IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: DOTSE JSC (PRESIDING)

OWUSU (MS.) JSC

LOVELACE-JOHNSON (MS.) JSC

PROF. MENSA-BONSU (MRS.) JSC

KULENDI JSC

CIVIL APPEAL

NO. J4/86/2022

8TH FEBRUARY, 2023

ISAAC ALORMENU …… PLAINTIFF/APPELLANT/RESPONDENT

VRS

GHANA COCOA BOARD …… DEFENDANT/RESPONDENT/APPELLANT

JUDGMENT

PROF MENSA-BONSU (MRS.) JSC:-

"Not all that tempts the wandering eyes and heedless hearts, is lawful prize;

Nor all that glisters gold.

Thomas Gray.

Introduction

This is an appeal from the judgment of the Court of Appeal that arose out of disciplinary proceedings undertaken in defendant company on account of illicit monies received officials from a contractor on a project. . What transpired evokes images of the age-old conundrum, "If the watchman steals, who shall watch the watchman?"

Facts and background

The plaintiff/respondent was employed by defendant/appellant (hereinafter Plaintiff and Defendant respectively), as an Accounts Clerk Grade II in 1995. He rose through the ranks and was promoted in 2010 to Deputy Accounts Manager with approval of the Board of Directors. On 13th October, 2014, he was promoted to Accounts Manager and transferred from Cocoa Health and Extension Division (CHED) to Seed Production Unit (SPU) (also known as Seed Production Division (SPD)). In the letter granting him promotion from Deputy Accounts Manager and also Accounts Manager and signed by the Chief Executive, it was clearly stated that Terms and Conditions applicable to Managers would apply to him.

Sometime in 2014 the Chief Executive of Defendant Company granted approval for the cultivation of fifty (50) million hydride cocoa seedlings to be raised. This was to be at a total projected cost of GH¢3,000,000.00 for top soil, and GH¢450,000.00 for fuel to convey the top soil to the nursery sites at defendant's Cocoa Stations. The Executive Director of the SPD was authorized to request for funds to procure the needed materials for the project to allow it to proceed speedily. Subsequently the Management of SPD put in a request for fifty (50) percent of the total amount of GH¢3,450,000 to be released. Therefore an amount of GH¢1,725,000.00 representing GH¢1,500,000 for top soil and GH¢125,000 for fuel was released.

The Accounts Manager, (i.e. plaintiff), who had responsibility for procurement, was asked to find contractors for the project. He contacted one Mr. Edward Opare, who had previously supplied goods to the company, to put in a bid for the job. He communicated to him that the quotations should reflect the fixed maximum rate of Ghc 300 already approved by Cocoa Board; and also requested to "mobilise" other contractors to put in bids for the exercise. He brought in another contractor, Madam Theresa Adanvor to participate in the bidding process.

As a result of this request, Mr. Opare submitted quotations, ostensibly for ten (10) companies; and Madam Adanvor submitted for three (3). All the quotations were for the same maximum amount of Ghc 300. As the evidence showed, the two contractors merely fronted for the other companies, because some of them did not exist, or only existed only in name. Others were real companies, but their names had merely been used because their Directors and Managers disclaimed any knowledge of the bids, and were not aware that they had been awarded any contract or that money had been lodged in their account.

The plaintiff, allegedly on the instructions of the Deputy Executive Director, put in a request for an amount representing 50% of the entire project sum, as mobilization fee to the contractors, contrary to the financial policy of paying 20% as such mobilization. The total sum paid to the contractors was the exact total of the 50% project sum that defendant company had provided. This means that the entire sum given to the Seed Production Division (SPD) (also sometimes referred to by its old name of Seed Production Unit (SPU)) for the contract, was given upfront to the contractors.

The plaintiff, Accounts Manager, was the one who did the computation, prepared the cheques and authorized the release of the signed cheques to the "contractors". However, the two contractors were allowed to pick up the cheques in the names of the other supposed contractors without any written authorization from the beneficiaries.

Thereafter, an amount of GH¢150,000.00 was also released to twenty-six (26) Cocoa Stations of the SPD, for the purchase of fuel for carting materials to the nursery sites. The payment was official as it was to the accounts clerks/officers of the various stations, and was to be accounted for in the usual manner.

The monthly meeting at the Headquarters of the Technical Department of SPD, which was usually attended by all the Cocoa Station Officers, took place on 27th November, 2014. During that meeting, the Technical Manager of SPD, Mr. Felix Appiah Nkwantabisa, (hereinafter referred to as 'T.M.'), invited them to his office for a meeting afterwards. At that subsequent meeting in T.M.'s offices, the group was split into two admitted into the conference room in two batches i.e. the 5 zonal coordinators and the 21 other Cocoa Station Officers. The zonal coordinators were then informed that there was money in cash to be given to them. The money had apparently been sent by the Accounts Manager, ie the plaintiff, described by witnesses as in a 'Ghana-must-go' bag (a big plastic woven bag so nicknamed because Ghanaian migrants to Nigeria used it to cart their goods home when they were expelled from that country in 1983), to be shared among those officers.

Being somewhat unhappy with the casual mode of distribution of the enveloped cash to them, one of the zonal coordinators, Dr. Mrs. Esther Kwapong, the coodinator of the Cocoa Stations for Eastern Region began to ask questions about the source and purpose of the money. The T.M. called in the Accounts Manager (plaintiff) to offer an explanation as to the source and purpose of the cash payments. The plaintiff then explained that the money was from management and that it was "unaccountable". The TM also added that it was "motivation" from Management to appreciate their hard work. After taking the money, they were further told by the T. M. to keep the fact in confidence and not to disclose it to even the Accounts clerks of their respective stations; and that each Station's Accounts office had also been given money. However, when the document was given to them to sign for receipt of the cash, they found that it was titled *"fuel"*. This discrepancy

between what they had been told, and the title of the document made Dr. Mrs. Esther Kwapong as well as a few others, even more suspicious. The other officers were then called into the office and also given envelops of cash with the names of their station written on them.

As the plaintiff admitted in his handwritten statement to the Disciplinary Committee, some money was also brought to the plaintiff in parceled envelopes, to be given to the Deputy Executive Director, the T.M., the Deputy Technical Manager, the Audit Manager and the plaintiff himself.

Subsequently, when rumours began to fly around that the payments were illicit payments from a contractor, Dr. Mrs. Esther Kwapong contacted the Audit Manager, and also made telephone calls to senior Management to ascertain the truth of the source of the cash. When it transpired that the money was not officially from Management as plaintiff had informed them in the T.M.'s offices, she wrote a letter dated 16th December, 2014, to the TM of Seed Production Unit (Mr. Felix Nkwantabisa), through the Executive Director, Seed Production Unit, and on official letterhead, questioning the mode of accounting adopted for the disbursement of certain monies to her and her peers, and returning same until the proper thing could be done.

The body of the letter was as follows:

"**Return of cash of five thousand Ghana Cedis (GH¢5,000.00)**

> *I write to return to you a sum of five thousand Ghana Cedis (GH¢5,000.00) being cash received from you on November 27, 2014 which I signed for under the heading fuel together with officers for the various Cocoa Stations who also received varying amounts.*

After sound deliberation I realised the process of release of the money to me did not follow normal accounting practice and left no room for accountability. I therefore discussed the issue with the Audit Manager on Wednesday, December 3, so the situation could be reversed, and I am allowed to receive the said amount through a normal accounting process. I have, however, made little progress to date. In as much as I need money under the Project for the raising of the one million one hundred and forty thousand (1,140,000.00) seedlings at the various sites under my supervision and hence under the supervision of the Bunso Cocoa Station, I would like to receive money through a proper accounting system provided by Cocobod."

This letter caused some commotion in the system, and at the December meeting of the Technical Division officers, the TM instructed them to all return the monies they had been given in November. Some did so immediately, others took a few more weeks to return it.

As a result of the letter, Management of Defendant company became aware of the incident and took steps to investigate the matter.

On 29th May, 2015, the plaintiff received a letter from management interdicting him and putting him on two-thirds salary till the end of the investigation. He was also instructed to await an invitation to appear before an investigation committee to answer allegations that he and some others had pursuant to the award of contract fraudulently withdrawn funds earmarked for raising cocoa seedlings. On 2nd June 2015, Plaintiff received a letter from the Director of Audit that Management had set up an Audit Committee to investigate the matter. He was therefore invited to attend upon the Committee to assist in the investigations. However, two days later on 4th June 2015, and unsurprisingly, considering the involvement of the Audit Manager, the plaintiff received another letter

from the Deputy Chief Executive (A&QC) informing him that Management had constituted an Ad Hoc Disciplinary Committee to investigate the matter.

At the hearings the plaintiff gave a handwritten statement as follows: (ROA vol. 1 page 240.)

> *"I called Mr. Opare, one of the suppliers to mobilise some suppliers to deliver top soil to the various cocoa stations."*
>
> *Mr. Opare quickly arranged for supplier and brought quotes ..*
>
> *On receipt of the quotations I forwarded them to Dr. K. Ofori-Frimpong.*
>
> *"I was at the office when a messenger brought some envelops labelled with each cocoa station and the amount. The messenger told me that, Mr. Opare said he should deliver this money to me together with other envelopes in a bag. The messenger told me I should give one envelop to the Audit manager, the other to the Technical Manager and keep one.*
>
> *The messenger told me that Mr. Opare said this was one hundred thousand Ghana cedis (GH¢100,000.000, Seventy thousand Ghana cedis (GH¢70,000.00) for Felix Appiah Nkwantabisa and thirty thousand Ghana Cedis (GH¢30,000.00) for Emmanuel Agyekum. So I deliver this money to Mr. Nkwantabisa the Technical Manager. The Messenger also told me to give another envelope to the Audit Manager which I did the same day.*
>
> *While waiting for the signed sheet for the monies collected by Cocoa Station Officers to be given to the messenger, I felt that the money*

brought to me was wrong and decided to call up Mr. Opare to find out what the money was. There the Audit Manager came to my office and told me that she did not know what the money was meant for. So I should take it back to the sender. There I called Mr. Opare and ask [sic] him what the money was for, Mr. Opare told me that, the monies the messenger gave to me and the Audit Manager were not meant for us. So the messenger should bring them back together with the sheet signed by the Cocoa Station Officers acknowledging receipt to follow up. So I did returned [sic] the two (2) envelopes to the messenger to be given back to Mr. Opare. So the monies brought by the messenger to the Accounts Manager and Audit Manager were returned to Mr. Opare the same day together with the signed…"

(ROA vol. 2 page 224)

This information about a mistaken messenger and the date of return of the enveloped money, were all discredited by other witnesses. The plaintiff did not explain his involvement in passing the money on to the coordinators and the other Cocoa Station officers who to the last person testified that he brought the money in a bag carried by an assistant from his office and explained to them what the source of the money was.

At its 12th Sitting on 13th August 2015, the Ad Hoc Disciplinary Committee charged the plaintiff and three other Managers jointly for dishonestly receiving. Following evidence that they received, the Committee recommended that their appointments should be terminated as provided under section 15€(iii) of the Labour Act 2003, (Act 615). The plaintiff's letter indicated that following the investigations of the Audit Committee and Ad Hoc Committee he was found to have breached COCOBOD's policy by dishonestly receiving money and processing fifty (50) percent mobilization advance instead of the usual policy of twenty (20) percent.

Aggrieved by the decision to terminate his appointment, the plaintiff filed a writ at the High Court, Industrial and Labour Division, Accra on 24th October 2016.

Trajectory of the case

The defendant entered appearance and filed a Statement of Defence on 24th November, 2016. In paragraph 4 of the said statement of defence, the defendant had averred that those claims being made by the plaintiff, had no basis *"as the Policy Guidelines the Plaintiff referred [sic] to, the Ghana Cocoa Board Policy Guidelines, June 2011, is a Draft which has not been finalized for adoption by the Defendant."* Again in paragraph 10, the defendant averred *…"the said Policy Guidelines is only a Draft which is not a final Policy document of Cocobod and therefore not binding on the Management of Cocobod".*

On 21st December, 2016, the plaintiff filed a motion to strike out the defendant's defence; and asked for judgment in default of defence. His grounds were that contrary to the Rules, the Entry of Appearance and Statement of Defence filed had been signed by someone other than the lawyer whose details appeared on the documents. This application was moved on 16th January 2017, and dismissed. Following the dismissal, the plaintiff filed a Reply in response to the Statement of Defence on 13th February 2017. Consequently, both parties set down issues for trial on 21st February 2017. However, the plaintiff was not yet done with the raising of preliminary issues.

In a surprising move, and ostensibly seeking to settle the Suit he himself had initiated by writ on 24th October, 2016, the plaintiff addressed a letter to Chief Executive, dated 3rd March, 2017, titled ***Re: Termination of Employment Request for Out of Court settlement***. (later, Exhibit '4a') The letter purported to propose terms for out of court settlement. However, the letter essentially restated the basis of the claim founded on breaches of the plaintiff's supposed rights under two documents the 'Conditions of Service for Senior Staff, 1998', and the 'Ghana Cocoa Board Policy Guidelines, June 2011' (hereinafter

referred to as Exhibits C and D), upon which the writ had been issued some five months earlier; and to which, the defendant had filed a statement of defence on 24th November 2016. Despite the letter of 3rd March, 2017 (Exhibit 4a) and without waiting for a response from the Chief Executive, the plaintiff, filed an application for Directions six days later, on 9th March 2017 in which he set down the issue for trial. The defendant also filed additional issues for the trial on 22nd March, 2017.

The High Court set down the following five issues for trial:

a) Whether or not the termination of Plaintiff was wrongful.
b) Whether or not the Plaintiff's misconduct was established.
c) Whether or not having terminated the Plaintiff's employment, the Defendant was justified in refusing to pay his ex gratia award.
d) Whether or not the Plaintiff is entitled to his claims
e) Any other issue(s) arising from pleadings.

Trial court gave judgment in favour of defendant -company on 30th January 2020. More will be said on the evidence before the Ad hoc committee later as it featured prominently in the judgment of the Court of Appeal. High Court stated that plaintiff failed to prove his case and concluded that the defendant's version of the status of the two documents was the more credible. As there was no reference to the two documents in his two appointment letters.

The plaintiff filed a Notice of Appeal to the Court of Appeal on 21st February, 2020. On 11th March 2020 (Exhibit "1A") the plaintiff filed an Ex-parte motion seeking Leave to file a fresh Notice of Appeal to the Court of Appeal. This was granted on 18th March 2020, and the plaintiff filed an amended Notice of Appeal on the same day, to substitute for what was earlier filed.

His amended Notice of Appeal stated the following grounds

The trial court erred in holding that the defendant's documents, which were tendered in evidence: ***1. Ghana Cocoa Board Draft Policy*** *and 2.* ***The Conditions of Service for Senior Members of Staff*** *document, which was not signed were not operative in the Defendant's organization, and were therefore no9t binding on the defendants.*

b. The trial court erred in holding that the defendant's management, instead of the Board of Directors has jurisdiction under ***Ghana Cocoa Board Act, 1984 (PNDCL 81****) and the* ***Ghana Cocoa Board Draft Policy*** *to terminate the appointment of the Plaintiff.*

c. The trial court erred in holding that the Plaintiff was not entitled to Ex gratia award even if his dismissal was right under the law.

d. The trial court's decision was erroneous and not supported by the evidence provided by the parties in court."

Based on these grounds of appeal, the Court of Appeal reversed the High Court decision on 29th July, 2021. The defendant has therefore brought the instant appeal to this honourable court. The titles of 'plaintiff' and 'defendant' are maintained so as not to cause confusion as to which party answered to 'appellant' and which 'respondent' at the two levels of appeal.

The appeal

Having shifted the basis of the appeal from the findings of the Ad hoc Committee to the legal basis for operating the way it did, the nature of the claims changed somewhat. Consequently, on the Notice of Appeal to the Supreme Court filed on 21st August, 2021, the defendant set down the following grounds

"a. The Court of Appeal erred in holding that the unsigned 1998 Conditions of Service and the draft Policy Guidelines of 2011 (Exhibits C and D) were binding on the parties.

b. The Court of Appeal erred when it held that the Chief Executive of Defendant/Respondent/Appellant had no authority to sign the termination letter of the Plaintiff/Appellant/Respondent.

c. The Court of Appeal erred in holding that the Plaintiff/Appellant/Respondent was entitled to be paid Ex gratia under the unsigned Conditions of Service of 1998 and the draft Policy Guidelines of 2011.

d. That the Court of Appeal erred in law when it held that the burden of proof shifted unto the Defendant/Respondent/Appellant when the Defendant/Respondent/Appellant denied that the unsigned 1998 Conditions of Service and the draft Policy Guidelines 2011 was in force.

PARTICULARS

i. The Plaintiff/Appellant/Respondent failed to adduce sufficient evidence to support his claim that the two (2) draft documents were in force contrary to the rule of evidence.

ii. The burden of proof will only shift after the Plaintiff/Appellant/Respondent has led sufficient evidence to support his claim that the two (2) documents were in force.

f. The judgment is against the weight of evidence at the trial

g. The Court of Appeal erred in not giving due consideration to the totality of the evidence of the Defendant/Respondent/Appellant.

h. That further grounds of appeal will be filed upon receipt of the Record of Appeal".

There were no further grounds of appeal filed and so the above grounds will be discussed as presented. Grounds '**a'**and '**d**' are both founded on the issue canvassed in ground '**a**' (that the documents tendered were binding on the parties and who carries the burden of proof in establishing the status of the documents). Consequently, the two grounds will be discussed together. Grounds '**b'** and '**c'** are given separate treatment, but Grounds '**f'** and '**g**', are also twinned for discussion as they are linked to the same issues.

Grounds 'a' and 'd'

a. The Court of Appeal erred in holding that the unsigned 1998 Conditions of Service and the draft Policy Guidelines of 2011 (Exhibits C and D) were binding on the parties.

d. That the Court of Appeal erred in law when it held that the burden of proof shifted unto the Defendant/Respondent/Appellant when the Defendant/Respondent/Appellant denied that the unsigned 1998 Conditions of Service and the draft Policy Guidelines 2011 was in force.

PARTICULARS

i. The Plaintiff/Appellant/Respondent failed to adduce sufficient evidence to support his claim that the two (2) draft documents were in force contrary to the rule of evidence.

ii. The burden of proof will only shift after the Plaintiff/Appellant/Respondent has led sufficient evidence to support his claim that the two (2) documents were in force.

On the major ground of the appeal contained in ground 'a', the defendant maintained that the two documents, i.e the 1998 Conditions of Service, which had not as yet been signed, and the draft Policy Guidelines of 2011 (Exhibits C and D) which was still at the Draft stage, had not yet been finalized, and were therefore not binding on the parties. They stated further that those documents had never been in use for, or in, regulating the appointment of its employees.

Again the defendant complained that the plaintiff was relying on letters of promotion signed by the Chief Executive as the basis for his claims, but was denying the validity of the same Chief Executive's signature on the letter of termination (see para 21). The defendant then queried, if Exhibits C & D were the documents it was implementing why has the document not been executed by the defendant and the Representatives of the Senior Staff or the Union for over twenty years? At para 17 of the statement of case, the defendant stated

"We respectfully submit that it was wrong on the part of the Court of Appeal to hold the Defendant/Appellant to a document it had no hand in drafting, it had not implemented, it had not quoted or made reference to in any document and had not signed. (Emphasis in original statement)

See **Boateng** v **Judicial Service & 6 Ors**, J6/3/2017; 28th February, 2018 (unreported).

In yet another example of why the defendant believed the plaintiff's claims to be misconceived, it pointed out that the plaintiff's claims to Ex Gratia award (even upon "dismissal"), as contained In the unsigned document was no longer part of the Labour landscape in the public sector. The defendant stated that the practice was abolished by the Government of the Provisional National Defence Council (PNDC), and replaced by End of Service Benefit under the governing legislation of PNDCL 81. Therefore, their contention was that even if Exhibits C & D were otherwise binding and contained references to the payment of Ex gratia to Cocobod staff, it would have been patently illegal and contrary to statute for the Board to pay such monies. The defendant queried why the plaintiff had not provided evidence of any such payments to other staff? (see page 22 Statement of Claim)

EVIDENCE

The defendant's plaint in ground '**d**' was that the evidence led by the plaintiff to establish his assertion that the documents were binding on the organization, had not satisfied the burden of persuasion which at all material times rests on the one who makes an assertion. He cited ***Ackah*** v ***Pergah Transports Ltd & Ors*** [2010] SCGLR 728 at 736 and ***T K Serbeh & Co. Ltd*** v ***Mensah*** [2005-2006] SCGLR 341 at 360-361 on who bears the burden of leading evidence and the burden of persuasion. The defendant, therefore, contended that the burden was on plaintiff to prove his assertion that the defendant always relied on those documents in the conduct of their business and were thus binding on the parties, but had failed to do so.

What was the nature of the evidence presented by the plaintiff to back the assertion that the document had, for all practical purposes, been treated as binding by defendant? The plaintiff was contending that the unsigned Conditions of Service and the Draft Policy Guidelines of June 2011 (herein referred to as Exhibits 'C' & 'D') were binding on the defendant. He averred that his promotion and transfer were done

according to the documents, although those documents were not directly mentioned. As further proof that the defendant relied on the documents in the conduct of its business, the plaintiff stated that he was interdicted according to the terms of the Exhibit D; that benefits he had been paid were in conformity with Exhibit D. Therefore, the documents had binding force even if they were unsigned, or in draft only.

The plaintiff then submitted in para 8 of his Statement of case thus:-

> *"My Lords if a party in a case made an assertion with documentary evidence to support his claim, it is only fair that the other party debunks the assertion with contrary documentary evidence."*

He went on further and stated that as the appellant in this case had failed to produce *contrary documentary evidence*, it was wrong for the trial High Court to agree with the appellant's position that the only document produced in evidence were documents in draft, and therefore not binding on them.

The Court of Appeal also agreed with the plaintiff and stated that

> *"The Plaintiff… has tendered the two exhibits as evidence of the rules and regulations, policies and guidelines upon which the Respondent operates and based on that management had no authority to terminate his appointment except by the Board. The defendant denied this and said those two documents were not signed and therefore not operational or not in force. Unfortunately the Respondent after denying those assertions and saying those documents were not in force and they never relied on them to terminate the Appellant's appointment failed woefully to tender any*

law (s) that were in place upon which the Appellant's appointment was terminated

(page 83 of ROA Vol 3).

This statement emanating from the plaintiff on his Statement of Case, and from the judgment of the Court of Appeal fails to mention that the recommendation accepted from the committee explicitly stated the ground of termination as section 15 (e)(iii) of Act 651, misconceives the import of the twin burdens of proof which rest on a party making an assertion. The Court of Appeal in agreeing with the plaintiff in its judgment, with respect, misstated the law on Evidence.

BURDEN OF PROOF

There was clearly some confusion between the plaintiff and the defendant as to whose duty it was to lead evidence; and to persuade the court, as to the credibility of the allegations.

These matters are covered both by statute and a long line of authorities. Under sections 11, 12 and 14 of the Evidence Act 1975 (NRCD 323) the burden of who has the responsibility to lead evidence is clearly set out. This is manifested by the twin burdens of leading evidence and the burden of persuading a tribunal by leading credible evidence.

11(1) For purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue.

(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the

evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence.

12. Proof by a preponderance of the probabilities

(1) Except as otherwise provided by law, the burden of persuasion required proof by a preponderance of the probabilities.

(2) "Preponderance of the probabilities" means that degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence."

The second is section 14 reads that:

"Except as otherwise provided by law, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting."

Thus there are two parts to the duty to discharge the burden of proof. Thus, the twin burdens of proof and standard of proof contained in the provisions are :

i. There is the burden of leading evidence to back an assertion

ii. The burden of persuasion i.e. leading evidence of sufficient standard to persuade a tribunal to rule in one's favour.

In ***Ackah*** v ***Pergah Transport Ltd***., supra, cited by the defendant, Sophia Adinyira JSC stated on the burden of proof at p.736 as follows:

"It is a basic principle of law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in

issue that has the quality of credibility short of which his claim may fail. The method of producing evidence is varied and it includes the testimonies of the party and material witness, admissible hearsay, documentary and things (often described as real evidence), without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the minds the court or tribunal of fact such as a jury. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact is more reasonable that its non-existence. This is a requirement of the law on evidence under Section 10(1) and (2) and 11(1) and (4) of the Evidence Act, 1975 (NRCD 323)".

In the earlier case of **In re Ashalley Botwe Lands; Adjetey Agbosu & Ors** v **Kotey & Ors** [2003-2004] SCGLR 420, at pp. 464-465, Brobbey JSC explained the law on burden of proof thus:

"The effect of sections 11(1) and 14 and sections in the Evidence Decree, 1975 may be described as follows: A litigant who is a defendant in a civil case does not need to prove anything: the plaintiff who took the defendant to court has to prove what he claims he is entitled to from the defendant. At the same time, if the court has to make a determination of a fact or of an issue, and that determination depends on evaluation of facts and evidence, the defendant must realize that the determination cannot be made on nothing. If the defendant desires the determination to be made4 in his favour, then he has the duty to help his own cause or case by adducing before3 the court such facts or evidence that will induce

the determination to be made in his favour. The logical sequel to this is that if he leads no such facts or evidence, the court will be left with no choice but to evaluate the entire case on the basis of evidence before the court, which may turn out to be only the evidence of the plaintiff."

See also ***Nortey (No.2) v African Institute of Journalism and Communications & Others*** (No.2) [2013-2014] 1 SCGLR 703; and ***Sumaila Bielbiel (No. 3) v. Adamu Dramani & Attorney-General*** [2012] 1 SCGLR 370. In ***Nortey (No.2)*** v ***African Institute of Journalism and Communications and Others*** **(No.2)** supra, Akamba JSC stated the law of evidence on the point at p. 716 as follows:

"The basic principle of law of evidence is that a party who bears the burden of proof is to produce the required evidence of the facts in issue that have the quality of credibility short of which his claim may fail. This court pointed out in Ackah v Pergah Transport Ltd. [2010] SCGLR 728 the various method of producing evidence which include the testimonies of the party and material witnesses, admissible hearsay, documentary and other things (often described as real evidence), without which the party might not succeed to establish the require defence of crediblity concerning a fact in the mind of the tribunal or court."

In ***Sumaila Bielbiel (No. 3)*** v. ***Adamu Dramani & Attorney-General*** (supra), Dr. Date-Bah JSC explained the distinction between the twin burdens of leading evidence and of persuasion at p.371 thus:

"The distinction between the two burdens of proof, namely the "burden of producing" as defined in Section 10(1) and the "burden

of producing evidence" as defined in Section 11(1) of the same Act, is important because the incidence of the burden of producing evidence can lead to a defendant acquiring the right to begin leading evidence in a trial, even though the burden of persuasion remains on the plaintiff. Ordinarily the burden of persuasion lies on the same party as bears the burden of producing evidence."

All of these authorities are clear, that the twin burdens rest on the plaintiff, until it shifts on any particular issue or on proof of a counterclaim. Therefore it is not enough for a party on whom the twin burdens rest to think the burden has been discharged merely by producing a document and making assertions of its binding nature. A person who is denying a fact is under no obligation to prove a negative, either by documentary evidence or otherwise.

On which of the parties lay the burden to lead evidence to establish the claims of the plaintiff' and when did such a burden shift to the defendant? The plaintiff's entire case was based on the fact that the two documents were binding on the defendant. According to the plaintiff, Clause 4.0 of Exhibit D states that it was incorporating Ghana Cocoa Board Law and therefore that made it binding on the defendant. The plaintiff conceded that although the documents had not been signed, and remained in draft only, there were instances which showed the defendant was relying on those two documents. For instance, the fact that the letter of interdiction putting him on 2/3 pay during the period of investigation was consistent with the terms of Exhibit D. Unfortunately, this is practice that is consistent with what pertains generally in the public service.

The duty to persuade as to the binding nature of the documents produced lay on the respondent and the question is whether he led sufficient evidence to persuade a tribunal that on the balance of probabilities, his version was by and large more

credible than that of the defendants. Therefore, the defendant did not bear the burden of persuasion to prove anything and so was under no obligation to produce any "contrary documentary evidence". The plaintiff is therefore wrong to insist that as he had produced his documentary evidence, the responsibility to produce its own had shifted to the defendant, and the Court of Appeal was wrong to so hold.

Indeed, the plaintiff appeared to properly appreciate the weight of the twin burdens, hence the effort to persuade the court by providing evidence of occasions when the defendant had relied on those documents. Unfortunately, the examples chosen were all standard practice in the various institutions of public service. The plaintiff did cite the unreported case of **John Tenmottey Affuah & Anor** v. **General Development Company** Ltd. Civil Appeal No. J4/28/2015 (Unreported) where the party proved that the organisation paid a funeral grant to him when he lost his wife, as provided under the relevant agreement. This was found to be strong evidence that the organization relied on the document in question, since it is not the norm in the public services for the institution to assume an obligation to pay funeral donations to bereaved staff. This was not the situation in the instant case. Indeed, Exhibit D under clause 11 (c) of Exhibit D, it was provided under 'Interdiction', inter alia,

> *"An employee shall draw two-thirds (2/3) of his monthly salary while on interdiction. Where the case involves a financial misconduct, such employee shall not be paid any salary."*

If the plaintiff was facing a charge of financial misconduct and yet was paid two-thirds of his salary, could it be said that the provision in 11 (c) in Exhibit D was the one relied on? Exhibit C had no comparable provision and so could not be the source of that discrepancy.

Again, to counter the plaintiff's assertion that the practices of the defendant were in consonance with the terms of the two documents, the defendant raised another clause pertaining to the plaintiff's Leave entitlement under Exhibit 'D', the following exchange took place under cross-examination:

> *"Q. How about the next column it stated less than 10 years and that is 40 days. Did you ever go on 40 days leave?*
>
> *A. My Lord I said I cannot remember and if the Defendant wanted to use this as evidence it would have been tendered so that I can look at it properly."*

(see statement of case para 16). None of the instances provided was so" peculiarly Cocobod" as to be peculiarly referable to a particular employer-employee agreement. The 40-day leave entitlement that was put to him could have made a difference if the plaintiff had been able to remember the occasions when he had enjoyed same, under cross-examination. It would thus have made it more difficult for defendant to deny either the applicability or binding nature of Exhibits C and D, but such was not the case.

ROA vol. 2 page 140 Acts deemed to constitute 'Misconduct' are offences that may result in summary dismissal. These include embezzlement, fraud, stealing or any form of dishonesty. From both Exhitbit C and Exhibit D, the financial misconduct established against plaintiff and the other managers made them liable to summary dismissal. The unsigned document of 1998 had provided under Clause 70

> *(a) "Except in the case of serious misconduct Cocobod may terminate the employment of an employee by giving three months*

previous notice in writing. Payment may be made in lieu of notice."(emphasis supplied).

Yet when the plaintiff had been found guilty of gross misconduct, he was paid three months salary in lieu of notice. This was, of course contrary to the terms of the provision and could not have been done if Exhibit C were operational. Section 62 of Labour Act 2003 (Act 651) provides for fair and unfair termination. Section 62(b) states that termination on grounds of "proven misconduct of the worker" is not unfair. Therefore if the penalty imposed on them was more lenient than the two documents prescribed, then it was more likely than not that it was the Labour Act that operated in their favour.

Again in further proof of the defendants reliance on Exhibit D, the plaintiff submitted that the change of name from Seed Production Unit (SPU) to Seed Procuction Division (SPD) was reflected in Exhibit D and so the defeendant's use of the newer name was evidence of reliance on Exhibit D. Actually, the evidence is less clear than what the plaintiff makes out. From an assessment of official documentation available, it would seem that the two names were used interchangeably, even on official documentation as two examples of official documentation below show:

i. In the Letter of 19th December 2014 both the Letter-head and references in the letter used the name "*Seed Production Unit*".

ii. The title of the disciplinary committee report read: ***"Report of an Ad-hoc Disciplinary Committee on Award of Contracts and Alleged Fraudulent Withdrawal and Misapplication of Funds in Seed Production Unit (SPD").***

Therefore, even the reliance on this name change as evidence of the validity of Exhibits C & D was not conclusive. If the plaintiff was relying on estoppel by conduct, then the instances provided should have been unequivocal as to the

defendant's previous conduct. The Court of Appeal, thus, wrongly approved of its application herein, when the facts were unlike the situation in ***John Affuah***, supra.

Again, Exhibits C and D were tendered by the plaintiff at the trial court and admitted into evidence. They were not tendered by the defendant, and so it was misleading for the plaintiff to give the impression on the Notice of Appeal to the Court of Appeal that they were the "defendant's documents". Indeed, the documents: "1. *Ghana Cocoa Board Draft Policy and 2. The Conditions of Service for Senior Members of Staff document*" were tendered in evidence, but not by the defendant from whose outfit they emanated. Thus, the burden of proving that they were binding on the defendant did not shift from the plaintiff – especially as the defendant conceded that even though those documents emanated from its establishment, they were in draft only, and not formalised. Why had those documents not been finalized if they were intended to be binding by both parties? With respect, the evidence backing the plaintiff's assertion was for him to provide, so as to give credence to it, and to persuade the court to "tilt matters in his favour".

At the Court of Appeal, one of the plaintiff's submissions was that the Disciplinary Committee of the defendant institution provided for a Standing Committee and that the defendant did not comply and set up the Ad hoc Committee whose findings became the basis for this termination. This argument is interesting only for the fact that, contrary to the plaintiff's assertion, it appears to support the defendant's case that those documents were not relied on, or used, because they had not been produced with input by the defendant and had never been finalized.

It must be here stated with some force, that the mere fact of leading some evidence satisfies only one leg of the burden, only. Without the other, it would be impossible for its impact to be felt, and so does not shift the burden to the other party. The Court of Appeal's view of the law was therefore, with respect, incorrect, when it stated:-

> *"The Appellant led evidence and established his assertion by tendering the two exhibits, Exhibit C and D. The Respondents in denying same bore the burden of establishing that those two documents were not operational as they alleged but failed to lead any such evidence so as to tilt the scale in their favour."*

This clearly cannot be supported on the law of evidence. It was not the defendant's duty to persuade the court not to rule against him, but the plaintiff's duty to back his assertions for the court to rule in his favour. Those two positions are not one and the same thing, as section 11 of NRCD 323 shows.

Therefore, the conclusion of the Court of Appeal cannot be supported when it stated,

> *"This Court is of the view that the Respondent failed to lead evidence to disprove the Appellant's assertion on the issue and also tilt the issue in their favour. On the preponderance of probabilities, we believe the Appellant's assertion than that of the Respondent on the issue. We therefore hold that Appellant has established that ground of appeal and it is upheld."*

Ground b

> b. *The Court of Appeal erred when it held that the Chief Executive of Defendant/Respondent/Appellant had no authority to sign the termination letter of the Plaintiff/Appellant/Respondent.*

Under this ground, the plaintiff questioned the correctness of the letter of termination being signed by the Chief Executive, as the head of

Management when S 16 (8) of the Ghana Cocoa Board Act, 1984 PNDCL 81 vests the power in the Board of Directors.

Section 16 (8) of PNDCL 81 states:-

> *"The Board of Directors shall, on recommendation of Management, be responsible for appointment, promotion, discipline, dismissal or removal of any person in respect of any other office in the Board…"*

This provision was essentially a repetition of Clause 11 (e) and (f) of Exhibit D) and that the promotion of Manager and Director were the ones covered by PNDCL 81. However, section 16 (9) also states that

> *"The Directors may delegate any of their function under subsection (8) to the Management or a Director or to an employee of the Board who may act with or without the recommendation that is referred to in sub-section (8) as directed by the Directors"*

With a provision such as that one in the parent legislation, it was not enough for the plaintiff to complain that it was only the Chief Executive who signed his letter of Termination. The letter of promotion to Deputy Accounts Manager dated 1st September 2010 signed by the Chief Executive stated that at its 303rd meeting held on 31st August 2010, the promotion to Deputy Accounts Manager had been approved by the Board. (ROA vol 2 page 53). That letter clearly showed that the appointment to Deputy Accounts Manager and signed by the Chief Executive, was from the Board. The letter was copied to the Chairman of the Board as well as a number of officials. The letter made no reference to Exhibit C and D, and merely stated his salary and a cryptic statement.

> *"Other terms conditions [sic] of service applicable to Deputy Managers of the Ghana Cocoa Board will apply to you."*

However, the plaintiff's letter of promotion to full Accounts Manager with posting to Seed Production Unit (SPU), dated 13th October 2020, was signed by the Chief Executive only, and copied to other officials but not to the Chairman of the Board. Again it merely repeated his salary and a cryptic statement:

> *"Other terms and Condition of Service for Managers currently in force under the Board's Rules and Regulations will apply to you."*

This was the part that could be read most positively in the plaintiff's favour. For the organization itself carried the name 'Board', so this could perhaps not be a reference to the Board of Directors, but to the organization itself. What were the "Board's' Rules and Regulations"? No one knows for sure. However, the letter was signed by the Chief Executive, and so plaintiff cannot approbate and reprobate.

The Draft Policy Guidelines (Exhibit D) provided for 'Promotion' of Managers and Directors in Clause 8.11. (a) as follows:

> *"The Board of Directors of COCOBOD, on the recommendation of Management, shall be responsible for the promotion to the position of Manager and Director*."

Was the plaintiff's promotion contrary to clause 8(a) of Exhibit D? It appears to be because on the evidence available, his letter of promotion and transfer was signed by the Chief Executive only. Was his promotion valid since the letter was signed only by the Chief Executive? Was there any indication that this letter was written and signed on the authority of the Board? There was none, and yet the plaintiff had no doubt about its validity and proceeded to act on its contents, and it was accepted by the plaintiff and other officers of

the organization as being so valid. A contrary posture could carry such serious implications that it was better for all around if the presumption of regularity of the performance of official duty under section 37 of the Evidence Act were applied. Therefore, as the evidence stands, it is impossible to maintain that the Chief Executive promoted the plaintiff to full Manager on his own authority, as it is equally impossible to maintain otherwise.

The Letter to the plaintiff dated 9th December, 2015, (Exhibit E) which was titled "***Termination of Appointment***" read in part

> *Management has accepted the report of the Ad Hoc Disciplinary Committee which investigated an Award of Contract and alleged fraudulent withdrawal and misapplication of funds in Seed Production Division (SPD) of Ghana Cocoa Board.*
>
> *The Committee established against you a proven misconduct relating to disregard for Cocobod's policy and dishonestly receiving seventy thousand Ghana Cedis (GH¢70,000) from a contractor which constitute a ground for termination of appointment in accordance with Section 15 (e) (iii) of the Labour Act 2003. Accordingly Management has decided to terminate your appointment with the Ghana Cocoa Board with immediate effect."*
> (– ROA vol. 2 page 224)

The letter was copied to the same officials to whom the letter of promotion was copied and signed by the same Chief Executive who signed his letter of promotion. Consequently, it leaves one with the question, "Why could he sign his letter of promotion but not his letter of termination?" Therefore, as part of the plaintiff's case, there should

have been further evidence that there was delegated authority by the Board for the Chief Executive to sign his letter of promotion, but none for the Chief Executive Officer to sign the letter of Termination. In the absence of such proof, the presumption of regularity ought to be applied to the letter of termination as well. It is true that as the Court of Appeal observed on p.29 of its judgment,

> *"The fact that the Board failed to comply with the law and it benefitted the appellant does not take away his right to challenge same before a Law Court. The Court is a shrine of justice where anyone thirsty for truth seeks to refuge[sic]"*

However, that posture would not lighten the burden of proof on the plaintiff to persuade that the decision to confer the benefit was wrong, without adducing any evidence to prove the contrary.

At page 30 of its judgment, the Court of Appeal said

> *"There is also no indication that Management communicated the findings of the Ad hoc committee to the Board for any action. In the absence of that, the CEO had no power or authority to terminate the appellant's appointment and we so hold."*

It would appear that the Court of Appeal was willing to make assumptions to fill evidentiary gaps left open by the plaintiff's failure to lead sufficient evidence to back assertions made. It is not the duty of an appellate court to "fill in the gaps". Why did the court require evidence from the defendant that everything had been correctly done when it was the plaintiff alleging that things had not been properly done? A set of Minutes of the Board contemporaneous with the events in issue could have put the plaintiff's case beyond dispute.

Relevant provisions of Exhibit C

Another issue that needed attention from the plaintiff in order to establish the applicability of the two exhibits were the provisions on the kind of misconduct established by the Ad hoc committee.

The defendant has resisted any claims that Exhibit C had binding force. Under the subheading "**Duration and Amendment of the Conditions of Service**" in Exhibit C, the commencement date was blank except that the year was stated as 1998. There was a further clause

> *"if after a period of three (3) years the Conditions of Service are not amended, the Senior Staff Association of Ghana Cocoa Board (CISSA) could prompt the Chief Executive to advise the Board of Directors to have them amended or renewed."*

This clause is revealing, that indeed, the document was not prepared by the organization as the defendant has consistently maintained. Why was it that Management was taking no responsibility for keeping it updated, and instead, it was the Senior Staff Association of Ghana Cocoa Board (CISSA) that "*could prompt the Chief Executive to advise the Board of Directors to have them amended or renewed."*

This view is strengthened by sections 17 and 18 on matters of discipline. Section 17 on **Discipline** provides that

> *"Any act of misconduct such as negligence, dereliction of duty, insubordination, willful disregard of instruction, embezzlement of COCBOD's funds, fraud, stealing or any form of dishonesty, willful damage to COCOBOD's property … render the following employee liable to disciplinary action*".

Employees are prohibited from giving/receiving valuable presents with a view to securing an advantage with COCOBOD whether in the form of money, goods and other personal benefits."

Under Clause 18 however, it is provided under its penalties that:

"All matters pertaining to breach of discipline shall be brought to the notice of the Senior Staff Association"

The document does, indeed, appear to have been prepared by, or under the auspices of the Senior Staff Association of Ghana Cocoa Board (CISSA), otherwise why would the association be so pre-eminent as a reference point? The defendant said it had no hand in its preparation and so was not bound by its terms. The plaintiff said it was a legally binding document because the defendant relied on it. Whose assertion is the more credible? Impossible to tell on the evidence provided. What can be stated without equivocation is that it was not up to the defendant to prove a negative, but the plaintiff to prove a positive assertion. See ***George Akpass*** v ***GCB*** J4/08/2021 (Unreported).

Relevant provisions of Exhibit D- 4.8.2

Exhibit D was title '**DRAFT POLICY GUIDELINES' June, 2011**

It stated some guiding principles:

7.5 Guiding Principles

"Human Resource Management within the Board shall be based on the Constitution of the Republic of Ghana, the Ghana Labour Law and International Labour Organisation Conventions."

No mention was made of either document i.e Exhibits C and D. 8(c) was what was set down. ***All such employment shall be in accordance with the Labour Act 651***." Promotion 8. 11(a)

Ground c

> *c. The Court of Appeal erred in holding that the Plaintiff/Appellant/Respondent was entitled to be paid Ex gratia under the unsigned Conditions of Service of 1998 and the draft Policy Guidelines of 2011.*

The plaintiff claimed that he was entitled to be paid Ex gratia. The Court of Appeal agreed with him. The Defendant explained that such payments would have been unlawful as the government of Ghana had abolished such payments in the public sector. Consequently, The Board of Directors substituted 'End of Service Benefit' under clause 34.2 titled ESB. The introduction in 34.2 (a) stated that

> *"The Board of Directors at its 280 meeting on 29th March 2008, approved the implementation of End of Service Benefit (ESB) scheme for employees of Ghana Cocoa Board, effective 1st May 2008."* (ROA vol. 1 page 172)

15.0 Separation benefits

"Employees leaving the services of the Board other than summary dismissal shall receive their benefit (i.e. End of Service benefit, provident fund, long service Award or any other benefit awards as may be determined by the Board or as stated in the Collective Agreement, Senior Staff rules and regulations and other personnel manuals. (**ROA 1: 142)**

In any case, Clause 77 provided

> *A permanent employee who leaves the service after giving the appropriate notice shall receive the following ex-gratia award*

Clause 77 coming under the general sub-heading of 'RETIRING AND SEVERANCE AWARDS' was what provided for Ex Gratia Award in clause 77(b)

Employee with not less than two (2) years continuous services who retire [sic] on grounds of age, ill-heath or redundancy will qualify for ex-gratia."

Was the plaintiff's separation on disciplinary grounds deemed to be 'retirement' on grounds of age, ill-heath or redundancy" so as to qualify for ex-gratia? Was it not surprising that the plaintiff thought himself entitled to "ex gratia" award when his employment had been terminated for gross misconduct? The Court of Appeal itself noted that "*It will be observed that the entitlements stated in the Termination Letter does not include the benefits stated in Clause 77(b)*." What then was the basis for awarding such benefits to the plaintiff merely because he had served about twenty (20) years in defendant's employment if he did not qualify, even assuming, without admitting, that Exhibit C was applicable? Clearly the Court of Appeal was wrong on this ground as well.

Grounds 'f'and g

These two grounds are essentially saying that the judgment was against the weight of evidence, and so we proceed to analyse the grounds accordingly.

The appellant has pleaded in ground '**f'** that the judgment is against the weight of evidence. Having so pleaded, it is trite law that, an appeal being in the nature of a re-hearing, this puts an obligation on an appellate court to review the entire proceedings to make up its own mind about the evidence led, See the oft cited authorities of ***Tuakwa*** v ***Bosom*** [2001-2002] SCGLR 61; ***Oppong*** v ***Anarfi*** [2011] 1 SCGLR 556; ***Djin*** v ***Musah Baako*** [2007-2008] SCGLR 686 . In ***Tuakwa*** v ***Bosom*** (supra) the Supreme Court held per Akuffo JSC (as she then was) at p. 65

"furthermore, an appeal is by way of a re-hearing … it is incumbent upon an appellate court, in a civil case, to analyse the entire record

of appeal, take into account the testaments and all the documentary evidence adduced at the trial before it arrives at its decision, so as to satisfy itself that on a preponderance of the probabilities the conclusions of the trial judge are reasonably or amply supported by the evidence".

The point is also made in ***Oppong*** v ***Anarfi*** (supra), per Akoto-Bamfo JSC at p 167 that,

"There is a wealth of authorities on the burden allocated to an appellant who alleges in his notice of appeal that the decision is against the weight of evidence led. … it is incumbent upon an appellate court in such a case, to analyse the entire record, take into account the testimonies and all documentary evidence adduced at the trial before it arrives at its decision, so as to satisfy itself that, on the preponderance of probabilities, the conclusions of the trial judge are reasonable or amply supported by the evidence."

Djin v ***Musah Baako*** (supra), it was held per Aninakwah JSC held at p691

"It has been held in several decided cases that where an (as in the instant case) appellant complains that a judgment is against the weight of evidence, he is implying that there were certain pieces of evidence on the record which, if applied in his favour, could have changed the decision in his favour, or certain pieces of evidence have been wrongly applied against him. The onus is on such an appellant to clearly and properly demonstrate to the appellate court the lapses in the judgment being appealed against.

These grounds therefore require an examination of the evidence before the court.

The Court of Appeal, was within its rights as an appellate court to review the evidence provided by the Ad hoc committee for as Acquah JSC (as he then was) has pointed out, In ***Koglex Ltd (No.2)*** v ***Field*** [2000] SCGLR 175 at p.185, "*an appeal, at whatever stage, is by way of re-hearing and every appellate court has a duty to make its own independent examination of the record of proceedings*". However, for the Court of Appeal to decide that the trial court had no evidence to make the findings it made, raises issues of the circumstances that would justify such disagreement. Therefore Acquah JSC went further to provide guidance at p.185 on when the appropriate circumstances when findings of fact by a trial court may justify interference by an appellate court as follows:

> *"(i) where the said findings of the trial court are clearly unsupported by evidence on record; or where the reasons in support of the findings are unsatisfactory.*
>
> *(ii) Improper application of a principle of evidence; … or where the trial court failed to draw an irresistible conclusion from the evidence….*
>
> *(iii) Where the findings are based on a wrong proposition of law…*
>
> *(iv) Where the finding is inconsistent with crucial documentary evidence on record.*

Urging caution nevertheless, the Supreme Court per Prof Kludze JSC in ***In Re Okine (Decd) & Anor*** v ***Okine & Ors*** [2003-2004] SCGLR 582 stated at p.607 thus

> *"There is a long line of cases to the effect that, even if the appellate court would have come to a different conclusion, it should not disturb the conclusion reached by the trial court. This is because the*

trial court is presumed to have made the correct findings. Therefore, where the evidence is conflicting, the decision of the trial court as to which version of the facts to accept is to be preferred, and the appellate court may substitute its own view only in the most glaring of cases. This is primarily because the trial judge has the advantage of listening to the entire evidence and watching the reactions and the demeanour of the parties and their witnesses … In other words, where the evidence can reasonably support the conclusions of the trial judge, the appellate judges should not order a reversal just because their assessment and comparison, or their view of the probabilities, may be at variance with those of the trial judge."

The Court of Appeal, in reviewing the evidence, seemed to prefer the evidence led by the plaintiff himself before the Ad hoc committee, even though a substantial part of it had been contradicted by other witnesses. For instance, the facts as stated supra, show that the events involving the cocoa Station Officers occurred on 27th November 2014. They were at the Headquarters for a usual monthly meeting. They were then told by the TM that they should report to his office after the meeting, which they did. As recounted supra, that was where they were offered the enveloped cash upon the false explanation by the plaintiff that it was from Management.

The Ad hoc Committee Report stated that *"Mr.Edward Opare gave out monies to the Accounts Manager, Audit Manager, Technical Manager, Deputy Technical Manager, five zonal officers and twenty one (21) Cocoa Station officers for no work done.* (para XXXVII).

It also found that

"The amount of GH¢150,000 brought in the "Ghana-must-go-bag" (a nickname for huge plastic bags which migrants from Ghana favoured for carrying their personal items when they

were expelled from Nigeria in 1983) was distributed to the Zonal and Stations Officers as a "motivation" (though they were required to sign for it as fuel).

The material dates in question clearly show that the plaintiff's version of calling the contractor and when the supposed mistake was revealed cannot be true. The envelops with cash had the names of the persons for whom they were intended written at the back. Again, the evidence showed that it was after Dr. Mrs Esther Anim-Kwapong's letter of 16th December, 2014 that all hell broke loose. This was three weeks after the meeting of 27th November, 2014. Here was a Technical Manager alleging breach of accounting practices involving procedures adopted by the Accounts Manager and his superiors to disburse projects funds. Unsurprisingly, it was this letter that alerted authorities to the untoward activities that had gone on in respect of the seedlings project. It was on 19th December 2014, that the Executive Director to whom the letter addressed instructed all who had received monies to return them to the Accounts Manager.

An Accounts Officer to whom money comes with a list of receipts, which list does not emanate from his office, must ask questions and be on notice that there is something untoward going on. If he chooses to close his eyes and does not ask obvious questions then his ignorance becomes willful and cannot protect him. In ***The Zamora (No.2)*** [1921] 1 AC 801 at 812, Lord Summer explained the nature of guilty knowledge thus:-

> *"There are two senses in which a man is said not to know something because he does not want to know it. A thing may be troublesome to learn, and the knowledge of it when acquired may be uninteresting or distasteful. To refuse to know anymore about the subject or anything at all is then a willful but a real ignorance. On the other hand, a man is said not to know because he does not want to know, where the substance of the thing is borne in upon is mind a*

conviction that full details or precise proofs maybe dangerous, because they may embarrass his denials or compromise his protests. In such a case he flatters himself that whenever ignore is safe, tis folly to be wise, but there he is wrong for he has been put upon his notice and his further ignorance even though actual and complete, is a mere affectation and disguise,"

How could plaintiff not have known the source of the money but could tell the recipients that it was from management? To the last person present that day, every one's written statement on the Record of Appeal stated that when they expressed doubts it was the plaintiff, as Accounts manager who was brought by the Technical Manager into his office to explain to the officers that the source of the money. The very presence of the Accounts Manager must have lent legitimacy to the occasion, followed by the explanation of the TM, who was obviously an accomplice, that it was for "motivation".

If as the plaintiff submitted, the money had been brought to him by mistake why did he share; keep the money, at least till the exposee of 16th December 2014 (from 27th November 2014). As defendant queried, the plaintiff had stated in his handwritten statement that he returned the money the same day. If that was so, why did he keep the money meant for the others, only to send them to the Monthly Technical meeting days later to be shared? The plaintiff testified that he returned his parcel of money, together with that of the Audit Manager's, the same day he received it and possibly by the same messenger who brought them to him. Indeed, his same day account was contradicted by the testimony of the recipient he named in his statement to the Committee - the Audit Manager, Mrs. Gladys Oduro (A7). She testified that she was given the money by plaintiff. She stated, "*It was the Accounts Manager, Mr. Isaac Alormenu and I told him to let the person who brought the money to come to me personally.*"

She continued, that she returned the money the next day after she received it. The detail supplied by the Audit Manager as to the mode of delivery "stapled in an envelope and wrapped in a polythene bag", which she returned to plaintiff "the next day" could hardly be faulted on the ground of "poor recollection." Her account thus sounded more credible than plaintiff's account of returning the envelops of money that same day, via the same messenger who brought them.

What is clear and incontrovertible, however, was that the other Managers received their monies from the plaintiff earlier than the Cocoa Station officers, hence their being called to report at the TM's office, and the sharing of the money after their monthly meeting. One might ask, at what time was the contractor called to explain that the money which had been brought to them had been by mistake, when this so-called messenger, named exactly who the envelopes were for? Whose version of events was more likely to be true and whose false? The evidence available suggested that the plaintiff's version could not be true, and the committee so found. Yet the Court of Appeal appeared to fully believe him in the teeth of contrary evidence.

Further the plaintiff himself admitted to being the conduit through whom the money came to the staff of SPD" but explains that "it was based on the orders from Deputy Executive Director, D. K. Ofori Frimpong. All these monies would not have been distributed without authority from my Deputy Executive Director." ROA Vol, 2 page 195 Dr. Ofori Frimpong testified earlier

"Let me state that I asked Mr. Appiah Nkwantabisa who told me it was Mr. Alormenu who brought the money to him for distribution to the beneficiaries".

This account backed the testimonies of the other officers. If the Deputy Executive Director Dr. Ofori Frimpong testified thus, but plaintiff had testified that it was Dr. Ofori Frimpong who instructed him, then which of them was speaking the truth was

down to corroborative evidence. Was it wise for the Court of Appeal to determine which of the two was speaking the truth by setting aside findings of fact made by the committee?

Further still, the Court of Appeal appeared to read in plaintiff's favour the incident of the subsequent re-awarding of the contract to the same 13 contractors. It said,

> *It is also true that the Appellant was not the officer who approved nor awarded the contracts to the contractors, but the Executive Director of SPD. Assuming he even colluded or connived with the 13 contractors, as alleged by the Respondent, those contracts were abrogated by his superiors and re-awarded to the same contractors but just reducing the mobilization fee from 50% to 20%. If there was any evidence of misconduct in the award by the appellant why did the superiors re-award the contracts to the same 13 contractors? There is also no evidence the appellant approved nor signed the contracts. Neither is there evidence he authorized the 50% advance mobilization fee, The uncontroverted facts are that the Audit Department vetted and certified all payments made to the contractors."*

This was a remarkable conclusion, especially as further evidence showed that on 12th February, 2015 the second set of contracts was abrogated, on grounds of non-performance. The documentation reflected the correct fee of 20% mobilization fee on the second contract. However, there was no evidence that the first monies paid out were ever returned before the contracts were abrogated. What due diligence was done on the 13 companies before the contracts were re-awarded? Was this not a charade to cover the fact of having proceeded in the wrong manner? Indeed, as the evidence showed, there were other persons involved, but the fact that they were also the people

to whom enveloped cash had been given should cause any tribunal of fact to conclude that i. there was collusion involving a good number of important officials, including the Audit Manager; ii. The Accounts Manager's spurious list of 13 contractors was still operative; iii the contractors did not perform on the first fraudulent contract but were re-awarded the same contract so as to cover the tracks of the wrongdoers. Indeed, far from getting plaintiff off the hook, it showed how vulnerable the defendant was when those to whom it had entrusted its affairs were involved in widespread conspiracy of corruption. Was the Court of Appeal right in setting aside findings of fact made by the Ad hoc Disciplinary Committee which had not been challenged? (pages 103-104 vol 3 ROA). No, it was not.

Again, the Court of Appeal said the Ad hoc committee had failed to call a material witness so its findings could not be supported and had to be set aside. It claimed that the messenger who was sent with the money in envelopes and who was supposed to have been mistakes was not called. Was he such a material witness that not inviting him to testify was fatal to the fact finding investigation, when the contractor himself was called? Did the contractor not back the "unlikely story" of the mistake by his messenger? What was so profound about the messenger's testimony that it could invalidate the testimony of the one who sent him?

Issues not pleaded on notice of appeal

This contention at p. 44 of the judgment of the Court of Appeal, that the Ad Hoc committee had failed to call a material witness and therefore its conclusions were invalid raised certain pertinent issues. It is difficult to understand how the Court of Appeal got dragged into assessing the evidence before the Ad hoc committee when the old Notice of Appeal challenging the substance of the findings of the Ad Hoc Committee had been substituted by a fresh one. First, this is not the case the plaintiff set out to establish on his amended Notice of Appeal which had, by leave obtained on

18th March, been filed on 18th March 2020 to substitute an earlier one of 21st February, 2020.

The Court of Appeal stated in support of the plaintiff's position:

> *"Again, the Adhoc Committee failed to call a very material witness the messenger who would have clarified the issue as to what he was told to do with the money. That failure is fatal to the Committee's findings of fact. This is akin to failure to call a material witness in a criminal trial. In effect, there is a big doubt as to whether the money was meant for the Appellant or not. Secondly whether he asked for it or not and these doubts inure to his favour.*

The defendant therefore, had no opportunity to respond to that claim. Clearly, the defendant was right to complain about the Court of Appeal's posture in page 24 of his statement of Case.

> *"It is our respectful submission, that the issue of not calling a material witness by the Committee came up for the first time in the Plaintiff/Respondent's address, when same was not pleaded, nor stated during the trial and it ought to be discarded in its entirety together with the decision of the Court of Appeal."*

Citing ***CFAO*** v ***Archibold*** [1964] GLR 718, the defendant contends that the Court of Appeal was wrong to have permitted the plaintiff to make submissions on a point not previously pleaded except in his final addresses. This argument by plaintiff, it is true, was never canvassed by the plaintiff either at the trial High Court, or on the notice of appeal to the Court of Appeal. It only surfaced for the first time in the written submission at the Court of Appeal and must be rejected if it did not meet the standards

set down in under section 8 (8) of the Court of Appeal Rules 1997 (C.I 19) as amended. Rule 8 (8) provides as follows:

> *"8. … the court in deciding the appeal shall not be confined to the grounds set out by the appellant but the court shall not rest its decision on any ground not set out by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground."*

The defendant is right. The Court of Appeal was wrong to uphold a submission which first made its appearance on the final submissions of the plaintiff, when the defendant had not been given a chance to respond to the new point as prescribed under the rules. This point of law is already covered by authority to the effect that every appeal is a creature of statute, and must be conducted according to the terms of the enabling stature. See: ***Akufo-Addo*** v ***Cathelin*** [1992] 1 GLR 377; also ***Ama Serwaa*** v. ***Gariba Hashimu & Anor*** Suit No. J4/31/2020. 14th April 2021 (Unreported).

On this ground therefore the Court of Appeal should have given the defendant a chance to respond to those issues and not based its decision of the point as required by Rule 87(8) of CI 19.

Who, in law, is a 'material witness'?

This point requires discussion despite the fact that it should not have formed part of the discussion of the Court of Appeal; nor formed the basis of the Court of Appeal's decision to set aside the findings of the Ad hoc Committee. Who a material witness is, was the subject of attention in ***Tetteh*** v. ***The Republic*** [2001-2002] SCGLR 854. Adzoe JSC, explained the nature of a material witness and the effect of a failure to call such a material witness thus:

"Whether or not a witness is a material witness depends on the quality and content of the evidence he is expected to offer in relation to the case on trial. The witness will be deemed to be material if the evidence expected from him is denied to be so vital as to be capable of clearly resolving one way or the other as important and decisive issue of fact that is in controversy. The evidence must appear likely to have a profound impact on the facts of the case to the extent that, if it is accepted as true, it will compel the court to come to a conclusion that is different from the decision it has taken."

Clearly the weight put on the absence of the messenger was insupportable. It distorts the law on the subject, and cannot be allowed to stand.

The Court of Appeal indicated that from the termination letter the inference is that the Ad hoc Committee never found the Appellant guilty or culpable for any wrong doing in the award of the top soil contract nor subsequent fraudulent withdrawal and misapplication of funds meant for the supply of the top soil for the nursery operations for which the Ad hoc committee was set up to investigate (pages 42-43 of Court of Appeal judgment). Did the termination letter come out of the blue or it was based on a report?

What were the acts of misconduct proved by the Adhoc Committee and accepted by the trial court?

1. Plaintiff should have gone through the procurement process. Did he? No he did not, pressing the exigency of the need to ensure readiness for the planting season.

2. He admits that he approached two contractors and asked them to "mobilise" other contractors to come in and bid for a contract. Was it proper procedure for a manager ask a potential contractor to mobilise his competition to undertake a job for the

defendant? Clearly not. This created the temptation for the contractor to produce other spurious companies as fake competitors to bid for the job.

3. He admitted to informing the contractors that they should quote GH¢300.00 for each trip as the fee the defendant, through SPD, would be willing to pay. They did so and so it was unsurprising that all thirteen (13) contractors quoted the same figure. However, was that the true cost of the top soil? On the evidence, the few stations supplied top soil by the contractors, did not pay more than half that amount for the supply. The over-invoicing that occurred was clearly done with the connivance of the defendant's employees – the plaintiff herein and the Deputy Executive Director.

4. Did Plaintiff respect the financial policy guidelines of not paying more than 20% of the contract sum. He paid 50%, claiming it was on instructions from the Deputy Executive Director. Whose responsibility is it to ensure compliance with financial Policy of an institution? That would certainly be the Accounts Manager.

5. Was all the 50% receive disbursed? Yes, the contractors were paid the full amounts but did not do the work.

6. Did plaintiff, as Accounts Manager receive an envelope of cash from one of the contractors even before the contract was performed? Yes, even though returned later.

7. Was he the one who distributed money to the Cocoa Station officers as well as others including the Audit Manager? Yes

8. Did a recipient question the source of the money before everyone began to return theirs? Yes

9. Was it the practice in the organisation for the Accounts Office to share money meant for discharge of official obligations in a "Ghana Must Go bag"? Clearly not, or

else the Manager whose suspicions were aroused by the mode of disbursement and the wrong description of the purpose of the payment would not have raised an alarm.

10. Did he cause to be released, thirteen (13) cheques, (10 to one and three to the other) made out to various contractors to only those two contractors without any Authority Note or other documentation showing the contractor had authority to receive such cheques on behalf of the other named contractors? Yes. However, he blames the accounts clerk working under him for having done so.

11. The plaintiff was the substantive Accounts Manager and so it was curious that he was made the conduit of money meant for fuel etc. to the Cocoa Station Officers by the Contractors who had won the bids to execute the contract. The Stations were given the same amount as accountable imprest through their accounts clerks. Asked by the Committee at its 11th Sitting on 9th July 2015, during a re-examination jointly and severally, the following transpired when the common questions were put to the witnesses. For Q2 and Q6

> *Committee (Q2): The money was meant for the contractors. If so, why did it rather go to the staff – Cocoa Station Officers?*
>
> *Isaac Alormenu (A2): It was one contractor, Mr Edward Opare who advanced those monies so that he would recoup upon submission of his bills. (ROA 2:30)*

Again the committee asked for them to clarify:

> *"Committee (Q6): Now to the Management Staff, how was Mr Edward Opare able to know and paid monies same as the amounts you granted as accountable imprest to the Accounts clerks'Officers for the Cocoa Stations?*

Isaac Alormenu (Q6): I suggested to Mr Opare to give the same amounts to the Cocoa Station Officers.

The plaintiff himself made very damning admissions of misconduct. The proceedings show a well-conducted investigation by the Committee. The question is whether it had legal authority to do the work it did. The plaintiff tendered Exhibits C & D, and the burden lay on him to establish that not only were they in force, but were relied on by defendant. None of this happened, so the findings cannot be set aside without good cause. The court appeared to give more credit to the plaintiff than was justified on the evidence. This posture was unsupported by the facts and the defendant was right to complain under this ground of appeal that its side of the case had not been given adequate consideration.

Conclusion

The judgment of the Court of Appeal was unsupported by the facts and the defendant was right to complain that its side of the case had not been given adequate consideration.

The burden of proof did not shift onto Defendant/Appellant merely because the plaintiff tendered Exhibits C & D, and alleged without proper proof that they were in force. Plaintiff/Respondent needed to do more to establish that fact.

Nowhere in the report were the two documents Exhibits C & D mentioned. The recommendation for termination all quoted section 15 (e)(iii) of the Labour Act. 2003 (Act 651). Indeed had they been mentioned, the correct sanction for the Managers should have been summary dismissal and not "termination" as imposed.

The plaintiff was not entitled to any Ex Gratia award.

The appeal succeeds, and the judgment of the Court of Appeal of 29th July, 2021 which was in favour of the plaintiff/appellant/respondent is reversed, and set aside. In its place,

the High Court decision dated 30th January, 2020 as explained in the judgment of this court, is substituted in its place.

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(JUSTICE OF THE SUPREME COURT)

V. J. M DOTSE
(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)
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