IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: YEBOAH CJ (PRESIDING)

PWAMANG JSC

AMEGATCHER JSC

OWUSU (MS.) JSC

TORKORNOO (MRS.) JSC

CIVIL APPEAL

NO. J4/16/2022

15TH JUNE, 2022

ANGLOGOLD ASHANTI GH. LTD. … DEFENDANT/APPELLANT/APPELLANT

VRS

AGA 2006 EARLY RETIREES ASSOCIATION .. PLAINTIFFS/RESPONDENTS/ SUING PER SAMUEL BOADU & 85 OTHERS RESPONDENTS

JUDGMENT

TORKORNOO (MRS.) JSC:-

Background to the Dispute

The dispute between the parties in this case arises from both factual and legal grounds. In 2006, it became necessary for the defendant/appellant/appellant (the

defendant) to undertake a reorganization of the operations at its mines in Ghana. The reorganization involved shedding off some of its work force so it obtained statutory approval from the Labor Department and proceeded to hold meetings with the workers' representatives on the modalities of the retrenchment exercise.

The dispute raised by the plaintiff in substance is about what was agreed at the meetings of the defendant and the workers' representative and whether that is what was implemented by the defendant or a different arrangement was wrongfully and unlawfully implemented.

A collateral dispute in law was raised by the defendant. The defendant raised the contention that the plaintiff endorsed on the writ was not clothed with capacity to sustain the action and further, **Section 4(1)(b) of the Limitation Act NRCD 54** should apply to the case. This is because the plaintiffs alleged that the cause of action occurred in December 2006 and the court action was commenced in March 2015. **Section 4(1) (b)** of **NRCD 54** reads:

4. Actions barred after six years

(1) A person shall not bring an action after the expiration of six years from the date on which the cause of action accrued, in the case of

b) an action founded on simple contract

On the substantive dispute, the contention of the plaintiffs/respondent/respondents (the plaintiffs) is that the agreement they came to with the defendant was for the workers that were to be retrenched, to be paid a redundancy package. The defendant/appellant/appellant (the defendant) disputes this and maintains that the workers were to exit through a special package called 'early retirement'.

The defendant therefore paid the workers that it laid off under this relevant exercise the 'early retirement' package in December 2006. The workers duly received it. In 2010, a group of the workers who were 'made redundant' as urged by the plaintiffs,

and 'retired early' as urged by the defendants, formed a guarantee company called AGA 2006 EARLY RETIREES ASSOCIATION.

The facts on record show that in February 2012, the AGA 2006 Early Retirees Association petitioned the Vice President of the defendant company per its Chairman Frank Asare, and Secretary Ernest Acheampong, whose names appear first and 36thon the schedule attached to the Writ in this suit. The petition prayed that the Vice President help them to collect their money or they would advise themselves.

The response of the Senior Vice President, written on defendant's letter head in March 2012, was that the basis of the petition is the subject of undetermined court litigation, and he was advised that under the circumstances, parties may only discuss a resolution of the issue with the consent of the court and withdrawal of the suit. He said that without more, he was unable to attend to their petition.

In August 2013, a letter from the head of Legal Services of the defendant to AGA 2006 Early Retirees Association stated that the cases in court had been resolved in confirmation of the defendant's position and therefore the defendant was unable to accede to the petitioners' request. Another letter dated 25th March 2014 written to the National Labor Commission referred to a suit titled **Frank Asare & 83 Others v Anglogold Ashanti (Ghana) Limited** and stated that pursuant to **section 4 (1) of the Limitations Act, 1972 (NRCD 54)** the petition of the parties was statute barred, since the cause of action accrued more than 6 years ago.

The plaintiffs claimed against the defendant the following reliefs:

a. ***Payment of redundancy award as earlier on agreed between the members of Plaintiff Association and the Defendant Company acting per its Industrial Relations Manager.***

b. ***Payment of interest on any amount payable by the Defendant Company under redundancy from December 2006 to the date of final payment.***

c. ***Damages for breach of Agreement.***

d. ***Cost as the court may deem fit.***

Six issues were set down for resolution by the plaintiff. They were

1. Whether or not the Industrial Relation Manager of the Defendant Company held meeting with the Plaintiff's Association members to sever their employment relationship on redundancy.
2. Whether or not End of Service benefits of the members of the Plaintiff Association appeared on their pay slips as redundancy.
3. Whether or not the Early Retirement Scheme used to sever employment relationship between the parties was alien to the Collective Bargaining Agreement which regulated their employment contract.
4. Whether or not the petition of the Plaintiff dated 13th day of February, 2012 is relevant to the matters in issue.
5. Whether or not the Plaintiff's action is statute barred.
6. Any other issues raised by the pleadings.

The defendant presented the following as additional issues.

i. Whether or not Plaintiffs are estopped from asserting a contrary claim to the express terms of their early retirement agreement.

ii. Whether or not the Plaintiff is entitled to proceed with the instant matter in the face of the pendency of the same matter before the National Labor Commission.

iii. Any other issue arising out of the pleadings.

Thereafter, the defendant moved the court under Order 11 Rule 18 (1) to dismiss the action on the ground that it disclosed no reasonable cause of action. The submissions

of the defendant in support of the motion were that the AGA 2006 Early Retirees Association did not have capacity to commence the action because it had no employment contract with the defendant. Further, the matters in contention were statute barred.

The court dismissed the application. According to the learned judge who heard this application, the capacity in which the plaintiffs had brought the action was well stated in the title of the case and further explained in the Statement of Claim. The name of the plaintiffs that commenced this action in February 2015 read as follows: 'AGA 2006 EARLY RETIREES ASSOCIATION SUING PER SAMUEL BOADU AND 85 OTHERS AS PER THE ATTACHED SCHEDULE'.

The schedule to the writ had the names of 86 people and these are the persons who instituted the action. The court went on to rule that the pleadings were clear that it was not the Association that entered into contract with the defendant but its members who individually entered into contract with the defendant. He went on to say that '*I do not think it will be fair to drive the plaintiffs from the judgment seat just because they have decided to come as a group to press home their demand*'. According to the judge, even if he was wrong, he thought that the title of the case could be amended in the course of the proceedings.

On the issue of the cause of action being statute barred, the court noted that the plaintiffs attempted to use internal grievance procedures to resolve their complaint and it was when those internal grievance resolution measures failed that they resorted to court action. In those circumstances, time would not run while the grievance procedures were being pursued.

The application was dismissed.

At the end of the trial, the high court resolved all issues in favor of the plaintiff. Three grounds of appeal were set down by the defendant on appeal to the court of appeal.

GROUNDS OF APPEAL FROM COURT OF APPEAL

i. The judgment is against the weight of the evidence.

ii. The learned judge erred in law by finding that the commencement of the action after the limitation period was justified by Appellant's conduct.

iii. The learned judge erred in holding that the Respondent had capacity to commence the instant action on behalf of the 86 annexed employees without amending the Writ of Summons

The court of appeal dismissed the appeal, hence this appeal to the Supreme Court on the same grounds, albeit crafted in different words

a) The judgment is against the weight of evidence on record.

b) The learned judges of the Court of Appeal erred in law in failing to hold that the plaintiff's instant action is statute barred vide s 4(1)(b) of the Limitation Act, 1972 (NRCD 54), same having been commenced more than 6 years after the cause of action accrued and same has occasioned a grave miscarriage of justice.

c) The learned judges of the Court of Appeal erred in failing to dismiss the instant action on grounds that plaintiff had no locus standi to commence this suit against defendant.

CONSIDERATION

Preliminary legal issues

It is a firm principle of law that where a fundamental legal issue such as jurisdiction, capacity or application of limitations has been raised against the sustainability of any legal action, a court is bound to resolve that issue first. A finding that that fundamental legal bar to prosecution exists, will disenable the court from considering the merits of the substantive dispute. We will therefore consider the issues of statute bar and capacity first.

Though a second appellate court must be slow in interfering with a judgment that has been affirmed by a first appellate court, the principles that support such interference, carefully distilled to ensure substantial justice have been outlined in several cases. The dicta in **Koglex v Fields 2000 SCGLR 175** and **Gregory v Tandoh 1V & Hanson 2010 SCGLR 971 at 985 to 987,** stand out in this array. The second appellate court may only overturn the decision of the two lower courts where there were strong pieces of evidence on record which made it manifestly clear that the findings of the trial court and the first appellate court were perverse or inconsistent with important documentary evidence or the totality of the evidence on record and the surrounding circumstances of the entire evidence on record. Such a decision would constitute a miscarriage of justice, and the second appellate court reverses the decisions to ensure that absolute justice is done. When it is also clear that the reasons in support of the findings had so wrongly applied principles of law such that if the error was corrected, the decision cannot stand, the second appellate court ought to overturn the decision

In **Koglex v Fields at page 185**, this court had this to say. '*Where the first appellate court has confirmed the findings of the trial court, the second appellate court is not to interfere with the concurrent findings unless it is established with absolute clearness that some blunder or error resulting in a miscarriage of justice is apparent in the way in which the lower court dealt with the facts*'. Citing Achoro v Akanfela [1996-97] SCGLR 209, this court went on to set out instances where such concurrent findings may be interfered with to include

1. Where the said findings of the trial court are clearly unsupported by evidence on record; or where the reasons in support of findings are unsatisfactory: see *Kyiafi v Wono* (supra);
2. improper application of a principle of evidence: see *Shakur Harihar Buksh v Shakur Union Parshad* (1886) LR 141 A7; or where the trial court has failed to

draw an irresistible conclusion from the evidence: see *Fofie v Zanyo* [1992] 2 GLR 475 at 490;

3. where the findings are based on a wrong proposition of law: see *Robins v National Trust Co Ltd* [1927] AC 515, wherein it was held that where the finding is so based on an erroneous proposition of law, that if that proposition is corrected, the finding disappears; and
4. where the finding is inconsistent with crucial documentary evidence on record.

Any variation therefore, of the determinations of the two courts below us will have to rest on the need to correct palpable and substantive errors that have worked miscarriage of justice. Further, an appeal is by way of rehearing, and because the resolution of the issues raised by the parties was arrived at on the basis of the records brought to court, we are in the same position as the two courts below to resolve whether their determinations on allowing the claims of the plaintiff and the 86 people listed as 'Complainants' and 'Employees' were premised on wrong propositions of law or misapplications of rules of evidence.

STATUTE BAR

As regards the applicability of Section 4(1) of NRCD 54, our candid view is that both the judgments of the two courts below and the submissions of both counsel failed to capture the simple and succinct resolution of this matter. So without meaning to discount their content, we will address what we appreciate to be the legal position that has been sitting in plain sight, without taking the trouble to set out the submissions in extensor.

IDENTITY AND CAPACITY

Under this heading, we will consider Ground (c) of the appeal. In its opening words, the Statement of Claim avers that the AGA 2006 Early Retirees Association is a voluntary association with 86 members who have the common interest of pursuing

their end of service benefits from the defendant. Notwithstanding the protests of the defendant that the AGA 2006 Early Retirees Association, as a corporate body, did not have any privity of contract with the defendant, and so no capacity to commence the suit in question, and the position of the plaintiffs that they were members of the plaintiff AGA 2006 Early Retirees Association, and so could commence an action in its name, the plaintiffs failed to present the incorporation documents of the AGA 2006 Early Retirees Association, in order to establish the identity of the members of this body. Fortunately, the records show that the critical question of the legal persona of the AGA 2006 Early Retirees Association, and its membership was settled in cross examination, without equivocation. The court also had the benefit of exhibit 1, tendered by the defendant's witness. Exhibit 1 was a search from the Registrar of Companies that established that AGA 2006 Early Retirees Association is a guarantee company with the three subscribers admitted by Samuel Kojo Boadu.

In the very opening lines of cross examination of Samuel Kojo Boadu, listed in the schedule attached to the writ as the 11th plaintiff, defendant counsel asked:

a. The plaintiff is a company limited by guarantee
b. That is correct
c. The association was formed in 2010
d. Yes
e. The association has only three subscribers by the name **Frank Asante, Baah Paul Buabeng and yourself Samuel Kojo Boadu**
f. That is correct

It is trite law that the members of a company limited by shares or guarantee are the subscribers. 'Membership' of a company is a term of art that cannot be used loosely to cover any person apart from the subscribers of a company. Thus, if the 83 out of the 86 people whose names were listed in the schedule attached to the Writ as suing for the company were not subscribers of the AGA 2006 Early Retirees Association, they could not in any guise of law or fact be accepted by a court of law as members

of the AGA 2006 Early Retirees Association, just because they seem to perceive themselves to be such members.

It is not clear how they perceived themselves to be 'members' of the AGA 2006 Early Retirees Association in its character as a voluntary association or guarantee company, but by failing to answer the extremely pertinent question of the dichotomy between subscribers and members of a guarantee company, and the listed persons who were not supposed to be subscribers, those persons disenabled the law from recognizing them as affiliated in any way with the plaintiff.

It is also trite law that a company limited by guarantee is a legal persona that does not need to sue per its subscribers or any external person affiliated to it through some interest. In the circumstances therefore, the AGA 2006 Early Retirees Association did not need anyone to sue the defendant on its behalf, and the designation on the writ that it was suing the defendant through the 86 named person was not merely an inelegant articulation of the alleged nexus of interest between the Association and the 86 people who are alleged in the pleadings to be members of the AGA 2006 Early Retirees Association, but a misconceived expression in law.

Beyond the 86 persons being wrongly described as persons suing on behalf of the AGA 2006 Early Retirees Association, or members thereof, we are in agreement with the courts below that the writ of summons and the statement of claim together disclosed the individual names of the plaintiffs who invoked the jurisdiction of the High Court to seek relief. Those named persons disclosed that their cause of action arose from being former employees of the defendant who were to benefit from an agreement entered into by the workers representatives and the AGA 2006 Early Retirees Association and the defendant. As earlier stated, this agreement is at the core of the dispute in this suit. To this extent, we do not agree with the defendant that the case be dismissed on the one ground of incapacity of the AGA 2006 Early Retirees Association to sustain an action against the defendant by itself, by reason of

the incontestable fact that no association could have entered into an employment contract with the defendant.

Order 4 Rule 5 of the High Court (Civil Procedure) Rules CI 47reads;

(1) No proceedings shall be defeated by reason of mis-joinder or non-joinder of any party; and the Court may in any proceeding determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the proceedings.

To the extent that the 86 named persons were listed in the schedule attached to the writ as suing the defendant, the courts below us were right in preserving the suit in their names for consideration. As was done in **Ampratwum v Divestiture Implementation Committee [2009] SCGLR 692** regarding the recognition of the Attorney General as the proper defendant in suits involving government agencies such as the Divestiture Implementation Committee, it is a proper application of the principle directed by Order 4 Rule 5 of CI 47 to recognize the 86 named persons as independent plaintiffs before the court, and the AGA 2006 Early Retirees Association as an independent plaintiff in its own right, whether mis-joined or not. This must be done in order to resolve *the issues or questions in dispute so far as they affect the rights and interests of the persons who have been recorded on the writ as parties to the proceedings.*

Where we must depart from the decision in **Ampratwum** case cited supra where the Attorney General's name was substituted for Divestiture Implementation Committee as the proper defendant for a Government agency such as the DIC, is our inability to substitute the names of the 86 listed complainants with the name AGA 2006 Early Retirees Association. This is because unlike the DIC which is a Government agency without legal persona, and was the only defendant in that suit, AGA 2006 Early Retirees Association is a company limited by guarantee, with a distinct legal persona, and can sue in its own name. Also, apart from the name of the AGA 2006 Early Retirees Association, all the 86 persons purporting to sue in its name are recognized on the writ and in the Statement of Claim.

For the reasons settled above on company law and Order 4 Rule 5 of CI 47, the courts below us grossly erred in recognizing all the 86 people, as able to stand in the shoes of the AGA 2006 Early Retirees Association, simply because they claimed to be members of the Association.

It was the duty of the courts below to determine as a matter of law and fact, if the persona of AGA 2006 Early Retirees Association had within it the 86 'complainants', in the form of subscribers or whatever structure that the law could uphold, in the light of the testimony of Samuel Boadu that the AGA 2006 Early Retirees Association had only three subscribers, before the courts could accept them as representative of AGA 2006 Early Retirees Association or vice versa.

The ruling that the 83 persons who were not subscribers to the Regulations of AGA 2006 Early Retirees Association were 'members' of, and could sue in the name of AGA 2006 Early Retirees Association must be reversed as premised on a totally wrong appreciation of law. It is a wrong evaluation of the testimony and evidence before the court. We reverse this ruling.

In the context of the evaluations above, the craft of Ground (c) that '*the learned judges of the Court of Appeal erred in failing to dismiss the instant action on grounds that plaintiff had no locus standi to commence this suit against defendant*' fails. For ease of reference, we correct the rendering of the names of the plaintiffs by designating the AGA 2006 Early Retirees Association as Plaintiff, and the 86 persons listed as 'complainants' as 1st to 86th plaintiffs.

STATUTE BAR

Having settled the capacity of the 86 listed persons to remain in the suit as plaintiffs in their own right, we now consider the issue of whether this action instituted by them was statute barred. It is our opinion that a simple review of the very few

exhibits and the quoted opening lines of the cross examination of Samuel Boadu, should have assisted the court to resolve the questions of the application of the Limitations Act

Exhibit AGA 5b is the first letter raising an objection to the payments made by the appellant to the respondents. It is dated 13th February 2012. Because its content is critical to the resolution on the matter of whether the action commenced by the 86 people is statute barred, I will set out its full content.

Dear Sir

PETITION FROM AGA 2006 EARLY RETIREES ASSOCIATION

The above addressed (sic) *association whose members were former employees of Anglogold Ashanti Ltd Obuasi, wish to petition grievances through you to the company.*

We were former employees of G.A. Ltd Obuasi until 2006 when the company decided to embark on redundancy exercise which were drifted into it. This exercise was even carried into 2007, but before the emplementation of the redundancy and phase two (2) was early retirement. Unfortunately we fell under phase two (2) which was early retirement. Even though early retirement issue had no place in the agreement paper with the government.

However A.G.A. 2007 early retirees association who are our counterparts in the same case initiated the move to the court. The matter was sent first to labour commission for redress. Later the matter was sent to high court which in turn reffered back to labour court. Then later it was sent to appeal court and from there sent to the Supreme Court and again back to appeal court. All this while it was A.G.A company which was contesting the case as they were found guilty by all the courts, and they were ordered to pay us our redundancy amount which AGA company has been adamant to the court rule and has not responded.

We therefore appeal to you Mr. Vice President with all humility to help us collect our money or else we shall advice ourselves.

Thank you

Yours faithfully

Frank Asante (Association Chairman). Ernest Acheampong (Secretary)

This petition clarifies that the legal personality that raised an objection to the payments given by the respondent and precipitated the dispute that came to court was the AGA 2006 Early Retirees Association. It claimed to be speaking on behalf of its members. Who were these members? As seen from the quoted cross examination and exhibit 1, the association has only three subscribers by the name **Frank Asante, Baah Paul Buabeng and yourself Samuel Kojo Boadu**

In law therefore, the association, which is the person that presented a petition to defendant in February 2012, has as members, only the persons listed as 1st, 4th and 11th complainants (sic) before the court, and now recognized as 1st, 4th and 11th plaintiffs. All the 83 other persons listed in the LIST OF COMPLAINANTS attached to the Writ in this suit who are not subscribers to the AGA 2006 Early Retirees Association, **cannot be deemed to be party to the petition** raised on 13th February 2012 and correspondence premised on it.

The trial court should therefore have recognized that the first time that the voices of the persons listed as complainants in the schedule attached to the writ – with the exception of the 1st, 4th and 11th plaintiffs, - were raised in protest against the payments they allegedly received from the appellant, was when the writ was issued on 18th March 2015.

The defense of the application of **Section 4 (1) (b) of the Limitations Act** is absolutely sustainable against all the plaintiffs with the exception of the 1st, 4th and 11th plaintiffs who are subscribers and members of the plaintiff association before us. Between December 2006 and March 2015 spanned a period of more than eight years.

For the above reasons, the second ground of appeal that '*the learned judges of the Court of Appeal erred in law in failing to hold that the plaintiff's instant action is statute barred vide* ***s 4(1)(b) of the Limitation Act, 1972 (NRCD 54),*** *same having been commenced more than 6 years after the cause of action accrued and same has occasioned a grave miscarriage of justice*' succeeds in relation to all the plaintiffs except the plaintiff Association, 1st, 4th and 11th plaintiffs.

Is the judgment against the weight of evidence?

The reliefs entered by the learned trial judge can be found in the penultimate paragraph on page 20 of his judgment. He said that '*their redundancy packages are to be paid to them with interest from the day of their exit from the company till date of judgment, less any moneys earlier paid to the plaintiff's members*.' He went on to dismiss the claim for breach of contract. This is the judgment that was affirmed by the court of appeal.

It is to be noted that Samuel Kojo Boadu filed a further witness statement which attached a Collective agreement that was different from exhibit 2. It is in this version of Collective Agreement that a clause is found allowing'*25% of annual basic salary for each completed year of service and a pro rata for a fraction of a year as compensation for loss of employment*' at the time of redundancy. This is claim on which the plaintiffs' demands were anchored.

In the Case Management Conference conducted to admit this witness statement, it was noted that this Collective Agreement came into existence in 2009, after the plaintiffs in the suit had left the employment of the defendant. It was therefore rejected as an exhibit and the relevant portion of the witness statement that sought to tender it expunged. See page 180 of the record of appeal.

From the exhibits and the records therefore, the Collective Agreement that the parties in this suit were bound to as at December 2006 provided in clause 11.09 (a) for a 'redundancy package' that included 'four months *basic pay for loss of*

employment' and not '*25% of annual basic salary for each completed year of service and a pro rata for a fraction of a year as compensation for loss of employment*'. The judgments of the courts below us reflect a failure to appreciate that there were two Collective agreements within the record and the one on which this second mode of calculating redundancy pay was extracted had been rejected as an exhibit.

Now all the disputants admit that the plaintiffs were paid for all the months they had not worked until their retirement date, instead of four months pay for the years that they lost employment. In essence, the plaintiffs were paid sums way above what they were entitled to in December 2006 when exhibit 2 was in operation.

Again, when one examines Exhibit AGA 5c provided by the plaintiffs, the exit package given to one Mumuni Abdul Zachari shows that there was also a line item for redundancy pay that was given to the plaintiffs. From the evidence before the court, it is abundantly clear that the final order by the learned trial judge to pay the plaintiffs '*their redundancy packages with interest from the day of their exit from the company till date of judgment, less any moneys earlier paid to the plaintiff's members',* apart from being nebulous, is not warranted by the evidence available to the court.

The appeal against the judgment of the Court of Appeal dated 1st April 2021 succeeds and is accordingly allowed. The orders made by the trial court on 5th November 2018 are vacated.

G. TORKORNOO (MRS.)

(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH

(CHIEF JUSTICE)

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

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