

IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
ACCRA.

Coram: J.B.Akamba, JA Presiding
Yaw Appau, Justice of Appeal
Victor Dotse Ofoe, Justice of Appeal.

H1/213/2009

11TH MARCH 2010

Tema Oil Refinery

Defendant/Appellant

Vrs.

African Automobile Ltd

Plaintiff/Respondent

JUDGMENT

J.B.AKAMBA, J.A: The defendant/appellant (simply the appellant) is an Oil Refinery company based in Tema. Sometime in 2002, appellant invited tenders for the supply of one million, six hundred thousand litres (1,600,000 Lt) of “*marine mix*”. The contract bid price was expressed in euros. Two suppliers won the contract - the plaintiff/respondents (simply respondent/s) and GOIL Limited. The respondent was awarded a contract to supply six hundred thousand (600,000) litres marine mix at a unit price of euro 1.63 of the tender whilst GOIL was to supply the remainder.

The appellant issued a Purchase Order No.400041120P on 22nd August 2002 (see Exhibit “A”) to the respondent to confirm the contract. It is apparent from the records that after three deliveries of the product, the contract run into a deadlock. This occurred when the appellants refused to accept one of the respondents’ deliveries upon presentation. The reason given for the resultant stalemate was that the product was

not of the specification ordered. The appellants said they were actually reacting to *“numerous complaints countrywide on products supplied in December 2003 which had caused outboard motors to malfunction”*. Exhibit 19 is a report tendered by the appellant in support of the *“alleged contaminated premix fuel”* dated 26th May 2009 . Attached to the exhibit 19 is a list of fifteen deliveries of premix to various landing beaches on the South West Coast of Ghana. On the list were the Oil Marketing Companies which were responsible for those landings. These companies were GOIL, GLORY, STAR, OANDO and AGAPEY. Indeed out of 27 location landings listed, fifteen (15) were by GOIL company and the remainder shared amongst the remaining four companies above mentioned. None of the offending deliveries was traced to the appellants (Tema Oil Refinery (TOR) directly nor the respondent. Following the refusal to accept the 4th consignment on 21st June 2004 the appellants set up a committee to investigate the allegation of non compliance with specification of the marine mix. The committee mandated an independent expert – Tema Lube Oil Ltd (TLOL) - to test samples of the engine oil supplied by the respondent and report. The test report confirmed the sample oil to be good quality SAE 30 grade engine oil which is ashless, detergent and with a moderate alkaline reserve and conforms to the National Marine Manufacturers Association’s (NMMA) specifications known as TCW2 and may be recommended for production of premix fuel for use in outboard motor engines. The Independent expert (TLOL) wrote a second report which was more conclusive on the same sample on the same 8th September 2004 (Exhibit B) in which it recommended the oil for production of premix fuel for use in out board motor engines.

Further tests were undertaken which also yielded positive results as confirmed by exhibit 22 issued on 11th November 2004. As a result of the satisfactory tests, deliveries of marine mix to the appellants (TOR) were resumed as per exhibit “C”. Significantly, the exhibit “C” in its second paragraph introduced a new element when it stated that it had however become necessary for TOR *“to vary the specifications for the marine mix”* and by a copy of this letter *“Dr. Ali Abugre (D.M.D Engineering and Production) of TOR is*

requested to provide you with the revised specifications for the marine mix". It is obvious from the above quotation from exhibit C that the decision to vary the specifications was the unilateral initiation of the appellants. Respondents in accordance with this new development submitted samples of their next delivery in accordance with the revised specifications for testing. The results were positive as evidenced in exhibit D. Consequently respondents were informed to supply 354,000 litres of the product which is the balance outstanding. The resultant product when delivered by the respondents was once more turned down by the appellants.

Following from these developments, the respondent issued two letters alleging and claiming losses occasioned by the appellant's refusal to receive the remainder of order 40004112 OP (exhibit A). The respondent presented a claim of 660,120 euros as *"lost revenue on TOR order for marine mix"*. The apparent result of these letters was a meeting attended by both parties on 16th December 2005 the outcome of which is purported to be conveyed in exhibit J. The respondents' reaction to exhibit J is conveyed in exhibit K in which they deny both the accuracy of the contents of exhibit J and the sincerity of the appellants in the deal actually arrived at.

Certainly the quibbles that followed after the 16/12/2005 meeting did not extend to the supply of the 49,200 litres packed in 240 drums of the marine mix which was obviously part of order No 400041120P as the same was promptly paid for at the rate of euro 1.63 per litre. The contention related rather to the subsequent changes. The resultant divergent positions evidenced in correspondences exchanged by the parties following the 16th December 2005 meeting attests to a lack of consensus as to what was actually agreed between them.

It is against this background of disagreements between the parties that the respondents as plaintiffs issued a writ against the appellants herein as defendants seeking an order for recovery of an outstanding sum of Euro 144, 424.83 or its cedi equivalent due them

for the supply of marine mix to the appellants; interest on the above sum from 31st October 2006 to date of final payment; damages for breach of contract; mandatory order for defendant (appellant) to furnish plaintiff (respondent) with a new delivery schedule on the balance of deliveries; any other reliefs; costs including solicitor's fees. The defendant/appellant denied the plaintiff's claims and counterclaimed for a declaration that the contractual relationship between the parties was redefined and substituted by the terms of agreement reached on 16/12/05; a declaration that plaintiff is in breach of the agreement of 16/12/05; declaration that the prices quoted on the invoices described, do not flow from the common agreement arrived between them in December 2005; declaration that plaintiff could not make any supplies in total disregard of the purchase order of 10/05/06 and that plaintiff knew it was bound to be paid the price stated in the said order when it did supply upon receipt of the order; declaration that defendant had fully paid for products submitted by plaintiffs as per waybills; declaration that the 50,000 litres marine mix products supplied by plaintiff does not meet the specification standard of defendant; an order that plaintiff takes back the said 50,000 litres from the stores of defendant company or in the alternative that same be destroyed and cost recovered from defendant; general damages for breach of contract; general and specific damages for avoidable litigation and costs.

In this court the appellant is seeking an overturn of the trial court's judgment entered in favour of the respondents. The notice of appeal filed on 5th September 2008 listed a prolixity of fourteen (14) so called grounds of appeal. Strictly speaking only one of the fourteen conforms to rule 8 of CI 19 as amended by CI 21. The relevant ground is that which alleges that the judgment is against the weight of evidence. In resolving that sole ground however I may consider the other thirteen particulars as and when appropriate as particulars of misdirection to be dealt with.

Whenever an allegation is made before an appellate court that the judgment is against the weight of evidence, the court is obliged to examine the totality of evidence on the

record of appeal and come to its own conclusion as to the admitted and disputed facts. See Akufo Addo vs Catheline (1992) 1 GLR 377; Boafa v Boafa (2005-2006) SCGLR 705 @ 715.

I propose to consider items D, E and F under the omnibus ground. The combined effect of these three complaints of misdirection is whether or not the parties had compromised the original contract or as in the words of the appellant, 'settled' on their original contract? If there was a settlement whether the plaintiff voluntarily waived any purported right to sue on the alleged termination or repudiation of the 2002 contract? To my mind the proper description of the concept sought to be highlighted is one of variation or modification of the contract in the light of prevailing circumstances. Crucial to the resolution of this impasse is the import of the deliberations that took place on 16/12/05. Did the outcome of the meeting of 16/12/05 result in a variation of the contract? The trial judge's finding was that *"there was no agreement to substitute the terms of order 40004112OP with any other terms"*. The reason given for the above conclusion was that *"the outcomes and alleged agreements reached were hotly contested by both sides in writing and left each other in no doubt that they had not changed the original contract with any new terms"*. What can be seen was that the appellant (defendant) left the meeting believing that they had agreed to change the price of order 40004112 OP to GOIL's price and to change the specifications to one that would be *'communicated'* later. The respondent (plaintiff) on the other hand, believed that the meeting rather affirmed their entitlement to compensation for the delays in accepting their deliveries through the 2006 order. Respondent further understood the requirement to supply at GOIL price as qualified to mean only when *"it is not lower than its own price"*.

In business undertakings it is sometimes inevitable for changes in the result of the contract to occur or vary over time necessitating another look at the contract requirements. While some variations may be common or inherent in a system, others

may be special which are caused by changes in the circumstances or environment. In general a contract in writing cannot be altered by the promisee without the consent of the promisor but a contract may be modified with the consent of the parties, whether the contract be by word of mouth, in writing or under seal. Where a variation which is inconsistent with the terms of the contract is made by consent, this amounts to a new agreement which supersedes the original contract; but an alteration, which consists merely in filling in details which were agreed upon before the contract was signed, or in correcting a mistake which was made in reducing the contract into writing, only expresses more accurately the original intention of the parties, and does not amount to a new agreement or affect the liability under the contract. (See Halsbury's Laws of England Vol 8 Pt 5 Sect 1.)

Was there a variation of the contract between the parties? If there was a variation, when did that occur and also what did the variation entail? The trial judge came to a conclusion concerning the meeting that took place on 16/12/05. This is how she articulated it: *"it is my clear finding that the meeting of 16th December 2005 did not lead to an agreement to redefine and substitute order 40004112 OP with any new terms. Agreement is formed from consensus and the exhibits evaluated show that there was no consensus to change the terms of agreement in order 40004112 OP after the meeting. Neither did it lead to an agreement to vary the order/contract because the parties were not at all idem on the specific points that could have varied the terms of the contract."* My own reading of the record of appeal leads me to the conclusion that the trial judge's evaluation of the evidence before her and the conclusion arrived at and quoted above was well founded. The numerous internal inconsistencies and conflicts in the appellant's presentation during the trial inevitably lent credence to the trial judge's finding on this claim. As this court stated in the case of Obeng vs. Bempomaa, (1992-1993) GBR 1027, CA, inconsistencies, though individually colourless, may cumulatively discredit the claim of the proponent of the evidence. There were conflicting stances between the DW2 on one side and the DW3 and DW 1 on the other on the crucial point as to whether or not

there was agreement emerging from the meeting of 16/12/2005. For his part, Kofi Kodua Sarpong DW2 (at page 176, lines 7 to 8 and 24 to page 177 lines 1 – 2 of the record of appeal) in his answers to questions under cross examination made it clear that the parties had not reached agreement at the said meeting. It was for that reason that DW2 decided to convene a further meeting between the parties. This led to the meeting on 1st March 2006 after which the DW2 said, they (appellants) requested the respondents to confirm the understanding reached. When the respondents failed to respond to the request, witness wrote a letter in May in which he stated the new volume, new specifications and the new price as well as a purchase order. There was no response to the two letters, exhibits 4 and 6 which are the same as exhibits S and T respectively that witness (DW2) wrote to respondents. Nevertheless the appellants on 7th January 2006 issued exhibit U authorizing the payment of Euro 76,186.20 in favour of respondent as payment for 240 drums of marine mix as per order 40004112 OP. The 240 drums are the same as 49,200 litres of marine mix. The above assertions by DW2's are in contrast to those made by both the company secretary DW3 and DW1 Dr Abugri. Under cross examination DW1 was emphatic that the series of meetings that they had which were in common with that of 16/12/05 to resolve issues including pricing resulted in both parties agreeing on the GOIL price. Of course from the trend of the deliberations, it is obvious that DW2's version of the narrative which supports the position stated by the respondents was more credible than the positions advanced by both DW 3 and DW 1 hence the trial judge's preference thereof. This conforms to the provision of s.11 of the Evidence Act 323.

Another significant point of divergence was the reason why the appellants sought a change in the specifications of marine mix. Granted that the parties are at liberty to seek an alteration or change in the supply specifications, given changes in circumstances or the environment, both parties must appreciate the exigency and given the opportunity to adjust or address the issue and consent thereto. In the instant case, the appellants claimed that the respondents had included an '*addictive*' (sic) to their original

marine mix specification which resulted in protestations by the end users. As observed earlier in this judgment, of all the deliveries of marine mix to the south west coast of Ghana by various oil marketing companies, none was traced directly to the appellant (TOR) to whom the respondents supplied their product. This is quite significant for the purpose of apportioning blame as can be gleaned from answers given by DW 1 during the trial. Under cross examination, the DW1 insisted that by their analysis, emulsion was formed from the plaintiff's (respondent's) marine mix. The witness did not tender any test proof of this assertion nor did the appellants provide any during trial. The witness mentioned the additive (sic) contained in the GOIL supply as XTP-33 but could not provide any for that alleged to be contained in the respondent's product. (See pages 152 – 153 of the ROA). The only analyst results tendered were those of the independent analysts which do not support the appellants' claims. The issue of additives to the specifications is a matter capable of scientific proof and so cannot be left to speculation or peradventure. Yet, the appellant valiantly peddled it as the reason for seeking a variation of the supply contract. Besides, if the issue was traced to an *additive*, the response would not be for an entire change in specification as to a demand for the removal of the *additive*. Thus the assertion by Mohammed Hijazi in his evidence in chief (see page 33 Line 17 of the ROA) that *"if there is a change then it is TOR telling us about the variation of the specification and not that the product is different from what we supply"* is the truth.

The respondents exhibited a great deal of composure and resilience in the unfolding events and agreed to subject their products for tests upon tests by the independent expert (TLOL) which all proved positive. The respondents by their own showing acceded to the appellant's new demand for the supply to conform to new specifications which they (appellants) unilaterally demanded based upon a spurious claim that the previous supplies contained an additive which was not borne out by the tests. It is thus obvious that by acceding to the new specifications the respondents had consented to the variation of the contract but limited only to the issue of the specifications. The case of

Sowah vs BHC (1982-83) GLR1324 @ 1346 is authority for the proposition that in Ghana parties can enter into a parol contract to supplement a contract under seal. Also the Contracts Act 1960 (Act 25) by its section 11 dispenses with the need for writing to make a contract valid or enforceable. It provides:

“11. Subject to the provisions of any enactment, and to the provisions of this Act, no contract whether made before or after the commencement of this Act, shall be void or unenforceable by reason only that it is not in writing or that there is no memorandum or note thereof in writing.”

The emerging trend or conclusion from the deliberations between the parties is that the respondents did agree to provide the new specification demanded by the appellant but this was before the meeting on 16/12/2005. At page 33 of the ROA the Plaintiff states:

“Q. Now when this product variation occurred did you comply with this?”

A. Yes my Lord.

Q. How did you comply with it?

A. We were given the specification and we supplied samples to TOR, a new sample to test and confirm that this new sample conforms to the specification, that is the new specification, and TOR confirmed that the sample is to their specification.”

As to how the appellant confirmed that the sample conformed to their new specification the witness referred to exhibit D issued on 14th October 2005 by the appellant to the respondent. In the said exhibit D the appellant expressed their satisfaction about the sample and also informed the respondent to supply 354,000 litres marine mix being the balance left to be supplied. When the respondent resumed the supply in compliance with exhibit D the same was again rejected. It is evident from the ROA that there were disagreements within the confines of the appellant company as to who was in control of events surrounding the execution of this contract given the level of the countermanding of decisions. Nevertheless, given this position, it is quite clear that the change in specification was not a product of the meeting on 16/12/2005. The change in

specification was agreed between the parties about two months earlier (14/10/2005) as attested by exhibit D. Those changes were circumscribed under the 2002 order. In spite of these changes there still were outstanding quibbles and disagreements and this necessitated the meeting on 16/12/2005. Those issues primarily had to do with a more far reaching variation of the order and the contract price. On these, the meeting of 16/12/2005 did not find consensus hence there was no agreement to vary the contract as a whole as rightly found by the trial judge. As the trial judge demonstrated, which we endorse, neither the tape recording nor the exhibit S show that the parties had agreed to redefine and substitute the terms of the original 2002 contract except for the specifications. At best what was conveyed in exhibits S and T was an offer requiring an acceptance to concretize into an agreement but which offer terms were unclear and uncertain. For the issue of what was the GOIL price was uncertain. Did it refer to the GOIL price calculated at 12,251 old cedis which translated into 1.71 euros at the time of the initial bidding or the 10,890 cedis suggested on 1/3/2006 or to other figures and if so what were they? As a result, since there was no settlement there could also not be a waiver of any right to sue on any termination or repudiation of the 2002 contract. The appeal on this ground therefore fails and is dismissed.

The next ground of appeal relates to the reliefs granted by the trial court as being unwarranted in law. The first of these reliefs under attack is the award of euro 230,000.00 as special damages when no special damages were particularized in the pleadings. The trial High Court entered the following reliefs in favour of the respondent:

- a) *114,424.83 euros or its selling rate in cedis as outstanding payments for the supplied marine mix and drums with interest from 31st October 2006 to date of payment.*
- b) *71,394 euros as loss of profit on the 146,000 litres of oil that plaintiff was prevented from supplying with interest from March 2006,*

- c) *Special damages of 230,000 euros as costs that should reasonably have been in contemplation of defendant when it prevented the performance of this contract. Interest on this sum runs from date of judgment.*
- d) *General damages of 500,000 euros.*
- e) *Defendant is also ordered to pay plaintiff's legal cost which is set at 30,000 euros. Court costs is set at cedis GHc 3,000.*

The trial judge had rightly in my mind summed up the events culminating in the conclusion that the respondents were entitled to damages. Firstly the parties did not arrive at any conclusion to adopt a new contract or redefine exhibit A in their meeting on 16/12/2005 and 1st March 2006. The efforts to push exhibit S, T and 3 as new terms of agreement at an imprecise price beyond referring to it as 'GOIL' price was not accepted by the respondent. Even if the meetings held on 16/12/2005 and 1/03/2006 were ostensibly regarded as negotiations for settlement the results of those meetings would not be binding until accepted by both parties which is not the case in this appeal. (See Regional Maritime Academy vs Amaning & Ors (2005-2006) SCGLR 717).

The appellant could not invalidate exhibit A simply by repudiating it and presenting a new agreement in exhibit 3 which was not accepted by the respondent in any manner. The respondent demonstrated their rejection of exhibit S, T and 3 by continuing to act on exhibit A which they were entitled to do. The respondents continued delivery of consignments after the issue of exhibit 3 could not be taken as acceptance of exhibit 3 in the light of their clear indication that the deliveries were based on exhibit A. This state of affairs clearly placed a burden on the appellants to continue its performance or repudiate the exhibit A for good reason. Since the appellant failed to prove any breach of contract by the respondent in their performance under exhibit A they (appellant) had no good reason to repudiate same. In the circumstance the appellant was obliged to either perform exhibit A or be liable in damages for breach of contract. The appellants had received two deliveries under exhibit A for which only part payment was effected leaving a balance on account of euro 110,104.83(See exhibits G, L & R). The court

accordingly entered judgment for the outstanding sum in favor of respondent. The court also entered judgment for the sum of euro 4,320 damages for the 540 drums in which the marine mix was delivered bringing the total sum to euro 114,424.83. The appeal does concern itself with this grant in favour of the respondent.

The appellant's main attack is on reliefs' b, c and d granted by the trial judge.

Grant of Compensation in lieu of Specific Performance in relief (b) above.

The appellant contends that the trial court exceeded its jurisdiction and was in patent breach of natural justice by ordering the payment of euro 71,394 to respondent in a purported substitution of their claim for *'mandatory order directed at defendant to furnish plaintiff with a new delivery schedule on the balance of deliveries'*. Exhibit D written by the appellant confirms that as at 14th October 2005 the respondent had a balance of 354,000 litres of marine mix outstanding from the contract volume of 600,000 litres awarded (See exhibit A). It is not matter of mere conjecture that the respondent sought the relief of an order of the court for a *'mandatory order directed at defendant to furnish plaintiff with a new delivery schedule on the balance of deliveries'*. The appellant had provided very good reasons for seeking the relief. At page 55 of the ROA lines 6 to 25 and page 56 line 1 to 4 the following dialogue provides the reasons:

"Q. You are telling or praying this court to make a mandatory order to order the defendant to give you new delivery to enable you deliver the balance?"

A. yes my Lord, because we are still holding stock to balance of which has been produced to their specification.

Q. And will the contract price as at 2002 now be relevant to the balance of the product?"

A. It is not, world oil price have gone up.

Q. The contract price still stands.

A. Yes my Lord and the world price have gone up with several folds, the product is stock maintenance and storage interest.

Q. You have sum up your total loss in exhibit H?"

A. Yes my Lord at the time of July 2005 and because we are not going to increase the price to match the current world price we maintain the other price but levy the interest and other cost and expenses, we are adding interest and other charges and cost. We have been suffering on daily basis and the total amount now owed is greater than the amount claimed here, the amount we claimed here as at July 2005.”

In the light of the above evidence by the plaintiff (respondent) in support of the relief for a mandatory order by the court to enable them deliver the outstanding balance of 146,000 litres marine mix, why did the trial court find it an appropriate occasion to grant a different relief as it did? The respondent's answer is pregnant with the suggestion that the marine mix to honour the whole contract is being held in stock awaiting delivery. With this understanding, what becomes of that stock in the light of the trial court's order for the payment of the compensation? A number of authorities have been cited to support the position that a court has power to award reliefs not expressly claimed and to justify the trial court's substitution of a different relief than that claimed. The following cases were cited to us namely:

- a. Butt vs Chapel Hill Properties Limited & Anor (2003-2004) SCGLR SC 636 @ 638 , holden (2) per Dr. Date Bah JSC.
- b. Hanna Assi (No 2) v Gihoc Refrigeration & Household Products Ltd (No 2) (2007-2008) SCGLR 16
- c. Republic vs High Court, Kumasi Ex parte Boateng, SCGLR (2007-2008) 404, holden 2.

The above cited authorities support the principle that a court is entitled to apply the law to the facts of the case even if the parties were unaware of it. Beyond that they are certainly inappropriate to the present facts. In the present case the respondent who is mindful of the fact that it had stocked the products demanded under the contract is seeking an order of the court for the rescheduling of the delivery dates to enable him deliver. This is certainly in the nature of specific performance and the trial court having

found as a fact that exhibit A is still binding and active; it laid within its power to grant same. There is a plethora of authorities to the effect that it is a travesty of justice if judgment is given against a party on a ground on which he did not have notice from the writ of summons or as in some cases from a counterclaim. This principle was applied in the following cases: Oloto v Williams (1944) 10 WACA 23; Dam v Addo (1962) 2 GLR 200; In re Okine (Decd); Dodoo & Anor vs Okine & Ors (2003-2004) SCGLR 582 @ 618. On the authorities referred above I find the reasons advanced by the trial court in substituting its own relief for that claimed by the respondent unjustified. I will in the circumstance grant this relief and set aside the award of euro 71,394 as compensation. In place of the relief set aside above, I hereby order the appellant to arrange to take delivery, first, of the outstanding balance of 146,000 litres marine mix which was rejected upon delivery, within three months of this judgment at the contract price spelt out in exhibit A i.e. euro 1.63 per litre with interest from March 2006 when the delivery was turned down to date of payment. The appellant is equally ordered to take delivery of the remaining balance of 108,000 litres within the same period and on the same terms i.e. at euro 1.63 per litre with interest from March 2006 to the date of payment.

Award of Special and General Damages.

The respondent asked for damages for breach of contract. They were instead awarded both general and special damages when the latter was not asked for.

The position of the law regards special damages is that as the name indicates they are special and must be claimed with such particularity that the defendants know, not only the amount of loss or damage alleged to be suffered but also how that amount is made up or calculated. Any monetary loss suffered by the applicant up to the date of trial must be pleaded, particularised and proved or else it cannot be recovered. In the case of Stroms Bruks Aktie Bolag v Hutchison [1905] AC 515 at 525 – 526, HL (SC) Lord Macnaghten stated that: *“Special damages’...are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their*

character, and, therefore, they must be claimed specially and proved strictly.” (See also Andreas Bschor GMBH & Co vs B.W.C. Ltd C.A 3rd April 2008, reported in (2008) 4 GMJ, 203). I found nothing in the pleadings and/or evidence at the trial in proof of any special damages to warrant the grant of this special relief against the appellants. In the premises I set aside the special damages of euro 230,000 awarded against the appellant as unproven.

As regards the award of euro 500,000 general damages against the appellant, the appellant has not demonstrated to this court why this should not stand. When this suit begun, each party presented itself as the victim of high handedness, callousness and what have you, at the instance of the other. At the close of the trial it became abundantly clear that the appellant rather than the respondents could not acquit itself of blameworthiness for all the obstacles and impediments in carrying out the contract. The appellants created as many excuses as there were deliveries by the respondents and each time the latter tried to accommodate them until they could no longer bear them. The resultant unjustified refusal to accept supplies under the contact from the respondent created the discomfort of finding places to store these products. Of course these difficulties so created, more by the neglect of appellants than the suppliers, were within their contemplation being long time operators in the oil business. If businesses in this country are to run in the fashion exhibited particularly by the appellants, no private company either indigenous or foreign would be attracted to do business. It is quite evident that but the frustrating tactics arising out of the internal indiscipline exhibited or employed by the appellants, the whole contract would have been carried out by now. There is thus abundant evidence to warrant an award of substantial damages. Accordingly I will set aside the sum of euro 500,000 and substitute an award of euro 350,000 as substantial damages against the appellants.

Legal and Court Costs.

The trial court awarded what it called legal cost of euro 30,000 as well as court cost of GHC 3,000 against the appellants. I wonder what the basis for the award of the legal costs and in euros is. Did the respondent engage counsel from the euro zone to do the case? Or is it the case that the Ghana cedi is no longer the sovereign currency of this country? I can understand the parties fashioning out their contract in a unit of currency other than the cedi when the product to be supplied is produced outside this country. But for a situation wherein counsel are engaged in Ghana to provide legal service in Ghana I fail to understand why the court would award legal costs in a currency other than the cedi. Order 74 of CI 47 regulates the award of costs. The award of costs is at the discretion of the court but, like every discretion, it is to be exercised in accordance with due process of law. This means an exercise of such discretion shall not be arbitrary, capricious or biased either by resentment or personal dislike. (See article 296 of Constitution 1992.) The trial judge gave no reason for the award of the legal cost in euros and the court costs. The court simply stated the following: *“Defendant is also ordered to pay plaintiff’s legal cost, which is set (sic) 30,000 euros. Court costs is set at cedis GHC 3,000 after looking at the court filing fees and the 30 or so times the parties had to come to court. All sums ordered to be paid in euros may be paid at the euro selling price of the cedi.”*

It is significant to point out that an award of costs is designed to compensate for expenses reasonably incurred and court fees paid by the party in whose favour the award is made and provide reasonable remuneration for the lawyer of that party for work done by the lawyer. The court in assessing the amount of costs to be awarded may have regard also to the amount of expenses, including travelling expenses reasonably incurred by the party or his lawyer or both in relation to the proceedings; the amount of court fees paid by the party or his lawyer in relation to the proceeding; the length and complexity of the proceeding; the conduct of the parties and their lawyers during the proceedings and any previous order as to costs made in the proceedings. (See Order 74 rule 2 of CI 47). These provisions require that trial judges put in some efforts in the

assessment of costs by stating the factors they consider in fixing a sum deemed appropriate if they are not to be unsettled on appeal. Counsel did not file any record of the work done and the fees attached as well as the basis for those figures to guide the court.

This of course left the court with no option than to state that *'the plaintiff's cost is fixed at euro 30,000'* which appears rather arbitrary and not measurable to the legal requirement for the exercise of discretion by a judge. The factors that went into fixing the costs at such a high figure and the choice of currency have all not been deemed essential and so have not been stated. In appropriate cases costs may be ordered to be taxed by the court. What measure of tax shall be imposed if the costs are awarded in different currencies each with different par values? I find no justification for the costs awarded and same is accordingly set aside. From the record of appeal there were twenty two trial days and nineteen days when various processes were taken before the court. There is no record of the filing fees paid to guide this court besides what the trial judge stated when awarding the cedi component of the costs. Bearing in mind the number of trial days and the measure of effort put in as gleaned from these records I assess the total costs inclusive of a reasonable lawyer's fees at (GH¢ 6,000) six thousand Ghana cedis in favour of the respondents.

Costs in this court will be assessed at (GH¢ 4,000) four thousand Ghana cedis having in mind the level of industry put into this appeal by both counsel in which the main ground of appeal is dismissed and the reliefs partially substituted.

J.B.Akamba
Justice of Appeal

YAW APPAU, J. A.

I have read beforehand the judgment of my able senior colleague, Akamba, J.A. and I agree with him in toto that the appeal be dismissed subject to the variation orders made therein with regard to the award of damages and plaintiff/respondent's legal cost. I have nothing useful to add.

Yaw Appau
Justice of Appeal

I agree

Victor Dotse Ofoe
Justice of Appeal

COUNSEL

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Mr Addo Atuah for the Plaintiff/Respondents.

Judicial Training Institute