IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA- A.D. 2021

CORAM: YEBOAH, CJ (PRESIDING)

PWAMANG, JSC

AMEGATCHER, JS

OWUSU (MS.), JSC

HONYENUGA, JSC

CIVIL APPEAL

NO. J4/30/2020

31ST MARCH, 2021

C. C. W LIMITED ……. PLAINTIFF/RESPONDENT/RESPONDENT

VRS

ACCRA METROPOLITAN ASSEMBLY ….

DEFENDANT/APPLICANT/APPELLANT

J U D G M E N T

HONYENUGA, JSC:-

INTRODUCTION

The instant appeal emanates from the Ruling of the High Court on a motion on notice for leave to levy execution in which the High court granted the application in favour of the plaintiff/respondent/ respondent as against the defendant/applicant/appellant for the payment of Nine million, two hundred and one thousand, eight hundred and fifteen US Dollars (US$9,201,815.29). Dissatisfied with the decision of the High Court, the defendant/applicant/appellant appealed to the Court of Appeal which also dismissed the appeal and affirmed the decision of the High Court. Being aggrieved with the Judgment of the Court of Appeal, the defendant/applicant/appellant filed an appeal to this court. In this opinion, the defendant/applicant/appellant would be simply referred to as the appellant while the plaintiff/respondent/respondent would be referred to as the respondent.

BACKGROUND

The background facts of this case are that by an agreement dated the 4th December 1997, the appellant engaged the respondent to render waste disposal services including landfill services within the city of Accra. However, the respondent commenced work only for the appellant to terminate the agreement. Being aggrieved, the respondent issued a writ at the Fast Track High Court claiming for an order compelling the appellant to pay to the respondent an amount equivalent in Cedis of US$10, 207, 718.51 at the prevailing forex bureau rate on the date of actual payment being the cost of services provided, interest on the sum mentioned until the date of Judgment, damages for breach of contract, loss of profit, further or other reliefs and costs. The appellant counterclaimed for a declaration that the procedure adopted in awarding the contract to the respondent was improper, irregular against public policy and illegal and therefore the agreement is null and void. The appellant also claimed for re-negotiation of the clauses that were inimical to it and

sought an order for the respondent to pay for the use of its vehicles, equipment, offices among others. It claimed interest on any amount due from the respondent to it and for an order to reconcile accounts.

At the end of the trial, the learned trial Judge, delivered Judgment in favour of the Respondent and concluded as follows:

> "I would refuse these claims of the defendant. In conclusion of this case the plaintiff will be entitled against the defendant to the sum of 715, 628.5 metric tons x US$18 dollars payable in cedis at the current inter forex bureau exchange rate. From this amount will be deducted the figure of ¢133, 400.00 [old cedis] owed the defendant for the use of the waste management premises."

The appellant appealed to the Court of Appeal but the court dismissed the appeal as being without any merit.

Upon the dismissal of its appeal, the appellant further appealed to the Supreme Court and on the 13th February, 2008, this court affirmed the decision of the High Court as follows:-

> "Accordingly, we order that the defendant should pay the plaintiff the net award made by the learned trial court Judge in the passage above. In accordance with the Court (Award of Interest and Post Judgment Interest) Rules, 2005 (CI.52), the defendant is ordered to pay interest on the amount awarded to the plaintiff at the bank rate prevailing today with effect from the date of termination of the contract, that is 29 June, 2001 till the date of payment.
>
> In effect, then, though we hereby reverse the Court of Appeal finding that the contract was not illegal, the appeal is dismissed and the orders of the learned trial Judge affirmed with the supplementary order that interest be paid."

It is noteworthy that the Judgment of this court is reported as CCW LTD V. Accra Metropolitan Assembly [2007 – 2008] SCGLR 409.

After the decision of the Supreme Court, a series of events ensued, leading to the motion that led to the present appeal. These events are coherently set out in the affidavit in support of its motion in the High Court so we shall reproduce the relevant parts of that affidavit.

Paragraphs 2, 5, 6, 7, 11, 13, 15, of the Affidavit in support is as follows:-

> "2. The Supreme Court on February, 13, 2008 affirmed the Judgment of the High Court, entering Judgment for plaintiff for the cost of waste management services provided by plaintiff under a waste management contract executed by the parties. Entry of Judgment is attached to this affidavit and marked as exhibit "CCWL 1"). The Judgment was delivered on the basis of a specified and proven tonnage of waste collected and disposed of by plaintiff for Defendant indexed to US dollar per ton.
>
> 5. In both Exhibit CCWL 3 and CCWL 4, Government of Ghana agreed to settle Defendant's indebtedness, not only as a guarantor, but also a primary obligor. Eventually, after some further delays, Government of Ghana paid fully the undisputed half of the Judgment debt together with accrued interest.
>
> 6. On January 23, 2012, the Commercial Division of the High Court delivered a ruling dismissing defendant's Suit against plaintiff as an abuse of process (Exhibit "CCL 5"). After the dismissal of the suit, plaintiff applied for leave to enter into execution of the remaining half of the original Judgment debt (Exhibits "CCWL 6" and CCWL 7"). The prevailing rates of exchange at the time brought the Judgment debt to about GH¢45,864,560.00. The application was granted (Exhibit "CCWL5").

Pursuant to the grant of the application (Exhibit "CCWL 8"), Plaintiff filed a writ of fifa to execute the Judgment debt of GH¢45,864,560.00 (Exhibit CCWL 9").

7. Government of Ghana intervened once again, and, acting through the office of the Attorney General, invited plaintiff for a meeting to discuss debt and its payment. (Exhibit "CCW 10"). During negotiations plaintiff was persuaded in consideration of prompt payment of the Judgment debt by Government of Ghana to discount the debt by a whooping GH¢9, 711,177.30. The final sum agreed by the parties to be payable by Government to plaintiff was GH¢36,153,384.36.

11. On July 14, 2014, Plaintiff caused a letter to be written to Government of Ghana through the Attorney- General's office, copied to Defendant and the Honourable Ministers of Finance and Local Government demanding payment of the sum of US$9,201, 815.29, being foreign exchange losses it had suffered as a result of the delay by Government of Ghana and Defendant in making scheduled payments (Exhibit "CCWL 16" is self-explanatory of plaintiff's basis for the claim for foreign exchange losses.

13. On May 29, 2017, Plaintiff formally demanded from Defendant payment of the sum of US$9, 201, 815.29 (Exhibit CCWL 19") Defendant ignored the demand. On January 5, 2017 Attorney General's Office once again reminded Defendant of its obligations to settle its indebtedness to Plaintiff (Exhibit "CCWL 20"). Defendant continued to ignore the demand.

15. WHEREFORE I swear to the affidavit praying the Honourable court to grant leave to plaintiff to levy execution against Defendant and Government of Ghana jointly and severally for the sum of US$9,201,815.29, together with accrued interest at the Bank of Ghana US dollar rate, from January 25, 2016 (when the office of the

Attorney-General wrote to Defendant to pay to plaintiff the agreed sum of US$9,201,815.29) until the date of final payment."

After hearing the parties the High Court held as follows;

"The application is granted as prayed. Leave is hereby granted the applicant to levy execution jointly and severally against the respondent and the Government of Ghana for the sum of US$9,201,815.29 or its cedi equivalent, being the foreign exchange losses incurred by the applicant as a result of delayed payment of the paid judgment debt. Interest shall be paid on the said amount at the Bank of Ghana dollar rate from 20th December 2016 (when solicitors of applicant wrote to respondent demanding payment of the agreed sum of US$9,201,815.29) up to date of final payment."

This is the decision that was affirmed by the Court of Appeal who reasoned as follows:

"The Supreme Court, in its judgment of 13th February 2008, as indicated earlier, not only confirmed the judgment of the High Court as to what was due the Respondent from the Appellant, but also directed that interest be paid on the said sum at the prevailing bank rate with effect from the date of the termination of the contract till the date of payment having regard to the Court (Award of Interest and Post Judgment Interest) Rules 2005, (C.I. 52). The judgment of the High Court affirmed by the Supreme Court was for the payment of the sum adjudged, payable in cedis, at the current inter forex bureau exchange rate. See page 155 of the record of appeal, where the Supreme Court, in its Judgment, quoted extensively from the judgment of the High Court, which it found to be fully supported by the evidence on record. By decreeing payment of the judgment debt at the prevailing dollar rate from 2001, albeit payable in cedis, the court meant to give the Judgment creditor full value of what is due it at the time of payment. The judgment was

compromised in 2012 with the understanding that same would be paid immediately. When by 2013 if had not been paid (sic), and the Respondent obtained an order to go into execution, upon which the compromised sum was eventually paid in July 2014, this could not constitute the same amount, in dollars terms, at the time of the compromise, having regard to the depreciation of the cedi to the dollar and therefore would not constitute full value of the sum due."

SUBSTANTIVE GROUNDS OF APPEAL

The Appellant has impeached the judgment of the Court of Appeal on the following grounds;

"a. That the Judgment is against the weight of evidence.

b. That the Court of Appeal erred by affirming a Judgment given without Jurisdiction as the preconditions for exercising Jurisdiction under Order 44 of the High Court (Civil Procedure) Rules 2004, (CI 47).

c. That the Court of Appeal was not property constituted as the Presiding Judge delivered the Judgment in CCWL vs. Accra Metropolitan Assembly; Suit No. FTC 17/2002 and thus had foreknowledge of the facts upon which the procedures before the High Court was initiated.

d. That the Court of Appeal erred when it held that the letters dated December 2016 and January 2017 from the Deputy Attorney-General advising the Appellant to pay the sum of USD9,201,815.29 constitute an admission against the interest of the Appellant in terms of section 26 of the Evidence Act, 1975 (NRCD 323).

e. That the Court of Appeal erred when it held that the Government of Ghana was a guarantor and first obligor in the contract resulting in the debt and therefore *had* to pay the said USD9,201,815.29 jointly and severally with the appellant.

f. That the Court of Appeal erred by affirming the decision of the High Court that the Respondent is entitled to foreign exchange differentials of USD9,201,815.29 when the Judgment debt was converted into Ghana Cedis and paid fully in July 2014.

g. That the Court of Appeal erred by affirming the decision of the High Court when the Appellant had fully satisfied the Judgment debt."

SUBMISSIONS OF THE APPELLANT

The gravamen of the case of the Appellant is that there was no subsisting Judgment or order that decreed that the respondent shall be paid US$9, 201,815.29 by the appellants so as to entitle respondent to levy execution for such sum. The appellant contends that the amount now being claimed by the respondent is a new claim being made subsequent to the judgment of the Supreme Court given in 2008 so it is an independent cause of action that if anything may be pursued by a new writ of summons.

THE RESPONDENT'S SUBMISSIONS

The Respondent on the other hand, submits that the sum of US$9,201,815.29 is not based on any new claim or new facts for which a new writ ought to have been issued and a fresh Judgment obtained. The Respondent contends that the sum represents the loss occasioned by Appellant and Government's failure to pay the compromised outstanding Judgment debt of GH¢36, 686,406.43 promptly. Counsel refers to the Judgment of this court in making a dollar indexed Judgment/award or its equivalent in cedis in favour of the Respondent, clearly recognized that the Respondent was entitled to the cedi equivalent of the dollar at the current inter forex bureau exchange rate.

The respondent also submits that the letters of the Deputy Attorney-General it exhibited in the High Court are a clear acknowledgment that the stated amount is due and owed

to it by the appellant. Those letters, it is contended are unequivocal admissions against interest by the appellant so it is estopped from denying the respondent's entitlements to those monies. The Respondent therefore submits that the Court of Appeal did not err by affirming the decision of the High Court.

DETERMINATION OF THE GROUNDS OF APPEAL

Before a consideration is given to the grounds of appeal, it is noteworthy that the appellant abandoned ground c of the grounds of appeal and it is hereby struck out as abandoned.

As the Jurisdiction of the High Court that was invoked by the respondent is premised on Order 44 rules 3 (1)(a) and 2 and 5 of the High Court Civil Procedure Rules 2004 (C.I. 47) as amended in their provisions we deem it necessary to set out the provisions in extensor hereunder:-

> "Necessity for leave to issue writ of execution.
>
> 3 (i) A writ of execution to enforce a Judgment or order may not issue without leave of the court in the following cases:-
>
> > (a)where six years or more have elapsed since the date of the Judgment or order,
>
> (2) Where the court grants leave for the issue of a writ of execution and the writ is not issued within one year after the date of the order the leave, the order shall cease to have effect without prejudice to the making of a fresh order."
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> Application for leave to issue writ.
>
> 5 (1) An application for leave to issue a writ of execution may be made under ex-parte.

(2) The application shall be supported by an affidavit.

a. Identifying the Judgment or order to which the application relates and if the judgment or order which the application relates and if the judgment or order is for payment of money, stating the amount originally due and the amount due under it at the time of the application;

b. Stating, where the case falls within rule 3(1) (a), the reasons for the delay in enforcing the Judgment or order.

(c)stating, where the case falls within rule 3(1)(b), the change which has taken place in the parties entitled or liable to execution since the date of the Judgment or order;

(d) stating, where the case falls within rule 3(1) (c) or (d) that a demand to satisfy the Judgment or order was made on the person liable to satisfy it and that the person has refused or failed to do so;

and

(e) giving such other information as is necessary to satisfy the court that the applicant is entitled to proceed to execution on the judgment or order in question and that the person against whom it is sought to issue execution is liable to execution on it.

(3) The court hearing the application may grant leave in accordance with the application or may order that any issue or question a decision on which is necessary to determine the rights of the parties, be tried in any manner in which any question of fact or law arising in an action may be tried and in either case, may impose such terms as to costs or otherwise as it considers just." (emphasis supplied).

Now, the issue in the instant appeal is whether the Judgment of the High Court which was affirmed by the Supreme Court entitled the Respondent automatically to foreign exchange differentials or losses?

For emphasis we would repeat the judgment of the High court that was affirmed by the Supreme Court;

> "In conclusion of this case the plaintiff will be entitled against the defendant to the sum of 715, 628.5 metric tons x US$18 dollars **payable in cedis at the current inter forex bureau exchange rate**. From this amount will be deducted the figure of ¢133,400,000 [old cedis] owed the defendant for the use of the waste management premises."

Order 41 Rule 5(2) (a) states that an applicant for leave to go into execution shall identify the judgment or order to which the application relates. The Black's Law Dictionary, Ninth Edition at page 918 defines 'Judgment' as follows.

> "1. A court's final determination of the rights and obligation of the parties in a case."

It is thus obvious that a Judgment or order is the final determination of issue or issues before it. Can it be said that on the basis of the facts deposed to above that there was a Judgment or an order of a court of competent Jurisdiction on which the Respondent could apply for leave to execute it? The judgment which can be executed can only be the judgment of the High Court that was affirmed by the Supreme Court. The only addition the Supreme Court made to the judgment of the High Court was the award of interest but this present dispute does not relate to the interest so it is the terms of the Judgment on the main amount to be paid to the respondent that has to be the focus in this case.

It is plain from the judgment of the High Court that its judgment was given in cedis and not in dollars. The dollar exchange rate was only for the purpose of determining how much was to be paid in cedis to the respondent. In fact, the Entry of Judgment filed by the respondent which can be found at page 35 of the record of appeal states the grand total judgment sum as GH¢28,962,856.75. It is true that there was delay in the satisfaction of this judgment debt so by the order for interest made by the Supreme court, the respondent was entitled to interest at the prevailing bank rate up to the date of payment of the whole judgment debt. That was also to be in cedis just as the amount that was stated in the terms of settlement at pages 15 to 18 of the record, all stated in cedis. The respondent cannot complain about losses it suffered between the judgment of the Supreme Court and the compromise the parties entered into on 12th August, 2009 since by the settlement it compromised whatever legal claims it had at the time. It is being contended that the appellant breached the terms of settlement and this occasioned deterioration of the value of money the respondent finally received. This may be true but whereas that may entitle the respondent to sue for those losses, it does not automatically convert the respondent's losses into an accretion on the judgment debt payable by execution. The Court of Appeal reasoned that the compromised was entered into on the understanding that the respondent would be paid timeously to avoid further losses due to the foreign exchange differentials. Even if this were true, it still will not, in the clear absence of such provision in the terms of settlement, automatically turn such losses to become part of the judgment debt for execution to be levied.

Much has been made out of the letters written by the Deputy Attorney-General and how they are an acknowledgement that the respondent is entitled to that amount claimed from the appellant. In our view, those letters at best amount to legal advice by the State's lawyer to the Accra Metropolitan Assembly that in his opinion, the respondent is justly entitled to the amount claimed. Those letters do not, in our view, amount to admissions

against interest. But even if they were, such admission would give rise to a cause of action in the respondent against the appellant but not automatic conversion as an accretion on the judgment sum.

It appears to us that if there was any delay in the payment after the settlement, it is the interest as stipulated under the Court (Award of Interest and Post Judgment Interest) Rules, 2005, (C.I.) 52 that is payable and not a conversion back into dollars and working out the difference in the dollar exchange rate to the cedi that should be paid.

A casual reading of the affidavit of the appellant in opposition to the respondent's motion in the High Court shows that they vigorously opposed the respondent's claim that it was entitled to be paid foreign exchange losses the sum of US$9,201,815.29. In the face of such resistance, the High Court judge ought to have exercised her discretion under **Order 41 Rule 5 (3)** (*supra*) and ordered that the issue of whether or not the respondent was entitled to that amount be tried by either by adduction of evidence and legal arguments before considering to grant or refuse the leave. This the trial judge did not do but ignored the valid grounds of opposition contained in the affidavit of the appellant and granted leave to respondent to recover an amount that was disputed.

It is settled law that in the face of concurrent findings of fact and conclusions by two lower courts, ordinarily, a second appellate court such as the Supreme Court would not interfere with the findings and conclusions unless the findings and conclusions were not supported by the evidence on record, or that the two lower court committed an error of law resulting in a miscarriage of Justice. In Fynn v Fynn [2013-2014] 1 SCGLR 727 this court in Holding I held that "the legal principles governing appeal against concurrent findings of fact and conclusions of two lower courts were ordinarily, a second appellate court, such as the Supreme Court, would not interfere with the findings of fact made by a trial court and confirmed on appeal by a first appellate court. A second appellate court

is the Supreme Court, would overturn such findings and conclusions only in exceptional cases. Thus, the Supreme Court, as a second appellate court, would not interfere with the concurrent findings of two lower courts unless it was established with absolute clearness that some blunder or error resulting in a miscarriage of justice, was apparent in the way in which the lower tribunals had dealt with the facts. It must be established that the lower courts had clearly in the face of crucial documentary evidence, or that a principle of evidence had not been properly applied, or that the finding was based on erroneous proposition of law that if that proposition were corrected, the finding would disappear. The Supreme Court would also interfere where it was satisfied that there were strong pieces of evidence on record which were manifestly clear that the findings of the trial court and the first appellate courts were perverse or inconsistent with the totality of evidence and the surrounding circumstances of the entire evidence on record: or where the trial court had failed to properly evaluate the evidence or make proper use of seeing or hearing the witnesses at the trial." See aslo Achoro v. Akanfela [1996-97] SCGLR 209; Obrasiwa II Out [1996-97] SCGLR 618; Obeng v. Tandoh IV & Hanson [2010] SCGLR 971 at 986-987, Mensah v. Mensah [2012] SCGLR391 Awuku Sao v Ghana supply Co. Ltd [2009] SCGLR 710 and Tamakloe v GIHOC Distilleries [2018-2019] 1 GLR 887 Holding 4 and a long line of other respectable decisions. In the instant case, there is not much dispute as to the facts however; the concurrent conclusions are perverse having regard to the clear provisions of the law as explained above.

In the circumstances, the appeal succeeds and is allowed. The Judgments of the High Court and the Court of Appeal dated the 21st July, 2017 and 11th April, 2019 respectively are hereby set aside.

C. J. HONYENUGA

(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH

(CHIEF JUSTICE)

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

N. A. AMEGATCHER

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