IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: PWAMANG JSC (PRESIDING)

LOVELACE-JOHNSON (MS.) JSC

AMADU JSC

PROF. MENSA-BONSU (MRS.) JSC

ASIEDU JSC

CIVIL APPEAL

NO. J4/91/2022

3RD MAY, 2023

MAMA ADESI COMPANY LIMITED …… PLAINTIFF/RESPONDENT/ RESPONDENT

VS

UNIVERSAL MERCHANT BANK LIMITED …… DEFENDANT/APPELLANT

/

(FORMERLY MERCHANT BANK (GH) LTD.) APPELLANT

JUDGMENT

AMADU JSC:-

INTRODUCTION:

1) My Lords, the key issue for our determination in this appeal is, whether or not the two lower courts properly apprehended and evaluated the evidence on record within the context of the relevant applicable law before entering judgment for the Plaintiff and affirming same respectively. In other words, did the two Lower Courts properly allocate the statutory evidential burden on the party who carries that burden, and found on the evidence and applicable law that, the Plaintiff's burden of proof had been satisfactorily discharged in accordance with the prescribed legal standard before they arrived at their concurrent positions which has given rise to this appeal?

2) From the undisputed facts of this dispute, the circumstances of the present appeal are stimulating. The Plaintiff, suspecting its General Manager (GM) to have misappropriated funds held in its accounts with Defendant's bank, lodged a criminal complaint of fraud and stealing against the GM. The GM was arrested, charged with One Hundred and Fifty Nine (159) counts for the offence of stealing between 2004 and 2010, contrary to Section 124(1) of the Criminal and Other Offences Act, 1960 (Act 29) *(as amended)*. The said GM, Konings Gbanaglo was subsequently convicted and sentenced. The Plaintiff not having realized its monies from the criminal process, issued a writ of summons, not against the GM but rather, against the Defendant Bank that held and managed Plaintiff's accounts. The substance of the Plaintiff's action, is for the Bank to refund monies unlawfully withdrawn from its accounts held with the bank.

3) The instant appeal thus, throws in the issue of whether the Defendant bank is liable for the refund of monies unlawfully withdrawn from Plaintiff's account by Plaintiff's GM. Should the bank be found to be negligent or breached the bank/customer

relationship, within the peculiar facts of the present suit? Is the bank liable to Plaintiff for the funds unlawfully withdrawn by Plaintiff's GM? These are relevant questions arising from the submissions of the parties in their respective statements of case which this court has been invited to answer having regard to the concurrent positions of the Trial Court and the Court of Appeal.

4) BACKGROUND TO THIS APPEAL

For brevity and convenience, the parties shall bear their respective designations at the trial court. The Plaintiff/Respondent/ Respondent shall be referred to as *"the Plaintiff"* while the Defendant/Appellant/ Appellant, "*the Defendant."*

5) On the 10th day of February, 2012, the Plaintiff caused to be issued out of the Registry of the High Court, (Commercial Division) Accra, a writ of summons accompanied by a statement of claim. Both writ and statement of claim, were amended with the leave of the court. The Plaintiff thus claimed against the Defendant, the following reliefs:

(i) ***"An order compelling the Defendant to pay forthwith to the Plaintiff the various sums of money proven by the Plaintiff as having been withdrawn wrongfully from the various accounts that the Plaintiff operated for about 2 (two) decades with the Defendant with interest thereon at the prevailing bank rate from the date of the wrongful withdrawal to the date of final payment.***

(ii) ***Refund by the Defendant to the Plaintiff of all amounts of money for which the Defendant had no legitimate authorization(s) to debit Plaintiff's accounts.***

(iii) Refund by the Defendant to the Plaintiff of all interests charged on Plaintiff's accounts from 2003 to date.

(iv) An order cancelling any loans and/or overdrafts purportedly granted to plaintiff by defendant through subterfuge.

(v) An order compelling the Defendant to return to the Plaintiff security documents obtained from the Plaintiff through subterfuge.

(vi) General damages.

(vii) Costs."

6) On the 30th day of May, 2018, the Defendant also filed a further amended statement of defence and counterclaimed against the Plaintiff for the following reliefs :

"(a) an order directed at the Plaintiff for the payment of GHc683,058.01 which said amount was advanced to the Plaintiff at its request by the Defendant but remains wholly unpaid, due and outstanding despite several requests for payment "the full details of which are set out in agreement dated 26th October 2009".

(b) interests thereon from 24 December 2011 until the date of final payment.

(c) Costs and such further order or orders the honourable Court may deem fit".

7) **THE PLAINTIFF'S CASE**

The Plaintiff is a long-standing customer of Defendant Bank. That relationship appears to have come to an end in 2010, following what led to the legal tussle between the parties. The Plaintiff operated thirteen (13) accounts with Defendant's Accra Main Branch, in both foreign and local currencies. The Plaintiff's Managing Director (MD) -Mama Adesi was the sole signatory to the accounts. Mama Adesi is also illiterate. Plaintiff averred that, the Defendant served her a demand notice to service a facility Plaintiff alleges it never contracted for. Alarmed by the development, the Plaintiff caused an audit and reconciliation of its accounts, to be carried out. The Plaintiff observed from the reconciliation exercise that, substantial sums of money in Ghana Cedis, United States Dollars and Great Britain Pounds had been illegally withdrawn from its account with the Defendant bank. The Plaintiff emphasised that it never consented nor authorised the said withdrawals. The Plaintiff's case is that, the documents/letters that were used for the withdrawals breached the provisions of the Bills of Exchange Act, 1961 (Act 55). Since the Plaintiff's Managing Director (MD), the sole signatory to the accounts never sanctioned the withdrawals, the Plaintiff contended that, same was unlawful and the Defendant was liable to it as per the reliefs sought at the Trial Court.

8) THE DEFENDANT'S CASE

The Defendant denied substantially all the averments of impropriety on its part by the Plaintiff. According to the Defendant, the Plaintiff's claims are statute barred. The Defendant contended that, it did not partake in the reconciliation exercise conducted by Plaintiff hence, same was self-serving. The Defendant also contended that, the Plaintiff had failed to keep proper books of accounts and appoint a duly qualified Auditor to prepare Annual Auditor's Report of Plaintiff's company as mandated by the Companies Act, 1963 (Act 179). The Defendant contended further that, since Plaintiff is a limited liability company, it is deemed to have had expert advice and

actual knowledge of its accounts with Defendant prior to March 2011 and was thus estopped from commencing the suit.

9) For the Defendant, the alleged unlawful withdrawals from the Plaintiff's account was the doing of the Plaintiff's own General Manager, Konings Francis Gbanaglo. The Defendant further averred that, at all times, it acted in good faith and in accordance with the ordinary banking business practice. The Defendant further averred that, the internal forensic audit conducted by the Criminal Investigations Department of the Ghana Police Service exculpated it, as it was found that all payments made to Plaintiff's GM were made in good faith as they were received either to the Plaintiff's MD herself or the GM. The Defendant added that, on the same facts, the Plaintiff's GM was charged with stealing and was convicted and sentenced by the High Court, Accra (Financial Division). The Defendant therefore contended that, the Plaintiff was estopped by its own conduct.

10) **ISSUES SET DOWN FOR TRIAL**

Attempt at settlement at the pre-trial stage not having been successful, the following issues were set down for trial at the High Court

"a. Whether or not the Defendant fraudulently followed settled banking rules and best practices in making huge payments out of the various accounts belonging to the Plaintiff-company.

b. Whether or not the Defendant fraudulently paid out moneys from the Plaintiff's accounts with the bank.

c. Whether or not it was wrongful for Defendant-bank to refuse to honour the Plaintiff's written requests for the release of any statements or authorisation documents in relation to Plaintiff's accounts.

d. *Whether or not the Defendant is indebted to the Plaintiff an amount of GHc37,315,106.45 since March 2011.*

e. *Whether or not the Defendant withdrew from the Plaintiff's various accounts the amount of Ghc37,315,106.45 through want of utmost good faith, due care best practices the full details of which are set out in paragraph 6 of the statement of claim.*

f. *Whether or not the Defendant as at all times during the period that it has handled the Plaintiff accounts in good faith in or the regular course of business.*

g. *Whether konings Gbanaglo is or was the Plaintiff agent at all times material to the various allegations made against the Defendant.*

h. *Whether or not the Plaintiff against Konings Gbanaglo has committed any fraud against the Plaintiff and or the Defendant at all times material to the Plaintiff suit against the Defendant.*

i. *Whether or not the Plaintiff agent Konings Gbanaglo can be held liable or responsible for whatever losses incurred by the Plaintiff (if at all).*

j. *Whether or not the Plaintiff is indebted to the Defendant in an amount of Ghc683,058.01 in respect of a facility entered into between the Plaintiff and the Defendant on 26 October 2009.*

k. *Whether or not Plaintiff is entitled to its claim against the Defendant.*

l. *Whether or not the Defendant is entitled to its counterclaim.*

m. *Any other issues as may be disclosed on the parties' pleadings."*

11) The Trial Court however, adopted four of these issues for its analysis and determination;

"(i) Whether or not the Defendant Bank followed settled banking rules and best practices in making huge payments out of the various accounts belonging to Plaintiff Company.

(ii) Whether or not Defendant withdrew from the Plaintiff's various accounts the amounts of Ghc37,315.10 through want of utmost good faith, due care, best practices the full details of which are set out in paragraph 6 of the statement of claim.

(iii) Whether konings Francis Gbanaglo is or was the Plaintiff's agent at all times material to the various allegations made against the Defendant.

(iv) Whether or not Plaintiff is indebted to the Defendant in the amount of Ghc683,058.01 in respect of a facility entered into between the Plaintiff and the Defendant on 26th October 2009."

12) **THE JUDGMENT OF THE TRIAL COURT**

The Trial Court delivered two judgments, one on the 8th day of November 2017 and another on the 25th of June 2019. Both decisions were in favour of the Plaintiff. The Judgment delivered on the 8th of November 2017 dismissed the counterclaim of the Defendant. The court, having found that the Plaintiff's claims before 2005 were statute barred, ordered the registrar of the court to work out the amount due the Plaintiff but after 2005. Thus, the actual quantum due the Plaintiff informed the judgment dated the 25th of June 2019.

13) In the first judgment, the Trial Court creditably evaluated the law on the relationship between the bank and its customer emphasising on the duty of the bank to act on the mandates of the customer. The Trial Court noted also that, if the bank fails to pay on the mandate, the Bank will be liable for the loss. The Trial Court relied on the case of **KELLY VS. SOLARI [1941] 152 ER 24** and on such decisions like **LIPKIN GORMAN (A FIRM) VS. KARPNALE LTD. [1992] 4 ALL ER 331 AND BANK OF AFRICA LTD. VS. ACKON [1963] 1 GLR 176** to emphasise the bank's duty to at all times to honour the mandates of the customer on the account, unless, there is an exceptional situation such as fraud.

14) The Trial Court further found that, the Plaintiff's mandate card Exhibit 'D6' was executed in 1994 which contained a specimen of Plaintiff's thumbprint. Exhibit 'D6' however differs from Exhibit 'D' which the Defendant contended changed the mandate in 2006. Exhibit 'D', had, in addition to the thumbprint of Mama Adesi and the Company Stamp the instruction ***"Taken by Konings."*** The Trial Court posited that, since the Plaintiff denied authorising Exhibit 'D', the burden was on the Defendant to prove that same had been authorised by the Plaintiff. The Trial Court also found that there was no board resolution changing the 1994 mandate of the Plaintiff. The Trial Court rejected the testimony of the Forensic Expert. It found that the said expert relied only on Exhibit 'D6' and not Exhibit 'D' in determining whether the letters and cheques used for the alleged unlawful withdrawals were thumprinted by Mama Adesi. The Trial Court thereupon held that, in the absence of a board resolution authorising the change of mandate to include an inscription ***"Taken by Konings"***,

the withdrawals were wrongful and did not meet the mandate of the Plaintiff to the Defendant Bank.

15) On the issue of whether the withdrawals complied with the provisions of the Bills of Exchange Act, 1961 (Act 58), the Trial Court found that, all the letters used for the withdrawals did not have a named payee and neither was it indicated on the face of the letters that the monies were to be held by the bearer, and therefore same violated Section 5(1) of Act 55. The Trial Court further held that, since payments were made without the mandate of the Plaintiff, even a defence of good faith will not avail the bank under Section 58 of Act 55.

16) The Trial Court further held that, the criminal charge or conviction of the Plaintiff's GM was not a bar to the civil action. The Trial Court further found that, the Plaintiff neither pleaded nor particularised fraud and added that, the Plaintiff failed to request concealments of wrong debits before 2005 and as such, was estopped and caught by the Limitation Act 1972 (NRCD 54) in respect of its claims before 2005.

17) With respect to the second judgment delivered on the 25th of June 2019, the Trial Court found that, the Defendant had failed to impeach the report of the Judicial Service Accountant following the reconciliation. The Trial Court proceeded to enter judgment in favour of the Plaintiff for the recovery of the sum of Ghc8,708,852.12 and USD980,000.00 plus interest on the said sums at the prevailing bank rate from 10th of February 2006 to date of final payment. The Trial Court further awarded general damages of Gh30,000.00 in favour of the Plaintiff and assessed costs at Ghs20,000.00.

18) Further, the Trial Court cancelled the loans and/or overdrafts purportedly granted to Plaintiff by the Defendant and the Defendant was ordered to return to the Plaintiff, security documents for the facilities said to have been obtained from the Plaintiff within 14 days of the order.

19) **APPEAL TO THE COURT OF APPEAL**

Dissatisfied with the judgment of the Trial Court, the Defendant appealed to the Court of Appeal. On the 22nd day of April, 2021, the Court of Appeal dismissed the appeal by affirming the judgment of the Trial Court. The Trial Court also awarded GHc30,000.00 as costs against the Defendant in favour of the Plaintiff.

20) In its judgment, the Court of Appeal dismissed the ground anchored on the non-compliance of Section 8(1) of the Legal Profession Act, 1960 (Act 32) reasoning that, following the dismissal of the application to dismiss the suit at the Trial Court, the Defendant did not bother to appeal against same and time had long lapsed. The Court of Appeal further affirmed the findings of fact of the Trial Court to the effect that, Exhibit 'D', was not authorised by the Plaintiff and same did not constitute Plaintiff's mandate. Significantly however, the Court of Appeal imputed fraud against the Defendant regarding the withdrawals despite the rejection of same by the Trial Court.

21) **APPEAL TO THE SUPRME COURT**

The Defendant, dissatisfied with the judgment of the Court of Appeal, appealed from the said decision to this Court by notice of appeal filed on 4th May 2021. The notice of appeal was first amended with the leave of the Court below on the 16th of

July 2021 and then, same was further amended on the 8th of April 2022. In determining this appeal, therefore, the relevant grounds before this court have been formulated and set out as follows:-

"A. The judgment is against the weight of the evidence.

B. The Court of Appeal erred in law by holding that Defendant/Appellant/Appellant's failure to appeal against the decision of the High Court dated 12 March 2018 violated Rule 9(1) of C.I. 19.

PARTICULARS OF ERROR OF LAW

a) Failing to hold that practicing without a valid license rendered the substantive suit a nullity, incurably bad and of no legal effect given that at the time the writ was issued Counsel for the Plaintiff/Respondent/ Respondent was not licensed to practice pursuant to Section 8(1) of Act 32.

C. The Court of Appeal erred in law in failing to ascribe any liability to the Plaintiff/Respondent/Respondent for failing to inform the Defendant/Appellant/Appellant about the various unlawful withdrawals spanning a period of 9 years in clear breach of its contractual duty of care towards the Defendant/Appellant/Appellant thereby occasioning a substantial miscarriage of justice.

PARTICULARS OF ERROR OF LAW

a) Failing to uphold the Greenwood duty in banking (after GREENWOOD VS. MARTINS BANK LTD [1933] AC 51).

b) Failing to hold that the Plaintiff/Respondent/Respondent had a duty to exercise reasonable care in executing written orders (Macmillan duty) See LONDON JOINT STOCK BANK LIMITED VS. MACMILLAN) [1919] UKHL 367.

c) Failing to hold that he Plaintiff/Respondent/Respondent is/was therefore estopped from making the various monetary claims against the Defendant/Appellant/Appellant as a result of Plaintiff/ Respondent/Respondents breach of duty towards the Defendant/Appellant/Appellant given the uncontroverted evidence on record that the Plaintiff/ Respondent/Respondent had audited accounts for the period under review.

D. Failing to hold that the Plaintiff/Respondent/ Respondent is/was therefore estopped from making the various monetary claims against the Defendant/Appellant/Appellant given the uncontroverted evidence on record that the Plaintiff/ Respondent/Respondent had audited accounts for the period under review."

22) As dictated by the rules of procedure, as well as several decisions of this court, an appeal is a creature of statute. That being the case, the procedural dictates of the enabling and adjectival law governing appeals must, at all times, be strictly followed. We have now rendered as pedestrian that, grounds of appeal must be well formulated, to insulate it from vagueness and argumentativeness. As can be observed from the grounds enumerated above, grounds C and D are argumentative. But for the points of law undergirding those grounds which necessitate a judicial introspection, the said ground would have been struck out.

We will nonetheless in the interest of justice examine the substance of the grounds in our analysis.

23) **ANALYSIS**

We wish to first, deal with the second ground of appeal which assails the decision of the Court of Appeal in refusing to hold that the Plaintiff's writ is a nullity, having been issued at the time when it's lawyer had no valid license which is a statutory condition precedent to the Plaintiff's lawyer's eligibility to commence the action. For purposes of emphasis, we reproduce the said ground:-

"The Court of Appeal erred in law by holding that Defendant/ Appellant/Appellant's failure to appeal against the decision of the High Court dated 12 March 2018 violated Rule 9(1) of C.I.19.

PARTICULARS OF ERROR OF LAW

a) ***Failing to hold that practicing without a valid license rendered the substantive suit a nullity, incurably bad and of no legal effect given that at the time the writ was issued Counsel for the Plaintiff/Respondent/Respondent was not licensed to practice pursuant to Section 8(1) of Act 32.***

24) When examined critically, the Defendant obfuscates the ground with what it alleges as the particulars of error of law. The target of the ground is an attack that the Court of Appeal was in error when it held that, the failure of the Defendant to appeal on that issue, violated Rule 9(1) of C.I.19. The ground of appeal is not really about a holding that the Court of Appeal erred in not holding that the absence of the solicitor's license rendered the action a nullity. It needs to be noted that, particulars of error of law must demonstrate a deconstruction of the

substantive ground of appeal to expose the specifics which, if put together demonstrates that, the court erred in law. There should thus, be a direct link between the ground and the said particulars. Within the present context, while the ground attacks the interpretation on Rule 9(1) of CI 19, the particulars is on an interpretation of Section 8(1) of Act 32. It appears that, Counsel for the defendant did observe this anomaly, and as such, in his statement of case to this court, in what he terms a *summary of the grounds,* he restated same to be ***"The Court of Appeal erred in law by failing to uphold the appeal on the failure of the Plaintiff's lawyer to obtain a license pursuant to Section 8(1) of (Act 32).***

25) In their delivery, the Learned Justices of the Court of Appeal expressed themselves on this issue as follows:-

(i) *"I roundly agree with submission of learned Counsel for the Respondent that this ground of appeal is improperly laid before this court and therefore an abuse of the legal process. It is trite learning that an appeal is create of statue. It is also a right principle of law to state that no litigant has an inherent right of appeal. Therefore, a litigant must exercise a right of appeal by filing his appeal within the parameters as set out by the law and within the statutory period. Indeed, the Court of appeal has no inherent jurisdiction to hear an appeal if the appellant failed to exercise his statutory right of appeal not in the manner prescribed by law.* ***See: R. VS. CAPE-COAST CIRCUIT COURT REGISTRAR: EX-PARTE ARTHUR (1980) GLR 165 C/A.***

(ii) *As an Appellate court, this court's jurisdiction is properly invoked only when an appeal against the decision of a lower court is filed within the statutory period and or with leave of court. It is noted that the writ was filed in the year 2012 yet the motion filed by the lawyer for the Appellant to have the case dismissed on account that the lawyer*

who filed the writ did not have a valid licence to practice was on 11/12/2017. For reason not apparent on record, the same process was refiled on 20/12/2017 with the return date as 10/01/2018.

(iii) *It is important to observe that the arguments of the lawyer did not find favour with the Learned Trial Judge as same were refused on 12/03/2018. Our view is that the decision of the Trial Court not to dismiss the suit was interlocutory since that did not determine completely, the rights of the parties. Being an interlocutory decision if the Appellant was minded to appeal that decision, it should have done so within 21 days from 12/03/2018 in compliance with Rule 9(1) of the Court of Appeal Rules (C.I.10). As a matter of law, a party who lost the opportunity for any reason to appeal an interlocutory decision within the statutory period cannot apply for an extension of time except where it is a final decision. See Rule 9(1)(b) & (4) of C.I. 19.*

As stated elsewhere in this judgment, the Trial Court's ruling refusing the application was on 12/03/2018 and that appears on pp 282-284 (ROA) Vol. 3. There is nothing on record to show that the Defendant ever launched an appeal against that refusal of the court to dismiss the writ. Having waited till the end of the trial and to file a notice of appeal against the judgment of the Lower Court given on 25th June 2019 the Defendant cannot lawfully and legitimately now raise that decision of the Lower Court refusing to strike out the writ as a ground of appeal. It bears emphasis that the Appellant being hopelessly out of time in not appealing against that interlocutory decision, it cannot smuggle that ground of appeal into the notice of appeal filed 30/07/2019.

26) Against this holding, Counsel for the Defendant submitted in the Statement of Case to this court in the following manner:-

"My Lords, the Court of Appeal's attention was drawn to the fact that the whole action of the Plaintiff was void for breach of statute but they refused to determine the issue with the excuse that it was too late in the day to complaint about that matter. But the well-established principle of the law on this matter was stated in clear language by Georgina Wood JSC (as she then was) in the case of ***ATTORNEY-GENERAL VS. FAROE ATLANTIC CO. LTD. [2005-2006] SCG:R 271 AT 309*** *as follows:*

"The salutary and well-known general rule of law is that where a point of law is relied on in an appeal, it must be one which was canvassed at the trial. But there are exceptions to this rule: the question of jurisdiction being one of them. A jurisdiction issue can therefore be taken or raised at any time, even for the first time, on appeal. Another exception is where an act or contract is made illegal by statute…Again, the well-established general rule is that where the legal question sought to be raised for the first time is substantial and can be disposed of without the need for further evidence it should be allowed."

Therefore, the matter was properly raised in the Court of Appeal and they erred by failing to consider it. The record of appeal contained all the evidence of the date the writ of summons was signed by the Plaintiff's lawyer and the affidavit in which the Plaintiff admitted that the lawyer had no valid practicing licnese."

27) On 20th December 2017, the Defendant applied to the Trial Court to strike out the suit on the ground of it being a nullity for want of procurement of a valid solicitor's licence by Plaintiff's lawyer at the time the action was commenced. On the 12th day of March 2018, that application was refused by the Trial Court. It is important to add that the application and the decision thereof, was after the first judgment had been delivered by the court on the 8th of November 2017. The fact is, the Defendant did not bother to appeal against the dismissal of the application. Yet, it launched an appeal against both judgments of the Trial

Court and raised this issue. The position of the Court of Appeal simply is that, the Defendant was estopped from making that allegation a ground of appeal, as time had already lapsed. The Defendant could not, therefore, be allowed to argue same in these proceedings.

28) Aside the fact that the issue on this ground goes to the root of the matter such that, it may have the potency of nullifying the entire proceedings, it appears the Court of Appeal took a narrow view on its resolution of the issue which may not be desirable for the law functionally. The rules of the Court of Appeal provide under Rule 30 that: "***No interlocutory judgment or order from which there has been no appeal shall operate so as to bar or prejudice the Court from giving a decision upon the appeal as may seem just.***"

29) As per this rule, the Court of Appeal was not prohibited from considering the issue notwithstanding the non-filing of an appeal in relation to same within the permissible statutory time frame in terms of Rule 9(1) of the rules. To that extent, we are of the view that the Court of Appeal was in error in refusing to consider the effect of the absence of a valid and subsisting solicitor's licence at the time Plaintiff's lawyer issued the writ of summons once the issue was raised at the court of first instance and therefore constituted put of the record before the Court of Appeal. This position is in no way seeking to suggest that, indolent litigants who fail to appeal against interlocutory matters can wake up after several years and hide under an appeal against final decisions to assert their right after the period provided by the rule to appeal against interlocutory decisions had lapsed. We are of the view that, the nature of the issue must inform a consideration of such appeal under Rule 30 of the Court of Appeal Rules, (C.I.19) particularly where the subject the issue provoked could have the effect of voiding the proceedings or

eroding the jurisdiction of the court, especially when the other party has had the opportunity to respond to same. As we have previously decided, in certain appropriate situations, lapse of time is inconsequential when the subject of the appeal will render proceedings void and a consequential nullity.

30) Section 8(1) of Act 32 provides that, apart from the Attorney-General or an officer of his department, no lawyer can practice unless the lawyer has in respect of such practice a valid annual Solicitor's License issued by the General Legal Council. The effect of non-compliance with this mandatory provision of the Act has been settled by this Court in several cases. In **HENRY NEURTEY KORBOE VS. FRANCIS AMOSA CIVIL APPEAL NO. J4/56/2014 dated 21st April, 2016,** this court decided that, the failure of a lawyer to procure a practicing licence for a particular year of practice renders every process or step taken pursuant thereof a nullity. Guided by policy, and to avoid incongruous anarchy in the legal system, this court has carefully pointed out that, the position taken in the ***Teriwaja cases*** must operate only prospectively and not retrospectively. It is not in tune with the interest of the public, for the decision to be applied retrospectively, having regard to the numerous decisions already handed. See **REPUBLIC VS. HIGH COURT (LAND DIVISION) ACCRA EX-PARTE: NUMO ADJEI KWANKO II Civil Motion No. J5/33/2017** cited by both Counsel for Plaintiff.

31) Indeed, this court had taken a similar approach in the case of **ASARE VS. ATTORNEY-GENERAL & THE GENERAL LEGAL COUNCIL WRIT NO.J1/1/2016 dated 22nd June, 2017** where it held that, it was unlawful for candidates to the Ghana School of Law to go through an interview before being

admitted. By way of policy, this court was careful to make its directive prospective having regard to the fact that some of the candidates had already become lawyers. Our judgments and orders, must not just satisfy a present dilemma, but must be able to stand the test of time. Decisions of courts must be pragmatic and realistic to avoid disorderliness in the judicial system. In the **ASARE case** (supra), our revered and respected Gbadegbe JSC speaking for this court stated as follows:-

"Dealing with the case before us, there is also the consideration that all those students had before satisfying the additional requirements imposed by the Council satisfied the qualification requirement contained in Regulations 2 and 3 of L.I 1296 which has been given effect to in this judgment and accordingly to deprive them of the admissions which were offered to them would undermine the declaration made regarding the extraneous requirements that they had to satisfy. Such a direction therefore would be contrary to reasonableness and not derived from the pronouncement made regarding these additionally imposed requirements.

By virtue of and in accordance with Article 2(2) of the Constitution, it is hereby ordered that the Council puts in place a mechanism that would enable it to make changes to L.I. 1296 in terms of what it thinks appropriate in order to properly exercise its mandate under Act 32 having regard in particular to Sections 1, 13 and 14 by putting in place a system of legal education in terms of Articles 11(7) and 297 of the Constitution. As preparations towards admissions in October 2017 have already been initiated and bearing in mind that persons who would avail themselves of such opportunities are qualified within the scope of Regulations 2 and 3 as pronounced in this judgment, we do not think it is in the public interest to interfere with such arrangements. It is hereby further ordered that the new system should be in place within 6 months from today such that admission into the professional law course in October 2018 shall not be conducted under the

system which has informed the declaration to which the consequential orders herein relate."

32) Grounded on this policy statement, we reject the arguments of the Defendant that notwithstanding the clear directions we have given with respect to this issue, we should depart from same. Acceding to the submission will deepen the very mischief we sought to prevent and same is not enticing. Ground B of the grounds of appeal is therefore dismissed as meritless.

33) As a sequel to analysing the other grounds of appeal, we deem it necessary to evaluate the legal relationship between a bank and its customer. We find an examination of the rights, duties and or liabilities of bankers and their customers most crucial, having regard to the issues at the heart of this dispute.

34) **The bank-customer relationship: Rights, duties and liabilities.** The relationship between a bank and its customer is one of contract. Therefore, the basic principles of contract apply to this relationship. As the law of contract teaches, the terms may be express or implied. Where the terms of the relationship are not specifically in writing, but expected to be inferred from a circumstance, then, it ought to be demonstrated that, at all times, the party against whom it is going to be used knew about it and did acknowledge same. Anytime there is an allegation of a breach of any of the duties owed to either the bank or the customer, then, it is important to consider the scope of the contract entered into by the parties vis-à-vis the statutory regime regulating that contractual relationship.

35) In **FOLEY VS. HILL (1848) 2 HLC 28** the **English House of Lords**

decided that, in the absence of a special relationship between a bank and its customer, the relationship is that of a debtor and a creditor. ***Lord Cottenham*** had this to say within the context of deposits made by customers to banks:

"Money, when paid into a bank, ceases altogether to be the money of the principal; it is by then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into a bank is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in other places. The money placed in custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as a the property of his principal; but he is, of course, answerable for the amount because he has contracted having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands.

That has been the subject of discussion in various cases, and that has been established to the relative situation of banker and customer. That being established to be the relative situations of banker and customer, the banker is not an agent or factor but he is a debtor."

36) For his part, **Lord Brougham** said at page 43 of the report as follows:-

"I am now speaking of the common position of a banker, which consists of the common case of receiving money from his customer on condition of paying it back when asked for, or when drawn upon, or of receiving from

other parties, to the credit of the customer, upon like conditions to be drawn out by the customer, or in common parlance, the money being repaid when asked for, because the party who receives the money has the use of it as his own, and in the using of which his trade consist, and but for which no banker could exist, especially a banker who pays interest."

37) In **TAI HING COTTON LTD. VS. LIU CHONG HINGBANK [1985] 3 WLR 33, Lord Scarman** also had this to say about the bank/customer contractual relationship:

"If the banks wish to impose upon their customers an express obligation to examine their monthly statements and to make those statements, in the absence of query, unchallengeable by the customer after expiry of a time limit, the burden of the objection and of the sanction imposed must be brought home to the customer…The test is rigorous because the bankers would have their terms of business so construed as to exclude the rights which the customer would enjoy if they were not excluded by express agreement. It must be borne in mind that, in their Lordships' view, the true nature of the obligations of the customer to his bank where there is no express agreement is limited to the Macmillan and Greenwood duties. Clear and unambiguous provision is needed if the banks are to introduce into the contract a binding obligation upon the customer who does not query his bank statement to accept the statement as accurately setting out the debit items in the accounts."

38) The facts of the above case are that, the bank's contract with the customer contained certain clauses to the effect that, the customer

notifies the bank within a particular time frame of any errors in the customer's monthly bank statements, else they be deemed correct. The House of Lords were of the view that, for the customer to be bound by such special provisions, same must be specially brought to his notice. As observed from these authorities, both the bank and the customer are subject to certain duties/obligations to each other. What then, are the duties banks owe their customers?

39) The duties banks owe their customers can be gleaned from the pronouncement of Lord Atkin in the **TAI HING COTTON LTD.** case (supra): where the Law Lord articulated as follows:-

"The question seems to turn upon the terms of the contract made between banker and customer in ordinary course of business when a current account is opened by the bank. It is said on the one hand that it is as simple contract of loan; it is admitted that there is added, or superadded, an obligation of the bank to honour the customer's drafts to any amount not exceeding the credit balance at any material time; but it is contended that this added obligation does not affect the main contract. The bank has borrowed the money and is under the ordinary obligation of a borrower to repay. The lender can sue for his debt whenever he pleases. I am unable to accept this contention. I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides and require careful statement. They appear upon consideration to include the following provisions. The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them the promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise

to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept…The result I have mentioned seems to follow from the ordinary relations of banker and customer, but if it were necessary to fall back upon the course of business and the custom of bankers, I think that it was clearly established by undisputed evidence into his case that bankers never do make a payment to a customer in respect of a current account except upon demand."

40) Observably, the Bank is under a duty to comply with the mandates and instructions of the customer. See the case of **B. LIGGET (LIVERPOOL) LTD. VS. BARCLAYS BANK LTD. [1928] 1 KB 48.** Further, at common law, the bank is under a duty to keep confidential, transactions with the bank as decided in cases such as **TOURNIER VS. NATIONAL PROVINCIAL AND UNION BANK OF ENGLAND [1924] 1 KB 461**. The Bank must also, keep and provide regular and accurate bank statements to the customer. In dealing with the customer, the bank must, exercise due diligence and care.

41) In **GREENWOOD VS. MARTINS BANK LTD. [1933] AC 51,** the English

House of Lords made a statement on one of the duties of a customer to the bank when it held that, a customer of the bank was under a duty to inform the bank of any forgeries immediately they were detected and failure to do so, upon being aware will estop the customer from claiming a recovery of his money. The House of Lords speaking through **Lord Tomlin** expressed itself as follows:

The Appellant's silence, therefore, was deliberate and intended to produce the effect which it in fact produced – namely, the leaving of the Respondents in ignorance of the true facts so that no action might be taken by them against the Appellant's wife. The deliberate abstention from speaking in those circumstances seems to me to amount to a representation to the respondent's that the foraged cheques were in fact in order, and assuming that detriment to the respondents followed there were, it seems to me, present all the elements essential to estoppel. Further, I d o not think that it is an answer to say that if the Respondents had not been negligent initially the detriment would not have occurred. The course of conduct relied upon as founding the estoppel was adopted in order to leave the Respondents in the condition of ignorance in which the Appellant knew they were. It was the duty of the Appellant to remove that condition however caused. It is the existence of this duty, coupled with the Appellant's deliberate intention to maintain the Respondents in their condition of ignorance that gives its significance to the Appellant's silence."

42) Further, the customer is under a duty to exercise due care when drawing a cheque, bills of exchange or other negotiable instruments so that they are not easily altered. In **LONDON JOINT STOCK BANKING LTD. VS. MACMILLAN & ARTHUR [1918] AC 777,** a firm entrusted to a confidential clerk, whose integrity they had no reason to suspect, the duty of filling in their cheques

for signature. The clerk presented to one of the partners of the firm for signature a cheque drawn in favour of the firm or bearer. There was no sum in words written on the cheque in the space provided for the writing and there were the figures **'200'** in the words ***'One Hundred and Twenty Pounds'*** in the space left for words and wrote the figures **'1'** and **'0'** respectively on each side of the figure **'2,'** which was so placed as to leave room for the interpretation of the added figures. The clerk presented the cheque for payment at the firm's bank and obtained payment of 120 pounds out of the firm's account. An action was brought by the Plaintiffs to have it declared that, the Defendants are not entitled to debit the Plaintiffs with a cheque for 120 pounds instead of 2 pounds. The bank resisted the claim on the grounds that the Plaintiffs had drawn the cheque so negligently as to lead to the fraud, and that the Plaintiffs had entrusted the cheque signed by them to their clerk authorizing him to fill it up.

43) In determining liability, it was held that the firm had been guilty of a breach of the special duty arising from the relation of banker and customer to take care in the mode of drawing the cheque, and the alteration in the amount of the cheque was the direct result of that breach of duty, and the bank were entitled to debit the firm's account with the full amount of the cheque. In elucidating on the issue, **Lord Finlay LC** pronounced as follows:

"The relation between banker and customer is that of a debtor and creditor, with a superadded obligation on the part of the banker to honour the customer's cheques if the account is in credit. A cheque drawn by a customer is in point of law a mandate to the banker to pay the amount according to the tenor of the cheque. It is beyond dispute that the customer is bound to exercise reasonable care in drawing the cheque to prevent the banker being misled. If he draws the cheque in

a manner which facilitates fraud, he is guilty of a breach of duty as between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker as a natural and direct consequence of this breach of duty." "In the present case the customer neglected all precautions. He signed the cheque, leaving entirely blank the space where the amount should have been stated in words, and, where it should have been stated in figures, there was only the figure "2" with blank spaces on either side of it. In my judgment, there was a clear breach of the duty which the customer owed to the banker. It is true that the customer implicitly trusted the clerk to whom he handed the document in this state to fill it up and to collect the amount, but his confidence in the clerk cannot excuse his neglect of his duty to the banker to use ordinary care as to the manner in which the cheque was drawn. He owes hat duty to the banker as regards the cheque, and it is no excuse for neglecting it that he had absolute, and, as it turned out, unfounded, confidence in the clerk. The duty is not a duty to have clerks whom the customer believes to be honest. It is a specific duty as to the preparation of the order upon the banker. If the customer chooses to dispense with ordinary precautions because he has complete faith in his clerk's honesty, he cannot claim to throw upon the banker the loss, which results. No one can be certain of preventing forgery, but it is a very simple thing in drawing a cheque to take reasonable and ordinary precautions against forgery. If, owing to the neglect of such precautions, it is put into the power of any dishonest person to increase the amount by forgery, the customer must bear the loss as between himself and the banker. But, further, it is well settled law that if a customer signs a cheque in blank and leaves it to a clerk or other person to fill it up, he is bound by the instrument as filled up by the agent."

44) Lord Shaw put the obligation of the bank towards their customers

by emphasizing that:

> ***"A cheque with the signature of a customer forged is not the customer's mandate or order to pay. With regard to that cheque, it does not fall within the relation of banker and customer. If the bank honours such a document not proceeding from its customer, it cannot make the customer answerable for the signature and issue of a document which he did not sign or issue; the banker paying accordingly has paid without authority, and cannot charge the payment against a peso who was a stranger to the transaction".***

45) With the above exposition, we proceed to analyse the remaining grounds of appeal beginning with Ground A which is to the effect that **the judgment is against the weight of the evidence.** As severally decided by this court, an Appellant as in this instant, the Defendant which has pleaded the omnibus ground of appeal simply alleges that there was an improper evaluation of the evidence adduced at the Trial Court and consequently invites the Appellate court to embark on its own evaluation of the evidence in order to arrive at a decision in the Appellants favour. This may be as a result of the non-inclusion of portions of the evidence in the analysis or exclusion of salient aspects of the evidence, or simply the misapplication of principles of law as regards the evaluation of the evidence thereby occasioning the Appellant, a miscarriage of justice. Such an Appellant carries the burden to point out the lapses in the judgment which render same against the weight of evidence adduced at the trial. We refer to cases such as **DJIN VS. MUSA BAAKO [2007-2008] 1 SCGLR 686; ACHORO VS. AKANFELA [1996-97] SCGLR 209** and other decisions of this court on the scope of this judicial attitude of the appellate court as pronounced in the cases of **OWUSU-DOMENA VS. AMOAH [2015-2016] SCGLR 790 and**

ATUGUBA & ASSOCIATES VS. SCIPION CAPITAL (U.K) LTD. & ANOR. [2017-2018] 2 SC GLR 196.

46) Equally pertinent on this ground is the principle of law that, the primary findings of facts are the preserve of the Trial Court. And further that, where the first appellate court affirms the findings of facts by the Trial Court, this court, as a second and final appellate court, must be extremely slow in disturbing those concurrent findings. It is only when there are exceptional grounds such as where the findings were not based on a proper analysis or evaluation of the evidence or same are at variant with the settled position of the law or statute, that this court as the second appellate court will disturb such findings.

47) In the case of **FRANK ODURO VS. GRAPHIC COMMUNICATIONS GROUP LTD. [2018] DLSC 4518** at pages 3-4 Benin JSC speaking for this court explained the attitude of this court to concurrent findings by the two lower courts and prescribed the criteria for a justifiable interference and reversal of such findings in the following words:

"On the concurrent findings of fact by courts below, it has been pointed out time without number that the second appellate court cannot substitute its own views for those of the Courts below, even if given the same facts, the second appellate court would have reached a different conclusion on the facts: ***However the second appellate court can upset the findings of fact if certain questions or some of them are answered in the affirmative. Did the court fail to consider vital pieces of evidence, oral as well as documentary? Did the court take into consideration and rely on irrelevant and non-material evidence. Did the court rely on legally inadmissible evidence? Did the court wrongfully exclude relevant material and admissible evidence? Did the***

court fail to identify and allocate the burden of producing evidence and of persuasion and thereby failed to consider the party's case properly. Did the court fail to identify the standard of proof required on a particular issue and thereby failed to access the party's case accordingly? Did the court embark upon a proper evaluation of the evidence as a whole? These are by no means exhaustive. Answers to such questions and others may guide the court to reach a decision whether to disturb the findings of fact or otherwise". See also **DAVID APASERA & 42 OTHERS VS. THE ATTORNEY GENERAL & MINISTRY OF FINANCE [2020] DLSC 9923; ADAMS ADDY AND ADU AKWAANOR VS. SOLOMON MINTAH ACKAAH [2021] DLSC 10160; KOGLEX LTD. (NO.2) VS. FIELD [2000] SCGLR 175; OBENG VS. ASSEMBLIES OF GOD CHURCH, GHANA [2010] SCGLR 300; AMOAH VS. LOOKKO & ALFRED QUARTEY (Substituted by: GLORIA QUARTEY) & ORS. [2011] SCGLR 505, NANA ANTI OWUSU (Suing For Himself And On Behalf** Of **SARAH NAANA KWAN SIMAN (MINOR) VS. ALHAJI ABDUL AZIZ @ PAPA WALA [2018] DLSC 5638** at page 6.

48) Against the background of the above cases and in proceeding with our analysis on the omnibus ground, it is important to set out the undisputed facts from the record.

a. *That at the Trial Court, there was no dispute, that the alter ego of the Plaintiff's company is Mama Adesi.*

b. *It was also not controverted, that Mama Adesi is illiterate.*

c. *The parties were also agreeable, that the Plaintiff company held thirteen (13) bank accounts with the Defendant bank.*

d. *From the pleadings and evidence, there is no contestation, that the sole signatory to these accounts is Mama Adesi who thumbprints to communicate the mandate of the Plaintiff on the accounts.*

e. *The parties also agree that the Plaintiff's General Manager Francis Gbanaglo Konings served the Plaintiff in that position for several years and had acted as a messenger for withdrawals on behalf of the Plaintiff for years on the Plaintiff's accounts.*

f. *The parties further do not dispute, that the moneys alleged by the plaintiff to have been unlawfully withdrawn from her accounts were withdrawn and or handed over to its General Manager for the Plaintiff.*

g. *There is also agreement, that the General Manager was arrested, prosecuted, convicted and sentenced by the Financial Division of the High Court for misappropriating moneys he withdraw form Plaintiff's accounts on behalf of Plaintiff.*

49) With these undisputed facts, it is clear where the Plaintiff's monies are; or who took possession of or misappropriated those moneys. The ability of that person to refund the monies is inconsequential to the determination of liability. Very interestingly, that person Francis Gbanaglo Konings the Plaintiff's GM was never made a party to the suit either upon the order of the court *suo moto* or upon an application by either of the parties. This default notwithstanding, the Plaintiff urges that the Defendant be made liable for monies withdrawn by its own officer.

50) We find from the evidence that, in 1994, the Plaintiff communicated its mandate, per Exhibit 'D6'. That Exhibit contained a specimen of Mama Adesi's thumbprint. At the time, the mandate was exercised through cheques duly impressed with the Company's Stamp and thumb printed by Mama Adesi. The Defendant relied on Exhibit 'D' and contended at the Trial Court that, in 2006, there was a change in the mandate where in addition to the company's stamp and the thumbprint of Mama Adesi were the inscriptions ***"Taken by Konings"*** suggesting that monies upon withdrawal be handed to the GM. Both the trial and first appellate courts, threw a challenge to the Defendant bank to prove that, the Plaintiff authorised the change, in the face of the denial by the Plaintiff. The fact is that, there was no board resolution supporting this. It is based on this finding that, the two lower courts concluded that, Exhibit 'D' did not emanate from the Plaintiff and cannot communicate the mandate of the Plaintiff. By that holding, the two lower courts concluded that the Defendant bank was liable to Plaintiff for the funds withdrawn from Plaintiff's accounts.

51) The evidence however shows certain payments that were effected on behalf of the Plaintiff company to clear some indebtedness with other entities like Patings Ventures; Nestle; Far East Mercantile Ltd; Promasidor Gh. Ltd. The evidence reveals that the mandate in authorizing payments to these entities were consistent with Exhibit 'D'. Again, contrary to the claims by the Plaintiff that there was an agreement that Mama Adesi was to thumbprint cheques before officials of the bank, there was no evidence in support of same. Infact, the instrument of payments to the aforementioned entities were not executed before any bank officials. In allocating the burden of proof therefore, when the Defendant denied this claim, the Plaintiff carried the burden to adduce further evidence in rebuttal

of the Defendant's position. The Plaintiff failed in this crucial respect. In our view, the Plaintiff simply blew a muted trumpet on this issue which it failed to discharge.

52) The Defendant also took issue with the holding that, because the bank issued cheque books to Mama Adesi, that was the only means of communicating its mandate for withdrawals. As rightly pointed out by Counsel for Defendant in the statement of case, Exhibit 'K', the letter written by Mama Adesi requesting for bank statements also requested the bank to furnish the company with copies of "***our authorization for all payments and transfers made through our accounts during the period e.g. cheques, letters, standing orders etc.***" Clearly, the company had utilized letters as authorisations for withdrawals.

53) With all due deference to the Justices of the Court of Appeal, we are of the opinion that, the Defendant at all times did act in good faith and cannot be said to have violated the Bills of Exchange Act. As the Trial Court itself did observe, the Plaintiff could not prove fraud against the Defendant. In fact as aforesaid, that allegation was never pleaded nor particularised. The evidence shows that the Plaintiff's GM was rather dishonest in his dealings. At all times, the Plaintiff had held out the GM as its duly authorised agent to receive and deposit funds on its behalf and the Bank had been accustomed to that practice as the conventional means course of dealing by the parties. Significantly, the letters and cheques utilised by the GM as per the evidence bore the thumbprints of Mama Adesi. The bank cannot therefore, be said to be complicit in this situation. In any event as already observed, it beats imagination why the GM was not even made a party to the suit even if it were jointly and severally while the Trial Court was urged to shift liability from the GM to the Defendant Bank.

54) Our position from the totality of the evidence and analysis

therefrom is that, the Defendant at all times acted in good faith and in accordance best banking practices reasonably expected based on the developed course of dealing and performance between the parties. Section 58 of the Bills of Exchange Act, 1961 (Act 55) provides as follows: ***"Where a bill payable to order or on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the endorsement of the payee or a subsequent endorsement was made by or under the authority of the person whose endorsement it purports to be and the banker is deemed to have paid the bill in due course, although the endorsement is forced or made without authority."***

55) We cannot gloss over the fact that Mama Adesi herself the Plaintiff's Chief Executive did not testify in this suit. An accountant contracted for the reconciliation exercise rather testified in her stead. The reason given was that, she was of advanced age and suffered occasional memory loss. This reason for her failure to attend and testify was not supported by any medical evidence. Whereas her failure to testify will not necessarily detract from the quality and credibility of the Plaintiff testimony since parties are free to decide on who to call as their witness, it is important that, material witnesses are not side-stepped or shielded particularly if their testimony is very crucial in deciding the facts in issue before the court.

56) In the context of the crucial issue for determination in the instant appeal and based on the entire evidence on record the substance and summary of the submission of the Plaintiff as articulated in it's statement which we reject is that:

(i) "The Defendant facilitated the fraud by not adhering to

mandate. If the Defendant had insisted on satisfying the elements of the mandate, it would have discovered that the authorization documents were not that of the Plaintiff because Mama Adesi was not the one who thumb printed the documents. A telephone call to Mama Adesi or a visit to her if even at her expense would have brought the fraudulent acts of Francis Konings Ganaglo the actual knowledge of the Defendant.

(ii) Since the Defendant did not take the prudent steps expected

of a reasonable banker in the circumstances where letters instead of cheques were repeatedly used; Frnacis Konings Ggbanaglo was always the beneficiary of the value of the authorization documents when at the same time he was the one the bank was verifying the authenticity of the letters from; and regularly cashing foreign currency on cedi accounts when the customer had foreign currency accounts, ***knowledge of the fraudulent acts of Francis Konings Ganaglo must be imputed to the Defendant. The Defendant facilitated the fraud and cannot be an innocent third party within the context of the law.*** *Therefore, the payment made by the Defendant on the strength of the fraud of Francis Konings Gbanaglo are not binding on the Plaintiff. More importantly, the payments were made contrary to the mandate and cannot be binding on the Plaintiff."*

57) The imputations of fraud in the statement of case are clearly not reflective of the pleadings and the evidence adduced at the Trial Court. Fraud was never an issue before the Trial Court. At the risk of being repetitive and for purposes of emphasis, it is clear that the Plaintiff did not plead nor particularised fraud as required by the rules of the Trial Court *(See Order 11 Rule 12 of C.I. 47).* The same was also not discernible by inference from the evidence. That imputed alegation of fraud was simply left unproven. Consequently the statutory burden under Section 13 of the Evidence Act, 1975 (NRCD 323) was not discharged. We

find and hold therefore that the Defendant did not act fraudulently in honouring the mandates of the Plaintiff through Plaintiff's GM. contrary to the allegations by the Plaintiff.

58) We find however that, within the context of the provisions of Section 177 of the Evidence Act 1975 (NRCD 323) the Defendant acted in accordance with the course of dealing and performance of the parties which had established a pattern of conduct between them in several previous transactions. Section 177 of (NRCD 323) provides as follows:- *"(1) Except as otherwise provided by the rules of equity, terms set forth in a writing intended by the party or parties to the writing as a final expression of intention or agreement with respect to such terms as are included in the writing may not be contradicted by evidence of any prior declaration of intention, of any prior agreement or of a contemporaneous oral agreement or declaration of intention, but may be explained or supplemented –*

(a) "by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the intention or agreement, provided that a Will and a registered writing conveying immovable property shall be deemed to be a complete and exclusive statement of the terms of the intention or agreement; and

(b) by a course of dealing or usage of trade or by course of performance."

(2) Nothing in this section precludes the admission of evidence relevant to the interpretation of terms in a writing.

(3) For the purpose of this section -

(a) ***"a course of dealing"*** *means a sequence of previous conduct between parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct;*

(b) ***"a usage of trade"*** *means any practice or method of dealing in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question;*

(c) *"course of performance"* *means, in respect only of a contract which involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any manner of performance accepted or acquiesced in without objection."*

59) In the instant case, some of the transactions which constitute the basis of Plaintiff's claim were applied in settling the Plaintiff's own just debts without any objection, query or complaint by the Plaintiff over the Plaintiff's bank balances with the Defendant bank. Where therefore a dispute arises between the parties, the course of dealing between them is relevant in determining how the parties by their own conduct intended to carry out their transactions.

60) While this contractual situation is a provision of statute as referred to above it has it's foundations at common law. Thus, in **AMALGAMATED INVESTMENT & PROPERTY COMPANY LTD. (IN LIQUIDATION) VS. TEXAS COMMERCE BANK LTD. [1981]3 AII ER.577 to 581, Lord Denning** said of the conduct of parties to their contractual relationships in the following words.

"So I come to this conclusion: when parties to a contract are both under a common mistake as to the meaning or effect of it and thereafter embark on

a course of dealing on the footing of that mistake, thereby replacing the original terms of the contract by a conventional basis on which they both conduct their affairs, then the original contract is replaced by the conventional basis. The parties are bound by the conventional basis. Either party can sue or be sued upon it just as if it had been expressly agreed between them."

The effect of the above position of the law is that, neither party can approbate on the new course of dealing and of performance when it suits them, and reprobate when it does not. This is exactly what the Plaintiff in the instant suit has urged, which this court properly instructing itself on the law, will reject.

61) We have also taken particular attention of the attempt by Counsel for the Plaintiff to distinguish the subject of the criminal suit against the GM of the Plaintiff, from that of the instant suit. Counsel for the Plaintiff contends that, the monies withdrawn from Plaintiff's accounts which were the subject of the criminal prosecution were done on the proper mandate of the Plaintiff save that same were subsequently misappropriated by the Plaintiff's GM. On the other hand, those that were withdrawn and being the subject of the instant suit were not transacted upon the mandate of the Plaintiff. Save the general statements of these allegations. Counsel for the Plaintiff failed to indicate the specifics of the distinctions in terms of the withdrawals. Therein lies the failure by the Plaintiff to discharge its crucial burden of producing evidence which the two lower courts glossed over. Contrary to these submissions, the amounts for which the Plaintiff's GM was charged in the criminal case, are part of the claim in this action. In any event, as we already settled, the thumbprints on the

cheques and letters were that of Mama Adesi thereby mandating Defendant to honour same.

62) From the foregoing analysis, the remaining grounds of appeal have been rendered otiose and merely academic as they seek to fault the quantum of the award in favour of the Plaintiff. Having held that, the Plaintiff is not entitled to any refund of those monies from the Defendant, the same have become moot and a discussion of same merely academic.

63) Upon our consideration of this appeal in the round, we are of the view that, the whole appeal is more or less a reconsideration of findings of fact by the Trial Judge all of which were affirmed by the Court of Appeal except that the first appellate court erroneously held that the Defendant was fraudulent. The principles upon which the appellate court especially the final appellate court can interfere with findings of fact especially where they are concurrent, we suggest are as follows:-

(i) *This court will start with the attitude to the Trial Court as the only forum which principally has the duty to make findings of fact from the evidence both oral and documentary further that the Trial Court. By its specially suited by its peculiar constitution is the forum which had the special advantage of selling the witnesses and the perception of documentary evidence at the time it was tendered and received in evidence.*

(ii) *This court will also find out whether the conclusion arrived at by the Trial Court as affirmed by the Court of Appeal in the instant case is justifiable while examined against the very premise and or controversy which formed the basis of the conclusion arrived at.*

(iii) *Where the conclusion was arrived at without any real controversy as for example on the basis of documentary evidence only, or where it involved a controversy as in the instant case, and the controversy is limited only to number, complexity or contradiction or interpretation of document; or where there is oral evidence but it involves merely an admission by the adversary; or there is unchallenged piece of oral evidence, the appellate court for that matter this court should consider itself to be in as good a position as the Trial Court in so far as the evaluation of such evidence as aforesaid is concerned.*

(iv) *Where the decision was arrived at after there has been an examination of the controversy such as where the opposing parties produced witnesses in the case to contradict each other by oral evidence, then it's the exercise of re-evaluation of the evidence, the Appellate court ought to appreciate that the flowing would be relevant.*

64) It must be emphasized that these tests become even more applicable where as in the instant case, the first appellate court not only accepted and affirmed the findings and conclusion of the Trial Court wholly, but proceeded to make a finding of fraudulent conduct against the Defendant. In appropriate cases therefore and the instant case is no exception, this court being the second appellate and final court can exercise its powers of departure and reversal of primary findings by a Trial Court and first Appellate Court, where it finds from its own reevaluation of the evidence on record that, either the specific findings of fact by the Trial Court and affirmed by the first Appellate court had taken into account irrelevant matters in law; or had excluded matters which were crucially necessary for consideration; or had come to a conclusion which no court properly instructing itself on the law, would have reached; and where the findings were not

inferences drawn from specific facts, such findings might properly be set aside. See the cases of **EFFISAH VS. ANSAH [2005-2006] SC GLR 943, BARCLAYS BANK GHANA LTD. VS. SAKARI [1996-97] SC GLR 639, FOFIE VS. ZANYO [1992]2 GLR 475** to mention a few. The need to ensure that justice is not miscarried must always dominate the attitude and thinking of the Appellate court especially the apex court, when dealing with appeals which raise questions on the improper evaluation of the facts, and evidence *vis a vis* the allocation of the statutory evidential burden to the parties in the dispute.

65) **CONCLUSION**

In the instant case, we find that the two lower courts failed to take into account the normal course of dealing and performance between the parties regarding the exercise of Plaintiff's mandate on its accounts. The evidence clearly shows that, the very complaint of the Plaintiff that, it did not authorise certain transactions, is inconsistent with other transactions between the Plaintiff and the Defendant bank if regard is had to the payments made through the new course of dealing and performance by the parties to satisfy other creditors of the Plaintiff.

66) From our reevaluation of the entire evidence on record, we find that the two lower courts failed to properly consider the evidence adduced at the trial, as they failed to properly allocate the evidential burden on the party which carries the burden of proof. The two Lower Courts also failed to apply the relevant law within the context of the peculiar matrix of facts and issues for determination in the suit. Consequently, the appeal is allowed. The concurrent judgments of the High Court and Court of Appeal are hereby set aside.

I. O. TANKO AMADU

(JUSTICE OF THE SUPREME COURT)

G. PWAMANG

(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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