

THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA-AD 2019

CORAM: BAFFOE-BONNIE, JSC (PRESIDING)
GBADEGBE, JSC
MARFUL-SAU, JSC
DORDZIE (MRS), JSC
AMEGATCHER, JSC

CIVIL APPEAL
SUIT NO. J4/39/2019

11TH DECEMBER 2019

EKOW ESSUMAN (DECEASED)
SUBST. BY RUTH ESSUMAN (MRS)
BODJA ESSUMAN & NANA ASARE BEDIAKO
PLAINTIFFS/RESPONDENTS/

RESPONDENTS

VRS

ABOSO GOLDFIELDS LIMITED
DEFENDANT/APPELLANT/APPELLANT

JUDGMENT

THE UNANIMOUS JUDGMENT OF THE COURT IS READ BY GBADEGBE JSC, AS FOLLOWS-:

In these proceedings, we shall for reasons of convenience describe the parties simply as plaintiff and defendant. The plaintiff claiming under and by virtue of two agreements entered into with the defendant relating to the haulage of tailings that were contained in documents tendered in evidence as exhibits B and B1 respectively, mounted the instant action before the High Court, Sekondi claiming the recovery of various sums of monetary damages for breach of contract. By the endorsement to the writ of summons, the plaintiff demanded from the court the following reliefs:

I(a) Recovery of the sum of GH¢2,582,000.00 being the cost of tailings supplied by the plaintiff to the defendant from July 2015 to December 2015 at the defendant's request.

(b) Interest on the said sum of GH¢2,582,000.00 at the prevailing commercial bank rate from July 15, 2015 to the date of payment.

II (a) Recovery of the sum of GH¢220, 000.00 being outstanding payment of the cost of haulage of the said tailings.

III(a) Recovery of the total sum of GH¢624, 000.00 being losses incurred by plaintiff by reason of the wrongful termination of the contract for the supply of tailings made between the parties.

(b) General damages for breach of contract.

Following the service of the initiating processes on the defendant, she submitted herself to the jurisdiction of the court and filed a defence in which among others, the claims made by the defendant were denied. In particular answer to the claim for outstanding payments under the contract of supply, the defendant averred that it had made full payment of bills submitted to it. The action proceeded to a full-scale trial at the end of which the learned trial judge in his judgment accepted the version of the plaintiff and allowed the claims endorsed on the writ of summons save relief 3(b) which was in relation to losses incurred consequent upon the wrongful termination of the agreement contained in exhibit B1. The defendant promptly appealed from the said judgment to the CA and was soon followed by the plaintiff, who also appealed against the denial of the claim contained in relief 3(b) of the writ of summons. At the CA, the defendant's appeal suffered a dismissal as was the case of the plaintiff for a reversal of the trial court's denial of the claim for consequential losses incurred by him. The defendant has now appealed to us demanding a reversal of the decision of the intermediate appellate court which upheld the trial court's decision in the matter.

Pausing here, it is observed that as the claims are derived from a contract and most of the heads of damage are in respect of specific sums of money that are computable by arithmetic calculation and the right thereto arose before the termination of the contract, they are in their nature special damages save the claim for general damages for breach of contract. In the circumstances, better practice required such claims to have been designated as such and all the monetary claims made under one relief with particulars of the separate amounts being provided. For example, going by the action herein, the amount being claimed as cost of tailings and the outstanding balance for haulage and the consequential loss of profits would have been lumped together as a claim for special damages. Further, the claims being in their nature special damages, the plaintiff was required to provide particulars of the special damages claimed in the matter. Although the claim as presented was a deviation from the settled practice of the Court regarding pleadings, both lower courts and indeed, the parties to the action contested the action without adverting their minds in the slightest degree to the requirements of pleadings in claims for special damages. The decision of this court in the case of **Eastern Alloys Company Limited v Chirano Gold Mines** [2017-2018] 1 SCLR 308, 324 is a recent exposition of the applicable practice to be employed by parties when making claims for special damages.

So strict is the rule construed that the failure of the plaintiff may preclude him from leading evidence at the trial on same as was stated in the cases of **Ilkin v Samuels** [1963] 2 All ER 879, 886 and **Hayward and Another v Pullinger and Partners Limited** [1950] 1 All ER 581, 582 and concurred in by the learned authors of in his statement of claim else **Atkin's Court Forms**, 2nd Edition, Volume 32 as follows:

“Where, however, the plaintiff claims that he has suffered special damage, such damage must be alleged with particulars in his statement of claim or he will not be permitted to lead evidence of it at the trial.”

The object of the requirement of particulars is to enable the defendant know the precise case, which he is to meet at the trial and prepare accordingly.

Before us in these proceedings, which are in the nature of a rehearing, the defendant relies on following grounds of objection namely:

- (1) The Court of Appeal’s judgment is against the weight of the evidence adduced at the trial.
- (2) The Court of Appeal erred in upholding the trial judge’s rectification of the amount of GHC 220, 000.00 endorsed in relief (II) (a) of the Plaintiff’s writ to the amount of GHC 247, 674.00 in the absence of evidence to support the award of the said amount.
- (3) The Court of Appeal erred in holding that the Appellant was in breach of the contract between the parties and upholding the award of damages against it.
- (4) The Court of Appeal erred in holding that the issue of “whether or not the contract between the parties required the plaintiff to haul tailings as and when requested by the defendant” was irrelevant to the determination of the real controversy between the parties.
- (5) The Court of Appeal erred in holding that the non-production of invoices issued by the third parties to the Plaintiff for the supply of tailings which the Plaintiff allegedly supplied to the Appellant was of no probative value to the determination of the real issue before the court.

(6) The Court of Appeal erred in assigning the burden of producing documentation relevant to the Plaintiff's case to the Appellant and holding that the Appellant had a duty to the court to produce the said documents to contradict the Plaintiff's claims.

The above grounds, in our view, raise for determination the question whether the various heads of damage allowed by the CA are supported by the effect of the evidence placed before the trial court. Stated differently, the question for our decision is whether on all the evidence the plaintiff succeeds on a balance of probabilities. We say so because from the grounds of appeal filed and set out in the immediately preceding paragraph, the questions which turn up for determination is whether the decision of the CA affirming the judgment of the learned trial judge is derived from the effect of the evidence contained in the record of appeal. At this juncture, we remind ourselves of the applicable standard of proof by referring to Hoffman LJ in **Re B**, [2008] UKHL, 35 wherein he delivered himself using a mathematical analogy thus: *"If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who has the burden of proof fails to discharge it, a 0 value is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."*

Proceeding further, we reiterate the settled principle that to succeed before us the plaintiff must demonstrate that the concurrent findings on which the decisions are based suffer from perversion and or unreasonableness or that there is an error of law inherent in the said

judgments, which when corrected renders the judgments without efficacy. Accordingly, we proceed to consider the question posed at the onset of the immediately preceding paragraph which is directed at testing the integrity of the findings on which the decision of the CA is based. This requires us to consider the various heads of claim and or damage allowed in favor of the plaintiff bearing in mind that we can only intervene with the findings when a consideration of all the evidence contained in the record of appeal leads us to a different conclusion on the findings through a critical process of reasoning that compels us to hold that the findings are perverse or unreasonable. To be good, our intervention should not be exercised only because we are of the view that faced with the admitted evidence, we would have come to a different conclusion; that certainly is the province of the trial court provided that such findings are supported by the evidence placed before them. See: **Gregory v Tandoh IV and Hanson** [2010] SCGLR 971. Turning our attention to the task before us, we commence with the award in the sum of GHC2, 582, 000.00.

(A) THE AWARD OF DAMAGES IN THE SUM GHC 2, 582, 000.00 FOR THE COST OF TAILINGS SUPPLIED TO THE DEFENDANT.

After carefully reading the evidence contained in the record of appeal and giving thought to the written briefs submitted before us by the parties, we have come to the view that on the state of the authorities, the claim under this head required the plaintiff to establish on all the evidence that he had actually expended the said amounts in purchasing tailings from small scale miners and or the like for the purpose of utilizing them in the contract of supply between him and the defendant solely for the defendant's business in accordance with the contract between them. In our view, the plaintiff assumed a different role when he accepted to procure tailings that would

satisfy defendant's requirement as stipulated in exhibit B1, the agreement of haulage between them. The plaintiff became an agent of the defendant and it being so, he is required in accord with common sense and good business practice to act in a manner that a person in a fiduciary relationship would. Therefore, to succeed in charging the defendant with the amount claimed for the cost of tailings, the plaintiff must provide the defendant with a credible means of how he came by the aggregate cost of the materials. Relevant matters to be proved include for example, without limitation, the dates of the purchase, the vehicle number of the haulage truck, the quantity of tonnage, the identity of person(s) from whom they were procured and the person who accepted delivery of the items on behalf of the defendant.

A careful scrutiny of the evidence placed before the court at the hearing reveals that the plaintiff failed to advance his case beyond the state in which it was at the close of the pleadings. Although the trial was to say the least conducted in an atmosphere in which for no apparent reason the practice of the Court was relaxed, the plaintiff was unable to introduce any evidence of the details of the supplies that aggregated to the sum of GH₵2, 582, 000.00. In the circumstances, it is difficult to appreciate the basis of the concurrent findings by the two lower courts which has the semblance of allowing the mere repetition of the figure claimed by the plaintiff as proof of the disputed claim. It is trite learning that such claims must be strictly proved and that the failure to do so is fatal to the claim as was decided in the case of **Eastern Alloys v Chirano Gold Mines Company Limited** (supra).

We venture to say that it is quite unreasonable for a court of law to saddle a defendant with so colossal an amount of money which in substance is alleged to have been expended by a plaintiff on his behalf without producing either receipts of purchase of the items allegedly procured or an invoice from the supplier to the defendant. If as the two lower courts found, the absence

of invoices and or receipts or even an indication of the various items of purchase over a period was unnecessary, by what process of reasoning did they come to accept the figure claimed in relief (1) (a) in the writ of summons herein. If as indeed, the plaintiffs claimed that the amount represents moneys expended by the plaintiff on behalf of the defendant by virtue of the purchase of tailings under the contract of supply between them then the concurrent findings related thereto must have been in error as no evidence was introduced by the plaintiff in support of his claim. The mere fact that the court, contrary to the defendant's vehement denial of such a contract held that such a contract of supply was in existence, does not in a court of law composed of reasonable men relieve the plaintiff of the burden imposed on him by law to prove by a preponderance of evidence that suffices the standard contained in section 11(4) of the Evidence Act *"that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence."*

The failure of the plaintiff to introduce any evidence on the items of purchase that totaled the amount claimed has the effect of not satisfying the requirements of sections 11 (1) and 14 of the Evidence Act, and renders his claim unproved. The said sections provide as follows;

"11(1). For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue.

14. Except as otherwise provided by law, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting."

But that is not all. The judgment of the learned trial judge which was affirmed by the learned justices of the Court of Appeal did not make any

finding on the contested claim of the plaintiff to be entitled to the sum of GH¢ 2, 582, 000. 00. Indeed, careful scrutiny of pages 196 to 207 of the judgment on which these proceedings turn reveals that nowhere in the evaluation of the evidence and or the consideration of the rival cases before him did the learned trial judge advert his mind to the requirement of proof of the head of claim set out as relief (1) (a). At pages 199 to 201 of the judgment, the learned trial judge in his consideration of the sub-heading 'Addressing the Issues:' dwelt on matters other than the said claim. In particular, he referred to the provisions of the Evidence Act, NRCD 323 on the issue of credibility and analyzed the question whether or not the plaintiffs supplied tailings described as "G" and surprisingly reached the conclusion at page 202 of the record of appeal as follows:

"It is interesting that learned counsel for the defendants did submit in her closing address that plaintiff's witnesses i.e. PW1 and PW2 admitted that, they did not have license to mine gold. Yet, by their own evidence the defendants admitted that the "G" sand was from the "galamsayers", and they did not reject them on the ground that Pw1 and PW2 did not have license to mine gold.

That leads me to discussing a most crucial issue as to whether there is outstanding balance of GHC220, 000.00 to be paid to the Plaintiff as haulage services rendered." [insertion mine]

Quite clearly from the above, the learned trial judge made no finding regarding the amount of GH¢2, 582, 000.00 claimed. In fact, from pages 199 to 202, not a single mention was made to the cost of tailings which was the subject matter of the said relief. Indeed, in his evaluation that preceded his findings, the only times he mentioned the said figure and or the claim related thereto is in the narration of the claim and interest relating thereto and quite curiously at page 206 when he entered judgment for the plaintiff under the sub- heading " Conclusions.:" How the learned trial judge could

from the said analysis reach a conclusion on the disputed claim contained in relief (1) (a) which he allowed is puzzling and can only be the product of perversion and or unreasonableness. In our view, the acceptance of the plaintiff's claim contained in relief 1(a) by the learned trial judge being unsupported by the evidence, its affirmation by the learned justices of the CA was wrong. Accordingly, we are of the view that the plaintiff's said claim fails and is dismissed.

(B) THE AWARD OF GH¢247,000.00 FOR OUTSTANDING HAULAGE CHARGE

In the decision on appeal to us, the learned justices of the CA affirmed the award of GH¢247,000.00 allowed by the learned trial judge for outstanding haulage charges. The defendant who denied the said indebtedness at the trial has contended before us that not only was the award under the said head of claim not proved but that the learned justice of the trial High Court was wrong in substituting the sum of GH¢ 247, 000.00 for the claim of GH¢ 220, 000.00. In his decision, the learned trial judge simply expressed himself to the effect that going by the fact that the defendant said he had made full payment of the haulage charges in the sum of GH¢ 6, 592, 649.31 as well as GH¢616, 455.00 for other services, then noting that the total amount paid by the defendant is GH¢6, 691,430.00 there is a shortfall of GH¢247,000.00 representing the amount owing to the plaintiff from the defendant. In reaching his view of the matter, the learned trial judge did not engage in any arithmetical computation that resulted in the figure he reached. That aside, it appears that in his computation, the learned trial judge did not advert his mind to the 5% deduction statutorily made from the total payments due to the plaintiff. That deduction is apparent from the face of the payment vouchers in evidence before us and may be of some value in explaining the difference. Further, the finding of the learned trial judge was not based on

any proof by the plaintiff that beyond the invoices tendered in evidence, there were other outstanding demands for payment of haulage charges that were not satisfied before he took out the writ of summons herein. In our opinion, when a defendant in an action for the recovery of a sum of money makes an admission of a lesser amount, the party who makes the demand is not thereby relieved from proving that the amount owed is greater than the part admitted. Notwithstanding the said admission, the plaintiff is required to lead evidence to prove the outstanding claim instead of engaging in what appears from the stance that was adopted on his behalf which essentially was to make reference to the payment for other services rendered by him and invite the court to infer from the diminution in the total sum due to him must represent the outstanding amount payable for the haulage charges. Proof of the outstanding amount must be in relation to actual haulages made and the amount owing from each trip.

Again, it was wrong for the learned trial judge to act on the deposition of the defendant's former employee which was withdrawn earlier on by the defendant with the consent of the plaintiff. A careful reading of page 126 of the record of appeal reveals that on that day, the defendant applied to be allowed to file a "*fresh statement*" on its behalf as the previous deponent was no longer in its employment. The response of the plaintiff to the said request was an unequivocal accession to the prayer with a rider that it "should not be substantially different from the previous one." Our understanding of the proceedings for that day is that the previous deposition made by Michael Aidoo was withdrawn and substituted with a "fresh" witness statement. Therefore, the previous witness statements were of no consequence in the action from the moment they were substituted with the deposition of Abdul Razak Yakubu which appears at page 127 of the record of appeal. In the light of this, it is surprising that the learned trial judge at page 167 in the course of the reception of evidence allowed the plaintiff through his counsel to have the previous witness statements tendered in

evidence as a hearsay statement and marked as exhibits E and E1. We think that having been previously withdrawn and substituted with new statements, it was wrong for the learned trial judge not only to allow the said statements in evidence but also to utilize them at page 231 of the record as a basis for disbelieving the defendant's testimony on the claim for outstanding haulage charges. As the said depositions were no longer subsisting as witness statements, by acting on such inadmissible material, there was prejudice occasioned to the defendant's case and we are of the opinion that this did not serve the ends of justice well.

We think that the proper course to have been pursued by the plaintiff, if he so desired, was to have called the deponent of the previous witness statement as a witness subject to the relevant rules of evidence to testify on his behalf instead of applying to have such statement which was no longer part of the processes before the court treated as hearsay evidence without satisfying the mandatory requirements of section 118 of the Evidence Act, NRCO 323, 1975. As noted earlier, that item of evidence which unnecessarily tilted the weight of the evidence against the defendant was an instance of miscarriage of justice and although not objected to by the party against whom it was offered ought to have been excluded by the learned trial judge or the learned justices of the CA in accordance with section 8 of the **Evidence Act**, NRCO 323.. The case of **Asante Appiah v Amponsa Alias Mansah** [2009] SCGLR, 90 supports this contention. Having erroneously acted on an incompetent process, the finding based thereon suffers from the misapplication of the rules of evidence. When the finding based on the erroneous application of evidentiary rules is expunged, the decision of the trial court to prefer the version contained in the said statement dissolves and so is the concurrence of the CA of the said finding. Had the learned trial judge correctly applied himself at law, there is no doubt that he would in all probability have reached the view that the claim to outstanding haulage charges was unproved.

There is also at page 158 of the record of appeal during the cross-examination of the defendant's representative, relevant evidence to which we now direct our attention. We commence from line 13 as follows:

“Q: The department of which Michael Addo was the head will endorse the documentation as regards delivery of tailings or ore to the company?

A: My Lord, not documents. It depends on which document you are referring to.

Q: As regards tailing, documentation of grade or quantity or volume?

A: My Lord, I may have to cross-check before I give an answer.

Q; Again, documentation as regards payments of tailings received by the company are also endorsed by the Head of Mineral Resources?

A: My lord, for that I have seen invoices endorsed by the Head of the Mineral Resources or his representative.

Q: Documentation for the payment of tailings received by the Defendant company is endorsed by the heads of Mineral Resources, the Mining Manager and eventually the General Manager before payment is made?

A: My Lord, receipts for tailings and payment is not regular or usual activity of Aboso Goldfields. So, there is no such procedure like what you mention that Finance Manager and he is one person who can [not] endorse all payments”. [emphasis mine]

As the above transpired during cross examination of the defendant's witness, the plaintiff sought to put across to the defendant his version of the matter regarding supplies of tailings which simply was to the effect that there are certain pre-requisites to be satisfied when such supplies are delivered to the

defendant company. That being the position, the absence of any further invoices from the plaintiff is supportive of the fact that no such other supplies alleged took place to enable defendant incur haulage charges beyond what it has admitted to owing and actually paid for. It is therefore apparent that the decision reached on the outstanding haulage charges is one not only unsupported by the evidence but erroneous. Accordingly, its affirmation by the learned justices of the CA is equally an instance of error. In our view, on the evidence, the proper conclusion is that that the failure of the plaintiff to provide credible and compelling evidence consistent with the mode of delivery inherent in the cross-examination of the defendant's representative at page 158 was fatal to the said claim. The award of GH¢247, 000.00 is accordingly set aside. Since there was no basis for the said award, we do not think it necessary to inquire into the related question whether the learned trial judge was right in substituting a higher figure for that expressly claimed by the plaintiff in his writ of summons as the learning is that one cannot put something on nothing.

(C) AWARD OF DAMAGES FOR BREACH OF CONTRACT.

In his decision, the learned trial judge found as a fact that the defendant wrongfully terminated the contract for the supply of tailings by bringing it to an end on December 15, before its expiry on December 30, 2015. This position received the concurrence of the learned justices of the CA. The said finding is one of the matters contested by the defendant and expressly set out as ground 3 of the notice of appeal to which reference has been made earlier on in the course of this delivery. Having carefully considered the nature of the contract, we are of the opinion that except the contract of supply provides for the supply by the plaintiff to the defendant of unspecified quantities of the tailings during the period provided, it would be unreasonable for the plaintiff to be engaged in making deliveries without any request from the defendant. We think that notwithstanding that the

agreement was to endure for a stated period, the plaintiff can only make supplies upon demand by the defendant to meet its mining requirements. In reaching this view of the matter, we have taken judicial notice of the practice relating to the nature of contracts of supply in our jurisdiction. When a contract of supply is entered into, the practice as the name denotes is for the person requiring the items, the subject matter of the contract to notify the supplier from time to time of quantities and grades of the items to be received in its stores; such a contract is not an open-ended agreement that enables the contractor to make supplies on his own. In our view, to place any other construction on the agreement of supply is to give effect to an agreement different in scope from that evidenced by exhibits B and B1 by which the contracts of supply of grade "A" and "G" sand were entered into.

Consequently, we conclude that the meaning placed on the contract of supply of tailings between the parties herein by the learned trial judge of the High Court that found favor with the learned justices of the CA is not in accord with existing practices relating thereto and exercising ourselves under the ample power conferred on us under section 9 of the Evidence Act, NRCD 323, 197, we take judicial notice of the fact that such supplies are ordinarily made upon the request of the one to whom the supplies are made. Applying this relative fact to the facts in issue, we come to the view that the contract came to an end when the defendant made no more request on the plaintiff for the supply of tailings between the 15th and 30th of December, 2015. It follows that the decision reached by the intermediate courts to the contrary was wrong. There being no breach of the contract of supply, the award of damages under the said head of claim is wrong and we hereby proceed to set it aside.

For these reasons, we would allow the appeal, set aside the orders made by the Court of Appeal. In place thereof, we substitute an order dismissing the plaintiff's claims as endorsed on the writ of summons herein.

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

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

**SGD. S. K. MARFUL-SAU
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