IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA- GHANA

A D 2021

CORAM: *DENNIS ADJEI, JA (PRESIDING)*

P. BRIGHT MENSAH, JA

OBENG-MANU JNR, JA

CIVIL APPEAL NO H1/185/2020

DATE: 27TH MAY, 2021

ENABLIS ENTREPRENEURIAL NETWORK GHANA ……

PLAINTIFF/RESPONDENT

VS

TULLOW GHANA LIMITED …… DEFENDANT/APPELLANT

RULING ON APPEAL

OBENG-MANU, JNR, J.A

Introduction

The High Court sitting at Accra on 5th March, 2019, dismissed an application at the instance of the Defendant/Appellant herein to non-suit the Plaintiff/Respondent for want of capacity. Being aggrieved and dissatisfied with the decision of the High Court, the Defendant/Appellant filed an appeal against the ruling on 26th March, 2019.

For purposes of this ruling, the Plaintiff/Respondent shall simply be referred to as the Respondent while the Defendant/Appellant shall also be referred to as the Appellant.

Facts

The Respondent is a private company registered under the laws of Ghana. It is limited by guarantee. The Respondent in paragraph 1 of its statement of claim described itself as company limited by guarantee and incorporated under the laws of Ghana to provide, *inter alia*, entrepreneurs with the necessary skills, training, funding, and networking opportunities and supporting the development and growth of small and medium enterprises in the emerging markets. This is admitted by the Defendant in paragraph 5 of its statement of defence and counterclaim.

The Appellant is a private limited company registered in Jersey under company number 91503 and whose main office in Ghana is at No 71 George Bush Highway (Motorway Extension), North Dzorwulu, Accra. It is also registered under the laws of Ghana, and engaged in the exploration and production of oil and gas. It is limited by shares.

Following the discovery of oil in commercial quantities in 2007 in the Jubilee Field, the Government of Ghana decided to establish an Enterprise Development Centre ("EDC") in Takoradi to provide support to SMEs to enable them position themselves to take advantage of business opportunities in the oil and gas sector. The Appellant, Kosmos Energy Ghana HC, Anardarko WCTP Petroleum Company and Sabre Oil and Gas Limited (the "Jubilee Partners") agreed to support the government in this venture. On

1st November, 2012, the Government of Ghana and the Jubilee Partners, signed a Memorandum of Understanding (MoU) which set out the roles and responsibilities of the parties for the establishment and management of the EDC. The parties to the MoU established a joint Project Steering Committee ("PSC") which was responsible for providing strategic direction and governance to the EDC project. The Appellant and its Jubilee Partners agreed to fund a third-party agency (the "Contractor") to establish and manage the EDC for an initial period of five (5) years. The Appellant on behalf of the Jubilee Partners committed Five Million United States Dollars (US$ 5,000,000) for a five-year period towards the provision of Enterprise Development Centre (the "EDC") services in Takoradi.

In furtherance of its commitments under the MoU with the Government of Ghana, the Appellant engaged the services of the Respondent to provide EDC services in Takoradi by contract dated 24th December, 2012. The contract was for a term of two (2) years. This was after a competitive bidding process. Under the CONTRACT, the Appellant;

"*… shall have the right to extend the CONTRACT period by one or two or three optional period(s) of 12 months each. Any such option(s) may be exercised individually or collectively. The right to extend and duration of any and each optional period shall be subject to a written notice given by Appellant to Respondent not less than thirty (30) days before the end of the then current CONTRACT period*".

The CONTRACT was subsequently amended into a 2nd contract which formed part of the 1st contract. The Appellant agreed to fund the first contract up to a maximum amount of One Million Nine Hundred and Thirty-Five Thousand United States Dollars (US$ 1, 935, 000) (the "Grant"); an amount of Eight Hundred and Fifty-Five Thousand United States Dollars (US$ 855, 000) for each other year for extension, as full consideration for the performance of the work by the Respondent.

Pursuant to the terms of the 1st contract, the Respondent provided both a Parent Company Guarantee (PCG) dated 18th February, 2013 and an Advanced Payment Guarantee (APG) dated 13th February, 2013 from UT Bank Limited. After the expiration of the 1st contract and the 1st APG, the Appellant extended the 1st contract for a further four (4) months period commencing from 7th January, 2015 to 30th April, 2015 to constitute the 3rd contract. The 1st APG did not exceed the sum of Five Hundred Thousand United States Dollars (US$ 500, 000.00).

The 3rd Contract increased the grant amount of Eight Hundred and Fifty-Five Thousand United States Dollars (US$ 855, 000.00) allocated for each other year of extension by Two Hundred and Ninety- Eight Thousand Four Hundred and Thirty-Seven United States Dollars (US$ 298, 437.00) to cover the duration of the extension. A new APG (2nd APG) was executed by the Respondent in tandem with the 3rd contract for a 4-month period effective 29th January, 2015 valid until 30th April, 2015; which guarantee did not exceed the sum of One Million and Eighty Thousand United States Dollars (US$ 1, 080, 000.00) subject to the terms and conditions of the 2nd APG.

During the subsistence of the 1st contract, the Appellant conducted an audit into an alleged breach of transfer of funds from the EDC account into the Respondent's account and issued an audit report dated 22nd December, 2014 to that effect. The Appellant found in its audit report, *inter alia*, that the Respondent had transferred a total of One Million One Hundred and Twenty-Nine Thousand Two Hundred Ghana Cedis (GHc 1,129, 200.00) from the EDC account in breach of the 1st contract and requested the Responded refund same with interest to the EDC account.

The Respondent in a letter to the Appellant dated 23rd March, 2015, rejected the said audit report and requested an independent audit of the EDC. In response to the Respondent's request to an independent audit of the EDC, the Appellant unilaterally appointed Deloitte Ghana to conduct an independent audit of the EDC and

subsequently issued an Audit Report dated 9th March, 2015 to that effect. It must be noted that this audit report by Deloitte Ghana, predated the Plaintiff's request for independent audit and also appeared to be the same as the earlier audit report which was rejected by the Respondent.

The Audit Report prepared by Deloitte Ghana found unauthorized transferred funds of One Million Ninety-Eight Thousand and Eighteen Ghana Cedis (GHc 1,098,018.00). The Respondent averred that the disputed amount of GHc 1, 098, 018.00 was expensed in accordance with the terms of the 1st contract, duly allocated and paid out of the EDC account in respect of personnel and management costs for performance of work; which amount was held in Respondent's account on behalf of its personnel and management.

The Appellant proceeded to call the amount Ghc 1, 098, 018. 00 on the 1st APG which according to the Respondent had long expired. The Respondent further averred that during the subsistence of the 1st, 2nd and 3rd contracts, the Appellant never raised a query on the performance of the Respondent's work to trigger a call on either 1st APG or 2nd APG. The Respondent says that the call on the expired 1st APG has plunged the Respondent's account into an overdraft situation which continues to accrue interest. It is the Respondent's case that the Appellant's call on the 2nd APG is wrongful and therefore same ought to be recalled immediately.

The Respondent despite several meetings and repeated oral and written demands on the Appellant to refund the funds called on the 2nd APG and the outstanding personnel and management costs has failed, refused and or neglected to pay same.

On 10th April, 2017, the Respondent instituted a legal action against the Appellant claiming from the Appellant as follows:

a) An order for the refund of the wrongfully called amount of GHc 1, 098, 018.00 together with interests accrued thereon up to the date of final payment.

b) An order for the payment for the outstanding personnel and management costs for Work done totaling Three Hundred and Eighty-Four Thousand Two Hundred and Thirty-Seven Dollars and Ninety-Three Cents (US$ 384,237.93) together with interest at the prevailing Commercial Bank rate until the day of final payment.
c) General Damages for breach of the Contract
d) Costs;
e) Any other order/orders as this honourable court may deem fit.

Upon being served, the Appellant entered conditional appearance through its Solicitors on 13th April, 2017. On 5th May, 2017, the Appellant filed an application for an order to stay proceedings and refer parties to mediation. After hearing the application, the learned High Court Judge held that an order to appoint a mediator had been made out. On 28th June, 2017, the learned High Court Judge appointed Mr. Austin Gameh of Gameh and Gameh as mediator to resolve their disputes. Somehow, the Appellant declined to participate in the mediation, citing lack of authority on the part of its officers in Ghana to participate in the mediation, for which reasons the mediation was cancelled by the mediator. Thereafter, the Appellant filed its statement of defence and counterclaim on 31st October, 2017, pursuant to an order of the court dated 17th October, 2017.

In its statement of defence and counterclaim which was subsequently amended pursuant to court order 14th May, 2018, the Defendant per paragraphs 2 and 3 stated as follows

"2 The Defendant avers that the Plaintiff lacks capacity to initiate this action"

"3 In general answer to Plaintiff's allegation, the Defendant avers that the Plaintiff has no cause of action against the Defendant"

The Respondent filed a reply and defence to counterclaim. The following issues were filed for and on behalf of the Defendant on 12th March, 2018:

1. Whether the Plaintiff has capacity to sue the Defendant
2. Whether the Plaintiff has a cause of action against the Defendant
3. Whether the Plaintiff breached its contract with the Defendant by transferring the amount of Ghc 1, 098, 018.00 from the EDC account into the Plaintiff's bank account.
4. Whether the Defendant validly called the Advance Payment Guarantee.
5. Whether the defendant is obliged to pay the Plaintiff the amount Three Hundred and Eighty-Four Thousand Two Hundred and Thirty-Seven Dollars and Ninety-Three Cents (US$ 384,237.93) as the outstanding debt under the contract.
6. Whether the Plaintiff committed fraud on the Defendant when it charged the EDC account GHc 497, 132, 50.00 for staff accommodation plus agency fee of GHc 3,913,75.00 to the EDC when no accommodation was actually provided for the staff.

The court set down the 1st issue i.e., "Whether the Plaintiff has capacity to sue the Defendant" as a preliminary issue and invited the Parties to address it on the preliminary issue of the Plaintiff's capacity.

Both Parties filed their legal arguments on this issue. The Respondent attached to its legal arguments Exhibit EENG 1 which is the Certificate of Incorporation of the Respondent dated 17th April, 2009.

Ruling of the High Court

On 5th March, 2019, the learned High Court Judge dismissed the application of the Appellant which contends that the Respondent lacks capacity to institute this action. The tail end of the ruling is as follows;

> *"therefore, it is the Plaintiff Company itself which can institute suit in respect of wrongs done to it. The Court in* ***Pinamang vs Abrokwa (1991) 2 GLR 384 @ 388*** *admonished trial courts to observe the rule in* ***Foss vs Harbottle*** *and not to inquire into matters of internal management.*
>
> *As a result, in the instant suit, the Plaintiff Company has all the powers of a natural person of full capacity to institute the instant suit. It is not for the court to inquire into its internal management to determine whether or not it did so by board resolution or otherwise. Since the company was suing on his own behalf and not in representative capacity, it did not need to endorse its writ as such.*
>
> *Since Plaintiff as a Company has capacity to sue and on the presumption that it has acted with regularity, the instant application to non-suit them for want or capacity fails and is dismissed"*

Grounds of Appeal

On 26th March, 2019, the Appellant filed a notice of appeal against the ruling of the High Court. The grounds of appeal and the relief sought from the appellate court were as follows:

a) The ruling of the High Court learned Judge dated 5th March, 2019, is against the weight of evidence on record.

b) The learned High Court Judge erred in law when she dismissed the arguments of the Appellant on the presumption that the Respondent acted with regularity.

c) The learned High Court Judge erred in law when she failed to consider that the Respondent had failed to lead evidence which established its capacity to sue.

d) The learned High Court Judge erred in law when she failed to consider that the Respondent bore the burden of proof to establish that it had the capacity to sue the Applicant.

e) The learned High Court Judge misdirected herself when she considered the issue of the Respondent's capacity to sue as a matter for the internal management of a private company.

f) The learned High Court Judge misdirected herself when she limited the requirement of companies to prove their capacity to sue to instances of representative actions.

The relief sought by the Appellant from this court is an order reversing the decision of the High Court and dismissing the Respondent's action for lack of capacity.

Analysis of the grounds of appeal

Ground (a) The ruling of the High Court learned Judge dated 5th March, 2019, is against the weight of evidence on record.

It must be noted that the Appellant did not canvas any legal arguments in support of ground (a) which is the omnibus ground of appeal. This is not strange because there was no trial in the court below. Consequently, no evidence was tendered in the court below which could have any weight to be measured against the judgment/ruling of the court. There were no disputed factual matters which called for findings by the learned trial judge as regards the subject matter on appeal. It is clear from the pleadings of both parties, that even the issue of the status of the Appellant as a private limited company is not disputed.

Paragraph 1 of the Respondent (Plaintiff's) statement of claim which states that the plaintiff is a private company limited by guarantee incorporated under the laws of Ghana is admitted by the Appellant (Defendant) in paragraph 5 of its statement of defence and counterclaim (see pages 94, 181 and the amended statement of defence and counterclaim filed on 12th July, 2018 pursuant to court order dated 14th May, 2018, at page 267 of the ROA), the Appellant admits paragraph 1 of Respondent (Plaintiff's) statement of claim. Indeed, the Appellant entered into a contract dated 21st March, 2013 (please see pages 18-21 and 22 -23 of ROA). Clauses 1 and 2 of the contract describes the Appellant as a company registered in Jersey under Company No 91503 and whose main office is at No. 71 George Bush Highway (Motorway Extension) North Dzorwulu, Accra. Clause 2 describes the Respondent as a company registered in Ghana under company No G-27804 and whose main or registered office is at F-17/6 Orphan Crescent, North Labone Estates, P. O. Box CT 5653, Cantonments, Accra.

It was after the learned judge in the court below invited both parties to file their written submissions on the preliminary issue as to the lack of capacity (Plaintiff) to institute legal action against the Appellant (Defendant) that the Respondent (Plaintiff) attached to its written submission the Certificate of Incorporation of the Respondent Company (see page 337 of the ROA). It must be noted that this document was not formerly tendered in evidence. It was merely attached to the Respondent's written submission in a bid to prove the Respondents existence which had already been admitted by the Appellant in its pleadings. Consequently, this certificate of incorporation of Respondent in the ROA is not evidence tendered at trial. There having been no trial, it is clear that no evidence was led in the court below. Every trial court is enjoined to evaluate the evidence of the record and make finding of facts in appropriate cases.

The Supreme Court after rehashing 3 notable cases of the Court in the case **of Zikpuitor Akpatsu Fenu & Others vs The Attorney-General & Others; (Civil Appeal No.**

J4/40/2018) (Unreported Judgments dated 17th October, 2018) had this caution to give Per Anin Yeboah (JSC) as he then was

> *"The omnibus ground is usually common in cases in which the evidence was led and the trial court was enjoined to evaluate the evidence on record and make findings of facts in appropriate cases. In cases in which no evidence was led but the order which has been appealed against is interlocutory, such ground of appeal are not canvassed at all. This has been settled long ago by this court in three notable cases;*
>
> *Asamoah vs Marfo [2011] 2 SCGLR 832, Republic v Conduah; Ex Parte Aaba (substituted by Asmah) [2013-2014] SCGLR 1032 and Re: Suhyen Stool; Wiredu & Obenewaa v Agyei & ORS [2005-2006] SCGLR."*

In this connection, it is clear that the Appellant cannot canvas the omnibus ground of appeal at all as the appeal is interlocutory. Furthermore, no evidence was led in the court below. For these reasons, and for the further reason that no arguments were urged by the Appellant in support of this ground, we dismiss ground (a) of the grounds of appeal.

Grounds (b), (c), (d), (e), and (f)

> b)The learned High Court Judge **erred in law** when she dismissed the arguments of the Appellant on the presumption that the Respondent acted with regularity.
>
> c) The learned High Court Judge **erred in law** when she failed to consider that the Respondent had failed to lead evidence which established its capacity to sue.
>
> d) The learned High Court Judge **erred in law** when she failed to consider that the Respondent bore the burden of proof to establish that it had the capacity to sue the Applicant.

e) The learned High Court Judge **misdirected herself** when she considered the issue of the Respondent's capacity to sue as a matter for the internal management of a private company.

f) The learned High Court Judge **misdirected herself** when she limited the requirement of companies to prove their capacity to sue to instances of representative actions. (Emphasis added)

Arguing the grounds of appeal for and on behalf of the Appellant, learned counsel for the Appellant did not take the grounds of appeal one after the other as it is normally done. Rather he chose to lump grounds (a)-(f) together and invited this court to, while exercising his appellate jurisdiction, review the entire Record of Appeal and the available records in its determination of whether the Respondent has the capacity to institute the instant action (please see page 12 of the Appellant's written submission filed on 13th May, 2020).

In its written submission filed for and on behalf of the Plaintiff/Respondent herein, learned counsel for the Respondent registered his objection to the Appellant's "unorthodox approach in addressing the grounds of appeal at page 12 of the Appellant's written submission". Learned counsel for the Respondent further submitted that, that submission offends the procedure that has been coherently set out in Rule 20(1) of the Court of Appeal (Amendment) Rules, C.I. 25 which provides as follows:

> "1. *An Appellant shall within 21 days of being notified in Form 6 set out in part 1 of the schedule that the record is ready, or in which such times as the Court may upon terms direct file with the Registrar* ***a written submission of his case based on the grounds of appeal set out in the notice of appeal and such other grounds of appeal as he may file***". (Emphasis added)

> Learned Counsel for the Respondent complained that an Appellant is required by the rules of Court to base its case and arguments solely on the grounds of appeal or additional grounds of appeal. According to learned counsel for the Respondent, this procedure was not followed by counsel for the Appellant. Rather, the Appellant has completely abandoned all the grounds of appeal and set up entirely new grounds of appeal under the guise of reasons for legal arguments. Learned counsel for the Respondent invited this court as a corrective court, to "take control" of the proceedings and direct lawyer for Appellant in the correct approach to writing a "Written Submission".

In response, learned counsel for the Appellant filed a reply in which he submitted that the Appellant's strategy in arguing the grounds of appeal in this manner accords with best practices in Ghanaian jurisprudence, where this honourable court and the Supreme Court aim to ensure that the real questions in dispute between the parties are effectively determined on appeal. He further submitted that contrary to the allegations of the Respondent, The Appellant did not abandon its grounds of appeal when it simply addressed this honourable Court on the core issue underlying the appeal. Learned Counsel for the Appellant submitted that it is not alien for the sake of judicial economy for the courts to summarise the grounds of appeal into a key issue for determination. He cited the Supreme Court cases of **Kwame Boadi Acheampong and Wisdom Ntim Awuku vs Ghana Highways Authority (Civil Appeal No J4/27/2015)** delivered on 11th December, 2019 and **Thomas Tata Atanley Kofigah and Bilola Rose Atanley Kofigah vs Kofigah Francis Atanley and Rev. Father Atsu (J4/05/2019)** delivered on 22nd January 2020 to buttress his point.

According to learned counsel for the Appellant, the Supreme Court adopted the approach of crystallising the several grounds of appeal into a single issue that would dispose of the entire appeal.

Be that as it may, an appellate court will crystallise several grounds of appeal into a single issue if it is found out that all the grounds of appeal are saying the same thing in different words.

It will be noted that certain keywords contained in the grounds of appeal as reproduced above have been highlighted.

i. In ground (b), the key words highlighted are "***erred in law***"
ii. In ground (c), the key words highlighted are "***erred in law***"
iii. In ground (d), the key words highlighted are "***erred in law***"
iv. In ground (e), the key words highlighted are "***misdirected herself***'
v. In ground (f), the key words highlighted are "***misdirected herself***'

The law is that where the grounds of appeal allege misdirection or error in law, particulars of the misdirection or error in law shall be clearly stated. Rule 8(4) of the Court of Appeal Rules 1997 C.I. 19 states as follows:

> "8(4) Where the grounds of an appeal allege misdirection or error in law, particulars of misdirection or error shall be clearly stated".

This court has pronounced on this provision of our rules in the cases of

i. **Alawiye v. Agyekum [1984-86] 1 GLR179, CA. Holding 1, and especially at page 184 of the Report**
ii. **Zabarma v. Segbedzi [1991] 2 GLR 221 CA. Holding 1, and especially at pages 225-226 of the Report**

The Supreme Court has also so held in the case of **Dahabieh V. S. A. Tarqui & Brothers [2001-2002] 1 GLR 171, SC. Holding 1, especially at pages 175-176**

The Appellant not having particularised the error and misdirection, its grounds of appeal sin against the mandatory provisions of Rule 8(4) of Court of Appeal Rules 1997 C.I. 19, rendering the said grounds void in law.

We therefore dismiss grounds (b), (c), (d), (e), and (f) of the Appellant's grounds of appeal as void in law.

We are in entire agreement with the learned judge below that the Respondent had capacity to institute the action against the Appellant. The Respondent as Plaintiff did not sue in a representative capacity. The Respondent sued as Plaintiff *qua* Plaintiff. In the case of **Morkor vs Kumah (East Coast Fisheries Case) [1998-99] SC GLR 620** at page 632, Her Ladyship Sophia Akuffo JSC held that

> *"Save as otherwise restricted by its regulations, a company, after its registration, has all the powers of a natural person of full capacity to pursue its authorized business. In this capacity, a company is a Corporate being which within the bounds of the Companies Code 1963(Act 179) and the Regulations of the company may do anything that a natural person can do. In its own name, it can sue and be sued and it can owe and be owed legal liabilities. A company is thus, a legal entity with a capacity separate, independent and distinct from the persons constituting it or employed by it"*

Directors are agents through whom a company acts (please see the case of **Great Eastern Rlwy. Co. vs Turner (1872) LR 8CH 149@ page 152.**

It is largely because they are agents that they were originally regarded as owing fiduciary duties and certain duties of care to a company. In the case of **Mills vs Mills (1938) 60 CLR 150 @page 186,** it was held Per Dixon J. that

"Directors of a company are fiduciary agents and the power conferred on them cannot be exercised in order to obtain some private advantage or for any purpose foreign to the power". This action was instituted during the regime of the now repealed Companies Act 1963(Act 179). Under the provisions of Section 137(1), (3), (4), and (5b) viz

"137. (1) A company shall act through its members in general meeting or its board of directors or through officers or agents, appointed by, or under the authority derived from, the members in general meeting or the board of directors.

(3) Except as otherwise provided in the company's Regulations, the business of the company shall be managed by the board of directors who may exercise all such powers of the company as are not by this Code or Regulations required to be exercised by the members in general meeting.

(4) Unless the Regulations shall otherwise provide, the board of directors when acting within the powers of conferred upon them by this Code or the Regulations shall not be bound to obey the directions or instructions of the members in the general meeting."

(5) Notwithstanding the provisions of subsection (3) of this section, the members in general meeting may

(b) institute legal proceedings in the name and on behalf of the company if the board of directors refuse or neglect to do so;"

Ghana Company Law as can be seen from provisions of section 137 (1), (3), (4), and (5)(b) is clear on the power of directors to institute a legal action in the name of the company without a Board Resolution. The combined effect of the provisions of section 137 (1), (3), (4), and (5)(b) is that there is no legal requirement that where a company sues in its own name, its capacity must be endorsed on the writ or the accompanying statement of claim as is being contended by counsel for Appellant. Ghana Company

Law is similar to English Company Law on this point. In the case of **Shaw & Sons (Salford) Ltd. Vs Shaw [1935] 2 K. B. 113, Greer L.J**., reached the conclusion that the articles of the company conferred the power to bring actions in the name of the company on the permanent directors; Hear him:

> *"I am therefore of opinion that the learned judge was right in refusing to dismiss the action on the plea that it was commenced without the authority of the plaintiff company…* ***A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in directors, they and they alone can exercise these powers.*** *The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors usurp the powers vested by the articles in the general body of shareholders".*

In this case the directors have not refused to act, neither are they acting in a manner detrimental to the interest of the company for which reason the shareholders could act by commencing legal proceedings against the entity which is acting in collusion with the directors. In such a case, the directors must be joined as Defendants. Prior to commencement of such an action, there is the need for a shareholder's resolution to empower the members in a general meeting to commence an action. In the instant case, the directors require no Board Resolution to commence legal proceedings on behalf of the Respondent Company and in its own name to enforce its own contractual rights under the contract.

We also agree with the learned High Court Judge when she stated the correct position of the law on the proper party to sue for wrongs done to a company. At page 341 of the ROA, she stated in her ruling as follows:

> *"In **PS Investment vs CEREDEC [2012] 1 SC GLR 611** at p. 633, the Court restated the rule in Foss vs Harbottle (1843) 2 Hare 461 by saying:*
>
> *Consequently, the common law principle known as Foss vs Harbottle rule continued in operation in Ghana by virtue of the section 7 of the Companies Act, 1963 (Act 179), has come to be applied on two grounds:*
>
> ***i. Flowing from the separate personality principle in Salomon v. Salomon (1897) AC 22… if a wrong is done to a company, it is only the company and not its members who can bring an action to remedy the alleged wrong. This has also been called the proper plaintiff rule: and (Emphasis added)***
>
> *ii. If the wrong complained of is one that majority can easily remedy by merely passing an ordinary resolution, the court would not interfere to force then to do something against their wishes. This has also been called the majority rule.*

*…**Therefore, it is the Plaintiff Company itself which can institute suit in respect of wrongs done to it**. The Court in Pinamang vs. Abrokwa [1991]2 GLR 384 @388 admonished trial courts to observe the rule in Foss vs Harbottle and not to inquire into matters of internal management.*

As a result, in the instant suit, the Plaintiff Company has all the powers of a natural person of full capacity to institute the instant suit. It is not for the court to inquire into its internal management to determine whether or not it did so by board

resolution or otherwise. Since the company was suing on its own behalf and not in a representative capacity, it did not need endorse its writ as such." (Emphasis added)

On the whole we find no merit in the appeal which we wholly dismiss. We award costs of GH10,000.00 Against the Appellant and in favour of the Respondent.

(SGD.)

OBENG-MANU JNR

JUSTICE OF THE COURT OF APPEAL

(SGD.)

P. BRIGHT MENSAH

JUSTICE OF THE COURT OF APPEAL

ADJEI, J.A:

I write to concur the ruling in appeal written by my brother Obeng Manu JA in which he dismissed the appeal against the ruling delivered by the High Court on 5th March, 2019. I agree with the conclusion reached by him but would like to express an opinion on some of the legal matters raised in the appeal. The Defendant before the trial High

Court who is the Appellant herein filed an application to the High Court to dismiss the Plaintiff's suit on the basis of absence of capacity to institute the action. It is the refusal by the trial High Court Judge to dismiss the Plaintiff's suit for want of capacity which has culminated in this appeal.

The law is that a person whose capacity is raised has the burden to prove same by cogent evidence else that party's action shall be dismissed for want of capacity. Capacity is fundamental and goes to the root of every action and where a defendant raises an objection against the capacity of a plaintiff, that cannot be heard on the merits of the plaintiff's case even where the plaintiff seemingly has a cast- iron case. In the case of Sarkodee I v Boateng II [1982- 83] GLR 715, the Supreme Court held that the trite position is that a plaintiff or petitioner whose capacity to initiate an action is challenged must prove it by cogent evidence else the merits of that plaintiff or petitioner's case cannot be heard.

In the case in point, the Defendant in paragraph 2 of its statement of defence averred that the Plaintiff lacks capacity to Institute the action without a clue to the type of absence of capacity being complained of. The Plaintiff in its paragraph 3 of Reply and Defence to Counterclaim also averred that it has capacity to bring the action and purported to shift the burden of proof to the Defendant. The Defendant in its paragraph 2 of the Statement of Defence pleaded as follows:

> ***"The Plaintiff denies paragraph 2 and 3 of the Statement of Defence and puts the Defendant to strict proof of the averments contained therein in limine."***

At the application for Directions, the Plaintiff raised the question of capacity of the Plaintiff to maintain an action against the Defendant and at that stage explained that the Plaintiff instituted the action without an authorisation in the form of a resolution from the directors. The Plaintiff rebutted the Defendant's position and asserted that directors

as fiduciaries do not require a resolution to protect the best interest of the company which is a legal personam and can sue and be sued in its own name.

The law is that a person who sues a party must exist as a legal entity and have capacity at the time of the institution of the action else the action shall be declared a nullity for want of capacity. The above position was restated by the Supreme Court in the case of Noas Holdings v Ghana Commercial Bank [2005-2006] SCGLR 407. The Supreme Court at pages 412-413 of the record discussed the legal effect of absence of capacity on the part of a company to initiate an action held thus:

> ***"Once its legal capacity was challenged and its corporate capacity was placed in issue, it was incumbent upon the appellant to produce more cogent evidence of its existence (such as its registered office address or a copy of its certificate of incorporation) to satisfy the trial court that it has the requisite legal capacity to sue. Since it failed to do so, the trial court was justified in arriving at the conclusion that the Appellants does not exist."***

From the above ratio, where a corporate body or a person does not exist at the time of commencement of an action, the action shall be declared a nullity for want of capacity. The second aspect of capacity is where the plaintiff exits and maintains an action in a matter that plaintiff has no cause of action against the defendant.

The Defendant's contention before this Court is that the transaction which culminated in this appeal was between the Defendant and the UT Bank and the Plaintiff therefore lacks capacity to Institute the action in its own right. Furthermore, the Plaintiff did not bring the action against the Defendant as the attorney of UT Bank. I must state that the legal position taken by the Defendant before the trial High Court and upon which the trial Judge delivered her ruling is completely different from the ground of appeal raised

by the Defendant before this Court and its legal effect will be addressed in the course of this decision.

In the case of ***Kimon Compania Naviera SARP v Volta Lines Ltd 1973]1 GLR 140,*** it was held that a person who sues as an attorney on behalf of a principal shall sue in the name of the principal and not in that person's own name.

As stated above, the legal issue under consideration was not one of the legal issues raised before the trial High Court for resolution. Furthermore, whether the transaction was between UT Bank and the Defendant is a matter that can only be resolved by evidence. A legal issue may be raised on appeal for the first time where it is a matter which goes to the root of the appeal and can be resolved without further evidence. The appeal before this Court is an interlocutory and this Court cannot discuss matters which are still pending before the trial High Court for resolution and may require evidence for effective resolution. It will be unfair to permit the Defendant to raise a fresh point on appeal which is not a legal point that can be resolved without evidence. I therefore proceed to discuss the submissions made by the parties before the trial High Court and upon which the notice of appeal was filed by the Defendant.

The Defendant raised two legal grounds before the trial High Court to dismiss the Plaintiff's action. The first ground was that the Plaintiff failed to demonstrate that it had the capacity to initiate the action as a corporate body. The Plaintiff instituted the action as a company limited by guarantee. The Plaintiff in paragraph 1 of its statement of claim vividly described itself as a company limited by guarantee and incorporated under the laws of Ghana to provide, inter alia, entrepreneurs with the necessary skills, training , funding and networking opportunities to support emerging small and medium scale markets.

A company may bring an action in its own name and being an artificial entity it can act through its directors who are fiduciaries to the company jointly and severally. The

directors of a company are required to act in the best interest of the company. This position was ably discussed by ***Lord Cranworth in the case of Aberdeen v Blaikie [1843] All ER 249 at page 252***. He stated thus:

> ***"The Directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interest of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal."***

The contention by the Defendant that a company cannot sue in its own name without the directors passing a resolution to that effect is not the true position of the law and has been over generalised. There is the need to draw a distinction between a company suing upon its regulations and an action instituted upon shareholders' resolution. Under the English law, it was the articles of the company which clothed a company with capacity to institute an action. Under the repealed Companies Act, Act 179 under which the Plaintiff instituted the action, it was the company's regulation which clothed it with capacity to sue and not by a resolution by either directors or general meeting.

The Plaintiff urged this Court to make reference to the Gower's Report with reference to the commentary on section 137(3) and (5) (b) as an aid to interpretation on the authority of section 10 (1) (b) of the Interpretation Act, 2009 (Act 792) but I refrained from using it by the fact that the section does not permit judges to use it as an aids of general application to the construction of an enactment unless the Court is concerned with ascertaining the meaning of an enactment. Section 10 (1) (b) of the Interpretation Act, Act 792 provides thus:

> ***"10 (1) Where a Court is concerned with ascertaining the meaning of an enactment, the Court may consider***

(b) a report of a Commission, Committee or any other body appointed by the Government or authorised by Parliament, which has been presented to the Government or laid before Parliament as well as Government White Paper."

The Court is not concerned with ascertaining the meaning of any particular enactment and therefore cannot apply section 10 (1) (b) of the Interpretation Act, Act 792. Section 10 (1) of Act 792 can only be used by the Court as an aid to the construction of an enactment where it is concerned with ascertaining the meaning of an enactment and not for all other purposes. Furthermore, section 10 (2) of the Interpretation Act, Act 792 shall only be invoked as an aid to the construction of an enactment where the Court considers the language of an enactment is ambiguous or obscure.

The company's capacity to sue under its articles of association (regulations or constitution) was discussed in the case of *Shaw & Sons (Salford) Ltd v Shaw [1935] 2 KB 113.* The Court of Appeal speaking through Greer LJ in a decision unanimously agreed by Roche LJ and Slesser LJ at page 134 held thus:

"I am therefore of the opinion that the learned judge was right in refusing to dismiss the action on the plea that it was commenced without the authority of the Plaintiff company. I think the judge was also right in refusing to give effect to the resolution of the meeting of the shareholders requiring the chairman to instruct the company's solicitors not to proceed further with the action. A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for shareholders in general meeting. If the powers of management are vested in the directors, they and they alone can exercise these powers.

The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their

articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders.

The law on this subject is, I think, accurately stated in Buckley on Companies as the effect of the decisions there mentioned: see 11 Ed., p.723. For these reasons I am of the opinion that the court ought not to dismiss the action on the ground that it was instituted and carried on without the authority of the plaintiff company."

The legal personality of a company introduced in the celebrated case of ***Salomon v Salomon (1897) AC 22*** clothes a company with capacity to sue and be sued and where a company is suing it derives its authority from the enactment creating it and its constitution and not a resolution. Furthermore, where a wrong is done to a company, it is the company which may sue and not its members. The Supreme Court case of **PS Investment v CEREDEC [2012] 1 SCGLR 611** affirmed the proper Plaintiff rule in corporate law and held that where a wrong is caused to a company, it is the company that may sue to remedy the breach and not its members.

I am satisfied that directors of a company derive their powers from the company's regulations to institute an action on behalf of the company and not through a resolution. Where the shareholders of a company require a resolution to commence an action, that power reverts to members at general meeting. One of the principles enunciated in the case of *Shaw & Sons (Salford) Ltd v Shaw, supra*, is that ordinarily, directors are to drive a company to institute an action but where the directors have clearly evinced an intention not to act or it is established that it cannot sue, the general meeting may sue but it requires resolution to give effect to their action. The Plaintiff's action was not brought by a general meeting and a resolution to that effect is not required.

I am satisfied that the Plaintiff properly instituted the action in accordance with its regulations and company law and practice and I dismiss grounds (b), (c), (d), (e) and (f) of appeal as unmeritorious. The Defendant did not discuss ground (a) of the appeal in its submission and the legal position is that an appellant shall be deemed to have abandoned a ground of appeal where the appellant fails to make a submission on it. The Defendant abandoned the omnibus ground of appeal and on the strength of respectable cases including ***Zikpuitor Akpatsu Fenu & Others v The Attorney- General & Others (Civil Appeal No J4/40/2018***; delivered on 17th October, 2018 SC , (unreported), I strike out ground (a) of the appeal as having been abandoned by the Defendant.

I affirm the ruling of the High Court delivered on 5th March, 2019 and dismiss the appeal as unmeritorious.

(SGD.)

DENNIS ADJEI

JUSTICE OF THE COURT OF APPEAL

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