IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: LOVELACE-JOHNSON (MS.) (PRESIDING)
AMADU JSC
PROF. MENSA-BONSU (MRS.) JSC
KULENDI JSC
ACKAH-YENSU (MS.) JSC

CIVIL APPEAL
NO. J4/06/2023

31ST MAY, 2023

CHARLES KWADWO GYASI ….. PLAINTIFF/APPELLANT/RESPONDENT

VS

MINING BUILDING CONTRACTORS
LIMITED …. DEFENDANT/RESPONDENT/APPELLANT

JUDGMENT

AMADU JSC:-

INTRODUCTION:

(1) My Lords, the key issue for our decision in this appeal is, which of the two lower courts properly apprehended and evaluated the facts in issue before applying the law in arriving at their respective decisions. While the Trial Court in its decision dismissed the action of the Plaintiff/ Appellant/Respondent on the ground that it was premature, the Learned Justices of the Court of Appeal held otherwise and reversed the judgment of the Trial High Court. The Court of Appeal proceeded to enter judgment for Plaintiff/ Appellant/Respondent in part. Our determination of this appeal therefore, depends, on our own re-evaluation of the evidence on record within the context of the facts in issue and the application of the relevant law to the facts and evidence.

(2) **BACKGROUND FACTS**

The factual background to this dispute is not uncommon in industrial relations particularly, between an employer and employee. The Plaintiff/Appellant/Respondent who for ease of reference shall be referred to simply as the Respondent is a former employee of the Defendant/Respondent/Appellant, who shall simply be referred to as the Appellant.

(3) The Respondent asserted that, he had worked as a Jack Hammer Operator with the Appellant since the 18th of October, 2004 until 31st July 2008 when he was dismissed from employment. He alleged that, he was dismissed by the Appellant on an allegation of attempted stealing.

(4) According to the Respondent, in June 2008, he together with two other employees- Yahaya and Seidu went to work at Level 23, No. 1354 cross-court. He averred that, after they were done with drilling, Yahaya left him and one Seidu Adams. He asserted further that, the said Seidu Adams instructed him to communicate to the

other workers in the area that, they were going to blast at 3:00pm. The Respondent complied with this instruction, and upon his return, he was informed by Seidu that, he had already ignited the dynamite. The Respondent averred that, as a result, he left his bag what contained a rescuer, a water bottle and connection rubbers. According to him, Seidu Adams told him he could retrieve the bag and the items after the blasting was completed.

(5) The Respondent asserted further that, the following day, when he went to retrieve his bag, he was asked to see the security personnel who informed him that, he was suspected of attempting to steal some gold. The Respondent asserted that, he, together with others were paraded for identification. One of the Managers of Anglogold Ashanti (AGA) by name Fred, pointed him out as one of the persons who pushed him (the Captain) down and fled in a stealing incident. The Respondent contended that, the said Captain had denied saying it was the Respondent who pushed him down and that, he the captain could identify the person.

(6) According to the Respondent, he was later reported to the Appellant by the Manager of Anglogold Ashanti (AGA). He averred further that, notwithstanding his explanation, he was dismissed without evidence of any complicity in the alleged crime.

(7) It is against this background that, on the 2nd day of February 2010, the Respondent issued a writ of summons in the Registry of the High Court, Labour Division, Kumasi against the Appellant for the following reliefs :

"(i) General damages for unlawful dismissal

(ii) General damages for unfair termination of his employment.

(iii) General Damages for the number of days that the Plaintiff (Appellant) had stayed at home without work."

(8) On the 16th day of February, 2010, the Appellant entered appearance to the action and filed a thirteen-paragraphed statement of defence on the 3rd day of March 2010. For its effect and emphasis in this rendition, the material parts of the statement of defence (paragraphs 4-12) are reproduced hereunder.

"4. Paragraphs 8, 9 and 10 of the Statement of claim

are denied save that the Plaintiff was found by the General Manager Mining, who was on his usual routine underground inspection, in the Company of certain other officials of Anglo Gold Ashanti Company Limited, having in conjunction with some other persons illegally and unlawfully gathered two bags of sacks of quartz on the said level No.23 No.1354 Cross court at a point there at where they were not supposed to be at the time they were found there.

5. Defendant says the Plaintiff and the other persons

who were employees of Anglo Gold Ashanti upon interrogation pushed down the security man accompanying the General Manager and absconded but were however apprehended when they surfaced from the underground.

6. Defendant says among the items collected at the site

where the Plaintiff and his cronies were found included the Plaintiffs self-rescuer which by the regulations of the employment was not supposed to be removed from one's body under any circumstances whenever any worker is working underground.

7. Defendant says upon their arrest the security men

mounted an identification parade and Plaintiff together with the others were duly identified by the General Manager and other officials as the ones who were found undertaking the illegal exercise underground.

8. *Defendant says the Plaintiff was arraigned before the Investigation officer of the Asset Protection Department of Anglo Gold Ashanti and subsequently before the Disciplinary Committee of the Defendant Company which after hearing the Plaintiff and the witnesses, adjudged that the Plaintiff was liable and recommended his dismissal in accordance with the disciplinary code of the Company.*
9. *Paragraphs 11 and 12 of the statement of claim are denied as fabrications and after thought especially so when by the regulations of the employment no employee is to drop his self-rescuer for any purpose whilst underground.*

10. *Paragraphs 12, 13, 14, 15 and 16 of the Statement of claim are denied and the Plaintiff shall be put to the strictest proof thereof.*

11. *Paragraph 17 of the Statement of claim is admitted.*
12. *Paragraph 18 of the Statement of Claim is denied and the Defendant says now and shall at the trial further contend that the Plaintiff was fairly treated and offered every opportunity to justify his conduct in accordance with the Company's Disciplinary Code and after exhaustive investigations and hearings lawfully and legally dismissed for his illegal conduct underground." (The emphasis is ours).*

(9) On the 19th day of July, 2010, the Trial Court set down the issues contained in the Appellant's application for directions filed on the 2nd of July 2010 for determination at the trial. The issues adopted by the Trial Court are as follows:

"1. Whether or not the Plaintiff was instructed to inform those around that there was going to be blasting at 3pm.

2. *Whether or not the Plaintiff left his bag behind which contained a self-rescuer, a water bottle and a connection rubber.*

3. *Whether or not the Plaintiff attempted to steal gold products.*
4. *Whether or not the Plaintiff pushed the captain.*

5. *Whether or not the Plaintiff's dismissal was unlawful*
6. *Whether or not the termination of Plaintiffs employment was unfair.*
7. *Whether or not the Plaintiff is entitled to his claim.*
8. *Any other issues raised at the trial".*

(10) After a protracted trial, spanning over six (6) years, the Trial High Court delivered itself by dismissing the Respondent's claims. The Trial Court reasoned that, the Respondent's action was pre-mature as the Respondent had failed to exhaust the internal dispute resolution mechanism contained in the Collective Bargaining Agreement (CBA) which regulated the contract between the parties.

(11) The ***raison d'etre*** of the Trial Court's position is captured in the following part of the said judgment.

"But aggrieved by his dismissal, Plaintiff rushed to this Court with Usain Bolt-like speed to commence this suit. The Defendant says that he has done so rather prematurely. This is because he failed to exhaust the internal dispute resolution mechanism laid down by the Defendant in the CBA before bringing this suit. The Plaintiff was very silent on this aspect of the matter and gave no answer.

Article 8 of the CBA deals with disciplinary procedures Item 8. (03) provides:

"(g) A warning or suspension from work or termination of appointment or summary dismissal maybe imposed as a result of the findings.

(h) If an employee is dissatisfied with the findings of the Disciplinary Committee, he may appeal to the next level which shall be at the MSNC level.

(i) If no resolution is reached at the MSNC level the employed may have recourse to the provisions in the Industrial Relations Act, 1965 (Act 299(MSNC means Mines Standing Negotiating Committee, vide Article 21).

Plaintiff did not make use of this appeal mechanism before jumping to this Court with his suit. He should have exhausted it first. Not having done so, his suit could only be premature. It should not be entertained."

(13) It is important to point out however that, the Trial Court did evaluate the entire evidence led at the trial, whereupon it found and held *inter alia* that: ***"there was a hearing at which Plaintiff was present and was heard before being dismissed. And he was dismissed in spite of his position that he was not one of the thieves***

which found supporting PW1 because Defendant also had evidence for the position it held."

(14) We wish to emphasise here that the proper procedural approach to adjudication is that, where a court is not in favour of delving into the merits of a matter, the court must, at the earliest opportunity, upon firming its position, halt proceedings and justify the refusal to determine the merits. It is improper for a Trial Court to set down all the issues for trial and not find it necessary to apply the provisions under Order 33 Rules (3)(5) of C.I. 47 or other pre action procedure and direct parties to adduce evidence for a considerable period of five (5) years only to decline determining the matter on its merits on the basis, that the internal dispute resolution mechanism has not been complied with.

(15) In the instant case, the Trial Court not only held, that the action was pre-mature, but went ahead to dismiss the entire claims of the Respondent. The accepted judicial approach, would have been that, the Trial Court would stay proceedings for the parties to exhaust the internal dispute resolution mechanism and report to the court, after which, the court may proceed to adopt any resolution or proceed to determine the matter on the merits or otherwise.

(16) This approach is also consistent with the provision of Section 7 of the Alternative Dispute Resolution Act 2010 (Act 798). The process of a full scale adjudication must, as much as possible be efficiently conducted; less expensive; expeditious, just and fair. Should the Respondent have accepted the position of the Trial Court, and gone through the internal dispute resolution process but

remained dissatisfied, and still intended to assert his right, he would now have had to suffer the expense and necessity to commence a new action.

(17) With much deference to the Trial Court, it's approach was not consistent with the proper dictates of an efficient and effective process of adjudication. Be that as it may, was the Trial Court even right in declining to interrogate and determine the merits of the action and holding, that the action was premature? That is the key question in this appeal which we shall soon re-visit.

APPEAL TO THE COURT OF APPEAL

(18) Expectedly, dissatisfied with the judgment of the Trial Court, the Respondent prosecuted an appeal to the Court of Appeal per notice of appeal dated the 9th day of September, 2016 on the omnibus ground of appeal. It needs to the emphasised that, the Appellant did not contest the appeal at the Court of Appeal. Nonetheless, because the appeal was anchored on the omnibus ground and being by way of re-hearing, the Court of Appeal rightly discharged its appellate duty by reviewing the entire record and arriving at its own findings. In it's judgment delivered on the 29th day of October, 2020, the Court of Appeal allowed the appeal and granted the Respondent's claims in part. The relief for unfair dismissal was dismissed by the Court of Appeal just as the Trial Court and rightly so, because, this court has held that, the National Labour Commission is the appropriate forum to deal with unfair termination or dismissal from employment. See **FELIX YAW BANI VS. MAERSK GHANA LTD. [2011] 34 GMJ 65.**

(19) The fulcrum of the decision of the Court of Appeal which has provoked the instant appeal before us is the interpretation of the relevant Section of the CBA to the effect that, the Appellant was not mandated to have submitted himself

to the internal appeal process of the Respondent. The Court of Appeal expressed itself *inter alia* as follows:

"While the BOYEFIO case is a correct statement of the law and we are indeed bound by it, being a Supreme Court decision, we have come to the unwavering opinion that the Learned Trial Judge erred in the interpretation he placed of [sic] Article 8.03 (h) and (i) of the CBA which led him to wrongly apply the said BOYEFIO case to the instant suit. The operative words used in those sub-clauses are ***"he may appeal to the next level" and "the employee may have recourse to the provisions in the Industrial Relations Act"*** *respectively. Section 42 of the Interpretation Act, 2009 (Act 792) gives us the construction of "shall" and "may" in these words: -*

"Construction of shall and may

42. In an enactment the expression "may" shall be construed as permissive an empowering, and the expression "shall" as imperative and mandatory."

This therefore means that by the use of the word "may" in the disciplinary procedure the Appellant was not bound to follow that procedure. He was only empowered and given the permission to follow that procedure if he so wished. The situation would have been different if the word used was "shall" in which case it would have been imperative and mandatory for him to follow that procedure and exhaust same before going to court. In this respect therefore, the Decision of the Trial Judge on the disciplinary procedure hurdle is snot supported by the evidence on record….

The Appellant was therefore not bound to comply with Article 8.03 (h) and (i) before instituting the instant action."

(20) On the merits of the suit, the Court of Appeal in our view, arrived at the correct decision by holding that, the allegation of stealing, which is criminal, ought to have been proved beyond reasonable doubt in accordance with Section 13(1)

of the Evidence Act, 1975 (NRCD 323). However, in this case, the very person whom the Appellant contended even identified the Respondent had denied same. There was a serious issue regarding the identity of the Respondent and same created serious doubts in the allegation of the Appellant against the Respondent. On this point, we find the following analysis of the evidence by the Court of Appeal accurate and worth reproducing :

(a) *"Section 13 of the Evidence Act, 1975 (Act 323) directs us on what is required under such a circumstance thus:-*

*"**13. Proof of crime***

(1) In a civil or criminal action, the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond a reasonable doubt."

*The ingredients of stealing as enunciated in cases such as **MENSAH AND OTHERS VS. THE REPUBLIC [1978] GLR 494** are as follows:-*

"(1) the basic ingredients requiring proof in a charge of stealing a thing were (i) that the person charged must not be the owner of it; (ii) that he must have appropriated it; and (iii) that the appropriation must have been dishonest."

(b) *Even more important is the identity of the person accused of the offence for there is no point in proving all the above ingredients against a person whose identity has not been established and linked to the crime or whose identity is in doubt. The evidence on record demonstrates that the identity of the Appellant as the owner who took part in the stealing was not proved beyond reasonable doubt. The Appellant asserted his innocence in his Pleadings and evidence-in-chief. In part of his evidence-in chief found at page 103 of the Record of Appeal, this is what he said:-*

"They said the Manager had said he would be able to identify the one who run away as he pushed him before running away. So they would organize an identification parade. Some others were added to us for identification. Fred, the Manager came and pointed at 2 persons who did not include me. But Fred later asked me to stand up.

(c) He asked me to allow him to look at my back. I allowed him. In the end, Fred said I was the one who pushed the captain and fled. The Captain on his part said I was not the one and that he could identify the one who actually pushed him and fled and that person was tall and fair…"

(d) He did not deviate from this position when he was under cross-examination. His evidence was corroborated by PW1 Alhaji Adam Seidu who also remained unshaken under cross examination. The Appellant was under the control and instruction of PW1 on the day in question when they went underground to work.

(e) The evidence of the representative of the Respondent, especially under cross-examination corroborated the evidence of the Appellant as far as his identity was concerned. The Respondent's representative was one Yaw Sefah the Industrial Relations Officer who had worked with the Respondent Company for 25 years. His answers under cross-examination can be found at pages 165-177 of the Record of Appeal. Here are excerpts of same:-

"Q. The AGA's findings did not include the Plaintiff as one of those who loitered?

A: It is correct.

Q: And the reason is that where he operated was where he was scheduled to operate?

A: Yes.

Q: I am putting it to you that Anyan per his statement never mentioned Plaintiff as one of those arrested.

A: It is correct

Q: Also Nsarko's statement never mentioned Plaintiff's name as one of those arrested .

A: It is correct

Q: But Kobea mentioned those they arrested with the gold quartz

A: Yes

Q: And the name he mentioned id not include Plaintiffs' name

A: It is correct

Q: I put it to you that Kobea stated in his statement that one of the 3 pushed him down

A: It is correct.

Q: During the identification parade Kobea was not called to identity the Plaintiff?

A: He was called.

Q: Did Kobea identify Plaintiff?

A: He could not.

Q: The arresting officers Anyand, Nsarko and Kobea, none could connect Plaintiff to the theft of the gold quartz?

A: Nsarko said it at the identification parade by identifying Plaintiff.

Q: At the identification parade the one who said he was pushed down did not say it was Plaintiff who pushed him

A: It is correct

Q: And at the parade that man, Kobea did not identity Plaintiff as one of those who stole the gold quartz?

A: Correct.

Q: And apart from Nsarko the other arresting officers did not mention Plaintiff?

A: It is Correct.

(f) The Appellant, (Respondent herein) on the other hand, has been able to raise a reasonable doubt as to his involvement in the alleged stealing incident that occurred on 31st July 2008. In the premise therefore, his appeal succeeds but we say only in part."

(21) We do not find it difficult, even at this juncture, to affirm the holding of the Court of Appeal that, the Respondent succeeded in raising a reasonable doubt to the charge of stealing against him.

APPEAL TO THE SUPREME COURT

(22) On the 25th of January, 2021 the Appellant commenced the instant appeal per a Notice of Appeal filed on 25th January 2021 on the following grounds:

"(i) Their Lordships at the Court of Appeal failed to adequately evaluate the evidence on record in reversing the definite [sic] findings made by the Learned Trial High Court Judge.

(ii) The Judgment is against the weight of evidence.

(iii) Additional grounds of appeal to be filed upon receipt of the record of appeal (No such grounds have however been filed)."

(23) **APPELLANT'S SUBMISSION TO THE SUPREME COURT**

Regrettably, although the appeal is anchored on the omnibus ground of appeal, the entire appeal by the statement of case filed by Counsel on behalf of the Appellant before this court rested on the interpretation placed on the Section 8.3 of the Collective Bargaining Agreement (CBA) by the Court of Appeal, to the effect that the Respondent was not obligated to submit to the internal dispute resolution procedures of Appellant. The Appellant's Counsel argued in his statement of case to this court that, the Court of Appeal, if it had properly construed the provision in its entirety should have decided in affirming the Trial Court's judgment to the effect that the Respondent's action was premature. However, on the issue whether or not the dismissal was proper; or the allegation of stealing had been made out, the Appellant's Counsel did not bother to put up a case on same as it was not addressed at all.

(24) Thus, although an Appellant who anchored an appeal on the omnibus ground of appeal is always reminded by this court on the obligation to point out the aspects of the judgment that was not, as alleged, properly analysed per the evidence or not evaluated to their detriment, the Appellant in the instant case failed to discharge its burden in that respect. Interestingly, the Respondent, who did not assume that duty took time to urge their position in urging us to affirm the judgment of the Court below that, the Appellant did not prove the charge of stealing against the Respondent.

(25) Be that as it may, as already observed, we do not find anything warranting us to disturb the findings of the Court of Appeal that, the Appellant failed to

prove the charge of stealing against the Respondent. Apart from the above finding, did the Appellant demonstrate that the Court of Appeal's holding that, the Respondent was not bound by Section 8.03 of the CBA was wrong?

(26) To answer this interrogatory, we observe that, contrary to the findings of the Court of Appeal that, the Appellant never pleaded that the action was premature and that, the Respondent ought to have exhausted internal mechanism, the Court of Appeal referred to paragraph 12 of the statement of defence which provided that: "***Paragraph 18 of the Statement of Claim is denied and the Defendant says now and shall at the trial further contend that the Plaintiff was fairly treated and offered every opportunity to justify his conduct in accordance with the Company's Disciplinary Code and after exhaustive investigations and hearings lawfully and legally dismissed for his illegal conduct underground.***" The Court of Appeal found that the Appellant had also filed documents which included the CBA and concluded that, the Respondent had not been surprised as the Appellant had made it clear that it was going to rely on the CBA in making it's case.

(27) With all due respect to the Learned Justices of the Court of Appeal, we are of the considered view that, they were in error in this respect. First, as earlier observed, nowhere in the pleadings was it part of the Appellant's case that, the Respondent's action was premature. The said paragraph 12 relied upon by the Court of Appeal, when properly construed was only to the effect that, the parties had utilised the disciplinary process under the CBA which resulted in the dismissal of the Respondent.

(28) Further, none of the issues that were set down for trial included an objection to the jurisdiction of the Trial Court to the effect that, the Respondent had improperly invoked jurisdiction because a condition precedent had not been discharged. It is our view that, if the Appellant took that jurisdictional issue seriously, the Appellant would have even before the filing it's statement of defence made it a preliminary issue to be considered by the Trial Court pursuant to Order 9 Rule 8 of C.I.47 as has been the settled practice. In the instant case however, the Appellant blew a muted trumpet on that right, filed a statement of defence, directions for trial taken, with the participation of the Appellant's representative and it's lawyer. At no stage of the proceedings was this issue of prematurity of the Respondent's action raised. The Appellant further participated in the trial till the end. It was only under cross-examination and in the written address that, the Appellant's counsel sought to make this an issue belatedly.

(29) By the Appellant's conduct therefore, it had acquiesced to the procedural jurisdiction of the Trial Court to adjudicate over the matter. We hold therefore that, even if, the CBA contained mandatory provisions requiring the Respondent to submit to the internal appeal process, same had been waived by the Appellant in the manner of its participation in the trial till the end and thus, consented to the jurisdiction of the Trial Court. Not being an issue of jurisdiction founded on a parent statute, and having waived it's right to object, the said issue became moot and inconsequential.

(30) Consequently, we affirm the decision of the Court of Appeal with respect to the jurisdiction of the Trial Court to entertain the action on the grounds that, both parties had submitted to the jurisdiction and have by their conduct

abandoned the domestic dispute resolution mechanism contained in the CBA. It will be therefore be merely academic to engage in an interpretation of the impugned provision of the CBA. Such discourse will have no bearing on the conclusion hereby reached.

(31) For all the reasons afore-expressed, the appeal fails in it's entirety and same is accordingly dismissed.

I.O. TANKO AMADU

(JUSTICE OF THE SUPREME COURT)

A. LOVELACE-JOHNSON (MS.)

(JUSTICE OF THE SUPREME COURT)

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

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