and Defendant."*

The Defendant tendered Exhibits "4-10" which were transfers made by Deliman & Co Limited and has no nexus to this particular transaction. The Defendant failed to produce evidence that those payments were being done on behalf of the Defendant Company. Defendant again could

not tell the Court how much it has paid to the Plaintiff in respect of this transaction. On the totality of the evidence before the Court the Defendant has not been able to challenge the Plaintiff's claim of US\$1,134,000.00 for the supply of equipment which remain unpaid from 19th July, 2014.

The Plaintiff prayed for damages for breach of contract but failed to prove the said damages. On the issue of damages since the Plaintiff claimed for interest on the said sum from July 2014, it is the humble opinion of the Court that this should compensate Plaintiff for lack of use of its funds during the period and therefore can place it where the prompt payment of the debt would have put it.

ISSUE 6

Whether or not the Defendant is entitled to the reliefs set out in its Counterclaim?

From my analysis above the Defendant did not do a good job in prosecuting its Defence and Counterclaim against the Plaintiff. Most of the Exhibits tendered by the Defendant have no nexus to this case and for these reasons I am unable to hold that the Defendant is entitled to its claim against the Plaintiff.

CONCLUSION

The burden of proof being the hob on which the case of the parties revolved, as the Defendant's has counterclaimed against Plaintiff which requires both parties to produce sufficient and credible evidence in support of their respective claims. Having considered all the evidence before the Court, it is my clear thinking that the story of the Plaintiff is more probable than that of the Defendant. The Defendant could not persuade the Court to determine its claim in Defendant's favour. I therefore enter judgment in favour of the Plaintiff against the Defendant as follows:

1. Recovery of the sum of US\$1,134,000.00 from the Defendant by the Plaintiff.
2. Interest on the said sum of US\$1,134,000.00 from 19th July, 2014 till date of judgment.
3. I award cost of Thirty Thousand Ghana Cedis (GHS30,000.00) in favour of the Plaintiff against the Defendant.

(SGD.)

SHEILA MINTA, J.

JUSTICE OF THE HIGH COURT

REPRESENTATIONS

PARTIES:

ABSENT

COUNSEL:

COURTNEY AWOTWI, ESQ., BEING LED BY ADBUL LATEEF SHAIBU, ESQ., HOLDING BRIEF FOR KWADWO GYASI NTRAKWAH, ESQ., FOR THE PLAINTIFF – PRESENT

COUNSEL FOR DEFENDANT - ABSENT

AUTHORITIES:

1. *ACKAH VRS. PERGAH TRANSPORT & 2 ORS. [2010] SCGLR 729 AT 736*
2. *TAKORADI FLOUR MILLS VRS. SAMIR FANS [2005-200] SCGLR 882*
3. *FAIBI VRS. STATE HOTELS CORPORATION (1968) GLR 471*
4. *OKUDZETO ABLAKWA (NO. 2) VRS. ATTORNEY GENERAL & ANOTHER [2012] 2 SCLR 845*
5. *KLAH VRS. PHOENIX INSURANCE LTD. [2012]2 SCGLR 1139*
6. *ACKAH VRS. PERGAH TRANSPORT LIMITED & OTHERS [2010] SCGLR 728*
7. *YEHANS INTERNATIONAL GH LTD VRS. JACOB GBATI & TEMA COMMUNITY ONE, CIVIL APPEAL NO. H1/118/2013 (CA) DATED 26TH JUNE, 2014*

