IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: DOTSE, JSC (PRESIDING)

PWAMANG, JSC

TORKORNOO (MRS.), JSC

HONYENUGA, JSC

PROF. MENSA-BONSU (MRS.), JSC

CIVIL APPEAL

NO. J4/32/2020

11TH NOVEMBER, 2020

DANIEL GIBSON DANSO ……

PLAINTIFF/RESPONDENT/RESPONDENT

VRS

1. INTECELL INVESTMENT LTD. …… DEFENDANT
2. KUDJO ANKU
3. DAVID FAMEYE ……. DEFENDANTS/APPELLANTS/APPELLANTS

4. DAVID OSEI-MANU

JUDGMENT

PROF. MENSA-BONSU (MRS.), JSC:-

INTRODUCTION

This case has travelled a painful and tortuous road, and comes to this Court on appeal from a decision of the Court of Appeal in a judgment delivered on 18th July 2019. The genesis of the appeal was that the High Court, had on 24th January, 2018, dismissed the application of the 2nd, 3rd and 4th Defendants (hereinafter referred to as 'Defendants) for Misjoinder under Order 4 r 5 of the High Court (Civil Procedure) Rules 2004 as amended; and had also upheld the 1st February application for Summary Judgment of the applicant (hereinafter referred to as 'Plaintiff') under order 14 of the High Court (Civil Procedure) Rules 2004 as amended. This Ruling of the High Court granting the application of plaintiff for Summary Judgment was subsequently affirmed by the Court of Appeal on 18th July, 2019, giving rise to the instant appeal. The Respondent and Appellants herein are simply referred to as 'Plaintiff' and 'Defendants' respectively, to avoid confusion.

FACTS

The facts of the case were that in May 2011, the plaintiff who had been introduced to the Defendant-Company by another person, entered into an agreement with the Company, variously described as a 'Microfinance Company' by the plaintiff and an 'Investment Company' by the Defendants. The 2nd defendant was designated as 'Ag Managing

Director', and the 3rd and 4th defendants were the other Directors. The plaintiff believed he was investing his funds for monthly returns of 3% interest, for one year. The agreement, which described the Plaintiff as 'Lender' and the Defendant-Company as 'Borrower', was for a period of twelve months, subject to either party's right to termination or extension upon serving three months' notice. Under the agreement, the Plaintiff agreed to lend GHc 80,000 to the Defendants at the rate of 3% interest per month. This monthly interest on the principal sum amounted to Ghc2,400. The total interest expected under the agreement was Ghc28,200. The agreement was signed by the Ag. Managing Director (2nd defendant) witnessed by the Accountant Jesse Maxwell Caleb, on the part of the Company, and by the Plaintiff, witnessed by Mrs. Theresa Kuma, the person who introduced the Plaintiff, to the Defendant-Company.

Barely four months into the agreement, in August 2011, the Plaintiff asked for a return of half of his investment ie Ghc 40,000, on grounds of pressing financial need. The Defendant-Company did not give him the money but instead, continued to pay the agreed monthly interest. On 27th October 2011, Plaintiff wrote to Defendant-Company again, this time, asking for the full amount of Ghc80,000 back. The Defendant-Company failed to pay up although the monthly interest payments of Ghc2,400 still continued to be paid. In total, the monthly interest was paid by the Defendant-Company from June 2011 until February 2012 when payments ceased, according to the Defendants, on account of "operational difficulties". The 'Cheque Payment Voucher' on which the payments were made described the payments as "interest on Investments paid to Mr. Daniel Gibson Danso for the month of …". These were all on the letterhead of the Defendant-Company and duly signed by the Ag Managing Director and the Accountant of the Defendant-Company respectively. (Exh B series). When the Plaintiff changed his mind about the transaction and wrote to the Defendant-Company, the

letter, titled 'Letter of Termination of Loan' was addressed to the Managing Director of Defendant-Company, and not any of the other Defendants, and signed by Plaintiff.

Following the failure to refund the capital sum of Ghc80,000 paid to Defendant-Company, the Plaintiff, a retired senior police officer, made a report to the Criminal Investigations Department (CID) of the Ghana Police Service. The CID launched an investigation into the Defendant Company, and arrested the Directors (2nd, 3rd and 4th Defendants). In the course of the investigations, the police allegedly wrote to the Bank of Ghana to ascertain whether Defendant-Company was registered with them as a Micro-Finance Company. The alleged letter from the Bank of Ghana replied the enquiry in the negative, and indicated further that there was no pending application for registration by the Defendant-Company. Upon these revelations, the police charged the three Defendants under section 2(1) of Non-Bank Financial Institutions Act, 2008 (Act 774), for operating a microfinance company without licence. They were also charged under sections 23 and 131 of the Criminal Offences Act 1960, (Act 29) for conspiracy to operate a Microfinance company without licence and defrauding by false pretences respectively, and arraigned before the Circuit Court, Accra.

Before the Circuit Court could conclude a determination of the case, however, the Defendants applied to the High Court, Human Rights Division, and were granted a Writ of Prohibition against the Circuit Court on 9th July, 2014. The reliefs sought were granted on the grounds that the relationship between the parties was contractual in nature and therefore sounded in civil law; and that those contractual terms did not give rise to criminal liability. Further, that section 2(1) of Act 774 did not have any sanctions attached to the prohibited conduct contained therein, and therefore violated the constitutional standard prescribed under Article 19(11) of the Constitution of Ghana, 1992. Since no constitutionally valid crime had been created under section 2(1) of Act 774, there could be no criminal liability under the provision. Consequently, there could

be no inchoate offence under that provision either. The High Court, Human Rights Division, further opined that the contract between the parties involved a future promise which could not be proved to have been false at the time it was made, and so the charge of Defrauding by False Pretences could not be properly laid. The proceedings before the Circuit Court were consequently described as "quashed", by the High Court on 9th July, 2014. In the course of the proceedings in the Circuit Court, the 2nd defendant undertook to refund the money owed, in installments. However, after paying four such installments of Ghc 1,000, amounting to Ghc 4,000, the 2nd Defendant failed to make any further payments.

Dissatisfied with the decision of 9th July 2014, the Plaintiff subsequently applied to the same High Court, Human Rights Division, for a review of the 9th July 2014 decision. On 2nd June, 2016, the High Court, Human Rights Division, now differently constituted, quashed the decision of 9th July, 2014. Following this purported act of quashing its own decision of 9th July, 2014, the Defendants sought judicial review before this honourable Court. On 9th February, 2017, the decision of the High Court, Human Rights Division, purporting to quash the decision of the same High Court, differently constituted, was quashed by this honourable Court. And rightly so.

The Plaintiff, then, initiated a fresh action by Writ, this time, at the High Court, General Jurisdiction, on 3rd November, 2017, asking for a total sum of Ghc 88,000, made up of the principal sum of Ghc 80,000; and the outstanding interest from 5th July 2012 (when the original contract would have ended) till the date of final judgment. The Defendants filed a Statement of Defence to the action on 22nd December, 2017, contending that the Ghc 80,000 was a loan made by Plaintiff to the Defendant-Company and not an "Investment" as Plaintiff claimed. In the said Statement of Defence, the Defendants averred in paragraph 18 that the Plaintiff entered into a business agreement with the Defendant-Company as a money-lender, for which Plaintiff had no licence, to lend

money to it at 3% interest per month. They also averred that in consequence of the agreement, the Plaintiff was a Money-Lender and the Defendant-Company was the 'Borrower' who had agreed to pay Ghc 28,800 as interest in addition to the principal sum of Ghc 80,000; and that the contract was between the Plaintiff and Defendant-Company, and not with them, as individuals. Apart from erecting the "corporate shield" between themselves and 1st Defendant, the sums of money paid, or due, were all admitted. These are the facts that have given birth to the instant appeal,

On 26th January, 2018, the Defendants moved the High Court to strike out the 2nd, 3rd and 4th Defendants on the ground of Misjoinder. They contended that although money was owed to the Plaintiff by the Defendant-Company (ie the 1st Defendant), the 2nd, 3rd and 4th Defendants, though Directors of Defendant-Company, were not proper parties to the suit and so could not be personally liable for a loan contracted by 1st Defendant. The High Court, presided over by Norvisi Afua Aryene J. considered the evidence provided on affidavit and ruled that the 2nd, 3rd and 4th Defendants' presence in the suit was necessary and so refused to strike them off the suit as parties. Relying on *Morkor* v. *Kuma* (No. 1) [1999-2000]1 G.L.R. 721, she ruled that the circumstances of the case were in consonance with the exception to the rule enunciated therein by this honourable Court, on when the veil of incorporation would be lifted.

Within one week of this Ruling on 1st February, 2018, the Plaintiff moved the High Court for Summary Judgment under Order 14 of the High Court (Civil Procedure) Rules 2004, C.I.47 as amended, contending that the Statement of Defence contained no defence and therefore he was entitled to Summary Judgment. The 2nd, 3rd and 4th Defendants contended that there were triable issues as to whose liability the debt was,

so the application ought not to be granted. The High Court granted the application and ordered the Defendants to pay up Plaintiff's claim subject to reconciliation of the accounts by the Director of Finance of the Judicial Service.

During the process of reconciling the accounts the Defendants had the opportunity to cross-examine the Director of Accounts but failed to do so, leading the court to conclude subsequently, that they were in agreement with the total amount which had, by then, ballooned to Ghc 184, 855.16. On 26th April, 2018, the 2nd, 3rd and 4th Defendants filed a Notice of Appeal against the Ruling. The 1st Defendant did not appeal. After months of inaction, the Court of Appeal struck out the case on grounds of non-compliance on 4th February 2019. On 14th February, 2019, the Defendants applied for, and secured Leave of the Court of Appeal for a re-listing of the case. The case was duly re-listed, and heard by the Court of Appeal. On 18th July, 2019, the Court of Appeal dismissed the appeal.

It is against this judgment by the Court of Appeal that the instant appeal has been brought by the Defendants.

GROUNDS OF APPEAL

The Defendants have submitted 6 grounds of appeal numbered a-f as follows

> "a. The court below erred in law when in the absence of proof beyond reasonable doubt held that the appellants had perpetuated [sic] fraud against the Respondent [plaintiff].
>
> b. The Court below erred in law when it adopted a summary and perfunctory approach to impute fraud and illegality against the appellant.

c. The finding by the court below that the appellants set up the 1st Defendant company for illegal purposes is not supported by the evidence on record.

d. That despite the subsistence of the decision of the High Court dated 9th day of July 2014 Suit No. HRCM 145/13 titled *The Republic v. Circuit Court Accra, & 1 Or. Ex parte Kudjo Anku, David Fameye and David Osei-Manu (Daniel Gibson Danso, Interested Party* which held among others that the appellants had not engaged in fraud or deceit against the Respondent herein, the court below erred in law when its decision purports to have reverse [sic] the findings of the High Court in Suit No 145/13.

e. The court below failed to adequately consider the case of the appellants.

f. That the judgment was against the weight of evidence."

A close inspection of the grounds of appeal suggests that this appeal, is in fact, a composite case of two appeals, made up the ruling of the High Court on 26th January 2018 dismissing the application for misjoinder, brought under Order 4 Rule 5 of High Court (Civil Procedure) Rules, CI 47; and the ruling of 26th April 2018 upholding the application for Summary Judgment under Order 14 of the High Court (Civil Procedure) Rules, CI 47.

Since the appeal was primarily against the Summary Judgment provided for under Order 14, it would be important to examine its operation in law while taking the specific grounds of appeal. The grounds of appeal, ought to have been discussed in

chronological order. However, it being thematically inappropriate so to do, we begin with ground **f**, the omnibus ground, which invokes the weight of authority as to what an appellate court should when such omnibus ground is pleaded.

GROUND f.

It is trite law that an appeal is by way of re-hearing. As stated by Akuffo JSC (as she then was) in *Tuakwa* v. *Bosom* [2001-2002] SCGLR 61 at p.65,

> "an appeal is by way of rehearing, particularly where the appellant…alleges in his notice of appeal that the decision is against the weight of evidence. In such a case, although it is not the function of the court to evaluate the veracity or otherwise of any witness, it is incumbent upon an appellate court, in a civil case, to analyse the entire record of appeal, take into account the testimonies and all the documentary evidence adduced at the trial before it arrives at its decision, so as to satisfy itself that, on a preponderance of probabilities the conclusions of the trial judge are reasonably or amply supported by the evidence."

In *Akufo-Addo* v.*Cathelin* [1992] 1 GLR 377 at p391, the Supreme Court had to determine, inter alia, whether the Court of Appeal could, *suo motu*, raise a point not argued by the parties in the trial court, and base its judgment on the point. Kpegah JSC concurring in the majority judgment stated as follows:

> "One must understand what the phrase 'by way of re-hearing' means. It must be pointed out that the phrase does not mean that the parties address the court in the same order

> as in the court below, or that the witnesses are heard afresh. …It does also not mean that the Court of Appeal is not to be confined only to points mentioned in the notice of appeal but will consider (so far as may be relevant) the whole of the evidence given in the trial court, and also the whole course of the trial."

However, in such situation, the other party must have a chance to be heard on the new point raised *suo motu* by the Court of Appeal.

Consequent upon these and other authorities in this line, this court is obliged to consider the totality of pleadings and other documents provided in the Record of Appeal.

GROUND b.

The Defendants' complaint about the use of the mode of Summary Judgment was couched thus: "the Court below erred in law when it adopted a summary and perfunctory approach to impute fraud and illegality against the appellant."

The procedure for Summary Judgment is well-grounded in law and cannot be described as "perfunctory" as the Defendants state in their Statement of Case. It serves a useful purpose when nothing would be gained by a full scale and possibly, long-winded trial when there are no triable issues. In *Sam Jonah* v. *Duodu-Kumi* [2003-2004] 1 SCGLR, 50 at 54, the Supreme Court, per Akuffo, JSC had cause to pronounce on the essence of this procedure, thus:

> "The objective of Order 14 … is to facilitate the early conclusion of actions where it is clear from the pleadings

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

On this statement of the applicable law, the question whether there were triable issues would have to be resolved.

WERE THERE TRIABLE ISSUES?

There appear to be. The Defendants state in paragraph 3.20 of their Statement of Case filed on 5th March, 2020, thus:

> "My Lords, clearly the trial court recognized that there were triable issues to which the appellants ought to assist the court to resolving them. In the wisdom of the court the controversies surrounding whether the appellants misrepresented to the Respondent to invest his money in the 1st Defendant ought to be interrogated and further, whether the defendant did invest or loaned his monies to the appellant. Even more important is whether Appellants could assume liability of what they contend is that of the 1st Defendant at the trial court."

It must be stated from the outset that the fact that an admission of indebtedness by 1st Defendant is made by the 2nd, 3rd and 4th Defendants, does not mean an admission and acceptance of personal liability on their part.

It is also a fact that the nature of proceedings for Summary Judgment makes it unsuitable for drawing conclusions when allegations of fraud are made. Indeed, under Order 14 r.12(c), it is provided that the rule on Summary Judgment should not apply when there is a "claim or counterclaim based on allegation of fraud." In defending the 'Summary Judgment', the Plaintiff made two interesting statements in 6.15- 6.16 of the Statement of Case, the Plaintiff states as follows:

> "The appellants also submit that the Respondent argued in the Court below that he did not plead fraud therefore the Court below erred by making a finding of fraud when same was not an issue before them.
>
> 6.16 It is our respectful opinion that an appeal being by way of re-hearing, the Court below is seised with the discretion to consider the entirety of the issues between the parties and not limit itself to only the points made by the parties on the grounds of appeal only."

As has been demonstrated, the above is a correct statement of law in respect of the remit of an appellate court. However, the correctness of the statement also means that there was a "claim or counterclaim based on allegation of fraud.", thereby rendering the grant of Summary Judgment under these circumstances inappropriate by the dictates of Order 14 r.12(c). The Plaintiff affirms the veracity of this observation by stating in 6.19 of the Statement of Case that "the Court below made no error when it made a finding of illegality and fraud against the appellants based on evidence before it during the

appeal." In *Oyoko Contractors* v *Starcom Broadcasting Services* [2003-2005] 1 GLR 445, this honourable Court allowed the appeal on the grounds that an allegation of fraud in the counterclaim of the defendant raised triable issues which ousted the jurisdiction of the High Court to grant application for Summary Judgment.

GROUNDS a-c

The Defendants argued grounds a-c together and therefore a composite response would be equally mandated.

WHO IS LIABLE IN THIS SUIT FOR THE MONEY OWED OR WHO ARE THE PROPER PARTIES IN THIS SUIT?

This case raises pertinent issues as to the nature and incidence of the corporate persona. Throughout the appeal, there was no contention as to whether money was owed to the Plaintiff. The real question was "Who owed that money?" Indeed, when the Defendants applied to the High Court for misjoinder, it was based upon their position that although they had conducted business, they had done so as a corporate entity and were therefore not personally liable for any debt incurred in the course of business. The High Court in ruling on the application to strike out the Defendants as parties to the suit ruled in cryptic fashion as follows:

> "Having heard both counsel, reviewed the respective affidavits and exhibits attached thereto, I rule that the applicants are necessary parties to the suit. Am [sic] satisfied that the exception laid down in *Morkor* v *Kuma* applies in the circumstances of this case. Whereas the applicants contend that the respondent described himself as a moneylender and the respondent on the other hand avers that he invested his

> money in 1st defendant due to alleged misrepresentations by the applicants herein, it is my respectful opinion that the presence of the applicants is necessary for the complete and final determination of the matters in dispute."

In this very statement by the learned judge, a number of issues required determination by further evidence.

1. Were the "alleged representations" made, and by whom, and to what effect? The Plaintiff alleges that he was influenced by those assurances given by the Defendants as to their sincerity. On the evidence, it is not quite clear exactly what constituted the "representations"; who made them; and in what capacity those were made. The "alleged representations" formed a critical part of the analysis as to fraudulent intent of the Defendants, yet it is uncertain whether they were made, by whom, of whom and to what effect. If at the end of a case, a court basing a judgment on "representations made" still qualifies those cardinal elements as "alleged" then there clearly was not enough evidence to conclude one way or the other. Again, it is uncertain who made the "representations" or in what capacity. If the 2nd Defendant as 'Ag Managing Director' made them on the then track record of Defendant- Company, it would surely mean something different from if they were made on the personal character and track record of the directors themselves. This should have been settled by clear evidence, particularly as Plaintiff alleges that those assurances tilted the balance in favour of a decision to trust his money to the company.
2. Was the 1st Defendant a body corporate, as maintained throughout by 2nd, 3rd and 4th Defendants? On the current documentation on the record, there is only the say-so of the Defendants. Should the existence of corporate personality being set

up as a shield against personal liability not have been established by documentary evidence? As observed by the Court of Appeal,

> It is patently clear that the Company listed as 1st Defendant does not exist or has the mandate to do business as a financial institution…It is their duty to show that they are truly registered to operate as a financial institution which they failed to do

The question here is, did the Defendants have a chance to prove by evidence, one way or the other, before the application for Summary Judgment truncated proceedings? I should think not. It is no surprise that the Court of Appeal itself oscillated between stating that the company did "not exist", and also that the "company was formed for illegal purposes". Did it or did it not exist? If it did not exist, then it could not even be a party to the proceedings since it would lack legal personality. In effect, had the trial proceeded beyond the Ruling of 26th of January, this question would have been answered definitively, as it was critical in determining who the parties were.

3. If the company did exist, what was its authorized business? Did its regulations permit the taking of loans from private individuals for the conduct of its business as the Defendants have sought to suggest by their reliance on the status of Plaintiff as 'Money-Lender'? Where a Company steps out of its line of business, the ultra vires doctrine could operate to impose personal liability on the Directors, and therefore establishing what its line of business was by its regulations could make a difference to the personal liability of its directors for a debt incurred in consequence.

4. Did the 1st Defendant possess a licence of any kind to carry on business in the financial sector? There is some documentary evidence on the record that the Police, in the course of investigations to initiate the ill-fated criminal prosecution at the Circuit Court, received a letter, in response to an enquiry from the Bank of Ghana denying the existence of such licence. The genuineness of this letter appears to have been accepted on faith, but this was not tested on the evidence. In paragraph 6.14 of the Plaintiff's Statement of Case, he pleads thus:

> "it is our respectful submission that the contents of Exhibit D ought to be presumed authentic in accordance with Section 37 of the Evidence Act, 1975 (NRCD 323) as it emanates from the body lawfully mandated to regulate business such as the one the Appellants purported to operate. In fact, the contents of Exhibit D or its authenticity was never challenged by the Appellants."

Was there opportunity for the authenticity of the letter to be established, bearing in mind that the proceedings at the Circuit Court were truncated; and there was no opportunity for a full scale trial at the High Court, General Jurisdiction? Since the absence of any licence from Bank of Ghana was construed as indications of fraud through the instrumentality of the Defendant-Company by the Defendants, this enquiry was part of what it would have taken to determine whether there was a corporate veil at all; and then to consider whether to lift it to reach the directors. Therefore it was necessary evidence that could not be left to guess work.

Indeed, in the judgment of the High Court, Human Rights Division in 2014, the Defendants had established that they had a Money-Lender's Registration which though valid on its face at the time they made the "alleged representations" to

the Plaintiff, was not in fact so, since the enabling legislation had been repealed some years earlier. This situation caused Essel Mensah, J. at the High Court, Human Rights Division to describe the situation as "a comedy of errors", when he found that the legislation under which the Defendants had purported to register their business had been repealed at the time both the Defendant-Company and the administrative agency, Ghana Police Service, purported to operationalize its provisions. Although on the pleadings in the instant case, they failed to plead same for obvious reasons, surely the very fact that they took steps to bring their operations under law, albeit an expired law, may be evidence of ineptitude, or even negligence, but is that sufficient to make imputations of fraudulent intent behind the operations of the Defendant-Company? It is true the business apparently had no legal backing, but was that conclusive evidence of fraud? As Essel Mensah J. observed, "At least the conduct of the applicants [Defendants] in applying for and obtaining a licence shows that they were bent on doing lawful business. They honestly believed that with the licence they were in lawful business."

Further, the Statement of Case of Plaintiff states at paragraph 6.6 as follows: "It is our considered opinion that enough evidence is available before this Court to support findings made by the trial High Court judge and the court below regarding the illegality of the 1st Defendant's operations". However, the facts do not bear out this statement.

5. Was the 1st Defendant actually in the business of taking and making loans on behalf of clients and paying them interest, even if it did not have appropriate licences to do so? If it did, would such evidence support imputations of fraud, as may be fairly and objectively be concluded from the Statement of Case of the Plaintiff, and which imputations were complained of in the Statement of Case on behalf of the Defendants?

The Plaintiff alleges that he was introduced to the Defendants by an acquaintance who remained in the transaction to act as his 'Witness' during the signing of the agreement. Was she an accomplice to the alleged fraud? Or she had used the services of Defendant-Company and was a satisfied consumer, hence the introduction? One cannot tell, one way or the other. Her evidence might have been helpful in establishing the nature of Defendants' business operations to which she introduced the Plaintiff.

6. Was the plaintiff-respondent under any misapprehension as to whether he was dealing with a 'Microfinance Company' or with the individuals involved?

These obviously triable issues, had they been determined in a full scale trial, may have given the learned trial judge a basis to indicate which particular aspects of *Morkor* v. *Kuma* were being relied on. As things stood, the cryptic reference to *Morkor* v. *Kuma*, without any further indication as to the particular "circumstances of this case", left the Defendants no option but to come to the undeniable conclusion that an allegation of fraud was being made against them in view of the previous attempts to prosecute them for fraud at the Circuit Court. They were therefore right to appeal to the Court of Appeal that there was an imputation of fraud against them and yet no particulars of fraud had been specifically pleaded as required under section 13(1) of the Evidence Act, NRCD 323.

The Court of Appeal's response was to confirm that indeed the Defendants had been guilty of fraud, without an opportunity to defend themselves against the charge as prescribed by *Akufo-Addo* v *Catheline*. At p.7 of the judgment, Gyaesayor JA said,

> in this case the Company does not exist or licensed to operate as a financial institution … It is a fraudulent company designed to defraud unsuspecting customers and

> they must be personally liable for the alleged acts of the supposed company.

With the greatest respect, the record of the case does not bear out this damning conclusion. The evidence shows that the plaintiff received the interest of Ghc 2,400 regularly for eight of the twelve months of the contract period, and even after the Plaintiff had written to them demanding his principal sum in full. Being aware of the consequences of being adjudged a fraud under Act 179 and its successor legislation, Act 992, the Defendants mounted a vigorous, even if somewhat delayed, challenge to the imputation of fraud.

From the evidence on record, the Plaintiff was under no misapprehension that he was dealing with a company. The payment Vouchers on which he received payment of the agreed interest were on the letterhead of the Company; and they were signed by the same officers to wit, the Ag Managing Director' and the 'Accountant". At p.6 of the judgment the Court of Appeal upheld the High Court's effort to lift the veil of incorporation under the exceptions in *Morkor* v. *Kuma* thus:

> "The attempts to detach themselves from the act of the 1st Defendant cannot be supported. It is true that the Company is a body corporate which can sue and be sued in its own name, but in the case before us, there is no evidence that the company was ever licensed to do business. **The company was clearly set up by the defendant for illegal purposes**." (my emphasis.)

With the greatest respect, a company set up for illegal purposes is not the same as one that engages in business that is rendered illegal for failure to comply with statutory and regulatory requirements. A company set up to take and make loans; and invest money

for interest would, with the necessary licences be engaged in lawful activity, whilst one set up to engage in money-laundering, for instance, could be said to have been "set up for illegal purposes." From the available evidence, the 1st Defendant appears to belong to the former category, rather than the latter category. To be able to come to a definite conclusion that Defendant-Company belonged to the latter category rather than to the former, one would have to base such conclusion on better evidence than mere inferences and suppositions.

LIFTING THE VEIL OF INCORPORATION

At p.7 of the judgment Gyaesayor JA also said

"in this case the Company **does not exist** or licensed to operate as a financial institution as claimed by the defendants." (my emphasis) With respect, the registration of a company is separate from its power to transact any business; and where, as in this case it required a licence to operate, its power to conduct lawful business in the financial sector. Even if it had not applied for the requisite licences to operate, that was a separate question from its existence as a company. To conclude therefore that the company did not exist, merely from the fact of it not having obtained the requisite licences was unfair to the Defendants. Indeed, the Defendants, in their Supplementary Affidavit in Opposition filed on 24th January, 2018, at the High Court, they traversed the averments of the Plaintiff's affidavit in paragraph 6 as follows: "Save that the 2nd, 3rd and 4th defendants promoted and became Directors of the 1st Defendant Company, the rest of paragraph 10 of the affidavit in Opposition is denied." Again in paragraph 9 of the affidavit in support of Motion to strike out 2nd, 3rd and 4th Defendants names from the suit filed on 22nd December, 2017, the Defendants maintained that although the Plaintiff, indeed, did sign an agreement with 1st Defendant, the contract was not with them as individuals since they were "distinct and separate individuals from the 1st Defendants.

What then was the evidence upon which the Court of Appeal could come to the conclusion that the 1st Defendant did not exist?

The application for Summary Judgment was filed on 1st February, less than one week after the Defendants' application of 26th January had been dismissed. Although the indebtedness of 1st Defendant had never been denied by 2nd, 3rd and 4th defendants, the real issue was who was liable to pay that debt. This, in turn, was dependent upon whether or not the 2nd, 3rd and 4th Defendants could be held personally liable for the debts of 1st Defendant. Consequently, the issue of whether the High Court was right to lift the veil of incorporation could not be settled by a mere statement that the case fell within "the exception in *Morkor* v. *Kuma*". In *Morkor* v. *Kuma* (No.1) [1999-2000] 1 GLR 721, at p. 733 Akuffo JSC (as she then was) had stated the oft-quoted words:

> "The corporate barrier between a company and the persons who constitute or run it may be breached only under certain circumstances. These circumstances may be generally characterized as those situations where in the light of the evidence, the dictates of justice, public policy or Act 179 [now Act 992] so require. It is impossible to formulate an exhaustive list of circumstances that would justify the lifting of the corporate veil. However, the authorities indicate that such circumstances include where it is shown that the company was established to further fraudulent activities, or to avoid contractual liability."

Her Ladyship did not end there. At p. 735 of the report, she gave some indications of the circumstances she had in mind and stated further that,

> "Nevertheless were there any proven factors driving the case, such as fraud, improper business conduct, deliberate attempts at evasion of legal obligations, or other devises or willful misdeeds on the part of the appellant, which would have justified the lifting of the veil in order to reach the appellant for redress?"

From these statements clarifying the circumstances under which the veil of incorporation would be lifted, the next question is, as *Morkor* v. *Kuma* contained a number of exceptions, "Which of the many grounds in *Morkor* v. *Kuma* were made out by the evidence, such that the learned judge could declare herself to be "satisfied that the exception laid down in *Morkor* v. *Kuma* applies in the circumstances of this case"? Not surprising therefore, that while the Defendants complained that they had been unfairly criminalized by the imputation of fraud, the Plaintiff stuck to the fact that the company's operations were "illegal", whilst the Court of Appeal oscillated between "fraud" and "illegal purposes". Even if the Defendants entered a line of business without fully apprising themselves of the legal requirements governing that sector, that did not convert the company they set up into one that had been set up to "defraud unsuspecting customers", or for "illegal purposes.

Although the Defendants have themselves to blame for their failure to comply with the statutory and regulatory regime, there should be conclusive evidence that their conduct, or their operations, do, indeed, come within the exceptions in *Morkor* v *Kuma* to justify them being deprived of the cloak of corporate protection. A full trial of these issues would have provided the necessary evidence for the trial court to come to a definitive conclusion.

In the circumstances, we would reverse the decision of the Court of Appeal and remit the case back to the High Court for the full trial to take place.

In the circumstances, the appeal by the 2nd, 3rd and 4th defendants succeeds, and is accordingly allowed. The judgment of the Court of Appeal dated 18th July, 2019, is set aside.

PROF. H. J. A. N. MENSA-BONSU (MRS.)

(JUSTICE OF THE SUPREME COURT)

V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

G. TORKORNOO (MRS.)

(JUSTICE OF THE SUPREME COURT)

C. J. HONYENUGA

(JUSTICE OF THE SUPREME COURT)

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