FTCC.242/19 2019 W. NO.96

IN THE HIGT COURT OF SIERRA LEONE

COMMERCIAL AND ADMIRALTY DIVISION

FAST TRACK COMMERCIAL COURT

BETWEEN:

WEST AFRICAN VENTURE FUND LLC - PLAINTIFF

PAJAH &.J (SL) LTD & ANOTHER - DEFENDANTS

RULING DELIVERED BY THE HONORABLE JUSTICE LORNARD TAYLOR ON THE 1ST APRIL 2020

On the 28th October 2019, the Plaintiff approached the court by writ of summons praying for the following;

1. Payment of the sum of US$367,016 or its equivalent payable in Leones being money due and owing the Plaintiff on Share Purchase and Redemption Agreement made between the Plaintiffs and the Defendants herein.
2. Interest on the said sum of US$ 367,016 at the rate of 8% per annum from August 2013 to the date of payment.
3. Any other or further relief that this honourable court may deem fit and necessary.
4. Costs.

The defendants filed a defence and counter-claim on the 28th November 2019 in which they inter alia made claims for the following:

1. A declaration that the 1st Defendant has paid for and redeemed all preference shares held by the Plaintiff in the 1st Defendant.
2. A recovery of the sum of US$ 4,475 being money due and owing to the 1st defendant which was paid in excess to the Plaintiff by the 1st Defendant in respect of the redemption of the preference shares.
3. An order that the Plaintiff specifically performs his obligations as contained in clause 10 of the SPRA by surrendering the preference shares the Plaintiff holds in the 1st Defendant to the 1st Defendant.

4. Damages for breach of Contract
5. Costs.

Subsequent to this the Plaintiff has now by Judge's summons dated 4th December 2019 applied to this court for judgment to be entered against the defendants citing that the defendants have no defence to the action. This application is being opposed by the defendants who have filed an affidavit in opposition to same deposed to on the 17th December 2019 stating inter alia that their defence to the action does raise triable issues to warrant a full blown trial in the matter. On the 6th February 2020, the Plaintiff filed an affidavit in response to the Defendant's affidavit in opposition and on the 17th February 2020, the defendants filed a supplemental affidavit to their affidavit in opposition.

The facts before this court are as follows;

The Plaintiff is a Company established in Mauritius by the International Finance Corporation and CORDAID and is engaged in direct financial and technical assistance support to small and medium enterprises portfolio companies with the view of providing financial assistance for improving such companies. The 1st defendant is a Limited Liability Company incorporated on the 12th April 2007 pursuant to the Laws of Sierra Leone to inter alia carry on business in all aspects of agriculture and farming. The 2nd defendant is for the purposes of this action, the majority shareholder in the 1st defendant.

On the 27th August 2011, an agreement was drawn and executed between the Plaintiff as "The Investor", the 1st Defendant as "The Company" and the 2nd Defendant as "The Shareholder". The 2nd Defendant signed the said agreement on behalf of the 1st Defendant in his capacity as Director of the 1st Defendant. This agreement is before this court and marked Exhibit FB1.

According paragraph C of the said agreement, the 1st Defendant's capital being inadequate wanted to enhance its income streams to enable it attain full capacity. Based on this need, they approached the Plaintiff for funding by way of equity and a bridging loan. The parties were to co-operate in the implementation of the project through the 1st Defendant. For this purpose, the plaintiff was to subscribe for shares in the 1st Defendant Company and the funds acquired in this process was to be utilised as the aforementioned needed capital to help the 1st Defendant attain full capacity. The agreement was meant to regulate their relationship with each other and certain aspects of the affairs and dealings with the 1st Defendant. This is also contained in paragraph F of the said agreement.

To accommodate this inflow of income, it was agreed that immediately after the signing of the aforesaid agreement there would be a special resolution of the 1st Defendant to increase its authorised share capital which was to be done by amending the Memorandum and Articles of Association to reflect that the authorised share capital of the 1st Defendant was now 3,412,584 units of shares made up of 2,657,750 ordinary shares of US$ 0.25 per share and 754,834 units of preference shares valued at US$ 0.25 per share.

Subsequent to this, the Plaintiff was to invest the sum of US$ 478,711 for which it was to be allotted 1,160,010 units of ordinary shares at the rate of US$0.25 per share and 745,834 units of preference shares also at the rate of US$ 0.25 per share.

The memorandum and articles of association of the 1st Defendant was to be amended to reflect this new position and the Register of members of the 1st Defendant was to be drawn up to reflect the plaintiff as additional member and certificates issued accordingly. No shareholder was to be able to sell, transfer or dispose of his shares other than in accordance with the agreement and where such transfer was done, it would be considered a breach of the agreement and shall be deemed void. This was provided by clause 6.4. Nonetheless, it was agreed in Clause 6.8 that in the event the Plaintiff chooses to sell or transfer its shares, the existing shareholders in the 1st Defendant shall have the right of first refusal to purchase such to have been done within 90 days failing which the Plaitiff would be free to transfer the shares to anyone of its nominees.

Clause 13 of the said agreement provided for the exit of the Plaintiff. The Preference shares which were to be in two classes A and B were to be redeemed as provided by the first clause 13.2 which I presume was intended to be labelled clause 13.1. The class A preference shares were to be redeemed in 4 equal instalments while the class B preference shares were to be redeemed within 12 months from the date of investment either on a monthly basis or in one bulk sum. After a year of the investment, the 2nd Defendant is to buy back the ordinary shares from the Plaintiff in phases at an estimated fair valuation price of the shares at the time of the repurchase.

The defendant contends that upon execution of the aforementioned agreement, it received from the Plaintiff the sum of US$ 421,500 instead of the US$ 478,711 as agreed and placed before the court their bank account statement which is marked Exhibit HP2 in that regard.

Exhibit FB 4 is a letter dated 28th March 2013. According to same, the 1st Defendant had by letter dated 18th March 2013 offered to purchase the total interest of the Plaintiff in the 1st Defendant company for the sum of US$ 200,000. This offer was turned down by the Plaintiff as not being reasonable and a counter-offer of US$ 586,384.70 was proposed. The 1st defendant by exhibit FB5 requested that an independent valuator be appointed to ascertain the true value of the Plaintiff's interests.

The parties subsequently met and according to Exhibit FB6 which is a letter from the Plaintiff to the 1st defendant dated 23rd May 2013, it was agreed that the 1st Defendant was to pay periodically the sum of US$575743.53. A breakdown of the periodic payments was attached to the said letter. By letter dated 8th July 2013, the 1st Defendant wrote to the plaintiff requesting inter alia that the payment terms be adjusted. It was even stated therein that "In light of the above, our client wish to demonstrate its unflinching commitment to the above proposal by making the undertaking that should there be any default on the terms above-mentioned, particularly relating to the repayment of monies owed to your institution for a period of 3 consecutive months, then our client shall relinquish all operations and management in our client's business located at 16 Lumley Beach road, Agriculture compound Freetown to your institution until such time when all monies owed to your institution by our client is recovered in full; after which all management and operations of same will revert back to our client. In the alternative, should it happen that the amount owed could not be recovered from the operations of the business at 16 Lumley Beach Road aforesaid, then your institution will be availed the option of liquidating the said business and recover any outstanding amount that may be owed to your institution at the time of liquidation. Additionally, our client is inclined to give your institution collateral in the form of his real property at Gwinner drive to fortify his commitment to the terms as contained in this letter and should it happen that your institution cannot recover the monies due and owing even after the above options would have been exercised, this property will be approximately utilized to recover amounts then owed to your institution. This offer was not accepted in its entirety.

However, on the 3rd October 2013, the Parties herein signed a share redemption and purchase agreement. This agreement is before this court as Exhibit FB9. According to clause 8 of the said agreement, "The company and shareholder shall pay to the Investor the sum of US$ 261,466 for the preference shares and the accrued coupon thereon and the shareholder shall pay USD$ 314,268.53 for the ordinary shares being held by the Investor (See attached schedule)." The schedule attached thereto is titled Pajah& I.J. (SL)

Limited Exit Agreement with WAVF Shares Repurchase & Redemption Agreement Payment Schedule.

These sums were secured in clause 14(a) of the said agreement. It states;

a. The Assets in the leased farm and the office in Lumley and Waterloo Property & lands which are all assets of the company in addition to Mr. Habib Pajah's Property which title document is already in the Investor's possession will be security to the unpaid exit sum and all the title documents of the said assets shall be deposited with the investor.

Clause 15 stated what was to be the position in the event of a breach of the agreement. It states;

a. In the event the Company and the Shareholder, respectively fails to perform any term of this agreement, or fails to make 3 consecutive payments as captured in the schedule to this agreement, an event of default shall be deemed to have occurred.
b. Should it happen that an Event of Default occurs, with regards to the balance amount, the Investor shall take over the management of the assets of the farm and the costs of recovery will be charged and paid from the proceeds of the farm and company in addition to the outstanding amount. And if the recovery period exceeds 3 months, beyond the mutually agreed 3 year terminal date, for the close of this transaction, then the investor's yield would be recomputed to accommodate the additional period of payment.
c. The Company and shareholder shall reimburse the investor for any costs, charges and out-of-pocket expenses (including attorney's fees and all expenses of litigation or preparation for litigation and recovery of unpaid monies) paid or incurred by the investor in connection with the collection and enforcement of this agreement.

The 2nd Defendant in paragraph 18 of the affidavit in opposition deposed to the fact that he had paid the sum of US$ 208,730 for and on behalf of the 1st Defendant. It is not quite clear when this payment was made but by Exhibit HP4 attached to the Affidavit in opposition, it seems that the said payment was made on or about the 28th March 2018. The Plaintiff have not disputed this and Exhibit HP4 in fact is an email confirming that the Plaintiff received the said sum and applied same towards payment of the Preference shares and part payment for the ordinary shares.

The Plaintiff now comes before this court claiming that there is still a balance of US$ 367,016 still outstanding while the 1st defendant has counter-claimed for a refund of the sum of US$ 4,475 which it claimed was paid in excess for the Preference shares and for the Preference shares already redeemed to be surrendered by the Plaintiff.

In spite of the aforementioned elaboration of the facts, this court can summarise the whole matter into one paragraph.

The Defendants who needed funds to develop their business approached the plaintiff and requested that it invests in the defendants' business. The nature of the investment was unique in the sense that it was not intended that the Plaintiff was to continue for the life of the business. The Plaintiff was to make the investment and once the defendants' business was up and running, the Plaintiff was to recover its investment and leave. Meanwhile as security for its investment, the Defendants were to allot a certain number of shares of different classes to the Plaintiff so that when it is time for the Plaintiff to exit the company, a value was to be placed on these shares which would then be redeemed as per the terms of the agreement. As at the time appointed for the redemption, the Defendants could not redeem the said shares as agreed and as such another agreement had to be drawn up which placed and agreed value on the shares, a time and mode of payment as well as security and a provision of what would happen in the event of default of this new agreement. The 2nd Defendant subsequently made payment for the shares which said payment was agreed was to be applied for shares of the 1st defendant. The ordinary shares remain unpaid for and the plaintiff now seeks redress.

It is the law Jacobs v Batavia and General Plantations Trust Limited (1924) 1Ch 287that it is not the duty of the courts to make new agreements for the parties. Our duty as arbiter is to interpret the existing contract and agreements between the parties in their bid to enforce same. As long as the parties have elected to enshrine their contract in a written document, the courts have always held that as a general rule, they cannot vary or contradict the terms of the contract.Where the contract is written, this court can only give its interpretation within the parameters of the document(s) which has been executed by the parties and presented to the court. Both parties in addressing the court submitted that in interpreting contracts, the court must take an objective position and consider the background of the facts leading to the execution of the agreements. Reference was made to the book "Principles of Contractual Interpretation" 2nd Edition by Dr. Kalman in this regard. As such,

in reaching a decision, this court must examine using the various documents before it the following;

1. The intention of the parties as at the time of executing Exhibit FB1.
2. Interpretation of and compliance with the terms as contained in Exhibit FB1.
3. The intention of the parties as at the time of executing Exhibit FB2.
4. Interpretation of and compliance with the terms as contained in Exhibit FB9.
5. The remedy agreed upon in the event of default (if at all).

THE INTENTION OF THE PARTIES AS AT THE TIME OF EXECUTING EXHIBIT FB1.

What better way to deduce the intention of the parties to any agreement than to look at the recitals. In the recitals of Exhibit FB1, the Plaintiff is defined as "…a company engaged in direct financial and technical assistance, supports to SME (prospective and existing) portfolio companies with the view of improving portfolio companies' operational and managerial performance in the companies which are viable whether or not having any operational difficulties in attaining their full production capacities or inadequate funding in attaining the objects of the company. The investor's involvement through equities in companies are not permanent as there is a divestment policy by which the investor sells off its investment after an agreed period of time with the investee company " The 1st defendant is also defined as "a private company incorporated in Sierra Leone under the Companies Act 2009 ……..with an authorised fully paid up share capital of 1,000,000 shares made up of 1,000 ordinary shares of Le 1,000 each. The Company is engaged primarily in the business of poultry production and all aspects of agri-business with a strategic objective of becoming the number one poultry producers in the country." The 2nd defendant is defined as "the registered shareholders and beneficial owners (free from any encumbrance as hereinafter defined) of the number of shares in the authorised share capital of the company appearing against their respective names in schedule 1 to this agreement."

As such from the onset, it is clear that the intended role of the Plaintiff is not the regular business investment model where an interested person purchases shares in a company in the hope of reaping dividend in future years. The relationship between the parties herein goes beyond that. It is my understanding that the relationship was born out of the desire of Plaintiff to

provide the necessary funds that will bring the 1st defendant to a particular stature in business and thereafter move on, leaving the 1st defendant in a better shape to continue its affairs. It is for this reason that Exhibit FB1 in paragraph 13 provides for the exit of the Investor to show that the relationship was not intended to be a permanent one.

INTERPRETATION OF AND COMPLIANCE WITH THE TERMS AS CONTAINED IN EXHIBIT FB1.

The Plaintiff's argument is that the Defendant is in breach of several terms of Exhibit FB1. For starters, they maintain that it was agreed in the said document that the defendants were to increase the share capital of the 1st defendant to accommodate the Plaintiff's investment as per the provisions of Article 2 of Exhibit FB1. This provision they complain was not complied with. The Plaintiff exhibited Exhibit LB3 in the Affidavit in Reply which is a report from the Corporate Affairs Commission showing the status of the 1st defendant and argue that by same, the plaintiff is not on record as being a member of the company. The defendants on the other hand argue that the fact that the plaintiff is not listed as a member of the 1st defendant holding shares comes down to the understanding that as per clause 2 of Exhibit FB1the 1st Defendant's duty was to allot shares to the Plaintiff and not bound to transfer the said shares. I agree with this argument of the defendants as it is clear from clause 2 of same that the shares were agreed to be allotted and not transferred. This position I understand clearly to be as it is considering the fact that the role of the shares was more as collateral rather than actual property. However it was agreed in the said Clause 2 of Exhibit FB1 that the authorised share capital was to be increased to accommodate the investment of the Plaintiff. There is no document before this court showing that this process was in fact completed and Exhibit LB3 which is the status report from the Corporate Affairs Commission showed that as at the 3rd February 2020 when the report was obtained, the authorised share capital of the 1st Defendant was still 1,000,000 divided into 1,000 shares of Le 1,000 each. If the authorised share capital was not increased, I cannot see how same would have been allotted let alone transferred to the Plaintiff.

The defendants also argued that Exhibit FB1 is as relevant to these proceedings as Exhibit FB9. This goes to answer the Plaintiff's point that the exit provisions among others in Exhibit FB1 was replaced by Exhibit FB9 and for that reason, this action is primarily for the enforcement of Exhibit FB9.The Defendants deny that this should be the case. They argue that clause 6.8

inExhibit FB1 must be read together with Exhibit FB9. For the avoidance of doubt, clause 6.8 of Exhibit FB1 reads thus;

"In the event that WAVF chooses to sell or transfer its shares, existing shareholders of the Company have the right of first refusal to purchase the said shares, on mutually agreed terms or as determined by an independent valuer and in the event that the shareholders do not pay, the said price, within 90 days of the receipt of the WAVF's offer, WAVF shall be free to transfer its shares to anyone or more of its nominee(s).

According to the defendants, the Plaintiff by this provision cannot compel the defendants to pay for the shares. Counsel argues that where the 2nd defendant refuses to pay for the shares within 90 days, the Plaintiff would then be at liberty to sell the shares to its nominee(s).

The task at this stage therefore is how can this court bring clauses 6.8 and 13 in tandem with each other as they both seem to be conflicted especially clause 13.2. I will reproduce clause 13.2 verbatim for a clear understanding of the issue. It states;

"Commencing from the end of the first year of investment or from the date of closing of each one year anniversary, for the Duration WAVF still holds shares in the company, existing shareholders/the promoter shall in phases buy back the ordinary shares held by WAVF at an estimated fair value price of the shares at the time of this repurchase. Twenty percent (20%) shall on each of the anniversary date mentioned above be repurchased thereby reducing the equity stake of WAVF yearly until divestment."

As is clear from this provision, which by the way is a "shall" provision, it was agreed that the 2nd defendant was to buy back the ordinary shares in the manner stated therein.

I must before endeavouring on this quest make clear that this is all based on the assumption that shares were indeed allotted and or transferred to the Plaintiff by the 1st Defendant.

Clause 6.4 to 6.9 of the agreement is intituled "Transfer of Shares". Clause 13 on the other hand is intituled "Exit of the Investor". As is clear from these titles the respective provisions deal with specific issues. Where the investor has reached the stage where it desires to exit the company at the time stated in the agreement, I hold that Clause 13 would apply. If on the other hand the investor wishes to transfer its investment prior to the period stated in clause 13.2, then I hold that the most suitable provision to be applied would be clause 6.8.

However, as stated above, this is more of an academic exercise as this court has already held that there is nothing before it showing that the authorised share capital of the 1st defendant was increased to accommodate the allotment and or transfer of shares which would have necessitated a discussion of the issue of whether in fact there was the need to transfer or redeem shares regardless of whether or not either or both parties were under the impression that the said shares in fact existed and was being held by either party.

THE INTENTION OF THE PARTIES AS AT THE TIME OF EXECUTING EXHIBIT FB 9.

Exhibit FB9 was executed by the parties on the 3rd October 2013. By this time, several written communication had been exchanged between the parties. To understand the purpose and true intention of the parties as at the time of executing Exhibit FB9 I again inspect closely the Recitals contained in the said document. The 5th recital I find most interesting and I will again take the liberty of reproducing same verbatim. It states;

"WHEREAS the Company and the Shareholder have approached the investor for a divestment/exit. The company desires to redeem from the investor all of the preference shares being held by it, while Mr. Habib desires to acquire all of the ordinary shares being held by the investor on the terms and conditions hereinafter set forth."

This recital is in itself clear and unambiguous. It states that the 1st and 2nd defendants have approached the plaintiff with respect to its exit from the 1st defendant and have expressed the desire to acquire the preference and ordinary shares respectively on the terms as contained in the agreement. This recital in itself clears the air completely of any doubt that may have arisen as to whether the courts should apply clause 6.8 or clause 13 of Exhibit FB1. It is clear from this recital that this was no longer the simple issue of a transfer of the shares but that it encompasses the exit of the Plaintiff from the 1st defendant. As such, it cannot be read together with clause 6.8 in Exhibit FB1 as defence counsel would want this court to believe. This agreement also solves that problem of whether the Plaintiff paid the full sum agreed at the start of the relationship as it arbitrarily, regardless of the terms of Exhibit FB1 states what the parties have agreed would be a satisfactory exit fee to be paid to the Plaintiff. This fee was also secured by the terms as contained in clause 14 of Exhibit FB9 as well as what would happen in the event of a breach of the terms contained therein.

INTERPRETATION OF AND COMPLIANCE WITH THE TERMS AS CONTAINED IN EXHIBIT FB9.

Clause 8 of Exhibit FB9 reads thus;

"Purchase price: The Company and Shareholder shall pay to the Investor the sum of US$ 261,466 for the Preference shares and the accrued coupon thereon and the shareholder shall pay US$ 314,268.53 for the ordinary shares being held by the Investor (see attached table)."

Based on this provision, counsel for the defence argues that liability for the payment of the sum of US$ 261,466 for the preference shares lie with both defendants jointly while liability for the payment of the sum of US$ 314,268.53 lies exclusively with the 2nd Defendant. He submits that in this regard the sum of US$ 208,730 have been paid to the Plaintiff in satisfaction of the payment for the preference shares. Added to this, he argues that since he had alleged that the funds provided by the Plaintiff as agreed originally was short US$57,211, that sum ought to be deducted from the cost of the preference shares as agreed which means that the defendants would have paid in excess of US$ 4,475 and it is that sum that is counter-claimed by the 1st defendant. The Plaintiff does not agree with this. Counsel for the Plaintiff argued that at all times in Exhibit FB9, the liability of the defendants is joint and not severed. I do not agree with counsel for the Plaintiff. It is clear and unambiguous in reading this provision that the respective payments have to be made by the respective parties as stated therein. As such it is clear that the parties agreed that both defendants were jointly responsible for payment for the preference shares while the 2nd defendant was responsible solely for payment for the ordinary shares. This however begs the question, are there ordinary shares in existence for the 2nd defendant to purchase?

With respect to defence counsel's argument that they have paid in excess of the sum due for the preference shares, I would hold that this is not the case. When the parties put pen to paper on Exhibit FB9, the defendants in effect agreed to being indebted to the Plaintiffs in the sums as contained therein. This is regardless of any deductions that ought to have been included therein but was not. As such, the payment of the sum of US$ 208,730 is considered to be in partial satisfaction of the sum of US$ 261,466 which is the sum due for the preference shares.

Defence counsel also argued that by the provisions of section 135 of the Companies Act 2009, a company cannot buy back its own shares and as such that portion of Exhibit FB9 that says the 1st defendant was to repurchase its

preference shares is statute barred. I see no merit in this argument with respect to this matter for one simple reason. Exhibit FB9 as far as the preference shares go is not an agreement to repurchase the preference shares. It is an agreement to redeem the preference shares which ought to have been held by the plaintiff as collateral for its investment. In fact, the whole transaction is in the nature of a mortgage in which the shares were given as collateral for Plaintiff's investment.

THE REMEDY AGREED UPON IN THE EVENT OF DEFAULT (IF AT ALL).

Regardless of the arguments with respect to the severance of the payments, it is clear though that the security for the debt and the consequences for non-payment could not be severed. I will reproduce clauses 14 and 15 of Exhibit FB9 verbatim so it becomes clear the reason for this conclusion.

Clause 14 states:

a. The Assets in the leased farm and office in Lumley and Waterloo property and lands which are all assets of the company in addition to Mr. Habib Pajah's Property which title document is already in the Investor's possession will be security to the unpaid exit sum and all the title documents of the said assets shall be deposited with the investor.
b. The assets of the Company shall be comprehensively insured throughout the duration of the Shares Repurchase and Redemption period by a reputable insurance company to be nominated by the Investor and the investor shall be the loss payee to the insurance policies until full payment of the agreed exit sum.

Clause 15 states:

a. In the event the company and shareholder respectively fails to observe or perform any item of this agreement or fails to make three consecutive payments as captured in the schedule to this agreement, an event of default shall be deemed to have occurred.
b. Should it happen that an event of default occurs, with regards to the balance amount, the Investor shall take over the management of the assets and farm and the cost of recovery will be charged and paid from the proceeds of the farm and Company in addition to the outstanding amount. And if the recovery period exceeds 3 months, beyond the mutually agreed 3 year terminal date, for the close of this transaction, then the Investor's yield would be recomputed to accommodate the additional period of payment.

c. The company and shareholder shall reimburse the Investor for any costs, charges and out-of-pocket expenses (including attorney's fees and all expenses of litigation or preparation for litigation and recovery of unpaid monies) paid or incurred by the Investor in connection with the collection and enforcement of this agreement.

Based on the above clauses, it matters not whether payments is made in full or in part by either defendant, as long as there is a default, clauses 14 and 15 are activated. This is what was agreed between the parties.

I must now address the issue of the authorised share capital not being increased and consequently the unavailability of shares to be transferred or redeemed or repurchased vis-à-vis payment of the sums representing the redemption and repurchase of the shares. It is clear that the authorised share capital of the 1st defendant was to be increased to accommodate the investment of the Plaintiff. It is also clear that this was not done. Hence any purported allotment of shares in that regard was therefore not valid. "Nemo dat quod non habet". How then can this court hold as a debt, the value of the shares which were not increased nor allotted in the first place? The answer lies in the equitable maxim of "Equity sees as done that which ought to be done". In its application, this court will for the sake of fairness see as increased and allotted that authorised share capital which ought to have been issued and for which the Plaintiff paid accordingly. The parties to the agreements proceeded on the belief that same was done even though it was still stuck at the stage of it ought to have been done. In the circumstances and based on this principle, this court will in ruling on defence counsel's concern that the shares already paid for have not been returned, hold that this court will see as returned, those shares which ought to have been returned. This will by the same token answer the issues of the contract being executory as argued by defence counsel.

Based on the forgoing I must now decide whether this is a matter fit for determination on an application for summary judgment. In the celebrated case of AminataConteh v All People's Congress SC CIV. APP. 4/2004, the Supreme Court had this to say; "The object of the order is to ensure a speedy conclusion of the matters or cases where the Plaintiff can establish clearly that the defendant has no defence or triable issues. This draconian power of the court in preventing the defendant from putting his case before the court must be used judiciously. A judge must be satisfied that there are no triable issues before exercising his discretion to grant leave to enter a summary judgment. The judge is also obliged to examine the defence in detail to ensure that there

are no triable issues". The defence is before this court as Exhibit HP5. The issues raised therein can be stated as follows;

a. The Plaintiff was to invest the sum of US$ 478,711 in the 1st defendant but rather only invested US$ 421,500 with a balance of US$ 57,211 outstanding which said sum is being claimed in the counter-claim. As highlighted above, this is not an issue for trial. The fact that the parties had gotten to the point that they had agreed in Exhibit FB9 regardless of the previously executed Exhibit FB1 that they have reached and agreed on a round figure as the debt due and owing without recourse to the said US$ 57,211, the defendant cannot later raise the issue of same as it would amount to changing the terms of the agreement. My attention is drawn to clause 23 (III) if Exhibit FB9 which states that Exhibit FB9 and any other writing or communication delivered pursuant to it is the entire agreement between the parties and supersedes any prior agreement. There is no other written communication before this court showing that the parties have agreed that the sum of US$ 57,211 was to be deducted from the sum agreed. It is therefore not in the circumstances a triable issue.
b. The defence also claimed that the 1st Defendant's failure to meet its payment obligations is owing to the fact that the 1st Defendant neither made distributable profits or any profit at all and could not issue or sell fresh shares. On this I also do not see a triable issue. I see a case of the 1st Defendant admitting the debt but giving reasons why there is a delay in payment thereof. The ratio in the case of Lazarus v Smith (1908) KBD 266 is instructive in this regard. Where the Plaintiff in a money-lender's action applies for leave to sign final judgment….and the defendant sets up a defence….but admits he still owes some part of the money actually advanced, the proper order is to order Summary judgment for the amount admitted to be due without interest and to give leave to defend the residue of the claim.
c. The defence in paragraph 9 thereof is as follows; "The defendant denies paragraph 9 of the Plaintiff's particulars of claim and would aver that the payments terms set out in clause 9 of the SPRA are in regard an agreement for the redemption of preference shares and purchase of ordinary shares as mentioned in paragraph 8 supra by the 1st and 2nd defendants respectively. The defendants further aver that the terms set out in clause 9 are not in respect of payment of a debt due and owing to the Plaintiff by the defendants". This I understand to mean that the payment terms in Exhibit FB9 are an agreement to redeem and purchase

preference and ordinary shares respectively and is not an admission of indebtedness. In this also I see not triable issue. The Plaintiff is before this court seeking to enforce the Exhibit FB9 which the defence is itself admitting is an enforceable agreement. The defence is not a denial of the agreement or the terms as contained therein, they are simply saying it is not a debt. The plaintiff has shown otherwise by its submissions and facts before this court. I do not also see any reason in these circumstances for this issue to proceed to trial.

d. The defence also avers that the 1st Defendant has redeemed all the preference shares. I do not see a triable issue on this point of defence either based on paragraph (a) above.
e. The defence also raises the issue of the refusal of the Plaintiff to transfer the shares already redeemed. As stated above, these shares were in equity and an actual allotment and transfer of same to the Plaintiff was not done. It could therefore not be a triable issue if the claim is for the Plaintiff to return that which was not given to it in the first place.
f. The 2nd defendant also agrees that it he has not paid for the ordinary shares as agreed in Exhibit FB9 but maintains that it could not purchase the shares because he is financially constrained. Is there a triable issue here? I think not. The inevitable conclusion is that the Plaintiff does not have a case against the 2nd Defendant. The shares were not in law allotted nor were they transferred. The Plaintiff never received the shares and as such cannot sell them to the 2nd Defendant. They only exist in equity. Exhibit FB9 is a valid agreement for the payment for shares. Should the 2nd defendant be ordered to pay for the shares, would the Plaintiff be in position to give him the shares? The answer is in the negative. The facts before the court is that the full sum provided by the Plaintiff was paid to the 1st defendant who was supposed to increase his share capital and allot the shares. It did not. As such there are no ordinary shares to be transferred. Liability for the ordinary shares therefore has not moved and still remains with the 1st defendant. This is not an issue for further facts and testimony. It is not a triable issue. Not at all. There are terms in the said agreement that provide to the consequences in the event of a breach of the agreement. There is no need for a full blown trial to understand and interpret the meaning of the enforcement terms. As seen above, they have been read, and analysed.

Having gone through the facts and issues in the matter, it is clear without the need for a trial that by Exhibit FB9 the enforcement of which the Plaintiff is

before this court, the 1st Defendant is indebted to the Plaintiff in the sum ofUS$ 367,016 and the 2nd defendant bears no liability to the Plaintiff. However the security for the debt as shown above is joint, and so are the remedies for the breach.

In the circumstances, the plaintiff is at liberty to enter judgment against the defendants on the following terms;

1. Both defendants are jointly and severally indebted to the Plaintiff in the sum of US$ 52,736being the outstanding sum for the redemption of the preference shares due and owing forunder the share purchase agreement dated 3rd October 2013.
2. The 1st defendant is indebted to the Plaintiff in the sum of US$ 314,268.53 being the value of ordinary shares that ought to have been allotted and transferred to the Plaintiff by the 1st defendant but which were not.
3. Interest on the said sums at the rate of 18% per annum from the 3rd October 2017 to date
4. The Plaintiff shall take possession of all assets of the Defendants in the leased farm and the office of the Defendants at Lumley and Waterloo property and all lands which are property of the company until the said sum is paid in full.
5. The Plaintiff shall also take possession of the 2nd Defendant's property, the title deed of which is in possession of the Plaintiff until the said sum is paid in full.
6. Should the aforementioned sums not be paid in full within 21 days from the date of this judgment, the Plaintiff shall be at liberty to sell all assets of the 1st Defendant to recover the aforementioned sum and the undersheriff shall have conduct of such sale.
7. The cost of this action is assessed at Le 100,000,000 (one hundred Million Leones) to be paid by the 1st Defendant.
8. The defendants are prevented whether by themselves, their assigns, agents or howsoever called from removing or transferring any asset or property from all properties the subject-matter of this ruling

HONORABLE JUSTICE LORNARD TAYLOR