IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: YEBOAH CJ (PRESIDING)
PWAMANG JSC
PROF. KOTEY JSC
AMADU JSC
PROF. MENSA-BONSU (MRS.) JSC

CIVIL APPEAL
NO. J4/33/2022

7TH DECEMBER, 2022

1. SPRINGFIELD ENERGY LTD. …… 1ST PLAINTIFF/ RESPONDENT/APPELLANT
2. FIDELITY BANK (GH) LTD. …… 2ND PLAINTIFF

VRS

BULK OIL STORAGE AND
TRANSPORTATION CO. LTD. …… DEFENDANT/APPELLANT/RESPONDENT

JUDGMENT

AMADU JSC

(1) **INTRODUCTION**

This is an appeal from the judgment of the Court of Appeal which set aside the summary judgment entered by the High Court in the sum of USD$11,104,143.29

in favour of the 1st Plaintiff/ Respondent/Appellant against the Defendant/Appellant /Respondent.

(2) **BACKGROUND FACTS**

By a writ of summons and statement of claim filed on 18th November, 2015, the 1st Plaintiff/Respondent/Appellant *(hereinafter referred to as the "Appellant")* claimed against the Defendant/Appellant/ Respondent *(hereinafter referred to as the "Respondent")* the following reliefs:

"a. Recovery of the sum of USD$20,226,717.75 being Defendant's cumulative indebtedness to Plaintiff as at 12/11/15.

b. Interest on the aforesaid amount at the rate of 19% being the rate of interest paid by Plaintiff to its bankers on its unpaid facility from 13/11/15 up until the date of final payment.

c. Recovery of the sum of USD$3,420,000.00 being the total sum of profits lost to Plaintiff from March 10, 2014 to November 12, 2015 by reason of the cancellation of Plaintiff's facility by its bankers as a result of Defendant's refusal to pay the debt due and owing from Defendant to Plaintiff to enable Plaintiff also service its debt with its bankers.

d. Interest on the aforesaid sum of USD$3,420,000.00 at the prevailing bank rate from 13/11/15 up until the date of final payment.

e. Costs for the prosecution of this suit on a full indemnity basis".

(3) The Appellant, per its writ of summons and statement of claim is a company registered in Ghana, while the Defendant is also a registered company in Ghana with the Republic of Ghana being its sole shareholder. The 2nd Plaintiff is a commercial bank who among others, grant credit facilities to its customers, one of whom is the Appellant. The Appellant avers that per the nature of its business, it imports petroleum products for sale to its customers which products are delivered

to the Respondent for storage pending onward sale to its customers. Sometime in 2013, it observed after a reconciliation of its stock balance, that the Defendant was unable to account for large volumes of products delivered to the Defendant for storage. After several meetings between the parties, it was agreed that 30th September, 2013 be accepted as the dated from which all losses suffered by Appellant be established. The Appellant reminded the Defendant by a letter dated 23rd January, 2014 of the above mentioned agreement and enclosed therein an invoice of USD 16,333,794.60 for payment based on its reconciled balances with the Defendant as at 30th September, 2013.

(4) However, the Respondent refused to honour the payment. The Appellant then wrote another letter dated 10th June, 2014 to the Respondent reminding the Respondent of its liability and also attached an invoice of USD 17,201,774.03 being the valuation losses based on the average Platts quotations for the relevant markets for the period 12th August to 11th September, 2013. The Appellant also informed Defendant that it had had to calculate interest at the rate of 19% because its bankers, Fidelity bank had started imposing penal charges on Plaintiff's facility as a result of Appellant's inability to pay off the letter of credit that was established to finance the cargoes.

(5) In a response to Appellant's letter, the Respondent wrote on 28th August, 2014 that it was in the process of reconciling all Bulk distribution company's (BDC's) stock balances which it expected to complete by 30th September, 2014. The Respondent failed to revert back to the Appellant whereupon the Appellant wrote another reminder letter dated 22nd December, 2014 to the Respondent. Frustrated by the turn of events, the Appellant caused his lawyers to write to the Respondent on 20th March, 2015 repeating its demands, whereupon the Respondent responded in a letter dated 2nd April, 2015 and informed the Appellant that it had received an audit report which it (the Respondent) was studying and would revert within twenty-one (21) days. In a letter dated 13th April, 2015, Respondent informed the Appellant that the audit report had acknowledged the stock balances and

requested for a meeting to discuss and agree on mutually acceptable terms of payment.

(6) The Appellant therefore wrote a letter dated 21st April, 2015 and attached an invoice demanding the sum of USD 18,206,227.11 for payment. The Respondent wrote back requesting some concessions to be made and promised to make a payment of USD5,000,000.00 on account and the outstanding balance to be paid in twelve equal monthly instalments. The Respondent failed to honour this promise also. The Appellant therefore wrote another letter dated 17th August, 2015 and attached invoice of USD 19,551,100.34 being the outstanding sum as at 17th August, 2015. Despite several notices, the Respondent has failed to honour its obligation. Consequently, as at 12th November, 2015, the indebtedness of the Defendant to the Appellant stood at USD 20,226,717.75. As a result, the Appellant has lost profits in the sum of USD 3,420,000.00 which would have accrued to the Plaintiff from 12th November, 2015. The Appellant therefore sued for the reliefs endorsed on its writ of summons and statement of claim.

(7) In its statement of Defence, the Respondent admits doing business with the Appellant as stated by the Appellant. However, the Respondent denied that the stock balances were agreed by both parties but rather, it was the Appellant's own reconciled figures which were rejected and the Appellant was informed that the Defendant had engaged the services of Ernst & Young to conduct an independent audit. The Defendant further states that it is not aware of any interest charges by the Appellant's bankers since it is not a party to the transaction between the Plaintiff and its bankers. The Respondent further stated that the report from Ernst & Young also revealed that the Appellant had overdrawn its stocks from Respondent's system between July 2011 and October 2011 which it intended to conduct its own investigations to reveal same. According to the Respondent, it made payment in the sum of GH¢5,600,000.00 to the Appellant on 3rd September, 2015 through a bank transfer and has also made at least three other payments to

the Appellant which has not been captured in its writ of summons and statement of claim. The Respondent thus, counterclaimed as follows:

"i. An order on Plaintiff to a refund of the total overdrawn stock balances or its monetary value.

ii. Interest thereon at the prevailing bank rate till date of final payment.

iii. Costs on full indemnity basis".

(8) In view of the procedural trajectory of this case, it is important to outline the procedural steps that were taken by the parties and the Trial Court in this matter. At the close of pleadings, the matter was referred to a different court by the Registry if the court as per the rules for pre-trial settlement conference to be conducted and afford the parties an opportunity to settle the matter without proceeding to trial. The parties were unable to settle at the pre-trial settlement conference. The matter was thus, referred to the Registry for it to be placed before the substantive judge. At the close of the pre-trial settlement conference, the following issues were set down as issues for the trial:

"a. ***Whether or not the Defendant owed the Plaintiff the sum of USD20,226,727.75 as of 12/11/2015 by virtue of Defendant's inability to account for stock balances of petroleum products delivered to it as of September 2013.***

b. Whether or not the 1st Plaintiff is entitled to be indemnified by the Defendant for interest charged by the 2nd Plaintiff on facilities granted the 1st Plaintiff by 2nd Plaintiff and which remain unpaid by virtue of Defendant's indebtedness to 1st Plaintiff.

c. Whether or not the 1st Plaintiff is entitled to compensation for loss of profit occasioned it by reason of the loss to Plaintiff of its stock

with Defendant, thereby denying Plaintiff the opportunity to trade with Plaintiff's stock.

d. Whether or not the Plaintiff is entitled to its claim.

e. Any other issue (s) arising from the pleadings.

(9) The Appellant applied for summary judgment pursuant to Order 14 Rules 1 and 2 (1) of C.I. 47. In the said application, the Appellant relied on the following evidence:

i. Exhibit "A"- Letter dated 23rd January, 2014 reminding Defendant of the meeting of 8th November, 2013 at which the parties agreed 30th September, 2013 be used as the cut-off date for establishing the exact stock losses.

ii. Exhibit "A1"- Invoice for the losses valued at USD16,333,794.60.

iii. Exhibit "B"- letter dated 10th June, 2014.

iv. Exhibit "B1"- Invoice attached to Exhibit "B" which indicated that the debt stood at USD 17,201,774.03 calculable at an interest rate of 18% per annum.

v. Exhibit "C"- Approval of Credit facility which indicates that the interest rate chargeable on the facility is 19% and not 18% as was erroneously captured in Exhibit "B".

vi. Exhibit "D"- Letter dated 28th August, 2014 written by the Defendant to inform the 1st Plaintiff that it (Defendant) was in the process of reconciling all BDC's stock balances which it expected to complete by 30th September, 2014.

vii. Exhibit "E"-Letter dated 22nd December, 2014 which the Plaintiff requested the Defendant to pay at least USD5,000,000.00 to mitigate the interest build-up on the amount owed the 2nd Plaintiff.

viii. Exhibit "F"- Demand letter dated 20th March, 2015 written by 1st Plaintiff's lawyers demanding the payment of the agreed sums.

ix. Exhibit "G"- Response from the Defendant to 1st Plaintiff's lawyer's letter informing Plaintiff that the Defendant has received the report from Ernst & Young which is it studying and requested for 21 days to conclude their internal reconciliation.

x. Exhibit "H"- letter dated 13th April, 2015 written by the Defendant confirming that 13,279,818 litres of the products were lost whereas the Plaintiff had quoted 13,074,192 litres in Exhibit "B1".

xi. Exhibit "J"- letter dated 21st April, 2015- Plaintiff revised the figure to USD 18,206,227.11.

xii. Exhibit "K"- Letter dated 7th August, 2015 from Defendant making a proposal for payment.

xiii. Exhibit "L" and "L1"- Demand letter dated 19th August, 2015 and invoice informing Defendant of the outstanding debt at USD 19,551,100.34.

xiv. Exhibits "M" and "M1"- Demand Letter dated 26th August, 2015 and invoice which calculated outstanding debt at USD 19,646,772.13.

xv. Exhibit "N"- Invoice indicating that the total debt of the Defendant as at 12th November, 2015 stood at USD 20,226,717.75.

(10) On the return date for the hearing of application, that is 18th August, 2016, the Respondent had not filed any affidavit in opposition to the application for summary judgment. It must be noted that per the records of the court, the case was called at 9:34am by which time there was no affidavit in opposition on record. The Trial Court therefore granted the Appellant's application for summary judgment in terms of reliefs (i) and (ii) endorsed on the writ of summons and deferred the issue of cost until the final determination of the suit. Thereafter, at 10:52am on the same day, the Respondent filed its affidavit in opposition to the motion for summary judgment. By the computation of time, it must be noted that the case was called and the application taken before the Respondent filed its affidavit in opposition.

(11) Upon being notified of the summary judgment entered against it, Respondent, it (the Respondent) caused to be filed on its behalf a motion praying for an order to set aside the summary judgment and for leave to amend statement of defence pursuant to Order 14 Rule 9 and Order 16 rule 6 of C.I. 47. For the purposes of this judgement, I shall reproduce in extenso the depositions of the Respondent. In its affidavit in support deposed to by Kwabena Buabeng-Mensah, the Legal Manager of the Respondent it was deposed from paragraph 4 as follows:

"***4. That Defendant and Plaintiff entered into business in 2011 and that by that arrangement plaintiff began to store petroleum products in the Defendant's storage tanks together with other bulk distribution Company(BDCs).***

5. This arrangement was at a point in time governed by a throughput agreement dated July 2012 (Attached s Exhibit A).

6. That sometime in 2013, the Defendant noticed some discrepancies in the stock balances of the products held by the BDCs in its system and therefore conducted reconciliation to establish the correct quantities.

7. That subsequent to that a meeting ws held with all the BDCs at the office of the National Petroleum Authority (NPA) for the stakeholders to attempt to resolve the anomalies in the stock balance between the BDCs and the Defendant.

8. That Consequent upon the meeting at the office of the NPA referred to earlier, it was agreed that 30th September, 2013 should be used as the cut-off date for the computation of the stock losses.

9. That it is established that Defendant owed plaintiff a stock of 13,279,818 litres of gasoline and 4,397,006 litres of gas oil according to an audit Report subsequently undertaken by Ernest and Young.

10. That Defendant has always maintained it has a potent Defence to the action as evidenced by the statement of Defence filed on 3rd February, 2016 and attached as "Exhibit B".

11. That the Statement of Defence also included a counterclaim in respect of stock overdrawn by Plaintiff from Defendant's tanks.

12. That Plaintiff did also file a reply after the Defendant filed its Defence.

13. That subsequent to this, per the rules of the High Court Civil Procedure Rules, C.I 47, the matter was referred for a Pre-Trial Settlement Conference.

14. That at the Pre-Trial Settlement stage, Defendant raised issues concerning the addition of facility fees, penal interest rates and loss

of profit that Plaintiff was demanding from it and insisted that Plaintiff was not entitled to those claims, particularly so when Defendant was not a party to the facility agreement between Plaintiff and its bankers.

15. That at a point, the court directed the parties to meet and discuss the issues of the interest and charges, so it was agreed that a meeting should be held at the offices of the second plaintiff Fidelity Bank.

16. That the said meeting took place on 28th June, 2016 but the parties did not reach a consensus due to the fact that Defendant still objected to the transfer of the penal interest rate of 19% being slapped on it by Plaintiff and also insisted that Plaintiff on the same occasion overdrew its stock with Defendant and therefore had to pay interest on those overdrawn stocks.

17. That another meeting was held between the parties at the office of the defendant on 5th July, 2016 during which time, Defendant still objected to the addition of the penal interest rate, facility fees and loss of profit on the total amount being claimed and so Defendant proposed to settle the claim with USD 11,104,143.29, being the actual cost of plaintiff's products (USD 14,779,622.26 less payments of USD 3,695,478.97 made by Defendant which Plaintiff declined (Attached as Exhibit c).

18. That due to the breakdown of the Pre-trial settlement the matter ought to have gone back to the court for full trial.

19. That Defendant was shocked and amazed when it was served with the Motion for Summary Judgement filed by Plaintiff and dated August 8, 2016 (Attached as Exhibit D).

20. That upon receipt of the said Motion, Defendant had to file an Affidavit in Opposition as the rules requires, but it was struck with some unforeseen administrative challenges which it had not anticipated hence it delayed in filing same on 18TH August, 2016 (Attached as Exhibit 'E').

21. That on the said 18th August, 2016, Defendant's representatives arrived in the court Registry early to file the Affidavit in Opposition but were unfortunately delayed and finally got it done at 10:52 by which time Plaintiff's Lawyer had moved the motion.

22. That the delay in filing the Affidavit in Opposition was not deliberate or advertent but due to circumstances beyond its control.

23. That as Defendant has always demonstrated, it has a strong Defence to the action hence the ends to justice and fairness would not be served if it is not allowed to contest the claim in a full trial.

24. That certain new information has come to the attention of Defendant which will strengthen its defence and therefore it is humbly entreating this Honourable court to set aside the summary judgment and grant it leave to amend its statement of Defence.

25. That this certain new information which will enable the actual amount to be determined has been requested by Defendant from the

plaintiff and the National Petroleum Authority (Attached as Exhibit F1).

26. That Defendant also subsequently after filing its statement of Defence, discovered that plaintiff owes it an amount of USD 1,576,701.93 in unpaid invoices in respect of throughput fees consisting of storage and rack fees for using Defendant's facilities during various months in 2014 and 2015 (Attached as Exhibit G).

27. That an amendment to the statement of Defence would assist this Honourable Court to determine the real issues and controversy between the parties.

28. That Defendant avers that the actual amount owed the Plaintiff being the actual cost of the product is USD 11,104,143.29 which will be further whittled downwards after receipt of the information requested from plaintiff and the NPA.

29. The said US$ 20,226,717.75 includes penal interest, facility fees and loss of profit of the whopping amount of USD 9,122574.46 on the outstanding product cost of USD 11,104,143.29 being claimed by Plaintiff which Defendant vehemently disputes.

30. That Defendant seeks leave of the court to plead this new information that will have an effect on the final judgment in this matter and which will show that there will be a gross miscarriage of justice if the summary judgment is not set aside and leave to amend defendant's statement of defence is not granted.

(12) Unsurprisingly, this motion was vehemently opposed by the Appellant. The court, after hearing the arguments from both sides delivered its ruling on 31st August, 2016 by varying its earlier judgment and held as follows:

"On the face of the applicant's own affidavit, Defendant made admission of the sum in the region of $11 million US Dollars. Based on the admissions, and on the foundation of Order 14 Rule 9, I shall vary the court's order dated 18th August, 2016 by rather entering summary judgment based on admission of the sum of $11,104,143.29 as well as interest on the said amount from 1st October, 2013 at rate of 19 percent annually to date of final payment.

The sum remaining on Relief (i) and the rest of the Reliefs as appeared on Plaintiff's writ of summons shall be subject for trial.

In conclusion, the courts order dated 18th August, 2016 is hereby varied".

(13) Dissatisfied with the ruling of the trial court, the Respondent appealed to the Court of Appeal which allowed the appeal and set aside the judgment of the trial court. The Court of Appeal relied on the following reasons in allowing the appeal:

a. That the Trial Judge was not certain on the figure and as such, ought to have set the case down for trial.

b. Since issues were set down as issues for trial at the pre-trial settlement conference stage, it presupposes that there are triable issues which ought to have warranted trial.

c. The Defendant claims to have evidence to whittle down the plaintiff's claim but was not allowed to do so.

(14) Not satisfied with the judgment of the Court of Appeal, the Appellant by notice filed on 1st August, 2019, the Appellant formulated the following grounds of appeal:

"*1. That the court below erred in holding that the High Court was not certain on the figure adjudged to be due and owing 1st Plaintiff/Respondent/Appellant when it varied its judgment of 18th August 2016 on the 31st day of August 2016. Particulars of error.*

The high court varied its earlier judgement of 18/08/2016 in accordance with the rules of court.

2. The court below erred in law when it held that the pre-trial judge having indicated the mater be tried meant that there were triable issues which could not be determine by a motion for summary judgment.

Particulars of error

a. ***The application for summary judgment was brought by Plaintiff/Respondent/Appellant in accordance with Order 58 Rule 3(2) of the High Court Civil Procedure Rules 2004(C.I. 47) which permits applications for summary judgment only after the pre-trial settlement conference.***

b. ***The setting down of issues by a pre-trial judge upon the failure of a pre-trial settlement conference does not lead to the inevitable conclusion that the suit raises triable issues for determination by the High Court, the settlement of issues by the pre-trial judge being a mandatory requirement of the pre-trial process.***

3. The findings by the court below that the Defendant/ Respondent/Appellant set down real defence to 1st plaintiff/Respondent/Appellant's application for summary judgment is erroneous.

Particulars of error

The court below failed to take into account the fact that sum for which the High court entered judgment in favour of the 1st Plaintiff/Respondent /Appellant was unambiguously admitted by the Defendant/Appellant/Respondent.

4. *The court below erred when it held that the purpose of the procedure under order 14 was to obtain summary judgment for the specific amount endorsed on the writ.*

   Particulars of error.

   The court below completely overlooked the other provision order 14 of the High Court rules which empower the court upon hearing such an application to give such judgment on the relevant claim or part of claim as may be just having regard to the nature of the remedy or relief sought.
5. *The judgment is against the weight of the affidavit evidence.*
6. *Further grounds of appeal would be filled upon receipt of the record of proceedings".*

(15) It must place on record that the Appellant did not file any additional grounds. This appeal will therefore be determined on the merit or otherwise of the grounds of appeal set out in the notice of appeal.

Ground One

"That the court below erred in holding that the High Court was not certain on the figure adjudged to be due and owing 1st Plaintiff/Respondent/Appellant when it varied its judgment of 18th August, 2016.

Particulars of error.

The High Court varied its earlier judgment of 18/08/2016 in accordance with the rules of court".

On this ground of appeal, the Appellant has invited us to make a determination as to whether or not the Court of Appeal erred when it held that the High Court was not certain on the figure adjudged to be due and owing. In respect of this ground, the Court of Appeal held as follows:

"The Defendant also claimed to have made payments which plaintiff failed to allude to in her writ and also did not take into account what the Plaintiff owes her. Indeed, the trial judge was compelled to vary its initial amount to a lower figure in the region of 11,000,000 dollars and reserved other issues to be tried. It is clear that not certain on the figure the Trial Judge ought to have set down the case for trial.

(17) The Court of Appeal came to this conclusion due to the fact that in the summary judgment entered in the absence of the Defendant on 18th August, 2016, the High Court entered judgment for the Appellant in the sum of US$20,226,717.75. However, upon the filing of the application to set aside the summary judgment by the Defendant, the High Court revised the judgment sum to US$11,104,143.29.

(18) To appreciate the merit of this ground of appeal, it is imperative that a discussion of the procedure of summary judgment application is made in brief. Order 14 Rules 1-5 of C.I. 47 provides as follows:

(19) **"<u>ORDER 14 - SUMMARY JUDGMENT</u>**

Rule 1- Application for Summary Judgment

Where in an action a Defendant has been served with a statement of claim and has filed appearance, the Plaintiff may on notice apply to the Court for judgment against the Defendant on the ground that the Defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or that the Defendant has no defence to such a claim or part of a claim, except as to the amount of any damages claimed.

Rule 2-Method of Making Application

(1) The notice of the application shall set out the reliefs sought by the Plaintiff.

(2) The notice shall be supported by an affidavit verifying the facts on which the relevant claim or part of a claim is based, and stating that in the deponent's belief there is no defence to that claim or part of a claim, or no defence except as to the amount of any damages claimed.

(3) Notice of the application, a copy of the affidavit in support and of any exhibit relating to it shall be served on the defendant not less than four clear days before the day named in the notice for hearing the application.

Rule 3 - Defendant may Show Cause

(1) A Defendant may show cause against the application by affidavit or otherwise to the satisfaction of the Court.

(2) Where the Defendant proceeds to show cause, the Court may order the defendant or in the case of a body corporate, any director, manager, secretary or similar officer of it, or any person purporting to act in such capacity to attend and be examined on oath or to produce any document if it appears to the Court that special circumstances make this desirable.

Rule 4 - Affidavits

Unless the Court otherwise directs, an affidavit filed under rule 2 or 3 may contain statements of information and belief with the sources and grounds on which they are based.

Rule 5 - Hearing of Application

(1) On the hearing of the application the Court may

(a) give such judgment for the Plaintiff against the Defendant on the relevant claim or part of a claim as may be just having regard to the nature of the remedy or relief sought, unless the Defendant satisfies the Court, with respect to that claim or part of it, that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part of it;

(b) give the Defendant leave to defend the action with respect to the relevant claim or part of it either unconditionally or on terms such as giving security or otherwise; or

(c) dismiss the application with costs to be paid forthwith by the plaintiff, if it appears that the case is not within this Order or that the Plaintiff knew that the Defendant relied on a contention which would entitle the Defendant to unconditional leave to defend the action."

(20) It must therefore be noted that the underpinning consideration for the provision in Order 14 is the overriding purpose or objective of the High Court (Civil Procedure) Rules C.I. 47. Order 1 Rule 2 (1) provides that:

"These Rules shall be interpreted and applied so as to achieve speedy and effective justice, avoid delays and unnecessary expense, and ensure that as far as possible, all matters in dispute between the parties may be completely, effectively and finally determined and multiplicity of proceedings concerning any such matters avoided."

(21) Thus, as much as possible, Trial Courts must interpret the rules with the ultimate goal of achieving a speedy and effective justice. The rationale behind Order 14 is

in furtherance of this objective. A summary judgment is a judgment on the merits even though it is obtained by a formal motion without a plenary trial. It is a judgment granted on the simple grounds that the respondent to the application has no defence to the action or part thereof or any reasonable defence to be allowed to contest the case on the merits to waste time and expense. The procedure for Summary Judgment is well-grounded in law. It serves a useful purpose when no useful purpose would result from would be gained by a full scale and possibly, long-winded trial when there are no triable issues. In **SAM JONAH V. DUODU-KUMI [2003-2004] 1 SCGLR, 50 AT 54,** this Court, per Akuffo, JSC had cause to pronounce on the essence of this procedure, thus:

"The objective of Order 14 … is to facilitate the early conclusion of actions where it is clear from the pleadings that the defendant therein has no cogent defence. It is intended to prevent a plaintiff being delayed when there is no fairly arguable defence to be brought forward. … What we are, therefore required to do in this appeal is to ascertain whether, on the totality of the pleadings and all matters before the High Court at the moment it delivered the Summary Judgment, the respondent had demonstrably, any defence in law on the available facts, such as would justify his being granted leave to defend the Appellant's claim.

(22) Thus, the summary judgment jurisdiction has been contextually designed in order to expedite matters when it is shown that a defendant does not have any real defence to the claim or any part of it and allowing the Respondent to defend same will occasion unnecessary delay in the case. In coming to such a determination, the court ought to be mindful and take into consideration whether or not the Defendant has raised any triable defence that should be considered by the Court. In resisting an application for summary judgment, the defendant must demonstrate that there is a genuine dispute with regard to all the facts or part of the facts in issue, or/and that the defendant has a probable legal defence to the case.

(23) Having set out the jurisprudence behind the summary judgment procedure, we turn our attention to the provisions of the rule as set out above. In an application for summary judgment, the rules allow for the trial judge to enter judgment in the sum endorsed on the writ of summons or to a particular part of such claim. Specifically, Order 14 Rule 1 of CI 47 provides as follows:-

"Where in an action a defendant has been served with a statement of claim and has filed appearance, the plaintiff may on notice apply to the Court for judgment against the defendant on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or that the defendant has no defence to such a claim or part of a claim, except as to the amount of any damages claimed".

(24) From a reading of the above rule, it is the correct position of the law that, what is not permitted in the summary procedure is for the trial judge to enter judgment for a sum exceeding the amount that is claimed by the Appellant in his writ of summons. The rules allow for the Trial Judge to enter judgment for such amount less than the amount endorsed in the writ of summons. In this proceedings, the Appellant in their application for summary judgment claimed for the sum endorsed in the writ of summons which stood at USD$20,226,717.75 as of the date of filing the writ. Summary judgment was therefore entered in that sum in favour of the Appellant. Specifically, the Trial Court held as follows:

"*Defendant/Respondent have (sic) been served with the application for summary judgment. They have not filed any response neither is the lawyer present in court to be heard.*

Based largely on Order 36, their failure to attend weighs hereby on me and for which reason I shall allow the application. Application allowed.

Let the Plaintiff/Applicant enter summary judgment in terms of reliefs contained in (i) and (ii) in the writ of summons. Cost to be deferred at the final determination of the suit".

(25) We have fully reproduced the order of the Trial Court above to indicate that at the time the trial court entered the summary judgment in the sum endorsed on the writ of summons and statement of claim, it clearly had the jurisdiction to so do as mandated in Order 14 Rule 1. The variation arose when the Respondent attempted to set aside the summary judgment per its application dated 24th August, 2016. At the hearing of the application, the Trial Judge varied at the judgment sum awarded earlier from USD$20,226,717.75 as endorsed on the writ of summons to USD$11,104,143.29 with interest thereon at 19% from 1st October, 2013 to date of final payment. It is this variation which caused the Court of Appeal to hold that the Trial Judge was not certain on the figure and as such, the issue of quantum of the Respondent's indebtedness ought to have been set down for a full trial.

(26) With all due respect to the Learned Justices of the Court of Appeal, the variation of the judgment award entered cannot be construed to be an uncertainty on the part of the Trial Judge to warrant a full trial. The variation by the Trial Judge was within jurisdiction. This is especially so when Order 14 Rule 9 of C.I. 47 has made express provision for the variation of the sum awarded when judgment has been entered in the absence of a Defendant. The said order provides as follows:

"A judgment given against a Defendant who does not appear at the hearing of an application under this Order may be set aside or varied by the Court on such terms as it considers just upon an application brought within fourteen days of the service on the defendant of notice of the judgment".

(27) There is no ambiguity in the said rule which would require a varying interpretation. The rule provides that if a party does not appear during the hearing of an

application for summary judgment as in the instant case, the court may set aside the summary judgment entered against the Respondent or vary the summary judgment. With all due respect, this cannot be construed that the Trial Judge was not certain as to the figure to award. From the record, neither the Respondent nor its lawyer was in court on 18th August, 2016 when the summary judgment was entered. The Respondent therefore applied to have same set aside. Indeed, on its motion paper, the Respondent clearly stated that it was invoking Order 14 Rule 9 of C.I.47 which said rule has copiously been reproduced above. As aforesaid, this rule allows for a variation of the sum awarded when the Respondent attempts to set the judgment aside. It is therefore not an issue of uncertainty as held by the Court of Appeal but a step permissible by the rules regulating procedure in the Trial Court.

(28) Even more significant is the undisputed fact that the Trial Judge varied the judgment sum based on the Respondent's own admission in its affidavit in support of the application for an order to set aside the summary judgment. In that affidavit in support already reproduced fully above, particularly in paragraphs 17 and 28, the Respondent deposed as follows:

"*That another meeting was held between the parties at the office of the defendant on 5th July, 2016 during which time, Defendant still objected to the addition of the penal interest rate, facility fees and loss of profit on the total amount being claimed and so Defendant proposed to settle the claim with* ***USD 11,104,143.29, being the actual cost of Plaintiff's products (USD 14,779,622.26 less payments of USD 3,695,478.97 made by Defendant*** *which Plaintiff declined (Attached as Exhibit "C").*

That Defendant avers that the actual amount owed the Plaintiff being the actual cost of the product is USD 11,104,143.29 *which will be further whittled downwards after receipt of the information requested from plaintiff and the NPA".*

From the above deposition, the Defendant clearly admitted liability in the sum of ***USD 11,104,143.29, being the actual cost of Plaintiff's products (USD 14,779,622.26 less payments of USD 3,695,478.97 made by Defendant.***

(29) Wherein therefore lies the uncertainty with which the trial judge entered judgment? This Court, when confronted with very similar facts in the unreported case of **WINDWORTH HOLDINGS (PTY) LTD. VRS DUPAUL WOOD TREATMENT (GH) LTD. SUIT NO. J4/66/2018) 23RD JANUARY 2019** held as follows:

"The gist of the said grounds is that the statement of defence raised triable issues. In their decision, the learned justices of the Court of Appeal came to the view that having regard to the conduct of the Defendant in accepting liability for the debt and not only proposing terms of payment but also making some payment to the Plaintiff, she was estopped from denying the existence of the debt. After giving careful and anxious consideration to the issues raised regarding the question of liability under Order 14, I hereby express my agreement with the decision of the learned justices of the Court of Appeal. It is unacceptable that the Defendant who accepted absolute liability for the amount in respect of which the writ herein issued and offered to pay the indebtedness in instalments but failed so to do can be said either in conscience or principle to have a defense to the action herein. The acceptance of liability by the Defendant in the circumstances of this case created a conclusive presumption under Sections 24 and 26 of the Evidence Act, (NRCD 323). By the said provisions, we are precluded from receiving evidence to the contrary of the presumed fact which in this case is the admission of liability by the Defendant. It repays to refer to the said provisions as follows:

SECTION 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.

SECTION 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 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 in any proceedings between that party or his successors in interest and such relying person or his successors in interest."

Then comes the question of the amount awarded. Suffice it to say that as the amount allowed by the learned trial judge under the summary judgment was lower than that which was claimed, the learned trial judge in making the award preferred the amount contained in Exhibit "M" instead of the entire amount being claimed by the Plaintiff and in respect of which the application was filed. His award was the result of the lawful exercise of a discretion conferred on the court under Order 14. Therefore, there appears to be no reason for the complaint. Indeed, Order 14 Rule 5 of CI 47 provides authority for the Trial Judge to make an award, which is part only of the amount claimed. Sub-rule 1 of the said rule provides:

"On the hearing of the application the Court may:

(a) Give such judgment for the Plaintiff against the Defendant on the relevant claim or part of the claim as may be just having regard to nature of the remedy or relief sought. . ."

The above words are free from any complexity in terms of their meaning and removes any doubt as to the authority of the learned Trial Judge to allow by way of summary judgment an award which is less than that which was claimed in the action. The amount awarded under the summary judgment properly in ordinary and technical legal usage belongs to that which may be described as ***"part of"*** *within the meaning of Order 14 Rule 5(1) (a) of the High Court Rules".*

(30) Consistent with the earlier position of this court, it cannot be on error that summary judgment was entered on the sum that was expressly admitted to by the Respondent. The Respondent admitted that the amount of money owed the Appellant is the sum of **USD 14,779,622.26** out of which an amount of **USD 3,695,478.97** has been paid, thus, leaving an outstanding balance of **USD$ 11,104,143.29** to be paid to the Appellant. This shows that the Respondent admits to owing the sum of **USD$ 11,104,143.29.** As held in the **Windworth Holding** case supra, the admitted sum is conclusively presumed against the Respondent and it would be in appropriate and unfair to allow the Respondent to set up another defence outside of what it has already admitted.

(31) In **OPOKU (NO. 2) V. AXES COMPANY LTD. (NO. 2) [2012] 2 SCGLR 1214 at 1226,** this Court held as follows:

"After giving much consideration to the proceedings at pages 140 -141 of the record of proceedings, I have arrived at the conclusion that it was based both on the affidavit sworn on behalf of the Respondent and the oral submission of learned counsel for the Appellant. As they Were Both Unequivocal Admissions Of Liability, The Learned trial judge of the court below was right in accepting them and basing his decision thereon. The decision of the court is one commonly referred to as ***"judgment on admissions"****, that our courts are authorised to enter in appropriate cases, under the rules of court. Indeed, Order 23 Rule 6 of the High Court (Civil Procedure) Rules, C.I. 47 explicitly provides for the exercise of this jurisdiction. The rule is expressed thus:*

"(1) Where an admission of the truth of a fact or the authenticity of a document is made

(a) In an affidavit filed by a party

(b) In the examination for discovery of a party or a person examined for discovery on behalf of a party; or

(c)by a party on any other examination under oath or

affirmation in or out of court; or

any party may apply to the court or judge in the same or another cause or matter for such order as the party may be entitled to on the admission without waiting for the determination of any other question between the parties, and the court or judge may make such order as is just."

(2) Where an admission of the truth of a fact or the authenticity of a document is made by a party in a pleading or is made or deemed to be made by a party in response to a request to admit, any party may apply by motion to the Court or to the Judge for such order as the party may be entitled to on the admission without waiting for the determination of any question between the parties, and the Court or the Judge may make such order as is just.

The admission made in the affidavit that was sworn to by the law clerk, as well as the oral submissions made by counsel in open court, in my thinking were in their nature clear admissions of part of the claim contained in the application for summary judgment, and as they were made in the course of proceedings before a judge seized with jurisdiction to determine the cause in which they were made, there can be no legitimate complaint against the Learned Trial Judge acting on them within the intendment of the rules.

The judge before whom an application for summary judgment is made is entitled under Rule 5(1) of Order 14 to give such judgment to a Plaintiff on the claim partly or wholly as may be just having regard to the remedy or relief sought except the defendant shows that there is an issue to be tried or for some other reason there ought to be a trial. From the record of proceedings before us regarding the hearing of the application for summary judgment, there does not appear to be any reason why the Learned Trial Judge can be faulted for his ruling on the application. This is a jurisdiction that our courts have exercised on several occasions and is intended to bring matters in respect of which the Defendant does not appear to have any

answer to a speedy end. Once there has been such an unequivocal admission before a court in respect of a claim or part thereof as was done in the case before us and not withdrawn there cannot in principle be any objection to a decision based thereon. In the instant case since the said admission was the foundation of the judgment, it subsists until it is discharged by an order of the court.

From the processes before us in the appeal herein, there appears to be no merit in the urgings that have been made to us attacking the ruling of the court on the summary judgment. One matter of significance that ought to be mentioned is that the decision in the matter herein was one by which the Learned Trial Judge gave effect to the admission of a party regarding part of the subject matter of an application for summary judgment. In such a situation, I think, it lies foul in the mouth of the Appellants to invite us to avoid the effects of their unequivocal admission. Such a conduct sounds sour having regard to the requirements of justice particularly when even before us in this appeal there has not been the slightest indication that the admission on which the judgment was entered by the Trial Court was made in error or mistakenly".

(32) The above statements of the accurate position of the law are applicable *in pari materia* with the instant case. Although the Appellant applied for summary judgment in the sum of USD$20,226,717.75 as endorsed on the writ of summons, the Respondent admitted to a liability of only USD$11, 104,143.29 out of which the Respondent alleged that the Appellant owed the it an amount of USD$ 1,576,701.93 in unpaid invoices in respect of throughput fees. By this admission, the Trial Court cannot be faulted for entering summary judgment in the sum of USD$11, 104,143.29 admitted to by the Respondent. The effect of the admission is that there is no dispute between the parties as far as that amount was concerned so there is nothing to be tried in respect of that amount. This ground of appeal is consequently upheld.

Ground 2.

(33) The second ground of appeal argued by the Appellant is that the Court of Appeal erred in law when it held that the pre-trial judge having indicated the mater be tried meant that there were triable issues which could not be determine by a motion for summary judgment

This ground of appeal invites us to make a determination on the effect of a pre-trial judge setting down issues for trial. Pre-trial settlement conferences are provided for in Order 58 of C.I.47. Of much significance, Sub-rule 8 provides that:

"If no amicable settlement is reached, the pre-trial judge shall at the time settlement broke down, direct the parties to the Administrator who shall immediately fix a date before another judge on the issues set down for hearing at the pre-trial settlement conference. The hearing date shall not exceed twenty-one days from the time settlement broke down".

(34) It is a requirement for the pre-trial settlement conference judge, if settlement breaks down, to refer the docket back to the Administrator of the court for it to be placed before the substantive judge. Before this is done, the parties are required to submit their issues for trial. The pre-trial judge forwards the issues presented by the parties, as well as a report indicating the failure of the parties to settle at the pre-trial conference stage to the Administrator for the case to be placed before a substantive judge. This is a requirement by the law. Does this imply that there are triable issues raised upon the failure of the parties to settle which requires that the matter must necessarily proceed to trial? We do not think so. For if it were so, then we daresay that there would never be an opportunity for a party to apply for summary judgment in commercial cases. We say this because, Order 58 Rule 3(2) provides that:

> ***"Applications for Summary judgment or judgment on admissions shall not be filed until after the pre-trial settlement conference".***

(35) The rules provide that an application for summary judgment can only be brought after the pre-trial settlement conference has concluded. If this court is to hold that upon the failure of the parties to settle at the pre-trial settlement conference stage, the fact that issues have been presented by the parties means that there are triable genuine issues will defeat the unambiguous provision of Order 58 Rule 3 (2).

(36) Further, the very wording of Order 58 Rule 3(2) indicates that the rules envisaged the possibility of an application for summary judgment or judgment on admission and thus, made provisions for same upon the failure of the parties to settle at the pre-trial settlement conference stage. The judge before whom a pre-trial settlement plays a substantially supervisory and not an adjudicatory rule.

(37) By Order 58 Rule 8 of C.I.47, the requirement for issues to be set down for trial is only a matter of procedure. Indeed, Order 58 Rule 3 (2) of the C.I.47 precludes a Party from applying for Summary Judgment until after Pre-trial Conference, even in cases where there is no reasonable defence by the Defendant or summary judgment or judgment on admission would lie. From the wording of Order 58 Rule 8 it can be conclusively presumed that issues are set down as a matter of course upon the breakdown of settlement at the pre-trial stage and not necessarily because they constitute triable issues. To give rise to a triable issue the defence put forward must not, be frivolous and practically moonshine. In the **Sam Jonah** case cited supra, this court emphasized that to be entitled to unconditional leave to defend, the defence must show that there is ***"some substantial question of fact or law to be tried or investigated."*** A triable issue will therefore not arise where the defence put forward is not bonafide or is a sham.

(38) From the foregoing, we cannot support the position of the Court of Appeal that once issues have been presented at the pre-trial settlement conference stage, there are triable issues and shall uphold this ground of appeal as well.

Ground 3

(39) ***"The findings by the court below that the Defendant/ Respondent/Appellant set down real defence to 1st Plaintiff/Respondent/Appellant's application for summary judgment is erroneous.***

Particulars of error

The court below failed to take into account the fact that sum for which the High court entered judgment in favour of the 1st Plaintiff/Respondent /Appellant was unambiguously admitted by the Defendant/Appellant/ Respondent.

(40) One other complaint of the Appellant herein is that the Court of Appeal's holding that the Respondent set up a defence to the action is erroneous. It must be noted that at the time the Appellant applied for summary judgment and the time the Respondent attempted to set aside the summary judgment, the only defence that had been filed per the records is that which was filed on 11th December, 2015. In the Respondent's application to set aside the summary judgment, the Respondent coupled it with an application to amend its defence. However, from the judgment of 18th August, 2016, the matters alluded to in the intended amendment defence were not form part of the consideration of the Trial Court in awarding the summary judgment. They did not form the basis for the award of the summary judgment. But strictly speaking the new matters sought to added by way of defence were actually in support of the counterclaim which we shall discuss hereto.

(41) The Court of Appeal also held that once there was a counterclaim, it meant that there is a reasonable defence to the claim of the Appellant. With all due respect to the learned justices of the Court of Appeal, this is an erroneous position of the law. A counterclaim, per its nature is not a defence to a claim. It is a claim separately made against the Appellant which requires the exact degree of proof as that of the Appellant. It is an independent action mounted by a Defendant

against the Appellant. The success or otherwise of a counterclaim is not premised on the claim of the Plaintiff. Therefore, setting up a counterclaim cannot be said to be a defence to a claim by a Plaintiff. Having said that, suffice it to say that, since setting up of a counterclaim is not procedurally a defence to a claim, the existence of the counterclaim cannot therefore be interpreted as constituting a fetter on the availability of the summary procedure to a deserving claimant. The Respondent's counterclaim in the instant case is therefore a matter to be determined by the Trial Court at the plenary. This is within the rights of the Respondent as provided in Order 14 Rule 11 as follows:

(1) Where on an application under Rule 1 the Plaintiff obtains judgment on a claim or part of a claim against any Defendant, the Plaintiff may proceed with the action as regards any other claim or as regards the remainder of the claim or against any other defendant.

(2) Where on an application under rule 10, a Defendant obtains judgment on a claim or part of a claim made in a counterclaim against the Plaintiff, the Defendant may proceed with the counterclaim as regards any other claim or as regards the remainder of the claim against any other Defendant to the counterclaim.

(42) The Respondent had deposed that although it admits to owing the Appellant the sum of USD$ 11,104,143.29, if it gets the information being requested for from the NPA, it will whittle down the Respondent's liability. As discussed above, this new information if procured can be set up in a counterclaim against the Appellant which would be contested at the trial. From the foregoing and for the reasons espoused above, we uphold this ground of appeal as well.

Ground 4

"The court below erred when it held that the purpose of the procedure under Order 14 was to obtain summary judgment for the specific amount endorsed on the writ.

Particulars of error.

The court below completely overlooked the other provision order 14 of the High Court rules which empower the court upon hearing such an application to give such judgment on the relevant claim or part of claim as may be just having regard to the nature of the remedy or relief sought."

(43) With regard to this ground of appeal, we do not wish to spend much time on same as these issues have been exhaustively dealt with above. The jurisdiction of the court on the summary judgment procedure is settled. The only fetter on the court's jurisdiction is to award judgment summarily in a sum exceeding what is claimed on the writ of summons. The court is not permitted under the rules to do so. Conversely, the court can award a sum equal to that which is claimed on the writ of summons or a sum lower than which is so endorsed. As the record of appeal reveals, the Appellant in its writ of summons claimed the sum of USD$20,226,717.75 which was granted by the trial court. However, upon the application of the Respondent and the admission on its part to only the sum of USD$11, 104,143.29, the Trial Court varied the earlier judgment and entered judgment for the admitted sum of USD$11, 104,143.29 in favour of the Appellant. This is well within the jurisdiction of the court and it cannot be faulted for awarding judgment for a sum lesser than which has been endorsed on the writ of summons.

Ground 5

"The judgment is against the weight of the affidavit evidence".

(44) The settled law is that, an Appellant who alleges that a judgment is against the weight of evidence places a call on the appellate court to among other things, rehear the appeal. This Court in **INTERNATIONAL ROM LIMITED V.**

VODAFONE GHANA LIMITED & ANOTHER (2016-2017) 2 SCGLR 1389, said about the omnibus ground of appeal as follows:

"This appeal being premised upon the contention that the judgment is against the weight of evidence, among others, is a call on us to rehear this appeal by analyzing the record of appeal before us, taking into account the testimonies and documentary as well as any other evidence adduced at the trial and arriving at a conclusion one way or the other. This is the import of the numerous decisions of this court on the point. Notable among these are TUAKWA V. BOSOM (2001-2002) SCGLR 61; DJIN VS MUSAH (2007-2008) 1 SCGLR 686.

In the Djin case (above), this court per Aninakwa JSC at page 691 of the report held that when an Appellant complains that the judgment is against the weight of evidence, "he is implying that there were certain pieces of evidence on the record which, if applied in his favour, could have changed the decision in his favour, or certain pieces of evidence have been wrongly applied against him. The onus is on such an Appellant to clearly and properly demonstrate to the appellate court the lapses in the judgment being appealed against."

In the instant case, the Appellant has invited us to take a second look at the evidence on record in order to identify those pieces of evidence not taken into consideration by the Court of Appeal or those wrongly apprehended which if properly apprehended, the Court of Appeal would have come to a different conclusion on the key issue for determination.

(45) We have already reviewed the evidence in the above consideration of the other grounds of appeal and concluded that on the affidavit evidence that is on the record the trial judge was justified in entering summary judgment for that part of the claim. However, an issue worthy of consideration under this ground is the Respondent's objection to the date that the trial judge ordered the interest to run from. Though the Appellant endorsed the writ for interest to run from 13th

November, 2015, the trial judge in entering judgment stated for the interest to run from 1st October, 2013 which the Respondent in its statement of case argued against. The trial judge did not state the reasons for this order but from a reading of the affidavit of the Appellant in opposition to the application to set aside the initial judgment in the High Court, it referred to communications between the parties in which the Appellant had sought to justify why the interest ought to be calculated from 1st October, 2013 and not 13th November, 2015. On review of the documents we do not find an admission by the Respondent of the Appellant's claim of the right date for commencement of interest. All the documents on it emanate from the Appellant who did not even amend its claim to reflect its stance about the commencement date for the interest. In the circumstances we shall rectify the date for calculation of interest from 1st October, 2013 to 13th November, 2015. It is for the Appellant to amend it's endorsement and adduce evidence at the trial to justify its new stance on the commencement date of the interest.

(46) The Respondent also challenged the award of interest by the trial judge but we find that, interest arises in this case by virtue of the fact that the Respondent was made aware that, following its default to pay what it owed to the Appellant, the Appellant was being charged additional interests on the Letters of Credit through which it imported the petroleum products into the country. From the record, the Respondent even attended meetings involving the 2nd plaintiff bank that gave the loan. In those circumstances, the Respondent cannot absolve itself from liability for the interest which was levied against the Appellant by the bank.

(47) In conclusion, the appeal against the judgment of the Court of Appeal dated 17th July, 2019 succeeds. Summary judgment is hereby entered in favour of the Appellant (1st Plaintiff) to recover from the Respondent (Defendant) the sum of USD11,104.143.29 with interest on the said amount at 19 per cent per annum plus the additional interest pursuant to the default interest clause in Exhibit 'C' the bank credit facility from 13th November 2015 to date of final payment. The

remaining part of the claims of the Appellant (1st Plaintiff) as well as the counterclaim of the Respondent (Defendant) are to be tried by the High Court.

I. O. TANKO AMADU
(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH
(CHIEF JUSTICE)

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

PROF. N. A. KOTEY
(JUSTICE OF THE SUPREME COURT)

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