IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2024

CORAM: OWUSU (MS.) JSC (PRESIDING)
LOVELACE-JOHNSON (MS.) JSC
PROF MENSA-BONSU (MRS.) JSC
KULENDI JSC
ASIEDU JSC

CIVIL APPEAL

NO. J4/43/2023

21TH FEBRUARY, 2024

1. **UNICHEM (GHANA) LIMITED**
2. **SURESH KIRPALANI**

PLAINTIFFS/RESPONDENTS/APPELLANTS

VRS.

1. **METROPOLIS HEALTHCARE (MAURITIUS) LTD.**
2. **METROPOLIS HEALTHCARE (GHANA) LTD.**

DEFENDANTS/APPELLANTS/RESPONDENTS

J U D G M E N T

MARIAMA OWUSU (MS.) JSC:

On 17th June, 2021, the Court of Appeal allowed the appeal of the Defendants/Appellants/Respondents (referred to simply as Defendants) and set aside the

Ruling of the High Court dated 1st November, 2018. The Court of Appeal further made an Order referring the parties to arbitration of the dispute between them as per the arbitration clauses in the Agreements and stayed proceedings in the substantive matter at the trial High Court pending the conclusion of the arbitration proceedings.

Dissatisfied with the decision of the Court of Appeal, the 1st and 2nd Plaintiffs/Respondents/Appellants (referred to simply as Plaintiffs) filed the instant Appeal before the Supreme Court on the following grounds:

A. The Court of Appeal erred in law when it held that the dispute between the parties must be referred to arbitration, contrary to the position of the law that a party must first agree to refer a dispute to arbitration.

PARTICULARS:

i. The majority panel of the Court of Appeal failed to recognize that the Plaintiffs challenged the existence of both the Container Agreement and the Arbitration Agreement.

ii. The majority panel of the Court of Appeal failed to recognize that an arbitration is a private dispute resolution mechanism and the parties must first agree to submit their dispute to arbitration.

iii. The Court of Appeal erred in law and in fact when it failed to recognize that the Plaintiffs never intended to resolve any issue through arbitration.

B. The Court of Appeal erred in law and in fact when it failed to recognize the plaintiffs never intended to resolve any issue through arbitration

PARTICULARS:

i. The Plaintiffs raised enough doubt as to the very existence of the Container Agreement which had the arbitration clause.

ii. *The Separability principle is based on a fundamental intention of the parties to submit their dispute to arbitration.*
iii. *The Plaintiffs provided their known signatures to demonstrate that they never apprehended their signatures to the Container Agreements.*

C. The Court of Appeal erred in law when it came to the conclusion that Plaintiffs' Writ of Summons was null and void because it was issued without leave which is contrary to law.

***PARTICULARS*:**

i. *The Court of Appeal failed to recognize that the 2nd Defendant to the suit is a company incorporated in Ghana.*
ii. *A Writ of Summons with two defendants is in essence two separate writs of summons fused into one judicial economy.*

D. The judgment of the Court of Appeal is against the weight of evidence.

RELIEFS SOUGHT FROM THIS COURT:

A reversal of the decision of the Court of Appeal.

Before going into the arguments canvassed in support and against this appeal, we will give a brief background of the case.

The Plaintiffs in this case by their Writ of Summons sought to dispute the existence of some agreements signed with the Defendants. These Agreements include a Shareholders Agreements, Share Purchase Agreements and Subscription Agreements referred to as the Agreements. The Plaintiffs' claimed primarily in their Statement of Claim that the transaction between the parties that diverted them of their shares in 2nd Defendant Company was fraudulent and wrong in law. They averred that, until their attention was drawn to the Agreements, they had no clue that there were such Agreements in force between Plaintiffs and 1st Defendant. They continued that, the signatures on the

Agreements are not their known signatures and therefore sought an Order of the Court to declare the Agreements null and void.

When the Writ and Statement of Claim were served on the Defendants, the latter entered appearance through their counsel. Subsequently, counsel for the Defendants filed a Motion on Notice to Stay Proceedings of the action commenced by the Plaintiffs and refer the parties to arbitration since the Agreements contain mandatory dispute resolution provisions which require the parties to refer disputes to arbitration in Mauritius should the parties fail to resolve the dispute amicably. Counsel for the Defendants attached the Share Purchase and Subscription Agreements as Exhibit SK2 series to their application and deposed that the Plaintiffs' claim of fraud is an afterthought with the sole aim of avoiding the Agreements.

The Plaintiffs vehemently opposed the application for an Order of Stay of Proceedings and refer the parties to arbitration insisting that Exhibit SK 2A and SK 2B (The Agreements) were procured by fraud as the Plaintiffs did not execute the said Agreements, they are not bound by the contents of the purported Agreements including the said arbitration clauses. Consequently, the Plaintiffs have not voluntarily submitted to arbitration and are not amenable to the said purported arbitration as the allegation of fraud raised in their pleadings, which is a quasi-criminal offence, the High Court is better placed to assume jurisdiction and determine the issue of fraud as opposed to an arbitral tribunal.

In its Ruling dated 1st of November, 2018, the High Court refused the application for stay of proceedings and also refused to make an Order referring the parties to arbitration.

Dissatisfied with the Ruling of the High Court, the Defendants appealed to the Court of Appeal which allowed the appeal and set aside the Ruling of the trial High Court. The Court of Appeal further referred the parties to arbitration as per the arbitration clauses in

the Agreements and stayed proceedings in the substantive matter at the trial High Court pending the conclusion of the arbitration proceedings hence the appeal before us.

In arguing the appeal, counsel for the Plaintiffs on,

Ground A of the Appeal which states that:

> *The Court of Appeal erred in law when it held that the dispute between the parties must be referred to arbitration, contrary to the position of the law that a party must first agree to refer a dispute to arbitration;*

Submitted that a party should not be forced into arbitration when there are enough grounds to demonstrate that there is no agreement whatsoever between the two parties. He continued that, the issue the Plaintiffs raised is a fundamental one and that any court ought to hasten slowly in forcing the Plaintiffs to arbitration. This is because, the crux of the Plaintiffs' argument is that they neither agreed to nor executed the Agreements that altered their legal rights in 2nd Defendant. That they were not even aware of those Agreements until their attention were drawn to them and it is these Agreements that contained the arbitration clauses. Counsel for the Plaintiffs again submitted that the most basic principle of arbitration is the agreement of the parties to arbitrate their dispute. That is to say, arbitration is consensual. Therefore, a party cannot be compelled to settle a dispute by arbitration when the party has not submitted to arbitration in the first place. Consequently, in the absence of an agreement to submit to arbitration or any other alternative dispute resolution mechanism by the parties to the agreement, litigation is still available as a possible venue to seek justice. He referred us to *section 135 of the Alternative Dispute Resolution Act, 2010 Act 798* and argued that, by this section an arbitration agreement means an agreement to submit to arbitration present or future dispute.

Counsel concluded on this point that, if the legitimacy of arbitration is based on consent of the parties, the court can do so only when it has first satisfied itself that there is the existence of an arbitration agreement between the parties that invokes arbitration as a dispute resolution mechanism. Therefore, the argument by counsel for Defendants that

the ability of the arbitral tribunal to determine preliminary issues is completely inapplicable in this case. The reason being that, the cases of **ANGLOGOLD ASHANTI GHANA LTD v MINING & BUILDING CONTRACTOR Suit No. H1/201/2015 and others** relied on by counsel for Defendants, in those cases the parties acknowledged the existence of a contractual agreement between the parties and the arbitration clause was then found in the contractual agreement. In the instant case, counsel for Plaintiffs argued, the Plaintiffs are saying that they are not aware of the existence of the Agreements that contain the arbitration clauses that will be the basis for a court to refer the Plaintiffs to arbitration.

Additionally, although there are signatures on the Agreements purporting to be those of the Plaintiffs' Officers, the said signatures are not their known signatures and that the purported signatures were procured by fraud. Counsel for the Plaintiffs concedes that the raising of fraud in itself is not enough to oust the jurisdiction of an arbitral tribunal. But argued that, in the case under consideration, the issue the Plaintiffs raised is fraud that goes to the existence of the Agreements. This, the Plaintiffs averred in paragraph 18 of their Statement of Claim. He referred us to the case of **PRIMA PAINT V FLOOD & CONKLIN, 388 US 395, 404 (1967)** which set down some principles on this matter which became known as ***PRIMA PAINT RULE.*** According to counsel for Plaintiffs, this Rule deals with whether the party resisting the arbitration target its complaint on the larger contract (the Container Contract) or the arbitration clause. He then submitted that, in the instant case, the Plaintiffs targeted their complaint on the Container Contract and also the arbitration clause and by the principle in the PRIMA PAINT RULE, where the complaint is about the fact that the Container Contract never came into existence as in the instant case, the American Courts will generally decide such questions for itself before referring the parties to arbitration. Based on the above Rule, counsel invited us to decide the existence of the Agreements first before any reference is made. That there was no offer and acceptance in the matter. He referred us to paragraphs 10 to 19 of their Statement of Claim in which Plaintiffs raised some concerns about some parts of the draft Agreements from 1st Defendant in respect of choice of law and the forum for dispute resolution and asked the 1st Defendant to review same. Thus, the Plaintiffs did not accept

the terms in the draft Agreements and therefore never executed the draft Agreements. This means that no contract or agreement came into existence in the first place.

Based on the above submissions, counsel for the Plaintiffs submitted that, the Court of Appeal erred when it referred the matter to arbitration.

In response to the submission on Ground A of the appeal, counsel for the Defendants after summarizing the arguments of the Plaintiffs which is that the reference to arbitration by the Court of Appeal was in error because according to the Plaintiffs both the Container Agreements and the arbitration agreement do not exist because the Plaintiffs did not sign the Container Agreements. He then submitted that this argument raises two main legal issues for the resolution by this Court. The first is the question who (either the court or the Arbitration Tribunal) determines the question of the existence of the Container Agreement which contains the arbitration clause. The second issue is who (either the Court or Arbitration Tribunal) determines the existence of an arbitration agreement. Counsel continued that the entirety of the Plaintiffs' case is based on the US PRIMA PAINT case mentioned above. He then submitted that apart from the fact that the PRIMA PAINT case is not binding on this Court, the decision was based on the Federal Arbitration Act of the US which is not in pari materia with the Alternative Dispute Resolution Act, 2010 Act 798 of Ghana. Secondly, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) takes no position on this question, thus leaving it entirely to the discretion of national legal systems. In this regard, section 24 of Act 798 answers these two questions in favour of the Arbitration Tribunal and not the Court.

Counsel for the Defendants then submitted that the arguments by the Plaintiffs that a dispute should not be referred to arbitration if a party challenges the existence of the arbitration agreement itself creates an absurd and unjust result which taken to its logical conclusion will only dissipate arbitral efficacy as parties can conveniently evade or obstruct the arbitration process by merely raising a challenge to the existence of the

arbitration agreement. He stated that, the present dispute is founded on a Share Purchase and Subscription Agreements dated 2nd May 2014 (collectively referred to as the Container Agreements). On the face of the Agreements, one R. D. Mohan and Dilip Jagad signed on behalf of 1st Plaintiffs and the Plaintiffs have not denied that the said R.D. Mohan and Dilip Jagad are Officers of 1st Plaintiff. Their only contention is that the said Officers did not sign the Agreements. He therefore submitted that, what prevents the Arbitral Tribunal from determining the issue as to the existence of the Container Agreements (or even the arbitral agreements in accordance with Act 798. Counsel referred to page 123 of the Record of Appeal Volume 1) and stated that, prior to this action the Plaintiffs through their counsel, accepted to subject themselves to arbitration. The sudden change of position on their part smacks of a deliberate attempt to frustrate the arbitral process counsel submitted.

He continued that, before the High Court the basis of the Plaintiffs' opposition to a referral to arbitration was the allegation of fraud, which is a quasi-criminal matter and thus the courts are better placed to assume jurisdiction. However, before the Court of Appeal and the Supreme Court, the Plaintiffs now admit that the arbitral tribunal can determine the issue of fraud (see page 44 of the Record of Appeal, Volume 2 and page 5 of the Plaintiffs' Statement of Case). After narrating the antecedents that led to the acquisition of the Shares by 1st Defendant which was issued by the 2nd Defendant, counsel for the Defendants submitted that, this is the real contention of the Plaintiffs. Put differently counsel argued if the Container Agreement do not stipulate that 1st Defendant acquired the Shares of the Plaintiffs but rather acquired the Shares of a third-party and subscribed to the issued Shares of the 2nd Defendant, then what is the locus of the Plaintiffs. In other words, if the Plaintiffs did not sell their Shares, why are they challenging the acquisition of another Shareholder's Share or the Subscription of the 2nd Defendant's Share? At best, these are issues of internal management rules of the 2nd Defendant according to counsel for Defendants. He argued that since both the Container Agreements contained an arbitration agreement, the Defendants filed an application seeking an order to stay proceedings before the High Court and refer the matter to arbitration.

The trial Judge refused to refer the matter to arbitration on the ground that on a comparison of the signatures on the Container Agreements and a different set of signatures produced by the Plaintiffs, the signatures on the Container Agreements appeared forged and thus affected the validity of the arbitration agreement. Counsel for the Defendants then submitted that the decision of the High Court Judge was erroneous in that the evidence he reviewed was untested by cross-examination neither were those signatures authenticated. He therefore submitted that the Court of Appeal was right when it held that the dispute between the parties was to be referred to arbitration. This is because the arbitral tribunal is the appropriate body clothed with jurisdiction to determine the issue as to the existence or otherwise of the Container Agreements. Counsel for Defendants referred to section 24 of Act 798 which reflects the internationally recognized Arbitration concept of "Kompetenz-Kompetenz", that is Arbitral Tribunals have the power to determine their own jurisdiction in relation to matters such as the existence of the arbitration agreement or the existence of the agreement which the arbitration agreement relates (in this case the Container Agreements).

Consequently, the contention of the Plaintiffs that the said signatures of their Officers were forged is an issue that goes to the existence and validity of the Container Agreements within the meaning of section 24 of Act 798. He therefore concluded on Ground A of the appeal that the Plaintiffs would not be left without remedy if they are not satisfied with the ruling of the arbitral tribunal on the jurisdiction by virtue of section 26 (1) of Act 798. Thus, the combined effect of sections 24 and 26 of Act 798 is that the arbitral tribunal must have the first opportunity to determine issues of potential lack of jurisdiction due to allege invalidity or non-existence of the Container Agreements. Counsel for the Defendants therefore invited us to dismiss Ground A of the Appeal.

Section 3 (1) of the Alternative Dispute Resolution Act, 2010 Act 798 provides:

> *"Unless otherwise agreed by the parties, an arbitration agreement which forms or is intended to form part of another agreement shall not be regarded as invalid, non-existence or ineffective because that other agreement is invalid or did not*

come into existence or has become ineffective and shall for that purpose be treated as a distinct agreement".

Section 24 of Act 798 deals with the Jurisdiction of Arbitral Tribunal. The section provides:

"Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own jurisdiction particularly in respect of;

a. *The existence, scope or validity of the arbitral agreement;*
b. *The existence or validity of the agreement to which the arbitration agreement relates (our emphasis).*
c. *Whether the matters submitted are in accordance with the arbitration agreement".*

Clearly, by sections 3 and 24 of Act 798, the Arbitral Tribunal is the appropriate body clothed with jurisdiction to determine the issue as to the existence or otherwise of the Container Agreements in which the arbitration agreement is contained. Section 24 (b) uses the words "the existence or validity of the agreement to which the arbitration agreement relates".

The argument of the Plaintiffs is that, they never executed the agreements which the arbitration agreement relates, but section 24 (b) makes it clear that the existence or validity of the agreement (Container Agreement) to which the arbitration agreement relates, the arbitral tribunal may rule upon. In the light of the above statutory provision, this Court cannot rely on the "Pima Paint Rule" of the US Courts which only has a persuasive effect on this Court. Our Supreme Court has stated time without number that no court or judge has the authority to grant immunity to a party from the consequences of breaching an Act of Parliament. In the words of **Date-Bah** JSC in the case of **the REPUBLIC v HIGH COURT (FAST TRACK DIVISION) EX PARTE NATIONAL LOTTERY AUTHORITY (GHANA LOTTO OPERATORS ASSOCIATION & OTHERS INTERESTED PARTIES) [2009] SCGLR 390, 402;**

"The learned Judge acted in obvious excess of his jurisdiction. No judge has authority to grant immunity to a party from the consequences of breaching an Act of Parliament. But this was the effect of the Order granted by the learned Judge. The Judicial Oath enjoins Judges to uphold the law, rather than condoning breaches of Act of Parliament by their Orders. The end of the Judicial Oath set out in the second schedule of the 1992 Constitution is as follows: I will at all times uphold, preserve, protect and defend the Constitution and <u>Laws of the Republic of Ghana</u> (our emphasis***). This Oath is surely inconsistence with any judicial Order that permits the infringement of an Act of Parliament".***

Relating the case referred to supra to the case under consideration, the Alternative Dispute Resolution Act, 2010 Act 798 is an Act of Parliament and in the context of the case under consideration should override the Prima Paint Rule of US which has a persuasive effect on this Court. Ground A of the Appeal fails and it is accordingly dismissed.

This brings us to Ground B which states:

The Court of Appeal erred in law and in fact when it failed to recognize that the Plaintiffs never intended to resolve any issue through arbitration.

The arguments canvassed by counsel for Plaintiffs under this Ground is that, the draft Agreement which were sent to Plaintiffs were not signed because issues were raised as to the choice of law and the forum for dispute resolution. Counsel continued that, the Separability principle was developed to counter the possibility that, where a party sought to raise any vitiating factors of a contract to impugn the validity of the Contractual document that contains the arbitral clause, the Court then separates the arbitration clause from the Container contract. He referred to section 3 of Act 798 and submitted that, the Defendants have to show that a valid arbitration agreement exists so that it can be

separated from the Agreements (Container Contract), the existence of which the Plaintiffs questioned in the substantive suit. Counsel for the Plaintiffs then submitted that, since the Plaintiffs did not sign the Agreements or the Container Contract, all the provisions contained in the Agreements including the purported arbitration clauses were never arrived at between the parties through an agreement.

Consequently, the jurisdiction of any arbitral tribunal is subject to an agreement by the parties and the 'Kompetenz-Kompetenz' and the Separability principles are applicable only after it is established that the parties have an arbitration agreement. He concluded on this Ground that, the issue the Plaintiffs raised is fundamental and therefore the argument that the arbitral tribunal is competent to determine issues of the authenticity of the signatures and appoint experts to determine same will not arise. Thus, in the absence of arbitration agreement, the Court is well placed to determine same. That is why the High Court set out the authenticity of the signatures of the Plaintiffs' Officers on the Agreement as a preliminary issue for determination and the Plaintiffs discharged the burden of proof by exhibiting the Known signatures of the two representatives of the Plaintiffs as contained in the two Access Bank facility letters signed in 2011. Counsel for the Plaintiffs then invited the Court to compare the Known signatures of the Plaintiffs' Officers against the signatures that appear on the Agreements and the trial judge rightly held that the two sets of signatures are not the same. Therefore, the Court of Appeal erred when they failed to recognize that the Plaintiffs never entered into any agreement with the Defendants.

In response to the submissions on Ground B of the appeal, counsel for the Defendants submitted that the Plaintiffs failed to demonstrate that they never intended to resolve their dispute by arbitration. He argued that, in the first place, the Plaintiffs challenge was to the Container Agreements and not the arbitration agreements. Counsel continued that, generally, arbitration agreements are separate from the Agreements which contained them. Accordingly, a challenge as to the existence or validity of the Container Agreement does not necessarily affect the existence or validity of the arbitration agreement. He also

referred us to section 3 (1) of Act 798 and quoted paragraph 29 of the Plaintiffs' Statement of Case and submitted that the sole basis of the Plaintiffs' opposition to the arbitration is that they did not sign the Container Contract, but this flies in the face of the doctrine of Separability as reflected in section 3 of Act 798. Counsel for the Defendants concluded on this point that, it is not enough to say that the Container Agreements (including the arbitration clause) as a whole are non-existence. There must be something more than that to impeach the arbitration agreement. In the absence of that, the Plaintiffs cannot be said to have challenged the existence or validity of the arbitration agreement. He referred us to section 24 of Act 798. Secondly, he submitted, by virtue of section 26 of the Evidence Act 1975, NRCD 323, the Plaintiffs are estopped by their conduct by a letter dated 8th September, 2016 they wrote through their counsel to the Defendants relying on the Shareholders Agreement for the purpose of dispute resolution (see page 123 of the Record of Appeal Volume 1). Counsel for the Defendants cited the case of **REPUBLIC v Bonsu & Others and section 105 (1) of NRCD 323** to buttress his point. Thirdly counsel argued, the Plaintiffs failed to discharge the burden of proof on them that the signatures on the Container Agreements were forged. He referred to section 13 (1) of the Evidence Act 1975 NRCD 323 as well as the cases of **SASU BAMFO v SINTIM [2012] 1 SCGLR 136** and **FENUKU v JOHN TEYE** and submitted that, the allegation of forgery being quasi-criminal, the standard of proof is proof beyond reasonable doubt.

In the instant case, the Plaintiffs only attached other documents claiming that it contained the true signatures of the Plaintiffs' officials. But section 141 of NRCD 323 requires the Court to compare the disputed signature in the Container Agreement with a specimen which has been proved to the satisfaction of the Court to be true. He concluded that, the decision of the High Court Judge was erroneous in that the evidence he reviewed was untested by cross-examination neither were those signatures authenticated. Therefore, the Plaintiffs failed to discharge the burden of proof on them to prove forgery of the signatures on the Container Agreements beyond reasonable doubt and invited us to dismiss Ground B of the Appeal.

In resolving Ground A of the appeal, we made reference to sections 3 and 24 of Act 798 and came to the conclusion that, by these sections, the arbitral tribunal is the appropriate body clothed with jurisdiction to determine the issue as to the existence or otherwise of the Container Agreements. Section 24 (b) uses the words *"the existence or validity of the agreement to which the arbitration agreement relates".* Secondly, by section 13 (1) of the Evidence Act 1975, NRCD 323, the standard of proof of forgery is proof beyond reasonable doubt and the burden of proof lies on the Plaintiffs in this case who are alleging forgery. This requires the calling of witnesses. The Defendants produced the Container Agreements with the signatures of Plaintiffs' Officers and the Plaintiffs also produced a set of signatures of their Officers on Access Bank facility documents. That would be Oath against Oath. So, the question is on what basis did the trial High Court Judge conclude that the signatures on the Container Agreements were forgery? The authentication or identification of any signature is provided for by section 141 of the Evidence Act 1975, NRCD 323. The section provides:

> *"Authentication or identification of any signature, handwriting, seal or finger impression may be by a comparison made by a witness or by the Court with a specimen which has been proved to the satisfaction of the Court to be genuine"* (our emphasis).

In the context of this case, the documents the Plaintiffs' attached to their affidavits in opposition to the application for Stay of Proceedings for the matter to be referred to an arbitral tribunal were not proved to the satisfaction of the court. How do we even ascertain whether those documents were from Access Bank? Consequently, the evidence the trial High Court Judge reviewed was not tested by cross-examination. It is for this reason that we say the allegation of forgery was not proved in terms of proof as provided for in section 13 (1) of the Evidence Act, Act 323 which is proof beyond reasonable doubt.

Ground B of the Appeal fails and it is accordingly dismissed.

Ground C of the Appeal reads:

> *The Court of Appeal erred in law when it concluded that Plaintiffs' Writ of Summons was null and void because it was issued without leave which is contrary to law.*

On this Ground, counsel for the Plaintiffs referred to Order 8 Rule 3 (1) (j) of the High Court (Civil Procedure) Rules, 2004, C. I. 47. He then submitted that, assuming without admitting that the procedure used by the Plaintiffs was wrong, this wrong was not one which should go to the root of the action and is capable of redemption by the grant of leave to regularize the default. Secondly, counsel argues, a Writ of Summons issued against two defendants is essentially two separate Writs fused into one. Therefore, where as in the present case one of the parties is resident outside the jurisdiction and the other is resident in the country, leave to issue notice of the Writ out of the jurisdiction may be sought after the Writ has been issued against both parties. He therefore submitted that the conclusion of the Court of Appeal that the Writ of Summons issued by the Plaintiffs against the Defendants is a nullity must be reversed.

Counsel for Defendants in responding to the arguments advanced in support of Ground C of the Appeal concedes that, the Court of Appeal per Justice Obeng Manu Jnr. erred when it held that the Writ of Summons was void because it was issued without leave of the Court. However, counsel argued that, this did not form the basis of the Court's decision to allow the Defendants' Appeal. Counsel for the Defendants submitted that, since the majority were ad idem on the fact that the arbitral tribunal was the appropriate forum to determine the matter. This alone is not sufficient for the Plaintiffs to succeed in this Appeal since it is well settled principle of law that an appellate court can uphold the right decision given for the wrong reasons, provided the appellate court itself assigns the right reasons for arriving at its decision. He cited the case of **SAM WOOD LTD v LUKE BEYUO DERRY Civil Appeal No. H1/150/2012 delivered on 28th February 2013** and submitted that, the Court of Appeal arrived at the right conclusion to allow the Appeal and referred the matter to the arbitration based on other reasons.

The law is settled that no judgment would be upset or set aside on the ground that its ratio is erroneous if there is another sound basis on which it can be supported. See the case of **OPPONG v VAUGHAN-WILLIAMS (PER lawful attorney) ACQUAYE [2015-2016] 1 SCGLR 781, 784** where **Sophia Adinyira JSC** delivering the Judgment of the Court had this to say:

> ***"We are of the view that, this case can be decided on other grounds as, indeed, in this court, no judgment would be upset or set aside on the ground that its ratio is erroneous, if there is another sound basis on which it can be supported".***

Besides, Order 8 of the High Court (Civil Procedure) Rules, 2004 C. I. 47 deals with Service out of the Jurisdiction. Order 8 Rule 3 (1) provides that:

> *"Service out of the jurisdiction of notice of a Writ may be effected with leave of the Court in the following cases";*
>
> *(j) If the action begun by a Writ is properly brought against a person duly served within the jurisdiction, but a person out of the jurisdiction is a necessary or proper party to it".*

In any case, the Court of Appeal per Barbara Ackah-Yensu JA (as she then was) stayed the Proceedings of the substantive matter pending before the High Court and referred the parties to arbitration pending the conclusion of the arbitration proceedings. This means the Plaintiffs' Writ of Summons was not struck out as being void. This is what the Court of Appeal said:

> *"For all the reasons set forth, the appeal succeeds and it is hereby allowed. The net effect is that the Ruling of the High Court is hereby set aside. I consequently make an Order referring the parties to arbitration of the dispute as per the arbitration clauses in the Agreements. Further proceedings in the substantive*

matter at the trial High Court are hereby stayed pending the conclusion of the arbitration proceedings" (our emphasis).

It is therefore clear that the Court of Appeal did not set aside the Plaintiffs' Writ of Summons as being null and void.

Ground C fails and it is accordingly dismissed.

The last Ground of Appeal is Ground D which states:

The Judgment of the Court of Appeal is against the weight of evidence.

On this ground, counsel for the Plaintiffs rightly pointed out what is required of them when such a ground of appeal is raised and that is the duty cast on the Plaintiffs to persuade this Court that the Judgment appealed against cannot be supported having regard to the evidence on record. In this regard, counsel for the Plaintiffs referred to their Statement of Claim paragraphs 18 and 19. He then submitted that, the Plaintiffs were able to demonstrate from the pleadings that they were disputing both the Agreements as well as the arbitration clause contained in them. Counsel continued that, if the Court of Appeal had adverted its mind to this fact using the Prima Pain Rule as a persuasive authority, it would have come to the conclusion that the instant case did not have to be referred to arbitration. Furthermore, in their application for an Order to Stay Proceedings at the High Court, the Defendants relied on the Agreements purportedly signed by Officers of the Plaintiffs. In opposition to that Application, the Plaintiffs exhibited the Access Bank facility letters signed by their Officers R.D. Mohan and Dilip Jagad in June 2011, long before the instant dispute to show that the signatures and hand writing contained in the Agreements are not that of the Plaintiffs and that they were forged. Counsel for the Plaintiffs concluded on this ground that had the learned Justices of the Court of Appeal carefully examined the hand writings and the signatures contained in the facility letters and the Agreements, they would have observed the clear discrepancies and would not have come to the conclusion they did. He therefore invited us to uphold the appeal and set aside the majority decision of the Court of Appeal.

The reaction of counsel for the Defendants on Ground D of the Appeal is that, the Judgment of the Court of Appeal is not against the weight of evidence in that the Plaintiffs failed to satisfy the requirement for raising this ground of appeal. Counsel continued that the Plaintiffs raised two lapses in their Statement of Case. The first is the allegation that the Court of Appeal holding that the validity of the arbitration agreement was never in dispute cannot be supported by the evidence on record; and secondly the holding by the Court of Appeal that the Plaintiffs did not provide sufficient evidence to establish forgery cannot be supported or record. He then submitted that the first allegation does not meet the test of the omnibus ground of appeal in that the ground invites this Court to consider pieces of evidence on record. But in cases where there were only pleadings on record and no evidence had been adduced, this Court dismissed the omnibus ground of appeal as unmeritorious. Counsel for the Defendants cited the case of **ASAMOAH v MARFO [2011] 2 SCGLR 832** to buttress his point.

On the second issue under the omnibus ground, he submitted that the combined effect of paragraphs 18 and 19 of the Plaintiffs' Statement of Claim restates the Plaintiffs' position that there was no arbitration agreement because they never signed the Container Agreements. Counsel for the Defendants submitted that, an attack on the Container Agreement does not automatically translate into attack on the arbitration. He quoted a portion of the Judgment of the Court of Appeal as articulated by Justice Ackah-Yensu JA regarding the doctrine of "Separability" and concluded that the Plaintiffs failed to point out the lapses in the finding of the Court of Appeal. Additionally, the Court of Appeal considered the signatures on the documents produced by the Plaintiffs and concluded that the production of the documents alone was not sufficient as proof of forgery beyond reasonable doubt. He therefore submitted that the Judgment of the Court of Appeal is not against the weight of evidence.

Our reaction on Ground D of the Appeal is that, in the first place no evidence was led in this matter. See the case of **ASAMOAH v MARFO [2011] 2 SCGLR 832 holding (1) of the Headnotes** where this Court unanimously held that:

> ***"The plaintiff's ground of appeal against the judgment of the Court of Appeal to the effect that the judgment was against the weight of evidence, was completely misplaced because the judgment obtained at the trial High Court did not go beyond the close of pleadings as no statement of defence was even filed; it was a default judgment. It appears that at the time the motion for judgment was filed, the respondent, who was the defendant, had not filed any defence on record or made any admission on oath or otherwise in any manner or form. It thus sounds strange for counsel for the plaintiff to appeal against the judgment on grounds that the judgment was against the weight of evidence, that ground is clearly misconceived and without merit".***

Secondly, we addressed the issue of the signatures on the Container Agreements in our discussion of Ground B of the Appeal and came to the conclusion that, by sections 3 and 24 of the Act 798, the arbitral tribunal is the appropriate body clothed with jurisdiction to determine the issue as to the existence or otherwise of the Container Agreements and do not intend to repeat them. Thirdly, we held that by section 13 (1) of the Evidence Act, NRCD 323, Poof of forgery is proof beyond reasonable doubt and the burden is on the Plaintiffs to prove the allegation of forgery. By section 141 of the Evidence Act, Act 323 merely producing the documents of Access Bank Facility is not enough. The Defendant have produced the Container Agreement. That would be oath against oath and by section 141, it would have to be a comparison made by a witness or a court *with a specimen which has been proved to the satisfaction of the court to be genuine {our emphasis).*

Consequently, the production of the Access Bank facility documents was not proved to the satisfaction of the court as they were not subjected to cross-examination.

From all of the forgoing the Appeal fails in its entirety and it is accordingly dismissed. The Judgment of the Court of Appeal dated 17th June 2021 together with the consequential orders are hereby affirmed.

M. OWUSU (MS.)
(JUSTICE OF THE SUPREME COURT)

A. LOVELACE-JOHNSON (MS.)
(JUSTICE OF THE SUPREME COURT)

PROF. H. J. A. N. MENSA-BONSU (MRS.)
(JUSTICE OF THE SUPREME COURT)

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