IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2017

CORAM: ANIN YEBOAH JSC (PRESIDING)
BAFFOE- BONNIE
GBADEGBE JSC
APPAU JSC
PWAMANG JSC

CIVIL APPEAL

NO:J4/48/2016

26TH JANUARY, 2017

EASTERN ALLOYS COMPANY LTD --- PLAINTIFF/RESPONDENT

/RESPONDENT

VRS.

CHIRANO GOLD MINES --- DEFENDANT/APPELLANT

/APPELLANT

JUDGMENT

GBADEGBE JSC:

This appeal is from the judgment of the Court of Appeal that affirmed the decision of the trial High Court in the action herein which concerns a contract of haulage between the parties herein whereby the plaintiff was engaged to haul ore from a mine to defendant's crushing plant. For reasons of convenience, the parties to the appeal shall bear the description which they had in the trial court. The dispute herein arose when the defendant terminated the contract of haulage before the period provided in the agreement. Following the said termination, the plaintiff claiming that it was done in breach of the agreement between them took out the writ of summons herein claiming compensation or damages and other ancillary reliefs.

Subsequently by an amendment to the writ and the statement of claim, the plaintiff sought from the High Court the following reliefs:

1. An order for damages or compensation in the sum of one million three hundred and fifty thousand US dollars ($1,350, 000.00).
2. Interest at Commercial Bank rate.
3. Cost.

Accompanying the writ was an amended statement of claim that averred in paragraph 26 as follows:

PARTICULARS OF LOSS.

1 Loss on equipment ($96 x 6 months) $576.00	
11. Severance of Labour (54 staff) $814.8x3months-	-$132,000.00
111. Unrefunded deposit on equipment hire	$462,000.00
1v. Administrative Expenses	- $180, 000.00
Total	**$1,350,000.00**

Before proceeding further, we pause to observe that in the course of the proceedings had in the trial court, the plaintiff amended the writ and statement of claim on two occasions but there is no minute of the proceedings on which leave to amend on either occasion was granted in his favor. The record of appeal before us does not contain any entry for February 04, 2012 and it is difficult to comprehend how leave granted to the plaintiff on that date could legitimately authorise the filing of the amended writ and statement of claim more than a year thereafter. Indeed, a careful perusal of the amended processes at pages 139 -141 reveal that although the application for leave to amend had as its return date 04 February 2013, there is an amended statement of claim accompanying it that is said to have been filed pursuant to leave granted on 04 February 2012.Again, the amended statement of claim filed pursuant to leave of the court on 28 January 2013, is expressed to have been settled by counsel on 04 February 2013, the very day mentioned in the body of the motion paper for leave as the return date. Reference is

made to these matters for future guidance only and to emphasize the need for parties to scrutinize processes which are contained in records of appeal as they form the basis of the hearing before the appellate court and might in certain cases have adverse effect on a party's case.

Regarding the time lapse which is apparent from the amended statement of claim being more than a year had from the date leave is expressed to have been granted to amend the process and the date it was settled by counsel and filed, it seems that on the authority of **Akufo-Addo v Cathline** [1992]1 GLR 377,the amended pleading was improperly constituted such that if the decision in that case were to be pressed on us the result would be that the plaintiff would have had to contest the case on the preceding statement of claim but having regard to the new provisions on non-compliance with the rules contained in Order 81 of the High Court (Civil Procedure) Rules, CI 47, we think that as the parties contested the action on the basis of the said amendment and took steps thereon, such a procedural lapse has the effect of a waiver within the intendment of sub-rule 2(2) of the said order. Accordingly, we would proceed with the appeal herein on the same basis as the trial High Court and the Court of Appeal; and we are hopeful that by adopting this course of proceeding we would be doing substantial justice to the parties.

As earlier on stated in the opening to this delivery, both lower courts found for the plaintiff with the result that we are now faced with a second onslaught by the defendant that seeks a variation of

the judgment of the Court of Appeal in its favor. We are not unmindful of the fact that as the two lower courts are in agreement on the issues of fact which turn on the case, none of which was found in favor of the defendant, the task with which the defendant is faced appears not to be an easy one; indeed to succeed on the questions of fact the defendant has to satisfy us by credible evidence contained in the record of appeal that such findings are perverse and or unreasonable or not derived from reasonable inferences from the admitted facts. See**: Achoro v Akanfela** [1996-7] SCGLR 209

We turn our attention to the consideration of the appeal and commence from the effect of Exhibit "F". While the defendant contended that its effect was a waiver of any right of claim that the plaintiff might have had against it following the termination of the contract, the plaintiff strenuously argued that since the exhibit was addressed to its managing director, Michael Tetteh but signed by a person without his express authority, it is not his act such as to bind the plaintiff company of which he is the principal officer. In our view as the document dealt with an alleged compromise of the right of the plaintiff company to sue the defendant, it ought to have been signed by the managing director to whom it was addressed for the purpose of constraining the plaintiff's right of access to our courts. It is worthy of note that the said exhibit itself acknowledged the need to have it signed by the managing director by directing it to him and not the company. Clearly, the defendant expected action to be taken on its letter by the managing director as it dealt with

very serious matters and referred to a previous discussion to which from a fair reading of the exhibit, no other person must have been privy to. In the circumstances, in the absence of credible proof by the defendant that the operations manager who signed was authorised to do so by the addressee, it cannot pass as an act of the company such as to constitute a waiver of their right to pursue any action to redress wrongs committed against the company. We think the objection to exhibit "F" is grounded firmly in law and good sense as well. The action was therefore properly constituted by the issue of the writ of summons herein wherefore we proceed to consider the matter before us on the merits.

By the action of the plaintiff, the nub of the reliefs claimed is compensation or damages. Observation is made of the word compensation as the mode by which courts offer monetary reparation to persons whose rights have been violated in contract or tort by a delicate act of balancing designed to restore them to the situation in which they would have been but for the wrong, the subject matter of the action. Thus, damages, general and special have a very invaluable role in the capacity of courts to give solatium to parties based on the principle of *restitutuo in integrum*. At the heart of the plaintiff's claim for damages is the cause or causes of the violation and the consequence or consequences which have compelled it to seek redress by the action herein. In the said scheme of events, we must direct our attention to the alleged breach (breaches) of contract. In our view, as the cause of action is based on the allegation of breach or breaches of contract, the

plaintiff must first satisfy us by credible proof of the said breaches. In so proceeding, we think it is convenient that we consider the plaintiff's right to compensation or damages in the order in which they are set out in paragraph 26 of the amended statement of claim. Accordingly, the first head of damage which comes up for consideration is that which is described as loss on equipment in the sum of $576.000.00.

In our opinion, from the pleadings and the evidence, the breach on which this head of damage turns was before the termination of the contract. It concerns, according to the plaintiff the loss of income which he suffered following the diminution in the tonnage of ore to be hauled. While he contends that the contract was for 2million tons over the period of eighteen months, the defendant said it was for 1.4 million tons. We think that notwithstanding the fact that the parties initially discussed the agreement and reached some understanding which was reduced into the contract of haulage that was subsequently executed by the parties, the discussions and understanding were merged in the contract document and the "annexures" which accompanied it. Again, the evidence of the plaintiff that the quantities were lower and therefore in breach of the agreement was not proved; all that the plaintiff did was to make the said assertion and leave it to the court to infer the breaches there from but having signed the agreement and accepted it as the basis of their relationship, it is difficult to understand why in the absence of proof of any vitiating circumstances, he should seek to be relieved from it.

If as the plaintiff contended, the defendant was in breach of the agreement, why did it not on any single occasion submit a complaint in writing? We observe from the agreement of haulage that complaints regarding breach by the defendant are required by clause 2.1.1 to be in writing. It stands to reason and common sense that where parties to an agreement have embodied the terms in a written document and made specific provision in regard to notices, any party who seeks to draw attention to breach of a term of the agreement must preferably do so in writing. We think the evidence of the defendant that the agreement was for the haulage of 1.4million tons with the cost of haulage varied depending on the tonnage to cushion its earnings as provided in annexure "A" to the agreement on which this action turns that is headed "Monthly haulage rates" must explain why the plaintiff carried out its obligations without demur. We accordingly reject the plaintiff's allegation to the contrary that the defendant was in breach of the undertaking to enable plaintiff haul a greater tonnage. The silence of the plaintiff before the termination can only be explained on the ground that the defendant was not in breach of any undertaking. It seems to us that the plaintiff decided to pursue the allegation of breach in relation to the quantities of ore hauled as an after-thought only after the termination of the contract by the defendant. It being so, the claim to the said amount of $576, 000.00 fails and is disallowed. In our opinion, the finding by the two lower courts to the contrary is based not on the proper inferences and or is unreasonable; for we cannot comprehend why a party whose right

to earn income is dependent upon the quantity of ore hauled would sit by without complaining until after the termination of the contract. When the default of the defendant which the plaintiff alleges is considered in relation to the haulage, it is not trifling and if true it would have greatly affected the value of the contract. Such a breach, we think is material in nature, proof of which may suffice when not remedied to avoid the contract. Reference in this regard is made to the express provision regarding the default of the principal in clause 3.7.2.1 of the contract of haulage between the parties as follows:

> "If the Principal neglects or refuses to make a payment which is due and payable to the Contractor under the Contract or hinders the Contractor from performing the Contract or otherwise materially breaches the Contract, the Contractor may give notice in writing thereof to the Principal. If within seven(7) days after delivery of the said notice to the Principal the neglect or refusal or hindrance or breach is not remedied without just cause the Contractor, in addition to any other remedies to which it may be entitled may either:....." [Emphasis mine]

The remaining three heads of damage described as loss of labour, unrefunded deposits and administrative expenses are by their very nature consequences which are alleged to have arisen from the termination. Simply put, the plaintiff's contention is that by virtue of the unlawful termination of the haulage contract, it has suffered

the said losses and must be compensated by the court. These claims being anchored on an allegation that the termination was wrongful can only come up for consideration when the breach involved in the termination of the contract of haulage is proved on a preponderance of probabilities. As the right to compensation according to the case of the plaintiff arose subsequent to the termination and before the action herein, the said claims are in their nature special damages because they are not damages which the law imputes as having been suffered by the plaintiff but are in relation to amounts of money actually lost and or expended. That aside by the particularization of the heads of damage in paragraph 26 of the amended statement of claim, the plaintiff is deemed to have acted in conformity with the settled practice regarding special damages as opposed to general damages which are in the discretion of the court.

As discussed in relation to the first head of damage claimed in the action, the right to the award of damages must flow from the wrongful termination of the contract which was found by the learned justices of the Court of Appeal to be wrongful. We have carefully read the record of appeal and attended to the written briefs submitted to us by the parties and are in agreement with the learned justices of the Court of Appeal for the reasons contained in their judgment. We are of the considered opinion that the decision of the learned trial judge on this aspect of the matter was right and the defendant has not in the slightest persuaded us to reach a conclusion on the evidence to the contrary. We think that although

perhaps we may hold a contrary view of the facts, once the decision of the learned judge is derived from a reasonable inference from the admitted facts, it is not open to us to reach a different conclusion; that is the province of the trial judge and we can only intervene when we are satisfied that the decision on the facts was unreasonable and or perverse.

There is yet another reason in law for which the onslaught on the finding of the learned trial judge in regard to the termination cannot be faulted. It is this. By section 26 of the Evidence Act, NRCD 323 of 1975, once the defendant by exhibit stated in exhibit "E" addressed to the plaintiff that it was done for failure to mobilize a permanent fleet as demanded by it in exhibit "D", we are precluded from considering a different view of the facts. In support of this position, reference is made to sections 24(1) and 26 of the Evidence Act as follows:

> " 24.(1) Where the basic facts that give rise to a conclusive presumption are found or otherwise established in the action, no evidence contrary to the presumed fact may be considered by the tribunal of fact.
>
> 26. Except as otherwise provided by law, including a rule of equity, when a party has, by his own statement, act or omission, intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon such belief, the truth of that thing shall be conclusively presumed against that party or his successors in interest and such relying person o his successors in interest."

As a matter of fact, reading exhibits “D” and “E” together, one is left in no doubt of the reason for the termination. As it is, we are precluded by law from considering a different view of the facts the effect of which is that the ground of the termination of the contract of services by the plaintiff was the non-procurement of its own fleet of equipment. That view of the facts, which was accepted by the learned trial judge and accepted by the learned justices of the Court of Appeal converges with the legal position contained in sections 24 and 26 of the Evidence Act and puts the controversy to an end. What this means is that the cause of the breach being wrongful, the defendant must bear the consequence or consequences of its breach - the allegation by the plaintiff that it has incurred loss and or expenditure for which it must be compensated subject to satisfying us on the burden of persuasion.

As earlier on mentioned in relation to these heads of damage, they are in their nature special and must be proved strictly. In this regard, we find it difficult to agree with the Court of Appeal that by virtue of the fact that the defendant filed no defence to the amended statement of claim by which in paragraph 26 the plaintiff provided particulars of its loss, to succeed on these heads the plaintiff was only required to lead evidence of the standard of “minimal proof”. We think that minimal proof in the context of which it was used by the learned trial judge and accepted by the learned justices of the Court of Appeal refers to the quality of evidence to be introduced by a party on whom the initial burden lies in an action to enable it shift to the other party (the defendant) so that on all the evidence at

the trial the tribunal of fact may consider whether the burden of persuasion has been met for the purposes of deciding whether or not the facts on which the proponent relies is more probable to have existed than its non-existence. See: sections 10-12 of the Evidence Act.

Although we have great respect for the leaned justices of the Court of Appeal. having regard to the fact that these heads of damage are special in their nature, the position pronounced by them in relation thereto runs contrary to collection of cases on the point that proof of such damages are always in issue and must be proved strictly. The question for our decision in the circumstances is whether the losses which the plaintiff alleged that it had suffered or incurred were proved to the satisfaction of the court from the evidence contained in the record of appeal? That is the task which the plaintiff took upon itself by virtue of the issues raised on the pleadings and to that we must now turn our energies. We shall in considering these heads of damage commence with the severance of labour. But before we embark upon the consideration of the evidence, we wish to make a reference to Bowen LJ in **Radcliffe v Evans** [1892] 2 QB 524 at 528 in the following words.

"… Lest we should be led astray in such a matter by mere words, it is desirable to recollect that the term "special damage" which is found for centuries in the books is not always used with reference to similar subject-matter, nor in the same context. At times (both in the law of torts and of contract) it is employed to denote that damage, arising out of the special circumstances of the case which

if properly pleaded may be superadded to the general damage which the law presumes in every breach of contract and every infringement of an absolute right. In all such cases, the law presumes that some damage will flow from the ordinary course of things from the mere invasion of the plaintiff's rights, and calls it general damage. Special damage in this context means that the particular damage (beyond the general damage which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated for which he ought to give warning in his pleadings in order that there may be no surprise at the trial. But when no actual positive right (apart from the damage done) has been disturbed, it is the damage done that is the wrong; and the expression used of this damage denotes the actual and temporal loss which in fact occurred. Such damage is called variously in old authorities "express loss", "particular damage"…, "damage in fact", "special or particular cause of loss."

See also: **Bogoso Gold Ltd v Ntrakwah** [2011] 1 SCGLR 415.

The above words are expressed with sufficient clarity and in very simple language to guide us in view of the fact that in this appeal as was the case in the court below considerable time was expended by the parties in their written briefs to distinguish between the two modes of compensation-general and special damages. We are hopeful that the above statements would be of value to our determination of the nature of the damages that were claimed by the plaintiff as a consequences of the wrongful termination. From a careful reading of the pronouncement of Bowen LJ in the case

referred to in the preceding paragraph, there is no doubt in our minds that the losses which referred to specific sums of money fall into the category of special damages and not general damages. The distinction is not merely academic but relevant in determining the mode of establishing the right to either head of award in an action. While general damage is presumed by the law from the invasion of a right, special damage on the other hand refers to the particular damage suffered by a party beyond that presumed by the law from the mere fact of an invasion of a right and must be proved strictly by evidence adduced at the trial. The insistence on giving particulars as explained by Bowen LJ is to avoid surprise to the other party and afford him the opportunity of challenging the loss else an award may be made against him in a manner that deprives him of defending himself before being hurt injuriously in his pocket. We hasten to say that the rationale for the insistence on giving particulars of special damage does not in cases where the proponent's adversary files no defence by which the particulars of damage are specifically denied, result in a relaxation of the burden of proof which the claimant assumes in a civil action.

The plaintiff in order to succeed in this claim which is put at $ 132,000.00 only recited the bare pleadings before the trial court without any effort directed at proving by way of exhibits the names and monthly income of the workers and for example the length of notice required in the event of a termination of their service contract. The mere statement in the evidence of the plaintiff's representative (PW1) at page 120 of the record of appeal that the

cost of labor hire was about $44, 000.00 was just a repetition of the particulars of loss set out in paragraph 26 of the amended statement of claim and in our view comes within the description of the evidence in the case of **Chahin and Sons Ltd v Epoe Printing Press** [1963] 1 GLR 163 at 168. We think that the evidence led by the plaintiff in support of the severance of labor is unreliable and falls short of the obligation placed on him under section 11(1) of the Evidence Act as follows:

"The burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue."

The requirement to prove special damages strictly has been emphasised in a collection of cases by our courts and we make reference to the statements made by Dr Twum JSC (as he then was) in the course of the judgment in the case of Delmas Agency Ghana Ltd v Food Distributors International Ltd [2007-2008] SCGLR 748 at 760 as follows:

"… Where the plaintiff has a properly quantifiable loss, he must plead specifically his loss and prove it strictly. If he does not, he is not entitled to anything unless general damages are also appropriate."

It seems to us from the circumstances of this case in relation to the allegation of severance of labor that consequent upon the wrongful termination of the contract, the plaintiff would have been faced with workers on its pay roll who now had no works to undertake and

whose contracts must be terminated by him by way of mitigation of his losses. But then, the plaintiff was required to lead credible evidence in respect of such loss such as payment vouchers, names of employees affected by the severance and their letters of appointment. The plaintiff's default in our view should disentitle it to the actual damages claimed. In our thinking some loss may legitimately be presumed in respect of the severance of labor as a direct consequence of the wrongful termination. According to the settled practice of courts where following a plaintiff's failure to prove special damages, the court is of the view that general damages are appropriate then it may award a reasonable sum. Taking all factors into consideration, and noting in particular from the nature of the works that they were extensive and perilous in nature and have accompanying health hazards, we would set aside the award by the Court of Appeal on this head of damage and substitute therefor a modest sum of fifty thousand dollars ($50,000.00) which we consider fair and reasonable. See: **Amankwah Addo v Abio Nartey** [2010-2012] 1 GLR 493.

Then comes the question of the unrefunded deposit on equipment. We have examined the receipts which contrary to the law were made in US dollars instead of cedis, which is the legal tender in our jurisdiction. The plaintiff again was unable to explain how the totals on the various receipts came about and worse still the length of time for which such huge payments were made. It is difficult for us to comprehend how the plaintiff came by such huge foreign currency in payment for the hiring of equipment for the haulage.

How did the plaintiff come by such huge sums of foreign currency that were paid within a short period? On the whole as regards this particular head of damage, we do not find from the record of appeal evidence that links such payments with the haulage contract between the parties beyond the mere inscription on the receipts to that effect in order to determine the question of their relevance to the haulage contract.

Equally baffling is the absence of any agreement that entitles the owner of the equipment to forfeit the deposits. There is also a payment receipt, tendered as exhibit "G" which bears March 22, 2010, a date outside the date of the termination, indeed long after the wrongful act on which the claim is based. We think that the plaintiff has not only exaggerated this head of damage but that the evidence tendered in support thereof is very unreliable as for example the receipts are not referable to particular to the licensed plates of the equipment in order to determine if they were actually used in connection with the contract of haulage. Besides, the date which exhibit "G" bears gives the claim under this head of damage a mark of fraudulent conduct in equity and we reject it in its entirety. We are of the opinion that the plaintiff's claim under this head of damage was not proved and that the learned justices of the Court of Appeal were wrong in allowing the claim in respect of unrefunded deposits on equipment hired by the plaintiff. As the Court of Appeal acted on wrong principles in the award of damages under this head, we proceed to set aside the entire damages allowed for unrefunded deposits.

Finally, there is the claim for administrative expenses in the sum of $180,000.00. Unfortunately, there is no evidence of how the said loss was incurred by the plaintiff in relation to the termination of the haulage contract. We think that the observation made by us in the course of this judgment in respect of the plaintiff's claim for severance of labor having regard to the need to prove such a head of claim strictly applies with equal force here. In our opinion this head of loss is purely speculative and was approached by the plaintiff in a very casual manner that does not come anywhere near the requisite degree of proof in respect of damages that may be allowed by a court of law. The plaintiff was required at the trial to have led sufficiently credible evidence to show that the expenses were not in connection with its business that was undertaken for six (6) months previous to the wrongful termination. Special damages are not intended by the law to be thrown away by parties to an action and a party who seeks an award must provide cogent evidence that satisfies the law in order to justify a person being condemned in his pocket. Accordingly, we are of the opinion that the award of damages under this head of damage was based on the application of wrong principles and intervene to set the entire award for administrative expenses aside.

The result is that the instant appeal succeeds in part only. In particular, we set aside that part of the judgment of the Court of Appeal by which it allowed in favor of the plaintiff the sum of $1,350,000.00as compensation or damages and substitute therefor the sum of fifty thousand US dollars ($50,000.00) general damages

for severance of labor. Reliefs 2, 3 and 4 as set out in paragraph 26 of the amended statement of claim are dismissed. We also direct that the amount adjudged in favor of the plaintiff in this judgment be the cedi equivalent of the fifty thousand dollars (US$50, 000.00) in order not only to comply with the law but also in accordance with the practice evidenced from the record of appeal between the parties whereby the amount due to the plaintiff was paid in the cedi equivalent.

(SGD) N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE - BONNIE
JUSTICE OF THE SUPREME COURT

(SGD) YAW APPAU
JUSTICE OF THE SUPREME COURT

(SGD) G. PWAMANG
JUSTICE OF THE SUPREME COURT

COUNSEL

YONI KULENDI WITH HIM DANIEL SEGU OSEI AND ERNEST KUSIFOR THEDEFENDANT/APPELLANT/APPELLANT.

FELIX QUARTEYWITH HIM BERNICE QUARTEY FOR THE PLAINTIFF/RESPONDENT/RESPONDENT.