IN THE SUPERIOR COURT OF JUDICATURE IN THE HIGH COURT OF JUSTICE (COMMERCIAL DIVISION) ACCRA HELD FRIDAY THE 4TH DAY OF NOVEMBER, 2022 BEFORE HER LADYSHIP AKUA SARPOMAA AMOAH J. (MRS.) JUSTICE OF THE HIGH COURT

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SUIT NO. CM/TBDC/0033/2016

1. SUNCITY PHARMACY
2. AG STARS WEST AFRICA LTD
3. GEORGE ASANTE .... PLAINTIFFS

VS.

1. KADENNIS COMPANY LTD
2. DENNIS BIENNI
3. MICHAEL AKAFIA .... DEFENDANTS

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PARTIES: PLAINTIFFS REPRESENTED BY GEORGE ASANTE – PRESENT

DEFENDANTS – ABSENT

COUNSEL: - ERIC OSEI-MENSAH FOR PLAINTIFFS – PRESENT

KWADWO ADDEAH-SAFO FOR DEFENDANTS – ABSENT

J U D G M E N T

INTRODUCTION

The Plaintiffs have sued the Defendants jointly and severally for inter alia the following reliefs:

a) ***A declaration that per the distribution agreement dated 1st January 2014 between the 1st Plaintiff and E&J Starz Inc. the 1st Plaintiff has exclusive rights to import, distribute sell and market the non-alcoholic food beverage branded or known as Starz Energy Drink in West Africa***

b) ***A declaration that the 1st Defendant has breached the 1st Plaintiff's exclusive distribution rights by importing, marketing, promoting, distributing, and selling Starz Energy Drink in Ghana and within the West African sub-region without the consent permission and or authorization of the 1st Plaintiff***

c) ***An order for perpetual injunction restraining the Defendants from importing, distributing, marketing and selling Starz Energy drink in***

Ghana and anywhere in the West African subregion to protect the 2nd Plaintiff's exclusive distributorship rights

d) An order of Interlocutory Injunction restraining the Defendants from further distributing, marketing, promoting, and selling any Starz Energy Drink Already imported into Ghana and anywhere in the West African Sub region

e) General damages for fraud, conversion, loss of business inducing a breach of the 1st Plaintiffs contract with the Producers and a violation of the Plaintiff's exclusive rights of importation and distribution

f) Recovery of the sum of Two Hundred and Thirty-Five Thousand Two Hundred Ghana Cedis (Gh235, 200) being proceeds of sale of the products from the Defendant

g) Two Hundred and Thirty-Five Thousand Two Hundred Ghana Cedis (Gh235,200) being the proceeds of sale of the defendant

h) Interest on the sum of Two Hundred and Thirty-Five Thousand Two Hundred Ghana Cedis (Gh235, 200) being proceeds of sale of the products from the Defendant

i) Recovery of Plaintiff's consequential losses in the sum of Two Hundred and Forty-Five Thousand Eight Hundred and Sixty-One

Ghana Cedis (245, 861.87) as at the date of the issuance of the writ and any other losses thereafter from the Defendants.

PLAINTIFFS'CASE

The joint amended statement of claim filed on the 19th of April, 2018 discloses the case of the Plaintiff which may be summarized as follows;

The 1st Plaintiff is a Ghanaian registered company which has exclusive rights to import, market, distribute and sell a non-alcoholic beverage known as Starz Energy Drink (the Product) in Ghana and the West African sub-region.

The 2nd Plaintiff is a sister company to the 1st Plaintiff which has been authorized by the 1st Plaintiff to import, promote, market, distribute and sell the Product in Ghana and the West African sub-region.

The 3rd Plaintiff is the Managing Director of both the 1st Plaintiff and the 2nd Plaintiff Companies and the person who is said to have discovered Starz Energy Drink (the Product) for and on behalf of the 1st and 2nd Plaintiff and on his own behalf.

The 1st Defendant is also a Company registered under the laws of Ghana. The 2nd Defendant is the Managing Director of the 1st Defendant and at all times acted for and on behalf of the 1st Defendant.

The 3rd Defendant on the other hand is a clearing agent based in Tema and engaged in the business of clearing goods from the Tema Port on behalf of importers and consignees.

In or about March 2013, the 3rd Plaintiff, upon conducting some internet searches, discovered the Product which is manufactured and supplied by E&J INC (E&J) a company incorporated in the United States of America. Driven by the prospects of becoming a distributor of same, he requested samples of the Product and upon receipt of the said samples, had the same tested, approved and subsequently registered by the Food and Drugs authority. The said registration which took place in the year 2013 was valid until August 2016.

In January 2014, the Food and Drugs Authority, approved the advertisement of the product which had been modelled by the spouse of the 3rd Plaintiff.

The 3rd Plaintiff initially intended to deal with the manufacturer personally, however, following the insistence of E&J acting through its President Myfit Citozi that he would rather deal with a company, the 3rd Plaintiff resorted to using the 1st Plaintiff, a company he had previously incorporated with a cousin of his but which had remained dormant until then.

Sometime in December 2013 and even before their contractual relationship was solidified by a formal written agreement, E& J had revised its website

to indicate that the 3rd Plaintiff was its sole distributor in West Africa. This, it subsequently confirmed to the Plaintiff in an email.

Not long thereafter, the 1st Plaintiff was made the "exclusive importer and distributor for the Product within the West African sub-region with exclusive rights to "distribute, sell, promote and market the product in the sub-region" for ten years.

Due to financial challenges however, the 1st Plaintiff entered into an arrangement with the 1st Defendant by which the 1st Defendant would import the product and sell in Ghana as the sub-distributor of the 1st Plaintiff. Plaintiffs say this arrangement was only for convenience and did not in any way amount to the 1st Plaintiff forfeiting its monopoly over the product. In line with this arrangement, the Plaintiff on some occasions instructed E&J to issue receipts in the joint names of the 3rd Plaintiff and the 1st Defendant or sometimes exclusively in the name of the 1st Defendant "for the sake of business convenience." Meanwhile, the 3rd Plaintiff knowing that he would be the ultimate beneficiary "rigorously" advertised and popularized the product in Ghana with the support of the 2nd Defendant.

This relationship run smoothly until things turned sour in or about April 2014, over certain credit arrangements. Following this disagreement, the 1st Defendant under the pretext of seeking to confirm the Plaintiffs' distributorship agreement with E&J, managed to obtain the contact address of E&J, made direct arrangements with E&J and started importing products

into the country without the knowledge, consent and authorization of the 1st Plaintiff and in breach of its exclusive rights to same.

The Plaintiffs' lament that the 1st Defendant in violation of 1st Plaintiff's exclusive right has established a direct business relationship with E&J and now imports the product into Ghana and other countries within the West African sub region and has by its conduct induced the producer to breach its contract with the Plaintiffs.

The 2nd Defendant is also accused of attempting to lure the 3rd Plaintiff into accepting an employment position with the 1st Defendant by presenting the 3rd Plaintiff with an appointment letter. This was however rejected outright by the 3rd Plaintiff. The 3rd Plaintiff however, agreed to let the 1st Defendant clear a consignment from the port despite the strained relationship. This was after he received several assurances from E&J that he will be duly compensated

In or about August 2015, the 1st Plaintiff gave authority to the 2nd Plaintiff, a sister company of the 1st Plaintiff to import, distribute, sell and market the product in Ghana. Pursuant to this authorization the 2nd Plaintiff had imported a 40-footer container load of the Product into the country to be distributed to its customers some of whom had already deposited monies with the Plaintiffs. To facilitate this enterprise, the 3rd Plaintiff had proceeded to obtain loans from certain financial institutions.

However, when the Product arrived at the Tema Port, the 2nd Defendant acting for and on behalf of the 1st Defendant and on his own behalf employed various schemes to prevent the 2nd Plaintiff from clearing the said container from the port. This included the filing of writ and a motion for interlocutory injunction in a bid to restrain the Plaintiffs from taking possession of the container. But not just that, the Defendants further engaged in various forms of threatening behavior including engaging certain persons who besieged the 3rd Plaintiff's residence one night with threats to attack him.

As for the 3rd Defendant, the Plaintiffs' case against him is that it was he who fraudulently transferred the 2nd Plaintiff's container to the 1st and 2nd Defendants without its authorization and consent.

Particulars of fraud pleaded by the Plaintiff included the following.

"....

d) The 3rd Defendant cleared the products from the Tema port and through whatever arrangement transferred same to the 1st and 2nd Defendant's knowing very well that they were not the consignees and that he had no authorization from the Plaintiffs to do so.

e) The 1st and 2nd Defendants surreptitiously took hold of the product from the 1st Defendant at the Tema Port, transported same to their depot in Accra and subsequently distributed, sold and disposed same as if they were the consignees knowing very well that they were not and they did not have the consent or authorization of the Plaintiffs/ Consignees so to do.

Plaintiffs say that the Defendants subsequently admitted having practiced fraud on the Plaintiffs and promised to return the Products or the proceeds of sale worth ***Two Hundred and Thirty-Five Thousand Two Hundred Ghana Cedis (GH¢ 235, 200)*** but have reneged on their promise despite several demands on them.

Plaintiffs say further that the Defendants' conduct has kept the Plaintiffs out of business and in addition to that, caused them to incur consequential losses by way of interest and charges on the loan facilities taken to finance the said enterprise. They say that their indebtedness stood at ***Two Hundred and Forty-Five Thousand Eight Hundred and Sixty-One Ghana Cedis Eighty-Seven Pesewas (GH¢ 245,861.87)*** as at the time of issuing the Writ.

It is for this reason that the Plaintiffs seek the reliefs set out above from this Court.

DEFENDANTS' CASE

The Defendants present a different version of events leading to the present suit. By their amended Statement of Defence filed on the 26th of April, 2018 they deny the generality of Plaintiff's claims. They contend that it was rather the 3rd Plaintiff who having obtained information in the course of his employment as Marketing Manager of the 1st Defendant, forged a Distribution Agreement and managed to contact E&J on the blind side of the 1st and 2nd Defendants. They listed the particulars of forgery and fraud which may be summarized as follows:

a) *Intentionally deleting the name of the 1st Defendant company from the distributorship Agreement with E &J and replacing same with the name of the 1st Plaintiff*
b) *3rd Plaintiff did so with the aim of expropriating the 1st Defendant's exclusive business of distributing the Product in Ghana*
c) *The 3rd Plaintiff carried out this act using the 2nd Plaintiff company which had no distributorship agreement with E&J to import 1st Defendant's product with the aim of selling same to the general public at the expense of 1st Defendant.*

The 3rd Defendant does not deny that he informed the 1st and 2nd Defendants of the arrival of the Product at the Tema Port.
According to 1st and 2nd Defendants, their enquiries revealed that the consignee of the said cargo was the 3rd Plaintiff using the 2nd Plaintiff as a device. When they became aware of the steps being taken by the 3rd Plaintiff to prejudice their business interest, the 1st and 2nd Defendant's jointly instituted an action against 2nd and 3rd Plaintiff. The Court however advised an amicable settlement of the dispute because one of the Directors of the 1st Defendant, Andrews Kofi Gyan was also a Director and shareholder of the 1st Plaintiff Company and a cousin of the 3rd Plaintiff.

1st and 2nd Defendants contend that the Plaintiffs' suit is fundamentally flawed considering the fact that it is founded on a Distributorship Agreement which E&J says it never executed with the 1st and 2nd Plaintiffs for the purpose of distributing the product in Ghana. 1st and 2nd Plaintiffs

therefore had no authority to do so. They add that if E&J had indeed executed the agreement, there would have been a company stamp embossed on the Plaintiff's copy of the Agreement.

They further aver that they are reliably informed by the other shareholder and Director of the 1st Plaintiff, Andrews Kofi Gyan, that the 1st Plaintiff never passed a resolution nor agreed to execute a distributorship Agreement with E&J. It is on the basis of the foregoing that they contend that the Plaintiffs' action is devoid of merit and seek the following reliefs by way of Counterclaim;

a) *An order of perpetual injunction restraining the Plaintiffs from carrying out any act of unfair competition to protect the exclusive distributorship right held by the 1st Defendant company*
b) *An order of perpetual Injunction restraining the Plaintiff's from selling, marketing and distributing any of the imported Starz Energy Drink in Ghana*
c) *General Damages for violation of the business rights and unfair competition*
d) *Costs*

ISSUES SET DOWN FOR TRIAL

Upon the failure of the Parties to settle their dispute at the Pre-Trial Settlement conference several issues were settled for trial. Notable among them being:

1. *Whether or not the 3rd Plaintiff was the first to discover Starz Energy Drink in Ghana*

2. *Whether or not the 1st Plaintiff and 3rd Plaintiff were the first to register Starz Energy Drink with the Food and Drugs Authority in Ghana*
3. *Whether or not the 1st Plaintiff had a ten year exclusive distribution agreement with E & J , the manufacturers of Starz Energy Drink which gave the 1st Plaintiff exclusive rights to import, distribute, promote market etc Starz Energy Drink in Ghana and the West African sub-region.*
4. *Whether or not the 1st and 3rd Plaintiff's introduced and earlier on imported Starz Energy Drink for the 1st and 2nd Defendants to distribute in Ghana as sub-distributors*
5. *Whether or not the 1st and 2nd Defendants circumvented the Plaintiffs and induced a breach of Plaintiffs' exclusive distribution agreement and imported Starz Energy Drink and distributed same in Ghana and other countries in the West African sub-region.*
6. *Whether or not the Defendants jointly cleared and subsequently converted a consignment of Starz Energy Drink imported by Plaintiffs at the Tema Port without the knowledge or consent of Plaintiffs*
7. *Whether or not the Defendants unjustly enriched themselves by selling Plaintiffs' imported consignment of Starz Energy Drink and kept the proceeds.*

I am of the view, after having evaluated the facts of this case and the entire evidence on record, that amidst the prolix pleadings and copious evidence led in the matter, stand only a few cardinal issues, the resolution of which should dispose of this suit. But first, there is the need to resolve one profound issue raised by the Defendants in the written address filed by

Counsel on their behalf. It relates to the capacity of the Plaintiffs to institute the present suit

CAPACITY OF PLAINTIFFS

I note that the 1st Plaintiff's capacity to institute the present suit was not challenged anywhere in the Defendants' pleadings or at any time during the trial to enable the Plaintiffs respond to same.

The legal position however is that the issue of capacity can be raised at any time and even if not expressly raised by the parties, cannot be overlooked by the Court if the same arises from the facts, pleadings and /or evidence. See the case of ***YORKWA v DUAH [1993-4] 1 GBR 225***

As the want of capacity could mark the end of an action regardless of how iron-cast the case of a party is, it is only proper that it be dealt with as a preliminary issue.
The Defendants in their written address contend that the Plaintiffs cannot maintain the present suit due to want of capacity of the 1st Plaintiff. They say that the commencement of the suit in the name of the 1st Plaintiff by the 3rd Plaintiff without the authority of the board or members in general meeting of the said company strips the Plaintiffs' action of any validity.

Now, a good starting point is to note the hackneyed principle of separate corporate personality. ***Section 24*** of ***COMPANIES ACT, 1963 (ACT 179)*** (the

law in force at all times material to the present suit though currently repealed) provided that;

"Except to the extent that a company's Regulations otherwise provide, a company registered after the commencement of this Act .....shall have, for the furtherance of its objects and of a business carried on by it and authorized in its Regulations all the powers of a natural person of full capacity".

This principle is equally captured under ***Section 18*** of the new Ghanaian ***COMPANIES ACT, 2019 (ACT 992)***.

What can be gleaned from the above provisions is that a company upon incorporation becomes a legal person recognized by law as being distinct from the persons who operate it. It can do almost anything a natural person can do. This includes the capacity to create contracts in its own name as well as the capacity to sue and to be sued.

However as rightly pointed out by the Defendants, a company being a dehumanized, artificial entity, can only act through human beings. This position was aptly emphasized by our Supreme Court in the celebrated case of ***MORKOR v KUMA [1998-99] SCGLR 620 as follows;***

" ...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 its 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 everything 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 capacity separate, independent and distinct from the persons constituting it or employed by it. ....since a company is non-human the only means by which it may execute an agreement is for its directors, or some other authorized person to sign on its behalf...."

Now, in the case of ***GOLDEN GATE GHANA SERVICES LTD & 2 ORS v GHANA PORTS & HARBOURS AUTHORITY & 2 ORS SUIT NO MISC 4/09 DATED THE 17TH OF MARCH, 2009***, the Respondents, as in the instant case, challenged the capacity of the 1st Applicant company to institute and maintain the action in the absence of a resolution by the board or by members in general meeting authorizing the 1st Applicant to do so.

After a detailed analysis of the allocation of powers within a company between members in general meeting and the board of directors and the managing director, as well as the provision in ***Order 4 (5) (3) of the High Court (Civil Procedure) Rules, 2004 (CI 47)*** which provides that no person shall be added as Plaintiff to a suit without that person's consent, the Court concluded that the 1st Applicant was not properly before the Court. At the risk of overburdening this judgement. I shall quote the relevant portions of the Court's decision for their full force and effect. The Court said;

"In the peculiar situation of a limited liability company, being an artificial person, such consent can by law only be given either by a resolution of the board or the members in general meeting and ought to be contained in some form of writing.

Counsel for the Respondents urged me to hold that in the absence of such consent by the 1st Applicant as provided by law, it would be wrong for the 1st Applicant to purport to institute and maintain this action. .....

The basic principles codified in Section 137 of Act 179 are clear;

The primary organs of the company are the members in general meeting and the board of directors. An act of either organ constitutes an act of the company for which it is directly and not vicariously liable. The officers or agents of the company through whom the company may act and those acts may bind the company must be appointed by or derive their authority from the members in general meeting or the board of directors.

The Act reserves certain powers to the members in general meeting which cannot be exercised by the board of directors. But except in such cases or unless the regulations otherwise provide, the business of the company is to be managed by the board who can exercise all the company's powers which the code or the regulations do not require to be exercised by the general meeting.

Among these powers of the board is the power to institute legal proceedings in the name and on behalf of the company. This is the effect of reading together subsections 3 and 5(b) of section 137. In any case, the institution of legal proceedings is an act of management for which the board is primarily responsible. It is only when the board of directors refuse or neglect to institute proceedings that the members in general meeting may do so.....It is therefore the duty of the directors to institute or discontinue legal proceedings.....

As was held in the English case of JOHN SHAW & SONS (SALFORD) LTD. VRS. SHAW 1935 2KB 113, PER GREER CJ at p.134. If the members in general meeting cannot direct or instruct the board as to how to exercise their powers to institute or discontinue legal proceedings, a single member qua member cannot obviously do so.

It follows logically therefore, that neither an individual director managing or otherwise, nor any group of directors has any powers conferred on him or them and it would be correct to state that in the absence of an express authorization in the regulation or other appropriate company document, the board cannot delegate such powers.....

The question which naturally arises is whether the 2nd Applicant as Managing Director of the 1st Applicant has the power to add the 1st Applicant in commencing these proceedings in the name of and/or on behalf of the 1st Applicant Company without the authorization of the board or members in general meeting?

From the entirety of the affidavit evidence before me and the legal submissions of Counsel for the 1st and 2nd Applicants, I find that frustrating as the circumstances may have been to the 2nd Applicant and having been left with no other choice than recourse to seeking legal redress, the 2nd Applicant as Managing Director instituted these proceedings jointly in the name of the 1st Applicant and himself without the authorization of the board of directors or the members in general meeting.....

Having found such authorization to be lacking, the Court continued;

'.. I ... find that no degree of construction of the law of presumption of regularity whether contained in Section 142 of the Companies Act 1963 (Act 179) or sections 18 – 21 of the Evidence Act 1975 (Act 323) will validate the inclusion of the 1st Applicant as an Applicant in these proceedings.

In making this finding I am aware of the provisions of section 139 of the Companies Act (Act 179) which provides.

"S. 139. Any act of the members in general meeting, board of directors, or a managing director while carrying on in the usual way the business of the company, shall be treated as the act of the company itself and the company shall be criminally and civilly liable to the same extent as if it were a natural person".

I have also scrutinized the provisions of sections 203, 204 and 205 all of which define the duties of directors. They do not by themselves confer power on every or any director to institute legal proceedings without regard to the wishes or authorization of other members of the company.....

In the light of my finding earlier in this ruling that the 1st Applicant has not been properly joined as an Applicant in initiating these proceedings. I shall strike out its name as 1st Applicant hereof and I so order." [My emphasis]

I associate myself wholly with the erudite reasoning of this Court (differently constituted).

On the evidence it becomes clear that the 3rd Plaintiff included the 1st Plaintiff in the present suit without authorization of the board or members in general meeting. This conclusion is supported by the answers given by the 3rd Plaintiff himself under cross-examination.

On the ***8th of February 2019*** the 3rd Plaintiff was asked;

"Q: Where is the board resolution from the 1st Plaintiff authorizing you to initiate this action?

A: I have said this, and I am repeating myself again that nothing was done in a formal way so there is no board resolution to that effect".

Indeed, one cannot overlook the fact that the 1st Plaintiff is a small company in which the same persons doubled as directors and shareholders. However this state of affairs did not permit non-observance of the well-established rules and regulations of corporate governance. It appears the 3rd Plaintiff's position as director and shareholder of the 1st Plaintiff led him into the mistaken belief that the said Company was his personal property and not an entity separate and distinct from him in his capacity as shareholder and/ or director. This fact is indeed obvious from the tenor Plaintiffs' pleadings.

In ***Paragraph 1*** of their Amended Statement of Claim, Plaintiffs aver that the 1st Plaintiff is the person with exclusive rights to import, promote, market, distribute and sell the Product in Ghana. They however proceed to aver in ***Paragraph 8B*** that it is the 3rd Plaintiff who was made the sole distributor of the Product in West Africa.

Paragraph 10B also continues that the 3rd Plaintiff "*sacrificed his time and energy ..... to promote, popularize, and market the product in Ghana as the ultimate beneficiary with exclusive distributorship*".

This is clearly inconsistent with the averment in the preceding paragraphs that it was solely the 1st Plaintiff that had exclusive monopoly over to distribute, promote and market the Product.

The point worth noting is, if the distributorship agreement was entered into by the 1st Plaintiff solely, then it was solely the 1st Plaintiff that was duly authorized to promote, popularize, and market the product in Ghana. If it

was not, then it had no business instituting the present suit praying for a declaration to that effect.

Unfortunately, the 3rd Plaintiff appears to be vacillating between two contentions which in my view cannot be raised in the alternative or interchangeably in company law. That is, the 3rd Plaintiff having been appointed in his personal capacity as sole distributor of the Product by E&J, pursuant to the said Exclusive Distributorship Agreement, on the one hand and the 1st Plaintiff company having been so appointed under the same Exclusive Distributorship Agreement.

There is a long rich legal history of decisions on the concept of corporate personality under Ghanaian law which emphasize that a limited liability company (such as the 1st Plaintiff in this case) is a being with capacity separate, independent and distinct from those constituting it or employed by it.

In the case of ***REPUBLIC v HIGH COURT ACCRA; EXPARTE APPIAH & OTHERS [1999-2000] GLR 420*** where the Plaintiff seemed to be under a similar misapprehension as 3rd Plaintiff in this case, the Court observed **@ *424*** that;

"..... the orders made seem to involve an incorporated body. By the deceased's presumed 100 percent shareholding, Lims Co. Ltd, the 2nd defendant seems to have been included in the estate of the deceased. The presumption being that since he owned 100% of the shares, he and the

company are one and that the company is owned by the deceased as his personal property. That may factually be so, but the legal position is that an incorporated company has a legal personality of its own different from those who form it. It can sue and be sued There is no dearth of authority on this issue.....<u>Consequently, though the late Kofi Boye Safo could be the owner of the 100 per cent shares in the company he is not the company so as to make the company his personal property.....</u>" [My emphasis]

Also noteworthy, is the court's opinion in the **Golden *Gate Case* (*supra*)** that the fact that the action had been instituted by the Managing Director and majority shareholder of 1st Applicant Company did not cure the impropriety of roping in the 1st Applicant into the suit without the authorization of the board of directors or members in general meeting.

The 3rd Plaintiff's case even gets worse with his admission that he is a self-appointed Managing Director of the 1st Plaintiff.

On the ***7th day of February, 2019***, the 3rd Plaintiff was asked:

Q: Who appointed you to the office of Managing Director?
A: Myself.....

Sections 138(b) and ***193 (a)*** of ***Act 179*** remove all doubt that the so- called appointment was devoid of any validity. The said provisions reserve the power to appoint a person to the office of Managing Director to the Board,

(unless of course the Company's Regulations otherwise provide). Section ***138(b)*** states that the board of directors;

> ***"(b) may from time to time appoint one or more of their body to the office of managing director and may delegate all or any of their powers to that managing director..".***

Section 193 (a) further states that the directors;

a) ***..may from time to time appoint one of their number to the office of managing director.."***

It has not been the contention of the 3rd Plaintiff that there are any special regulations of the 1st Plaintiff Company that sanctioned his self-appointment to the office of Managing Director. He therefore lacked the authority to so act.

At any rate, as noted in the ***GOLDEN GATE case*** (supra), the 3rd Plaintiff, even if regularly appointed as Managing Director, still had no power to institute the present suit on behalf of the 1st Plaintiff company, without a resolution of the board or members in general meeting or regulations of the company vesting him duly authorizing him to do so.

Without putting too fine a gloss on the matter, it appears that the 3rd Plaintiff considered the 1st Plaintiff an extension of his person, an entity with which he could do as he pleased. What the 3rd Plaintiff states under cross-examination on the ***8th of February, 2019*** is illuminating as to what his

motivation for joining the 1st Plaintiff Company to the present suit actually was. This was the exchange between him and Counsel for Defendants;

Q: Did the 1st Plaintiff company authorize you to initiate this action?

A: Yes My Lord. I think one of our meetings in the Tema police station I made it clear to my partner that I will not sit down for somebody to take over what I have struggled for over the years and will definitely proceed to court for redress."

The evidence on record reveals a web of irregular acts on the part of the 3rd Plaintiff at every step. These acts did not only relate to the unauthorized inclusion of the 1st Plaintiff as a party to the present suit but to the very agreement or transaction upon which the 1st Plaintiff purports to found its cause of action.

As already noted, the case of the 1st Plaintiff is founded on a certain Exclusive Distributorship Agreement. This was tendered in evidence by the 3rd Plaintiff as ***Exhibit E.*** It is the terms of ***Exhibit E*** that Defendants' are said to have breached or induced E&J to breach. The evidence that emerged during cross-examination of 3rd Plaintiff on the said issue is however very telling as far as ***Exhibit E*** is concerned. 3rd Plaintiff was asked;

Q: In paragraph 14 of the amended witness statement, you testified that you signed an exclusive dealership agreement with the manufacturer of Starz Energy Drink Incorporated, is it not so?

A: Yes my lord it is distributorship

Q: You also attached Exhibit E to the supplementary witness statement. I believe this is the agreement you signed?

A: Yes my lord

Q: Where is the board resolution from the 1st Plaintiff authorizing you to enter into this agreement that is ***Exhibit E***

A: Yesterday in my submission I made it clear to this court that we never made or execute [sic] our duties in a formal way. Everything we did was informal. So if Counsel here is seeking formalities as in executing our duties, I am unable to provide."

It is accepted that there are exceptions to the rule that the affairs of a company must always be conducted formally. Both statute and case law point to the fact that a company under certain circumstances may proceed informally with its business. Indeed, this is considered a useful mechanism to avoid undue bureaucracy especially in small companies such as the 1st Plaintiff.

A case in point is the English case of ***RE DUOMATIC LTD [1969] 2 CH 365,*** from which the *Duomatic principle* derives its name. In that case ***Buckley J*** held that where it can be shown that all the shareholders who have a right to vote at a general meeting of a company assent (without a meeting) to

some matter which a general meeting could lawfully carry into effect, that assent will be as binding as a resolution in a general meeting will be. The rider to this principle however is that such assent or consent must be unanimous. A 99% shareholder of a company cannot therefore rely on the Duomatic Principle if he does not have the consent of the other shareholder who holds 1% shares.

Relying on this principle, ***Osei- Hwere JA*** in the case of ***ASAFU ADJEI v AGYEKUM [1984-86] 1 GLR 86*** and ***RE DUOMATIC LTD [1969] 2 CH 365*** opined that;

" ....it was perfectly within the powers of the company to agree orally to issue shares without any resolution as in section 41 of the Code or alter the companies regulations without any resolution as prescribed by section 57 of Act 179"

It should however be emphasized that in such circumstances nothing short of unanimity will suffice.

By ***Section 200 (j)*** of the repealed ***Act 179*** directors were also permitted to act (except for specific instances) without a formal meeting. This position remains the same under the ***Act 992.*** The said section states;

"(j) a resolution in writing, signed by the directors for the time being entitled to receive notice of a meeting of the directors, or of a committee of

directors, is as valid and effectual as if it had been passed at a meeting of the directors or a committee of directors duly convened and held"

Turning to the case at hand, the Plaintiffs' Representative Andrews Kofi Djan the other 50% shareholder and director of 1st Plaintiff has maintained that he never participated in or had any input in these major decisions that were taken on behalf of the 1st Plaintiff. The 3rd Plaintiff denies this but has failed to support his claims with any evidence either documentary or from other witnesses, even though he testified that there was some e-mail communication between them that proved his assertions.

The only conclusion I come to therefore is that all acts including the registration of the Product with the Food and Drugs Authority and the authority purportedly granted the 2nd Plaintiff to import the Product into Ghana are void and of no legal effect. They were the 3rd Plaintiff's personal acts and decisions, arrived at without the consent and/or authorization of the 1st Plaintiff. One well -received principle of law is that one cannot put something on nothing and expect it to stand. See the case of ***UAC v MCFOY [1961] 3 AER 1169***. In the circumstances the Defendants' challenge to the locus standi of the 1st Plaintiff in this suit must stand.

I have noted Counsel for Plaintiff's reliance on the ***Golden Gate case*** to submit that the 1st Plaintiff even if struck out as Plaintiff, could be made a nominal Defendant to the suit by way of derivative action. I must note in passing that until the promulgation of ***Act 992,*** there was no specific provision for derivative actions under ***Act 179.*** The Court in that case

therefore resorted to the common law and practice in other jurisdictions in applying that principle. Having carefully evaluated the entire circumstances of this case however, I am unable to accede to this prayer as I fail to see the purpose that such a step will serve within the context of the present suit.

I have already covered the effect of the failure to secure the requisite authorization to institute 1st Plaintiff's action and find no need to rehash same. But the next question I ask myself is, of what use will the presence of the 1st Plaintiff serve when ***Exhibit E***, the very contract upon which its claims before this Court are founded, has been found to have been entered into without authorization? This finding in my view knocks the bottom off the 1st Plaintiff's case entirely. The legal consequence is that the 1st Plaintiff is not only improperly before this Court but cannot be entitled to the reliefs it seeks.

It follows therefore that 1st Plaintiff should be struck out and is hereby struck out as a party to the suit. Having ceased to be a party, the 1st Plaintiff shall subsequently be referred to "Suncity" as and when necessary in this Judgement so as to avoid any confusion regarding it status in the matter. For ease of reference however, I shall continue to refer to the remaining Plaintiffs as 2nd and 3rd Plaintiffs.

That said, I cannot agree with the Defendants that the whole case of the Plaintiffs' crumbles once the 1st Plaintiff is non-suited. I say so because Plaintiffs' pleadings do not state that the 1st Plaintiff is acting on behalf of

the other two Plaintiffs. Even though their cases appear intertwined, it is clear that each Plaintiff sues in its own right**.**

The most important consideration for determining whether or not the 2nd and 3rd Plaintiffs can maintain the present suit is whether the Plaintiffs' writ and statement of claim disclose a cause of action in the 2nd and 3rd Plaintiffs against the Defendants.

The **Black's Law dictionary [8th Edition]** defines a cause of action as

"a group of operative fact giving rise to one or more basis for suing, a factual situation that entitles one person to obtain a remedy in court from another person"

In the English case of ***REED v BROWN (1888 22 QBD)*** Lord ESHER explains that a cause of action is:

"every fact which would be necessary for the Plaintiff to prove, if traversed in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact but every fact which is necessary to be proved."

This view was also accepted as a correct reflection of our law in the case of ***SPOKESMAN (PUBLICATIONS) LTD v ATTORNEY GENERAL [1974] 1 GLR 88-93.*** The Court said;

" ... A party has a cause of action when he is able to allege all the facts or combination of facts which are necessary to establish his right to sue"

Stripped of all the prolixity, the case of the 2nd Plaintiff is simply that the Defendants fraudulently converted a 40 footer container of the Product that the 2nd Plaintiff had duly purchased from E&J and imported for sale in Ghana, thereby causing it considerable "loss and suffering".

The 3rd Plaintiff's case on the other hand is that it was he who first discovered the Product and "sacrificed his time and energy... to promote, popularize and market the product in Ghana". It is also his case that it was he who took loans from financial institutions to facilitate the importation of the said 40 footer container load of the Product into Ghana on behalf of the 2nd Plaintiff. He says that it was this container which was eventually converted by the Defendants.

These are the facts that emerge upon a careful examination of the pleadings of the Plaintiffs. It is therefore clear that the pleadings reveal the existence of a factual situation which if proven should entitle the 2nd and 3rd Plaintiffs to certain reliefs from this Court. The question as to whether or not the Plaintiffs' will succeed in proving their allegations is of no moment to determining their capacity to sue, as that remains to be determined from the evidence led. It is based on the foregoing that I find and hold that the 2nd and 3rd Plaintiffs cannot be non- suited.

Now, having struck out the 1st Plaintiff as a party to the suit, my view is that a number of issues (as far as they relate to the 1st Plaintiff) must fall away.

These should be issues ***(2) (3)*** *and* ***(4).*** There is for instance, no need to determine whether or not the 1st Plaintiff had a ten-year distributorship agreement with the E&J as I do not see how that advances the present enquiry.

ISSUES FOR DETERMINATION

The next step therefore will be to distill the issues that presently need to be resolved for the effective disposal of the instant suit.

These issues in my considered opinion are;

1. *Whether or not the 3rd Plaintiff introduced the Product and earlier on imported Starz Energy Drink for the 1st and 2nd Defendants to distribute in Ghana as sub-distributors*

2. *Whether or not the 3rd Plaintiff was an employee of the 1st Defendant*

3. *Whether or not the 1st Defendant has an exclusive distributorship agreement with E&J*

4. *Whether or not the 3rd Plaintiff breached his duty to the 1st Defendant by fraudulently using information acquired in his line of business to forge a distributorship agreement between E&J and Suncity.*

5. *Whether or not the Defendants jointly cleared and subsequently converted a consignment of Starz Energy Drink imported by Plaintiffs at the Tema Port without the knowledge and consent of Plaintiffs.*

6. *Whether or not the Defendants unjustly enriched themselves by selling Plaintiffs' imported consignment and kept the proceeds.*

WHO WAS FIRST TO DISCOVER THE PRODUCT?

In proof of his assertion that it was he who first discovered the Product, the 3rd Plaintiff tendered ***Exhibits A, B, C and D*** **series.** ***Exhibits A*** series which are mostly made up of e-mail communication exchanged in the year 2013, disclose preliminary discussions between the 3rd Plaintiff and Myfit Citozi the President of E&J. These center on plans to appoint the 3rd Plaintiff (using a company as vehicle for that purpose) as sole distributor of the Product in Ghana. Indeed the testimony of the Defendants' representative in ***Paragraphs 7*** and ***8*** of their witness statement corroborates 3rd Plaintiff's assertion that it was he who first discovered the Product. Defendants however seem to suggest that 3rd Plaintiff did so as their agent. The question is, which of the opposing versions should this Court accept as more probable than not? This will require weighing up the testimony of the 3rd Plaintiff against that of the Defendants in the backdrop of the entire evidence on record.

It is first important to note that on the Defendants' own showing, the 1st Defendant had not been incorporated at the time they met with the 3rd

Plaintiff to discuss the possibility of trading in foreign branded food and drinks. According to Defendants' witness, it was upon his return from a trip outside Ghana, that he found that the 1st Defendant company had been incorporated sometime in September 2013.

The question therefore is in what capacity, would the 3rd Plaintiff have been tasked to perform this service on behalf of the Defendants? There is no evidence that any contract or business relationship existed between the said Parties at the time. What then would have been the consideration for the Plaintiff embarking on such a project on behalf of and for the benefit of the non-existent of 1st Defendant?

Indeed, the picture that emerges from the testimony of the Defendants themselves is that any discussions held between the Parties at the time (if at all) were only business ideas with no intention to create legal relations. There was no offer, no acceptance and certainly no consideration to make any contract that may have been entered (if at all) into by the parties enforceable. Put differently, any such agreement could not have been binding on the 3rd Plaintiff, even if true.

Considering the Defendants' admission in ***Paragraph 8*** of their Witness Statement that it was the 3rd Plaintiff who discovered E&J, the burden of proving that he did so on their behalf and in a bid to make the 1st Defendant the sole distributor of the Product, rested on them. This they woefully failed to establish. I am therefore not convinced that it was the Defendants who tasked the 3rd Plaintiff to search for the Product. He did so independently

and without any assistance from them, even if the 2nd Defendant was the first to moot that idea.

The other elements of the Defendants' own testimony that strengthen me in this view are;

a) The 3rd Plaintiff's resistance to the 2nd Defendant being made a director and shareholder of Suncity. This in my opinion makes it highly unlikely that the 3rd Plaintiff considered himself as working for or with 2nd Defendant at the time he scouted for the Product.

b) The fact that the Defendants' witness Andrews Kofi Djan, initially proposed that Suncity be used as a vehicle for importation of the Product, even though the 1st Defendant Company had been incorporated at the time. (See ***Paragraph 13*** of the Defendant's Witness statement). This is consistent with the 3rd Plaintiff's testimony and veritable evidence that the 1st Defendant company was not even in the reckoning during the preliminary discussions between 3rd Plaintiff and E&J.

Section 18(2) of the Evidence Act, 1975 (NRCD 323) states that

"An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found otherwise established in the action"

The inference I draw from the established facts is that the 3rd Plaintiff was the 1st to discover the Product. It was however after he had done so that he solicited assistance from the 1st and 2nd Defendants due to financial constraints. On the facts, I am led to the conclusion that this is when the 3rd Plaintiff was offered a position in the 1st Defendant Company. The next enquiry therefore is whether the 3rd Plaintiff accepted this offer and became an employee of the 1st Defendant as a result.

WAS THE 3RD PLAINTIFF AN EMPLOYEE OF THE 1ST DEFENDANT?

The 3rd Plaintiff seems to have invested all his energies in establishing that he was not an employee of the 1st Defendant. His case is that he only helped the 1st Defendant, his sub-distributor, market the Product. He tendered ***Exhibit G series*** which bear his name and that of the 1st Defendant to prove that his position as sole distributor of the Product was recognized despite using the 1st Defendant as a conduit.

This is yet another point in respect of which the 3rd Plaintiff demonstrates his lack of appreciation of the separate corporate personality of Suncity. I have already found that ***Exhibit E*** was not worth the paper on which it was written due to lack of the requisite authorization. But even if we proceed on the assumption that this was an agreement regularly entered into, the question that needs to be answered is, who actually entered into ***Exhibit E*** with E& J? Was it the 3rd Plaintiff or Suncity?

On the facts, the answer, I believe is quite obvious. Yes, this Court has found as a fact that it was the 3rd Plaintiff who discovered the Product. But the dynamics changed as soon as it was agreed that Suncity be used as the vehicle for that business venture. Consequently, the fact that ***Exhibit G series*** were issued in the joint names of the 3rd Plaintiff and 1st Defendant does not assist in establishing that the 3rd Plaintiff was not part of the 1st Defendant at the time. At best, it only proves that he was the link between E&J and the 1st Defendant and no more. The purported exclusive distributorship agreement as evidenced by ***Exhibit E*** was with Suncity and not with the 3rd Plaintiff in his personal capacity.

I must however conceded that the inclusion of the 3rd Plaintiff's name on ***Exhibit G series*** lends credence to his assertion that it was he who discovered the Product. This is because E&J need not have stated his name on those invoices as the 1st Defendant had full capacity to transact the business in its own name. To my mind, that was ample proof that he was the one known to E&J at that time and not the 1st Defendant.

Now, to support its assertions that the 3rd Plaintiff was its employee, the 1st Defendants tendered ***Exhibits 19*** and ***20 Series*** being what they said was the 3rd Plaintiff's letter of appointment and evidence of his remuneration as an employee of the 1st Defendant. 3rd Plaintiff does not deny knowledge of the existence of ***Exhibit 19*** but says it was after their relationship had turned sour that the Defendants attempted to lure him into accepting employment with the 1st Defendant using the said letter. This he says he rejected.

Admittedly, the question of who an employee is, has always been a complex one. The doyen of English Labour Law, ***Lord Wedderburn of Charlton*** in his book, the ***Worker and the Law (3rd Penguin Harmondsworth 1986)*** observes that the courts normally resort to the elephant test in determining who an employee is. This test is applied in situations that are difficult to describe or define but easily recognizable when seen.

Perhaps, the relevant provisions of our ***Labour Act, 2003 (Act 651)*** may be of some help.

Section 175 of the Act defines an employer as;

"a person who employs a worker under a contract of employment"

A worker is also defined under the same section as;

"a person employed under a contract of employment whether on a continuous, part-time, temporary or casual basis"

A contract of employment is also defined as
"A contract of service whether express or implied, and if express whether oral or in writing"

Put in the backdrop of the facts of the instant case, a number of questions flow from the above-quoted definitions – when one is considered an employee? Is it only when he is issued a letter of appointment, or notified

orally that he has been so appointed? Or a person is deemed an employee when he receives remuneration for the performance of duties assigned to him? Does the fact that a person is only paid an "allowance" and not a "salary" for his services rule out the fact that such a person is an employee of the person in whose service he performs those duties?

In order to surmount any limitations that may exist in the statutory definitions (in the context of the present case) this Court will have to test the allegations of each party against the general probabilities in order to ascertain in whose favour the balance tilts. This will require assessing the parties relationship as a whole in order to ascertain whether it points to the existence of a contract of employment or otherwise.

On the ***8th day of February, 2019*** the 3rd Plaintiff was asked the following questions under cross-examination;

Q: In paragraph 16 of your amended witness statement, you testified that you did a great deal of marketing for the 1st Defendant is that not so?

A: Yes it is.

Q: So in other words you were working for the 1st Defendant to ensure that Starz Energy Drink was popularized?

A: It is not so I was not working for the 1st Defendant.....

Q: So how did you market the drink Starz Energy without working for the 1st Defendant?

A: As I have already indicated because of the relationship we were having in the initial stage of the business and also my personal experience as a marketer as well as in charge of the product Starz Energy Drink I decided to volunteer myself to take charge in the marketing aspect in the initial stage to popularize the product in the Ghanaian market

Q: So by volunteering your services, you want the Court to believe that you were not working for the 1st Defendant?

A: Yes my lord

The question is, if the 3rd Plaintiff had such exceptional marketing skills and business acumen, why did he not market the product upon its discovery through Suncity, the entity that purportedly held the exclusive franchise to the Product? The ready answer to this question I presume, would be that Suncity was cash strapped at the time. If that was the case, the next question would then be, "why did the 3rd Plaintiff does not consider the option of taking loans to facilitate his business plans? This is what he claims to have done in the case of the 2nd Plaintiff. And if his claim that he appointed the 1st Defendant as sub-distributor is to be believed, the next question that flows naturally is, was 3rd Plaintiff under any obligation to promote, popularize and market the product in the name of the 1st Defendant? Did the 1st Defendant as sub-distributor not have the ability to do so by itself?

And could the 3rd Plaintiff not have embarked on his own promotion of the product in the name of Suncity if he really meant to guard its alleged exclusive rights as distributor of the Product?

Indeed, the record brings to light several pieces of evidence that tend to corroborate the 1st Defendants' story that the 3rd Plaintiff was its employee – the clearest being ***Exhibit 6*** where the 3rd Plaintiff signs a Promotional Services Agreement as Marketing Manager of the1st Defendant. The law is that in the absence of evidence to the contrary a document speaks for itself. I am therefore not persuaded that the 3rd Plaintiff was a mere volunteer in 1st Defendant Company as he put it. I must also state for the sake of completeness that there is no credible evidence before this Court substantiating the 3rd Plaintiff's assertion that he appointed 1st Defendant as his sub-distributor.

The 3rd Plaintiff's trump card appears to be the paucity of evidence that he was ever paid a salary by the 1st Defendant. But that in and of itself cannot be the sole indicium for determining the nature of his relationship with the 1st Defendant. This Court must look at the entire picture in order to arrive at a fair conclusion.

It is for this reason that I also consider what ensued between his Counsel and the Defendant's representative under cross-examination quite instructive;

On the 28th of January 2021 the said witness was asked the following questions by Counsel for Plaintiffs;

Q: *Kindly tell the Court whether the 3rd Plaintiff as at the 29th of January, September, 2014 was still with the 1st Defendant Company*

A: I don't recall the month but I believe he left in 2014

Q: I am suggesting to you that the 3rd Plaintiff left the 1st Defendant company between March and April 2014

A: I do not know the date Counsel is referring to

Q: I am further suggesting to you that as at the time this contract (Exhibit 9) was signed the 3rd Plaintiff had long left the 1st Defendant Company...."

[My emphasis]

This line of questioning clearly supports the case of the 1st Defendant that the 3rd Plaintiff was its employee. Put in context, how could the 3rd Plaintiff have "left" a company he never worked for or with? As it is not the case of 3rd Plaintiff that he was shareholder or director of 1st Defendant, in what capacity was he "with" the company, if not as its employee?

In any event even if the 3rd Plaintiff was never an employee of the 1st Defendant, he is estopped from denying the truth of the Defendant's assertions on this particular issue after conducting himself in manner that furthered the business objectives of the 1st Defendant. By advertising, promoting and popularizing the Product in the name of the 1st Defendant he had blessed the dealings of the 1st Defendant as far as the Product was concerned and cannot now turn round to accuse the 1st Defendant of

violating his exclusive rights even if any existed. Suffice it to say that the 3rd Plaintiff personally had no such rights anyway. But how about the 1st Defendant? Did it have any such exclusive distributorship rights to the Product? This is what the this Court shall now proceed to answer

DID 1ST DEFENDANT HAVE AN EXCLUSIVE DISTRIBUTORSHIP AGREEMENT WITH E&J?

I have limited my determination of the present issue to the 1st Defendant since having declared ***Exhibit E*** invalid, it becomes unnecessary to consider the claims of the Plaintiffs on this issue. I shall however refer to the said ***Exhibit E*** as and when necessary and to the extent that it furthers the present enquiry.

The Defendants tendered ***Exhibit 9*** as proof of the Exclusive Distributorship Agreement entered into with E&J. In my considered opinion to determine whether or not the 1st Defendant had an exclusive agreement with E&J, this Court should not only consider the wording of ***Exhibit 9*** but the conduct of the parties as well. I am supported in this view by the learned jurist Christina Dowuona Hammond in her book the ***Law of Contract in Ghana.*** The author states at **page 5** that;

"...In determining whether or not the parties have an agreement the courts lay particular emphasis on external appearance rather than the actual state of mind or intent or state of mind of the parties. The courts operate on the

basic principle that agreement is not a mental state but rather an act and, therefore, a matter of inference from conduct"

Applying the above principles to the instant case, the test should be; does the conduct of the parties to ***Exhibit 9*** disclose an understanding that the 1st Defendant had indeed been granted an Exclusive franchise of the Product? Or could the 1st Defendant honestly have believed that it had an exclusive franchise in light of the circumstances of this case?

But before I proceed to answer this question, let me state without any equivocation that I consider the Defendants' claim that ***Exhibit E*** was forged not only far-fetched but a strained attempt to improve their case and to whittle down the probative value of ***Exhibit E.*** Despite my finding that the said Exhibit cannot be valid due to the procedure followed by 3rd **Plaintiff**, I have no doubt regarding its authenticity. I am strengthened in this view by the communication between the President that preceded its execution particularly ***Exhibit A13,*** (the authenticity of which has not been challenged by the Defendants).

Further, the Defendants' own ***Exhibit 15H*** belies their claims. I say so because its contents which are attributed to the President of E&J tacitly confirms the authenticity of ***Exhibit E.*** I will not comment on whether or not the claim that ***Exhibit E*** "has not been legally enforced" is correct as that is not my task here.

It should however be remembered that by ***Section 13*** of ***the Evidence Act, 1975 (NRCD 323)*** an allegation of fraud or forgery requires proof beyond

reasonable doubt. This hackneyed principle is explained at ***Page 16*** of the ***Commentary on Act 323*** as follows;

"Section 13 sets out the usual requirement that guilt of a crime be proved beyond reasonable doubt by the prosecution. The section is also made to apply to proof of commission of a crime in a civil action. There have been criticisms of this treatment of crimes in civil cases but on a balance it is felt that where the commission of a crime is at issue the consequences on the reputation and life of the person alleged to have committed the crime are so great that the standard of proof applied in criminal actions to protect those who are accused should equally apply in civil actions"

The Defendants therefore cannot make out their accusations based on bare unsubstantiated claims. I note that Counsel for Defendants has sought to support the Defendants' claims by stating that the registration of the Product before the execution of ***Exhibit E*** provides ample evidence that it was forged. If this argument is anything to go by, then the Defendants should also be called upon to explain the circumstances under which they commenced importation of the Product in 2013 (as evidenced by ***Exhibit 4 series***) prior to executing ***Exhibit 9*** in 2014.

All in all, I think it was obvious or ought to have been obvious to both sides that E&J did not consider anything exclusive about the so called 'Exclusive Distributorship Agreements" entered into with them. 3rd Plaintiff actually acknowledges this fact when he states in ***paragraph 19*** of his amended

Witness Statement that he realized that E&J was only paying "lip service" to their agreement.

Likewise, this fact would have been obvious to the 1st Defendant right from the onset when E&J did not breath a word of disquiet about selling the Product to the 1st Defendant through an individual (3rd Plaintiff) without any formal agreement sanctioning such an arrangement at the time. (See ***Paragraph 15*** of Defendants' witness statement)

I consider preposterous the Defendants' assertion that E&J was under the mistaken belief that the container imported by the 2nd Plaintiff belonged to the 1st Defendant. This is because the Defendants' own ***Exhibit 15 series***, the bill of lading covering the said container removes all doubt that E&J had ample notice that the said purchase was by an entity other than the 1st Defendant. There is also ***Exhibit 15F***, the probative value of which is doubtful as it is unsigned. But if it is anything to go by, it establishes the fact that E&J knew exactly who it was dealing with when it accepted payment for the said container. It certainly knew that it was not the 1st Defendant but the 3rd Plaintiff acting on behalf of an entirely different company. I am therefore not enthused to attach any weight to ***Exhibits 15(f), 15(h)*** and ***16(A)*** which even if written by E&J, are clearly afterthoughts.

By the time the parties approached this Court it should have been clear to them that E&J considered the agreements entered into with each of them complete dead letters. It had by its conduct shown that it did not consider

itself bound by the terms therein and had thereby impliedly repudiated same.

Sadly, the parties, each obviously shackled by the fear of losing their specious "Exclusive Distributorship" agreements with E&J failed or refused to hold the said company accountable for its obvious breaches. Instead, they turned on each other and traded accusations of the other being responsible for the said breaches.

What the parties seem to have overlooked is the fact that ***Exhibits E*** and ***9*** were entered into, not with each other but by each party with E&J. Consequently, each party remained a stranger to the other's agreement. It is trite learning that the terms of a contract cannot be binding on a 3rd party who has not consented to be bound by same. Thus the 3rd Plaintiff who was not a party to ***Exhibit 9*** was not bound to observe its terms. Additionally, having been the one who first made contact with E&J, it cannot be true that he took advantage of his relationship with the 1st Defendant to gain access to E&J or to acquire any classified information relating to the Product. He already had access to E&J and to all the necessary information prior to communicating same to 1st Defendant as is evident from the evidence on record.

Flowing from the above reasoning, I am unable to accept the Defendants' contention that the Plaintiffs are guilty of unfair competition. This Court must be careful not to make orders that could have the effect of restraining the Plaintiffs from freely carrying on their business. This is especially so

when there is no evidence on record showing that the 3rd Plaintiff obtained any trade secrets in the course of his employment with 1st Defendant or contracted not to trade in the Product upon leaving 1st Defendant's employ. The general position of the law is that an employer has no right to protect himself from competition from his former employees. See the case ***of HERBERT MORRIS LTD v SAXELBY [1916] 1AC 688.***

Christina Dowuona Hammond, at ***page 258*** of her book, the ***LAW OF CONTRACTS (supra)*** FURTHER refines this position of the law as follows;

"Since it is in the public interest that people should be free to practice their professions and pursue their trades, the law takes the position that all contracts in restraint of trade are prima facie contrary to public policy and therefore void. However such contracts will be upheld if (a) It is shown to be reasonable between the parties; and (b) it is shown not to be unreasonable in the public interest"

I think it is clear from my analysis so far that the Defendants have not satisfied this Court that the Plaintiffs' have engaged in unfair competition. Firstly, there is no credible evidence that the 3rd Plaintiff forged ***Exhibit E***. Secondly, 2nd and 3rd Plaintiffs are not parties to ***Exhibit 9*** and thirdly, Defendants have failed to provide any proof of any contract or undertaking on the part of 3rd Plaintiff not to trade in the Product upon leaving the 1st Defendant's employ. In the result, I find that the 1st Defendants 'exclusive' distributorship agreement existed only in name. To its knowledge the

relationship it had with E&J was not indeed exclusive. I also hold that (even assuming it was) the 3rd Plaintiff cannot be held liable for a breach of same.

ARE DEFENDANTS JOINTLY LIABLE FOR CONVERSION OF PLAINTIFFS' CONSIGNMENT OF STARZ ENERGY DRINK?

A reading of the written addresses filed by both sides discloses that the parties broadly agree that this issue constitutes the heartbeat of the present suit. It also discloses the fact that there is no dispute regarding the fact that the 1st Defendant took possession of a forty footer container of the Product imported by the 2nd Plaintiff. The Defendant however seeks to justify its actions on two grounds. The first being that the 3rd Plaintiff using Suncity as a device, had no authority to grant the 2nd Plaintiff the right to import the Product. The second is that the 1st Defendant as exclusive distributor of the product was the entity duly authorized to clear the product and not the 2nd Plaintiff.

I have already held that Suncity, not having been duly authorized to enter into ***Exhibit E*** could not have authorized the 2nd Plaintiff to import the said container. That may be correct but that, in my considered view, did not change the fact that the 2nd Plaintiff and not the 1st Defendant remained owner of the container in question. Put differently the lack of due authorization to deal in the Product (if at all) did not change the fact of the 2nd Plaintiff's ownership of the said consignment. ***Exhibit L2*** which bears the name of the 2nd Plaintiff as Consignee puts this fact beyond doubt. Commenting on the purpose and probative effect of a bill of lading, ***Goode on Commercial Law [4th Edition]*** at ***Page 980*** put it succinctly as follows;

"At common law a bill of lading is a document of title (indeed the only document of title) to goods ...

Section 81 *of* our ***Sale of Goods Act 1962 (Act 137)*** also defines a document of title to include a bill of lading. There is therefore no question that it was the 2nd Plaintiff who had the rights, title and interest in the said consignment. In light of this established fact, the reasons given by the Defendants for taking possession of same will have to be critically examined by this Court.

The Defendants refer this Court to ***Exhibits 15(a) (f)*** and ***(h)*** as well ***Exhibit 16*** to show their actions were justified. I have already noted that I am not enthused to attach any weight to the said Exhibits as they are in my view afterthoughts. From the evidence on record, the inference I draw is that the same were written by E&J (if at all) in an attempt to assuage the feelings of the 1st Defendant after it found that E&J had sold the Product to 2nd Plaintiff. Unfortunately, this had been E&J's course of dealing with both sides. One does not need to look beyond the Plaintiffs' ***Exhibit A 18*** to ascertain this fact.

But more importantly, **Exhibit 15 (f)** on which the Defendants heavily relies, (unlike the other documents alleged to have emanated from E&J) is unsigned.

It should be noted that even though the 3rd Plaintiff admits meeting E&J in respect of the said consignment, it vehemently denies that there was any

agreement to accept a refund of the ***Eighteen Thousand Dollars*** (***$18,000.00)*** in exchange for releasing the container to the Defendants. This is evident from the exchange that ensued between Counsel for Plaintiffs and the Defendants' representative on the 27th of October, 2021.

Q: *I am putting it to you that the 3rd Plaintiff never agreed to relinquish his ownership of the goods the subject matter under this litigation in exchange for any money?*

A: I do not know about that, but what I do know is that somewhere June 22, 2015 Myfit Citozi gave us a notification that George Asante had agreed in principle to take the money that he sent to the white man

In light of the 3rd Plaintiffs' denial, the maxim *affirmanti non regant incumbit probatio* very much applies here. This translates as "the burden is upon he who affirms". See ***Sections 10*** and ***12*** of ***NRCD 323***.

Consequently, it was the 1st Defendant who assumed the burden of proving that the 3rd Plaintiff had agreed to relinquish ownership in the goods in exchange for a refund. To the extent that the Defendants supported their assertions with the unsigned ***Exhibit 15(f),*** I do not find their claim sufficiently proven. Nothing stopped the Defendants from calling E&J as a witness especially now that the costs and inconvenience of securing the attendance of witnesses resident outside the jurisdiction has been whittled down by the introduction the rules which allow evidence to be given via Video Link.

The Defendants have also been at pains to establish that they followed due process in clearing the said container and that it was only after what they term the "final notification" (***Exhibit 15(h)***) that it was released to the 1st Defendant. The totality of the evidence however belies this assertion as the said exhibit dated the 16th of August, 2015 was clearly issued after the container had been taken over by the Defendants.

The Defendants' lack of candour on this particular issue is further demonstrated by the evasive answers given by its witness during cross-examination. When confronted by Counsel for Plaintiff on the issue of ***Exhibit 15(H)*** this is what Defendants' representative said;

"Q: *I am putting it to you that the goods were cleared in June 2015, two months before this letter dated August, 2015 which is exhibited as* ***Exhibit 15H*** *by you.*

A: I do not know about that..."

The constant refrain to the questions posed to the witness in respect of the said container was "*I do not know about that*". These answers in my view, were clearly aimed at avoiding the merits of the matter. I say so because they related to the Defendants own Exhibits. The witness therefore could not feign lack of knowledge of its contents or the circumstances surrounding same.

One fact that remained unshakable throughout the trial was the fact that 2nd Plaintiff remains the owner of the container in question. The promise of a

refund even if truly made by E&J cannot under any circumstance outweigh the probative value of ***Exhibits L2 and L3.*** The law is well settled that the Court will lean in favour of weightier or superior evidence. See the case of ***SAGOE & OTHERS v SOCIAL SECURITY AND NATIONAL INSURANCE TRUST (SSNIT) [2012] 2 SCGLR 1093.***

This is more so when the Defendants have not been able to prove that the said amount has been refunded to the 2nd Plaintiff pursuant to alleged promise. It is also for this reason that I think lies foul in the mouth of the Defendants to contend that 2nd Plaintiff's cause of action lies with E&J and not them.

On the evidence, the general attitude of the Defendants, in relation to the said consignment appeared to be that "might being right" and that the rights of the 2nd Plaintiff did not matter. Hiding behind the 1st Defendant's so-called "exclusive distributorship' agreement and an unsubstantiated claim of an agreement having been reached between 3rd Plaintiff and E&J, the 1st and 2nd Defendants with the help and connivance of the 3rd forcibly took possession of the 2nd Plaintiff's bonafide property from the Tema Harbour, after the said Plaintiff had paid all clearing charges and made it clear that they neither intended to return same nor refund the costs incurred by the 2nd Plaintiff. As a result of this conduct, the 3rd Plaintiff who acted for the 2nd Plaintiff has had to endure unnecessary anguish, indignity and costs.

Granting without necessarily admitting that the Plaintiffs were indeed guilty of unfairly competing against the 1st Defendant, the answer did not lie in 1st Defendant adopting self-help but in going to Court to ventilate its rights, real or perceived.

In saying so, I should not be taken as having overlooked ***Exhibit 14*** which is a copy of a Writ filed by the Defendants seeking certain reliefs against the 2nd and 3rd Plaintiffs in respect of the said consignment. ***Exhibit 15(e)*** however shows that the parties had subsequently withdrawn their suit and had been encouraged by the Court to "work with each other for peace".

What is significant to note is that the Court never made any pronouncement regarding title or ownership to said consignment. Consequently, if it subsequently emerged that parties could not agree on who owned or had title to same, the proper course would have been for the aggrieved party to return to Court for the Court to determine that issue. ***See Order 17 of CI 47***. The answer certainly did not lie in the Defendants taking matters into their own hands.

In any event a reading of ***paragraph 10*** of ***Exhibit 14*** makes me doubt the sincerity of the Defendants in instituting that action. This is because it is obvious from the undisputed facts before this Court that their averment that the Plaintiffs (Defendants therein) had "several containers" of the consignment at the Tema Port was made by Defendants (Plaintiffs therein) knowing same to be false.

In the case of ***YOUNGDUNG INDUSTRIES v RORO SERVICES [2005-206] SCGLR 816,*** the Supreme Court cited with approval the English case of ***KUWAIT AIRWAYS CORPORATION v IRAQI AIRWAYS (NOS 4 AND 5) [2002] 2 Ac 883 @ 1092*** where the Court explained ambit of the remedy of conversion as follows:

"Conversion is the principal means by which English law protects ownership of goods. Misappropriation of another's goods constitutes conversion. Committing this tort gives an obligation to pay damages".

The court further explained that;

"Conversion of goods can occur in so many circumstances that framing a precise definition of universal application is well-nigh impossible..."

It however listed the 3 basic elements that would ground an action for Conversion. These are:

1) *The Defendant's conduct must be inconsistent with the rights of the owner*
2) *The Defendant's conduct must be deliberate and not accidental*
3) *The conduct must be so extensive an encroachment on the rights of the owner as to exclude him from the possession and use of his goods.*

I find all the above elements established in the present suit. It is on this basis that I find as a fact that Defendants are jointly guilty of conversion of the consignment in question. Counsel for Plaintiffs in his written address has sought to argue that the Plaintiffs should also be entitled to damages for

detinue. Unfortunately, I am not persuaded by this argument in light of the reliefs endorsed on the Plaintiffs writ. In the ***Yungdong case*** (supra) the Court per ***Date-Bah JSC*** interpreted the Plaintiff's action as one for Conversion and not one for detinue because there was no demand for the return of the goods interfered with. The Plaintiff's claim in that case, as in here, dwelt on the return of the value of the goods and not the goods themselves.

I also think it is important to state, for the avoidance of doubt that I have given due thought and consideration to the fact that the 2nd Defendant as Managing Director of the 1st is separate and distinct from the said company. Ordinarily, the acts or omissions of the 1st Defendant should not attach personal liability to him.

However, the evidence discloses that he is the alter ego and the very will and centre of the personality of the 1st Defendant. I am fortified in this view by the Defendants' pleadings in its amended statement of defence and its ***Exhibit 14.*** As its directing mind, his state of mind was the state of mind of the 1st Defendant for which its acts should be attributable to him.
In the case of ***HL BOLTON (ENGINEERING) CO LTD v TJ GRAHAM & SONS LTD [1957]1 QB 159,*** Denning MR , the renowned English jurist clarified this principle as follows;

"A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It has hands which hold the tools and act in accordance with directions from the centre. Some of the

people in the company are mere servants and agents who are nothing more than hands to do the work and cannot represent the mind and will. Others are directors and managers who represent the directing mind of the company and control what it does. The state of mind of these managers is the state of mind of the company and it is by law treated as such.... <u>whether their intention is the company's intention depends on the nature of the matter under consideration, the relative position of the officer or agent and the other relative factors and circumstances of the case</u>"

I find the above reasoning to be of persuasive value in this case.

<u>RELIEFS SOUGHT BY PLAINTIFFS</u>

Now, I think it is clear from my earlier analysis that reliefs ***(a) (b) (c) (d***) endorsed on the Plaintiffs' writ, are not maintainable. Relief ***(d)*** however merits some comment. First, it was irregular for the Plaintiffs to have endorsed their writ with a prayer for interlocutory injunction as that relief was readily available to them once the writ was issued. See the case ***of REPUBLIC v HIGH COURT, TEMA ex parte OWNERS OF ESSCO SPIRIT [2003-2004] SCGLR 689.*** Secondly, since the jurisdiction of this Court is territorial, the decisions of this Court cannot have direct operation outside Ghana. One therefore wonders how this Court could have properly restrained the Defendants from selling the product anywhere in the West African sub-region. ***Relief (d)*** is thus clearly misconceived.

Turning to Relief ***(e)*** I only find the tort of Conversion proven. In the ***Yungdong case*** (supra) the Court held at ***page 847*** that the normal measure of damages for conversion is the value of the goods converted together with any consequential losses that are not too remote.

I must say the Plaintiff presented a poor case as far as its Reliefs ***(f)*** and ***(h)*** and by extension Relief ***(g)*** are concerned. Not a jot or scintilla of evidence was led in proof of its claim that the proceeds of sale of the consignment was ***Two hundred and thirty-five thousand Ghana Cedis (GH¢ 235, 000.00.)*** or that the Defendants had previously agreed to refund same.

I also agree with Counsel for Defendants that the Plaintiffs' Relief (***h)*** was in the nature special damages which ought to have been proved with particularity. For instance how does ***Exhibit J Series*** establish that the said loans taken by the 2nd and 3rd Plaintiffs were applied towards the purchase of the Product? Likewise, apart from ***Exhibit L12*** I find no credible evidence to substantiate the Plaintiffs' claim for expenses made in respect of the said consignment. I also find ***Exhibit M*** not only incomprehensible but self-serving for which reason I shall attach no probative value to same.

That said, it is my considered opinion that the concept of justice and in fairness will be illusory if the 2nd Plaintiff, whose consignment of Product was converted by the Defendants is left without remedy. Given the paucity of evidence regarding the true value of the said consignment I consider it safe to fix its value at ***Eighteen Thousand United States Dollars (USD 18,000.00.)*** as this is the value the Defendants themselves place on the said Consignment. See ***paragraph 30*** of Defendants' Witness Statement.

I shall order the payment of interest on the said sum at the prevailing commercial rate from the 8th of May, 2015 which is when they Defendants issued their writ, as it is as a result of the said action that the 2nd Plaintiff was prevented from taking possession of its bonafide property.

On the authority of ***the Yungdong case*** (supra), I am also of the view that the 2nd Plaintiff is entitled to recover any consequential losses incurred. ***Exhibit L12*** is ample proof that the 2nd Plaintiff paid an amount of ***Fifteen Thousand and Sixty-Four Ghana Cedis Seventy-Eight Pesewas (GH¢ 15,064.78)*** as customs clearing charges in respect of the said consignment. I hold that 2nd Plaintiff is entitled to recover same from the Defendants.

DEFENDANTS' COUNTERCLAIM

Counsel for Defendants concedes in his written address that ***Reliefs (a)*** and ***(b)*** are rendered otiose by effluxion of time. I am in total agreement with him. I have already made it clear that I do not find merit in Defendants' ***Relief (c)***. In the premises ***Relief (c)*** and by extension ***Relief (d)*** are dismissed.

CONCLUSION

In conclusion I commend both Counsel for the industry and scholarship exhibited in prosecuting this matter.

DECISION

In the premises;

1. ***(i) Relief (a) dismissed***

   (ii) Relief (b) dismissed

   (iii) Relief (c) dismissed

   (iv) Relief (d) dismissed

   (v) Relief (f) dismissed

2. In respect of ***Reliefs (e)*** and ***(h)*** Judgement is hereby entered for the 2nd Plaintiff to recover from the Defendants jointly and severally the following amounts as damages for conversion:

   *i. The amount of **Eighteen Thousand United States Dollars (USD 18, 000)** or its cedi equivalent being the amount the 2nd Plaintiff paid for the purchase of one container of Starz Energy Drink from E&J Starz incorporated*

   ii. Interest shall be payable on the said amount at the prevailing commercial rate of interest from the 8th of May 2015 till date of final payment.

   *iii. The sum of **Fifteen Thousand and Sixty-Four Ghana Cedis Seventy-Eight Pesewas (GH¢ 15,064.78)** being customs clearing expenses incurred by the 2nd Defendant in clearing the said container of Starz Energy.*

   *iv. Interest shall be payable on the said amount of **Fifteen Thousand and Sixty-Four Ghana Cedis Seventy- Eight Pesewas (GH¢ 15, 064 .78)** at the prevailing commercial rate of interest from the 8th of May, 2015 till date of final payment.*

3. ***Defendants Counterclaim dismissed.***

I award costs of ***Thirty Thousand Ghana Cedis (GH¢ 30, 000.00)*** in favour of 2nd Plaintiff.

(SGD)

AKUA SARPOMAA AMOAH (MRS)

JUSTICE OF THE HIGH COURT

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