IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: BAFFOE-BONNIE JSC (PRESIDING)

OWUSU (MS.) JSC

AMADU JSC

ACKAH-YENSU (MS.) JSC

ASIEDU JSC

CIVIL APPEAL

NO. J4/08/2022

21ST JUNE, 2023

BERTHA ANSAH-DJAN ……. PLAINTIFF/APPELLANT/APPELLANT

VS

1. PRYCE KOJO THOMPSON

DEFENDANTS/RESPONDENTS/RESPONDENTS

2. THE REGISTRAR GENERAL

JUDGMENT

ASIEDU JSC:-

INTRODUCTION:

This is an appeal against the judgment of the Court of Appeal dated the 2nd day of July 2020. In the said judgment, the Court of Appeal affirmed the judgment of the trial High Court delivered on the 25th November 2016 in favour of the Defendants/Respondents/Respondents hereafter referred to as the Defendants. Aggrieved by the judgment of the Court of Appeal, the Plaintiff/Appellant/Appellant hereafter referred to as the Plaintiff filed a Notice of Appeal against the said judgment on the 12th August 2020.

FACTS:

The facts of this case are that the Plaintiff/Appellant and the 1st Defendant herein are friends. The Plaintiff claims that she formed a transport Company known as Pergah Transport Company Limited in 1999 and was the sole shareholder of the Company. In 2004, the Plaintiff transferred seventy percent of the total shares of the Company valued GH₵24,500.00 to the 1st Defendant. An agreement, exhibit 'A' herein, was executed by the parties in respect of the share transfer. Exhibit 'A' was subsequently presented to the 2nd Defendant which registered it accordingly. The Plaintiff says that, after waiting for a long while, the 1st Defendant failed to pay for the value of the shares transferred to him and for that reason, the Plaintiff repudiated the share transfer agreement by writing exhibit 'C' to that effect. The Plaintiff later issued the writ in the instant matter.

The 1st Defendant, on the other hand, says that the idea to set up the transport Company was mooted by him but because he was then working as the Managing Director of a Bank, he caused the Plaintiff to register Pergah Transport Company Limited. The 1st Defendant says that as a result, he financed the formation of the Company with his own resources and also provided the start-up capital for the Company. The 1st Defendant also procured loans for the running of the Company. The 1st Defendant alleges that whatever shares

that the Plaintiff held at the formation of the Company was held by the Plaintiff in trust for the 1st Defendant. According to the 1st Defendant, two out of the three Directors of the Company were nominated by him. The 1st Defendant maintained that he was the owner of the Company but later decided to give the Plaintiff thirty percent of the shareholding in the Company as shown in exhibit 'A', the share transfer agreement. The Plaintiff's writ, issued on the 21st November 2011 against the Defendants asked for:

(a). A declaration that the Plaintiff owns all the issued shares of Pergah Transport Limited

(b). A declaration that the 1st Defendant is not a shareholder in Pergah Transport Limited.

(C). An order directed at 2nd Defendant to expunge from its record the Deed of Transfer dated 1st January 2004 and made between Plaintiff and the 1st Defendant and all entries in its record showing 1st Defendant as holding any issued shares in Pergah Transport Limited.

(d). Costs.

The 1st Defendant filed an amended counterclaim as part of his statement of defence and counterclaimed against the Plaintiff for:

(a). A declaration that the 1st Defendant is the legal and beneficial owner of 70% of the total shares in the establishment known as and called Pergah Transport Limited.

(b). An order restraining the Plaintiff from holding herself as the sole shareholder of Pergah Transport Limited.

(c). Damages for breach of trust.

(d). Costs.

JUDGMENT OF THE HIGH COURT:

After hearing the parties and their witnesses, the learned trial Judge, dismissed the claims of the Plaintiff and entered judgment for the 1st Defendant on his counterclaim against

the Plaintiff. Dissatisfied with the judgment of the High Court, the Plaintiff appealed to the Court of Appeal.

JUDGMENT OF THE COURT OF APPEAL:

After hearing the appeal by the Plaintiff, the Court of Appeal delivered its judgment on the 2nd day of July 2020 and also dismissed the appeal and affirmed the judgment of the High Court and by way of a consequential order, the Court of Appeal ordered the Plaintiff to account to the 1st Defendant for the period that the Plaintiff was the Managing Director of Pergah Transport Limited. The Plaintiff being dissatisfied with the judgment of the Court of Appeal has, therefore, appealed to this Court by a Notice of Appeal filed on the 12th day of August 2020.

APPEAL TO THE SUPREME COURT:

Before this Court, the Plaintiff/Appellant seeks "an order setting aside the judgment and costs of the Court of Appeal, and a further order entering judgment in favour of the Plaintiff/Appellant for all the reliefs contained in the statement of claim and writ of summons."

GROUNDS OF APPEAL:

The reliefs sought by the Plaintiff is premised on the following grounds of appeal:

(a). The judgment of the Court of Appeal is against the weight of evidence.

(b). The Court of Appeal erred in preferring oral evidence to clear undisputed and uncontroverted documentary evidence.

(c). The Court of Appeal erred when it held that the action of the Plaintiff/Appellant was statute barred; which holding was contrary to the evidence and facts on the record.

(d). Additional grounds will be filed upon receipt of the record of appeal

CONSIDERATION OF THE APPEAL:

Weight of Evidence:

The first ground of appeal argued by the Plaintiff/Appellant is that "the judgment of the Court of Appeal is against the weight of evidence." This ground of appeal constitutes an invitation to this court to virtually examine the totality of the evidence on record: both documentary and oral evidence, which were adduced before the trial Judge and come to its own conclusion as to whether in the light of the relevant law and the evidence, the conclusion reached by the trial Judge and concurred in by the Court of Appeal, is supported by the evidence adduced. Implicit in this ground of appeal, is an allegation by the Appellant that there exist certain pieces of evidence on record which were either ignored by the trial Judge or not applied in favour of the Appellant or otherwise applied against him, which if properly considered, would have led to no other conclusion than that judgment should be entered in favour of the Appellant. It has been held that in such circumstances, it behooves the Appellant to meticulously point out to the Appellate Court any such evidence which he alleges to be on the record. See **Djin vs Musah Baako [2007-2008]1 SCGLR 686; Republic vs. Conduah; Ex parte Aaba (substituted by) Asmah [2013-2014] 2 SCGLR 1032.**

An off shoot of the above principles of law is the caution to Appellate Courts to be slow to interfere with concurrent judgments. Hence, where a judgment of a trial court is concurred by the first Appellate Court, as is the case in the instant appeal, a second Appellate Court such as this court should not be in a hurry to interfere with it or set it aside. In **Koglex Ltd vs. Field [1999-2000] 2 GLR 437**, this Court stated in holding one that:

"Where the first appellate Court had confirmed the findings of the trial Court, the second appellate Court was not to interfere with the concurrent findings unless it was established with absolute clearness that some blunder or error resulting in a miscarriage of justice was apparent in the way in which the lower Court dealt with the facts. Instances where such concurrent findings may be interfered with included where the findings of the trial Court were clearly unsupported by the evidence on record or where the reasons in support of the findings were unsatisfactory; where there was improper application of a principle of evidence or where the trial Court had failed to draw an irresistible conclusion from the evidence; where the findings are based on a wrong proposition of law and that if that proposition be corrected, the findings would disappear; and where the finding was inconsistent with crucial documentary evidence on record."

Loans not equivalent to shares:

Under this ground of appeal, it was argued on behalf of the Appellant that "loans given to a Company or gratis [gifts] are not equivalent to acquiring shares in the Company, especially where there is no evidence of an agreement with the Company to that effect". This submission was made against the backdrop of the finding by the Court of Appeal concurring that of the trial Court that the 1st Defendant was the person who financed the formation of the Company called Pergah Transport Limited which is at the centre of dispute in this matter. Indeed, at the application for directions stage, which can be found at pages 135 to 137 of the record, not less than three issues were dedicated to the question under consideration. In this respect, it was set down for consideration: whether or not the 1st defendant, having solely provided all the initial capital of the establishment known as and called Pergah Transport Ltd, can be said to have no interest in the Company; whether or not the repayment of loans which were later advanced to the Company by the 1st Defendant besides the initial capital the 1st Defendant had provided, extinguishes all the

1st Defendant's interest in the Company; whether or not the 1st Defendant has any legal or beneficial interest in the shares of Pergah Transport Limited.

From the judgment of the trial court, all the issues quoted above were resolved in favour of the 1st Defendant. At page 18(M) of volume 2 of the record of appeal (ROA), the learned trial Judge found that the evidence of one Baidela Mortey Akpadzi corroborated the testimony of the 1st Defendant on the issues stated above. Among others, the trial Judge found that:

> *"Baidela Mortey Akpadzi, who was once a member secretary of Pergah Transport Ltd gave evidence to support the 1st Defendant claim about the Plaintiff running the Company on behalf of the 1st Defendant. This witness who said it was rather the Plaintiff who was his friend and who nominated him to the Company, stated that she was the one who confided in him that the 1st Defendant was in fact the owner of Pergah Transport. This witness, who also supported the 1st Defendant's case that he was instrumental in appointing all but one of the directors of the Company, added that he was the only nominee of the Plaintiff. The witness who said that the 1st Defendant was consulted on many issues and was considered as owner of the Company, added that he even had to approve his nomination."*

It is important to state that the finding of the trial Judge as quoted above and which was also concurred in by the learned Justices of the Court of Appeal is supported by both the oral testimonies given by the witness in his evidence in chief as well as the answers given by him to questions put to him under cross examination as shown in volume 1 of the record of appeal.

Indeed, the evidence on record shows that the idea to form the Company called Pergah Transport Limited was conceived by the 1st Defendant who was then the Managing Director of SSB Bank. The 1st Defendant also provided the funding for the incorporation

of Pergah Transport Limited. At page 325 of the record the 1st Defendant stated, among others, in his evidence in chief that:

> *"I have indicated here that all non-institutional funding was supplied by myself. That the Company formation, bank account opening, assets acquisition, money for operational running and all such were supplied by myself for quite a time till the Company could stand on its feet"*

There is ample evidence, even by the Plaintiff/Appellant herein, that the 1st Defendant contributed immensely to the financial health of the Company. The Plaintiff admitted that apart from cash loans which the 1st Defendant made available to the Company, whose shares are in issue, the 1st Defendant also arranged for the Company to acquire buses from various sources in order to enhance its operations as a transport Company. The Court of Appeal therefore had no hesitation in holding, at page 368 to 371 volume 3 of the record that:

> *"In the opinion of this court, the instrumentality of the respondent in seeing to the success of Pergah Transport cannot be put in any serious doubt whatsoever. There is that overwhelming evidence on record to support the finding that at the start of the operations of the Company, the respondent was able to persuade a friendly Company of his, i.e. Agate Transport to subcontract to Pergah Transport, a contract that Company had then won from the Ghana Commercial Bank. To facilitate Pergah Transport's operations, the respondent paid to Ghana Commercial Bank ten million cedis for acquisition of buses to pick its staff to and fro. The Appellant admitted these material evidence as appearing on pages 209-210 of the record of appeal…It is important to stress that whereas the respondent tendered evidence to show that he bore such expenses to show at the time of incorporation of the Company, the Appellant only repeated on oath without more, her assertion that she formed the Company. From the available evidence, I uphold the findings of the trial court*

that payment supporting the formation of the Company was made by the respondent and was contemporaneous to the setting up of the Company."

Counsel for the Appellant had criticised the Court of Appeal on the above finding. Indeed, Counsel stated specifically that exhibit 4 and 5 does not show any payment to Pergah Transport Limited. This criticism of Counsel contrast sharply with the Appellant's own admission to the contrary that the 1st Defendant/Respondent made enormous financial contribution to the operation of Pergah Transport Limited. See page 223 Volume 1 of the ROA where the Plaintiff/Appellant categorically admitted the financial contribution which the 1st Defendant made towards the running of the Company. It must be stressed also that in evaluating evidence, the duty of a trial judge is not to dwell on just a piece of evidence given by the witnesses at the trial but to consider the totality of the evidence adduced vis-à-vis the relevant law in coming to his conclusion that the evidence of a party is preferable to the evidence of another party. This act itself involves pitching one version of the evidence against the other on any particular issue. This further implies that there are, at the minimum, two versions, if not more, of the evidence to choose from with a further implication that the party whose evidence does not find favour with the court had also a story to tell except that his version of the events or transactions could not scale the burden of persuasion imposed on him by the law as compared with the evidence adduced by his opponent. This court recognised the importance of this analysis when it held in **Bisi and Others vs. Tabiri alias Asare [1987-88] 1 GLR 360** when it held that:

"The standard of proof required of a plaintiff in a civil action was to lead such evidence as would tilt in his favour the balance of probabilities on the particular issue. The demand for strict proof of pleadings had however never been taken to call for an inflexible proof either beyond reasonable doubt or with mathematical exactitude or with such precision as would fit a jig-saw puzzle. Preponderance of evidence became the trier's belief in the

preponderance of probability. But "probability" denoted an element of doubt or uncertainty and recognised that where there were two choices it was sufficient if the choice selected was more probable than the choice rejected. Consequently, the trial judge was justified in accepting the case of the plaintiff on the materials and money he had contributed towards the construction of the house, in spite of the discrepancies in the evidence of the first and fourth plaintiff witnesses on the quantities."

Thus, there is evidence on record, as found by the trial court and concurred in by the Court of Appeal, to the effect that the Company was in fact established by the 1st Defendant but in registering it, the 1st Defendant caused the documentation to be done in the name of the Plaintiff who has been his friend for a long time; as a result of which the initial documents on the Company naturally bore the name of the Plaintiff as the sole shareholder of the Company. However, the evidence is incontrovertible to the effect that all the expenses regarding the formation and registration of the Company were borne by the 1st Defendant herein. The 1st Defendant gave positive evidence of this fact with relevant supportive documentation including cheques issued by him. The Plaintiff in this matter acknowledged this fact in her answers during cross examination. In the English case of **Dyer v. Dyer (1788) 2 Cox Eq. Cas. 92 at p. 93 which was affirmatively applied in re Wiredu (Decd.); Osei vs. Addai [1982-83] GLR 501**, it was pointed out that:

"The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name or several, whether jointly or successive, results to the man who advances the purchase money... and it goes on a strict analogy to the rule of common law, that where a feoffment is made without consideration, the use results to the feoffor."

This court affirmed this position of the law when it held in **re Fianko Akotuah (Decd); Fianko & Another vs. Djan & Others [2007-2008] 1 SCGLR 165** that:

> "It is settled law in equity that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchaser and others jointly or in the name of others without the purchaser results to the man who advances the purchase-money. In such cases, the provider of the purchase-money or the true owner in equity is not estopped from averring and proving that to be truth of the transaction; neither can they be estopped from relating the real truth known to them at the time of making of the statement. In such circumstances, a person with his own equal and clear knowledge to the contrary, cannot contend at common law or in terms of section 26 of the Evidence Decree, 1975 (NRCD 323) that the other party in question has, by his own statement, act or omission, intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon such belief. Clearly, section 26 does not apply to such situations."

The learned authors of The Law of Trusts and Equitable Obligations (4th edition) Oxford University Press state at page 238 of their book that:

> *"It is also presumed that a person who provides the money required to purchase property intends to obtain the equitable interest in the property acquired. Therefore, where the property is purchased in the name of someone who did not provide the purchase money, he will be presumed to hold the legal title on trust for the provider thereof."*

We hold therefore that the Court of Appeal was right in concurring the finding by the trial High Court Judge that the Plaintiff held the shares in Pergah Transport Limited in trust for the 1st Defendant. There is ample evidence on record to support this finding by the trial Court and the Court of Appeal. The 1st Defendant, from the record before us, has a heavy presence in the formation and management of the Company in question.

Appointment of Directors:

Next, Counsel criticised the Court of Appeal by asserting that there is no evidence that the Respondent appointed two directors and that that was impossible both in law and in fact. Counsel asserts that the 1st Defendant rather recommended certain persons to the Plaintiff for appointment as directors since the Plaintiff/Appellant had been out of the country for a long time and did not know many people. This criticism stems out of the observation by the Court of Appeal at page 371 of the record that the evidence given by the respondent that he nominated the first directors of the Company was not seriously challenged. At page 295 of volume 1 of the record, the 1st Defendant testified that:

> *"The Company started at registration with three directors, the Plaintiff, the Chairperson Mrs. Charllotte Obeng and a 3rd person Mr. Frank Gadzekpo who was a common friend to Plaintiff and me. Not too long thereafter, I added one Mr. Steve Akuffo, a long-standing friend of mine. I nominated all the directors with the Plaintiff as the Managing Director."*

Although Counsel, in his submission, did not give the reasons why he said it is impossible, both in law and in fact, for the 1st Defendant to appoint the first directors of Pergah Transport Limited, the reason for Counsel in so submitting is captured in a question he put to the 1st Defendant under cross examination that it is only shareholders who can appoint directors. See page 342 of volume 1 of the record. That statement by Counsel is not wholly correct. The Company in respect of which the instant dispute had arisen is Pergah Transport Limited. It was incorporated in the year 1999 when the Companies Act, 1963, Act 179 was then the governing law. Act 179 had since been repealed by the Companies Act, 2019, Act 992. It was a requirement, per section 181(2) that the first directors of a Company shall be named in the Company's Regulations. Section 181(3) of Act 179 provided that:

> *"(3) Subject to this section and to sections 182 and 183, the appointment of directors shall be regulated by the Company's Regulations, and except as otherwise provided in the*

Regulations, section 272 shall regulate the appointment of directors of a private Company and sections 298 and 299 the appointment of directors of a public Company."

The first point of reference in the appointment of directors therefore was the Company's Regulations. Thus, it is the provisions of the Regulations that determines how directors are to be appointed and by whom they are to be appointed. And section 181(4) states that:

"(4) The Regulations of a Company may provide for the appointment of a director or directors by a class of shareholders, debenture holders, creditors, employees or any other person."

Nonetheless, unless, there are provisions to the contrary in the Company's Regulations, the appointment of directors of the Company shall be made in accordance with the provisions of section 272 since the Company in question is a private Company. Section 272 of Act 179 provides also that:

"272. Appointment and removal of directors of private companies

(1) The appointment and removal of directors of a private Company shall, subject to sections 180 to 185, be regulated by the Company's Regulations.

(2) In the absence of a contrary provision in the Company's Regulations, each of the existing directors shall continue to hold office until the director vacates office under section 184 or is removed under section 185; and the Company may at any time by ordinary resolution fill a vacancy in the number of directors and may at any time by ordinary resolution increase the number of directors, but the total number of directors shall not exceed the maximum prescribed by the Regulations."

Therefore, as already pointed out, it is not entirely correct that it is only shareholders who can appoint directors for private companies and that the appointment of directors shall always be dictated by what is contained in the particular Company's Regulations failing

which the appointment may be done in accordance with section 272 as shown above. In the instant matter, the evidence given by the 1st Defendant, as observed by the Court of Appeal, was not seriously challenged. The testimony of DW1 was that his appointment as a member secretary of Pergah Transport was made with the approval of the 1st Defendant. And according to DW2 Charlotte Obeng:

> *"Mr Pryce Kojo Thompson had formed this Company and that she (Plaintiff) was running this Company as the Managing Director and wanted me to be on the board"* Page 399 of volume 1 of ROA.

Under cross examination DW2 was asked:

> *"Q. Do you know how the first directors were appointed*
>
> *A. We were not formally written to but as I said earlier, I was invited verbally by Bertha with confirmation from Mr. Pryce Kojo Thompson that he wanted me to be a director of the Company*
>
> *Q. Can you tell us how the present directors were appointed*
>
> *A. I know that Mr. Pryce Kojo Thompson brought his friend Mr Akuffo and had also worked on the board with Mr Brefo Nimoh. At the time of going to litigation, we found that Mr Brefo Nimo's name has not been included at the Registrar General's as a director, but we saw him as a de-facto director. This was supposed to have been done by Mr. Mortey who was then the Company secretary. We saw it as an omission on the part of Mr Mortey"*

From the above it is clear that the 1st Defendant continues to engage in the appointment of directors of the Company and the Plaintiff was not reported to have raised any issue with the nominations of people to serve as directors of the Company by the 1st Defendant notwithstanding that the 1st Defendant's name was not formally stated, initially, as being

a shareholder of the Company. The parties are therefore bound by their conduct in this regard.

At any rate, the Plaintiff/Appellant herself admitted under cross examination that the 1st Defendant/Respondent made appointments to the Board of Directors of Pergah Transport Limited. Counsel posed the questions:

> *Q. And you know the first directors of Pergah Transport Limited*
>
> *A. I know them.*
>
> *Q. And all of these persons were nominated by the 1st Defendant.*
>
> *A. My lord, that is not true. I nominated one person and* ***he nominated the other person*** *because I wanted a lady whilst I was doing the registration. I nominated my friend who is Frank Gadzekpo and then* ***he nominated Charlotte Obeng****.*
>
> *Q. Apart from that the 1st Defendant nominated Stephen Akuffo onto the board. Is that not correct*
>
> *A. My lord, Stephen Akuffo was a mutual friend so it wasn't a nomination.*
>
> *Q. I am suggesting to you that it was the 1st Defendant who got Stephen Akuffo onto the board.*
>
> *A. My lord, I would not know.*

The evidence on record shows that the Plaintiff/Appellant was the Managing Director of Pergah Transport Limited and the said Stephen Akuffo was not one of the first directors of the Company. In sum, the answers given by the Plaintiff/Appellant herein constitute admission of the case of the 1st Defendant that he established Pergah Transport Limited and caused the Plaintiff to manage the said Company on his behalf to the extent that he nominated the persons who were the directors of the said Company. This admission by

the Plaintiff/ Appellant herein corroborates the case of the Plaintiff and this court has no reason not to accept same. See **Asante vs Bogyabi [1966] GLR 232**.

Counsel for the Plaintiff/Appellant rightly submitted in his statement of case at page 16 that '*this action is about who is a shareholder of a Company"*. In this regard, the evidence of the Plaintiff/Appellant is that she registered Pergah Transport Limited and was the sole subscriber/shareholder at the inception or the formation of the Company. Exhibit B, the Company's Regulations tendered by the Plaintiff/Appellant, shows clearly that the Plaintiff was the sole shareholder of the Company in question at its inception. The exhibit shows that at the registration of the Company, the Plaintiff/Appellant had 10,000,000 of the issued shares of the Company. The total authorised shares of the Company at registration was 500,000,000 shares of no-par value as stated by exhibit B herein. By exhibit 'A', the Plaintiff says she agreed to transfer *"part of her total shares in the Company to Pryce Kojo Thompson"*. Indeed, the Plaintiff says that by exhibit 'A' she agreed to transfer "*seven thousand ordinary shares in the Company"* and that the said seven thousand ordinary shares represent *"seventy percent (70%) of the total shares of the Company*". The transfer was in consideration of the sum of "*two hundred and forty-five million cedis agreed to be paid by the Plaintiff*".

In contrast, the evidence of the 1st Defendant is that he conceived of the idea to form the Company Pergah Transport Limited but due to the fact that he was then Managing Director of the SG-SSB Bank, he caused the issued shares of the Company to be legally registered in the name of the Plaintiff and for that matter the Plaintiff held the shares in trust for the 1st Defendant; a fact, which we have found for the 1st Defendant. Thus, until the execution of exhibit 'A' by the parties, the interest held by the 1st Defendant in the shares of the Company was an equitable interest which was not registrable under the Companies Act, Act 179 which was the prevailing substantive law which governs matters affecting companies. Thus, section 98(1) and (2) of Act 179 provided that:

98. Registration of transfers

(1) Subject to sections 99 and 100, a notice of a trust, express, implied or constructive or of any equitable, contingent, future, or partial interest in a share or debenture or a fractional part of a share or debenture shall not be entered in the register of members or debenture holders or receivable by the Company.

(2) For the purposes of subsection (1), the Company shall not be bound by, or be compelled in any way to recognise, any other rights in respect of a share or debenture except an absolute right to the entirety of the share or debenture in the registered holder; and accordingly until the name of the transferee is entered in the register in respect of the share or debenture the transferor, so far as concerns the Company, remains the holder of the share or debenture.

With the foregoing, it was inevitable that before the 1st Defendant could assert a right at law there have to be a legal transfer recognised by the Companies Act. No wonder therefore that the parties agreed and executed exhibit 'A' to effect the transfer of the shares as shown therein. In the said exhibit, the Plaintiff/Appellant transferred seventy percent of the issued shares of the Company to the 1st Defendant/Respondent herein. The seventy percent was said to be a total 7,000 shares of no-par value. In respect of the transfer of the shares, the Plaintiff was asked, during cross examination as appear on page 250 and 251of volume 1 of the record as follows:

"Q. This deed of transfer exhibit 'A' was actually exhibited by you, is that not correct, and it was signed by you freely?

A. My lord, that is correct. That was the intention at that time.

Q. The intention was to transfer 70% shares to the 1st Defendant. Is that not so?

A. My lord, at that time the circumstances surrounding Pergah Transport and for which we wanted somebody to come and take a share was such that it was okay when he asked for that amount of shares, Because, at that time I will say that our back was against the wall"

From the answers given by the Plaintiff/Appellant above, it is very clear that the shares were voluntarily transferred by the Plaintiff to the 1st Defendant herein. Exhibit 'A' which can be found on page 78 of volume 2 of the record states that seven thousand (7,000) shares in the Company [equivalent to seventy per centum (70%) of the total shares of the Company] was transferred to the 1st Defendant by the Plaintiff. This deed of transfer, exhibit 'A', was made between the Plaintiff and the 1st Defendant. It was not made between the Company, qua Company and the 1st Defendant herein. Indeed, exhibit B, the Company's Regulations, showed that the total number of shares registered by the Company was 500,000,000 of no-par value. Out of the total shares of the Company, 10,000,000 had been issued to the Plaintiff. It stands to reason therefore that if the Plaintiff was transferring seventy percent of shares to the 1st Defendant then that said transfer could only come from the shares issued to her, that is, the 10,000,000 and not the total number of 500,000,000 shares registered by the Company as stated above. This is so because, at the time of the transfer, the whole of the 500,000,000 shares of the Company had not been issued to the Plaintiff. Thus, the Plaintiff could not purport to transfer to the 1st Defendant what she does not have. The principle, nemo dat quod non habet applies with equal force to this transaction. More importantly, the 500,000,000 being the total shares of the Company have, as pointed out, not been issued at the time of the execution of the Deed of Transfer and therefore was not available to be transferred and could not be a subject of transfer by the Plaintiff to the 1st Defendant. The clear intention of the parties therefore was to transfer seventy percent of the issued shares legally held by the Plaintiff in trust, to the 1st Defendant, the equitable owner of the shares as it were and that being so, the seventy percent of the 10,000,000 issued shares will work up to 7,000,000

and not 7 000 shares as indicated, mistakenly on exhibit 'A'. No wonder therefore that the parties sought to rectify this mistake as shown by a Search Report on Pergah Transport Limited issued by the Registrar-General Department dated 22nd June 2011and found on page 193 volume 2 of the record.

It has been submitted on behalf of the Plaintiff/Appellant that she has vehemently denied authorizing the registration of the transfer with the Registrar of Companies. The Plaintiff has however admitted to executing exhibit 'A', the Deed of Transfer voluntarily. She has also admitted that one Lawyer Eric Atieku witnessed her signature on exhibit 'A'. Plaintiff has also admitted that exhibit 'A' was prepared by a lawyer who was the Company secretary at the time. The Plaintiff stated that she does not know whether it was the Company secretary who registered exhibit 'A', the Deed of Transfer. See pages 250 to 252 of Volume 1 of the record. DW1, Biadela Mortey Akpadzi, stated in his evidence in chief that the Plaintiff is his friend and that it was the Plaintiff who nominated him to be Secretary to the Board of Directors of Pergah Transport Limited. DW1 testified that the Plaintiff told him that the 1st Defendant was the real owner of the Company and that it was the 1st Defendant who ceded 30% of the issued shares of the Company to the Plaintiff herein. See page 371 to 372 of volume 1 of the record. At page 373 volume 1 of the record, DW1 testified in chief as follows:

> *"A: My Lord, from what plaintiff herself had told me and it is not in one instance, she was acting on behalf of the 1st defendant and My Lord if my memory serves me right, there was a time we applied for a loan from the bank, I was working on all those processes with the plaintiff. We got to the bank and an issue about the ownership of the Company came up. From what I understood the bank was not too comfortable with the fact that all shares were in one name, at that time, they stood in the name of the plaintiff. It was after then the plaintiff gave me instructions to formalize the relationship between her as a shareholder*

and the 1st defendant as a shareholder. So, it is the plaintiff who gave me instructions to prepare a share transfer in the ratio of 70 to the 1st defendant and 30 to the plaintiff.

Q: Did you actually carry out this instruction of the plaintiff?

A: Yes, My Lord I did.

Q: Please take a look at this document exhibit 'A' and tell the court if that is what you did?

A: Yes, My Lord.

Q: From exhibit 'A', what is the date of transfer?

A: 1st day of January 2004

Q: Can you tell the court what was effected by exhibit 'A'?

A: My Lord exhibit 'A' was formalizing the relationship which I knew already existed. The relationship was to make 30% of the share remain in the name of the plaintiff. Although she herself had all along admitted to me that the 1st defendant was the owner of the Company.

Q: After preparing exhibit 'A', what did you do?

A: My Lord we completed the process by filing with the Registrar of companies.

Q: ***Can you tell the court who got the document filed with the Registrar of companies?***

A: ***My Lord I did.***

Q: You indicated that all the shares stood in the name of the plaintiff at the inception. Do you know why this is the case?

A: My Lord my understanding was that she was holding it in trust for the 1st defendant.

Q: You see from Exhibit 'A' (deed of transfer) that there is a consideration of the sum of 245 million old cedis. What do you have to say about that consideration?

A: If I may your lordship, I will like to repeat what I told the plaintiff on this matter. My Lord the plaintiff never instructed me on this amount. And when I confronted her in the presence of her husband, she admitted that she never gave me those instructions. The plaintiff herself had admitted the ownership of the Company by the 1st defendant. This figure was inserted so that the deed of transfer would not seem fictitious. My Lord I confronted her in the presence of her husband and she admitted it. She and I all knew that this document was only formalizing an existing relationship over which she was the one who gave me instruction, i.e. the 70/30 percentage ratio…"

The above answers given by a person who is a friend of the Plaintiff/Appellant makes Counsel's submission that the Plaintiff had vehemently denied knowledge of the registration of the Deed of Transfer a very strange submission indeed. The above evidence by DW1 shows clearly that the Plaintiff/Appellant admits that the Company was established by the 1st Defendant and that the Plaintiff was only a trustee of the shares of the Company on behalf of the 1st Defendant. It also shows that the Plaintiff voluntarily prepared and executed the Deed of Transfer as a testimony to her trusteeship of the shares of the Company for the benefit of the 1st Defendant. The evidence also shows, clearly, that the 1st Defendant does not owe the Plaintiff any money in respect of the cost of the shares transferred to the 1st Defendant.

Counsel for the Plaintiff/Appellant referred to section 95(1) of Act 179 and submitted that "exhibit 'A' could not have operated to effect the transfer of the shares claimed by the Respondent in the Company". This submission is somehow difficult to appreciate in view of the provision of section 95(1) of Act 179 which states that:

"95. Restrictions on transferability of shares

(1) Except as expressly provided in the Company's Regulations shares are transferable without restriction by a written transfer in common form."

Contrary to the submission by Counsel, it is our opinion that exhibit 'A' which was executed by the Plaintiff/Appellant herein, rather conforms with the provisions of section 95(1) of Act 179 in that, it constitutes a written transfer of the shares otherwise legally held by the Plaintiff to the 1st Defendant herein. Counsel has not been able to refer to any express provision in the Company's Regulations, exhibit B herein, which require shares of the Company to be transferred in any other manner.

Counsel further referred to sections 98(3) and section 95(2) of Act 179 and also Regulation 8a of the Company's Regulations and submitted also that the Board of Directors shall have to approve the transfer of shares in the Company before it becomes valid. According to Counsel no such approval was obtain in respect of the share transfer in issue. Indeed, sections 95(2) and 98(3) of Act 179 provides as follows:

"95(2) Subject to section 294, the Company's Regulations may impose restrictions on the transferability of shares, including power for the directors to refuse to register a transfer and provisions for compulsory acquisition or rights of first refusal in favour of other members or officers of the Company."

"98(3) Despite anything contained in the Regulations of a Company or in a contract, the Company shall not register a transfer of shares or debentures unless a proper instrument of transfer duly stamped, if chargeable to stamp duty, has been delivered to the Company."

Section 95(2) quoted above does not invalidate the transfer of the shares made in exhibit 'A'. The section only gives power to the Company to impose restrictions through its Regulations on the transfer of shares and also give power to the Directors of the Company to refuse to register the transfer of any shares of the Company. Section 98(3) also gives power to the Company to refuse to register shares transfer unless a proper and duly

stamped instrument of transfer has been presented to the Company. These sections affect the internal arrangements and mechanisms of a Company which the directors are enjoined to observe with regards to the shares transfer in the Company. These duties cast on the directors of a Company can in no way be delegated onto persons dealing with the Company with the consequence that their non-observance shall not nullify shares validly transferred by the shareholders to other investors. Persons dealing with the Company are entitled to presume that management have very well carried out their duties and obligations. It is our view therefore that the non-observance of the duties of the directors of the Company cannot invalidate the registration of the Deed of Transfer of the shares from the Plaintiff to the 1st Defendant/Respondent.

Counsel also submitted that the 1st Defendant/Respondent failed to provide equity and that he failed to pay for the shares transferred to him by the Plaintiff. The evidence of DW1, who is a friend to the Plaintiff, shows quite clearly that the shares transferred by the Plaintiff to the 1st Defendant herein was not meant to be paid for. First, the shares were held in trust for the 1st Defendant by the Plaintiff and secondly, as DW1 puts it, the sum of money quoted as consideration for the shares transferred was a mere formality. In the words of DW1, the Company secretary, *"this figure was inserted so that the deed of transfer would not seem fictitious… She and I all knew that this document was only formalizing an existing relationship over which she was the one who gave me instructions, i.e. the 70/30 percentage ratio"*. These facts were testified to by the 1st Defendant in his evidence in chief. See page 325 of volume 1 of the record. Further to the above, DW2, Mrs Charlotte Obeng, the Chairperson of the Board of Directors, also stated in answer to a question under cross examination that "Bertha herself told me that the Company was for Mr. Pryce Kojo Thompson". See page 412 of volume 1 of the record of appeal.

We find that the record is replete with evidence, showing beyond any doubt, that the 1st Defendant is a shareholder in Pergah Transport Limited contrary to the allegation by the

Plaintiff/Appellant. First, the Plaintiff/Appellant admitted during cross examination that when she decided to go on secondment to Masloc, the Company secretary wrote exhibit 3 which can be found at page 143 of volume 2 of the record to formally inform the 1st Defendant about the move. Secondly, by the same letter, exhibit 3 herein, the 1st Defendant was informed of the resignation of Mr. Biadela Mortey Akpadzi as the Company secretary. If the 1st Defendant was not a shareholder in the Company then what was the need to inform him of these activities involving key personnel in the Company? Again, by exhibit 3, the 1st Defendant was asked to "be involved in the process of appointment [of the acting Managing Director as a member of the board] since the shareholders are by law the appointers of members of the board of directors"

Further, the Plaintiff admitted under cross examination that she and the 1st Defendant jointly executed a Guarantee to source for funds at Ecobank Ghana Limited. This Guarantee was admitted in evidence as exhibit 2 which can be found on page 137 to 142 of volume 2 of the record. The preamble to the Guarantee reads as follows: *"We, **Pryce Kojo Thompson and Bertha Ansah-Djan both shareholders of Pergah Transport Limited** of post office CT49 Cantonments- Accra Hereby jointly and severally guarantee payment on demand upon us of all monies and liabilities whether certain or contingent now or hereafter owing or incurred to you from or by Pergah Transport Limited…"* The admission by the Plaintiff that the 1st Defendant is a shareholder of Pergah Transport Limited is crystal clear. See pages 264 to 265 of volume 1 of the record.

Additionally, in the year 2009 or thereabout, the Company held its first Annual General Meeting at which the Plaintiff, who was the Managing Director of the Company presented her report to the meeting. This was captured in exhibit 1 which can be found at page 104 to 136 of volume 2 of the record. In the report, presented by the Managing Director, the Plaintiff referred to the 1st Defendant as the majority shareholder of Pergah Transport Limited. For instance, in the said report, the Plaintiff stated, among others, at

page 116 volume 2 of the record that *"in 2000, the Company won another contract with the then Ghana Telecom (now Vodafone). With the two buses left from the Ghana Commercial Bank contract, we had additional two buses to be used for the contract. The loan for these two buses was provided by the majority shareholder and was paid back with interest."* Under cross examination, the Plaintiff was asked, among others, as follows as appear on page 259 of volume 1 of the record:

> *"Q. Madam in exhibit 1, the exhibit that you prepared when you stated that the present majority shareholder who were you referring to as the present majority shareholder in the Company?*
>
> *A.* ***At that time we had intended Mr. Thompson to be the majority shareholder****.*
>
> *Q. The person you are referring here was Mr. Thompson?*
>
> *A. Because my lord, we had already done the deed of transfer"*

Indeed, references to the 1st Defendant as majority shareholder of Pergah Transport Limited span across the report presented by the Plaintiff in her capacity as the Managing Director of the Company. In exhibit 1, the report prepared for the first Annual General Meeting of the Company, the Plaintiff described herself under the profile of the members of the Board of Directors that "*she is the* ***co-founder*** *of Pergah Transport Limited and has been the Managing Director since commencement of business in 1999*". The question which follows is: who is the other co-founder of the Company? This statement by the Plaintiff contrast sharply with her assertion that she founded Pergah Transport Limited alone whereas the 1st Defendant had always maintained that the idea to form the Company was conceived by him and the establishment was financed by him but because of his engagement as the Managing Director of SSB Bank at that time, and for uneasiness of conflict of interest, he got the Plaintiff to register the issued shares and the Company in her name. This position of the 1st Defendant is strongly corroborated by the evidence of DW1, the Plaintiff's own

friend who was appointed as Company Secretary and DW2, the first Chairperson of the Board of Directors. The Plaintiff also reported that the Board of Directors agreed to pay an amount of Two Thousand Ghana Cedis a month to the majority shareholder just for the reason that since the formation of the Company no dividend has ever been declared and paid to the shareholders. See page 119 volume 2 of the record of appeal. Once again, if the 1st Defendant is not a shareholder in the Company, why pay him a monthly stipend in lieu of payment of dividend?

At page 117 volume 2 of the record, the Plaintiff wrote in her report to the Annual General Meeting of the Company that:

> *"The majority shareholder was approached by the Managing Director to convert his outstanding loan to shares. The Managing Director, then the sole shareholder, was then looking for a more professional and structured way to run the Company… The majority shareholder agreed to convert his outstanding loan into 70% of the Company's shares. The Managing Director looking for good corporate practice asked the now majority shareholder to suggest a board member with a good accounting background to sit on the board…"*

So, with all these admissions made by the Plaintiff in her own report how could she turn around to allege that the 1st Defendant is not a shareholder of Pergah Transport Limited?

Again, under cross examination the Plaintiff was questioned as follows, as appear on page 261 volume 1 of the record:

> *"Q. Indeed, Mr. Thompson was invited to the Annual General Meeting as a shareholder. Is that not correct?*
>
> *A. My lord, we had prepared deeds of transfer and based on the relationship we had, I had no intention of not giving that due respect.*
>
> *Q. And the due respect you are talking about is that of a shareholder. Is that not correct?*

A. That was the intention."

Once again, it is clear that the above answers given to the questions posed to her constitute admission of the fact that the 1st Defendant, Mr. Pryce Kojo Thompson, is a shareholder of Pergah Transport Limited and for that reason, the Plaintiff as the Managing Director of the Company saw it as an obligation to invite the 1st Defendant to attend and take part in the Annual General Meeting. The power to call Annual General Meetings was both mandatory and a fiduciary discretion vested in the Directors of the Company and members who want such meetings to be called. See **Asafu-Adjaye and Others vs. Agyekum [1984-86] 1 GLR 382**. Therefore, where the directors as in this case, decided to hold an Annual General Meeting and invited the 1st Defendant to attend, in his capacity as the majority shareholder, it lies ill in the mouth of the Plaintiff to deny what she had earlier admitted to be the position, that the 1st Defendant is a shareholder of the Company.

Even in exhibit 'C' the letter which the Plaintiff wrote purportedly to revoke the shares of the 1st Defendant, the Plaintiff admitted that the 1st Defendant and herself were ***"the existing shareholders of Pergah Transport Limited"***. See page 266 of volume 1 of the record. Prior to the writing of exhibit 'C', the Plaintiff admitted that she had not written any demand letter to the 1st Defendant to make payment for the shares and in the same exhibit 'C' addressed to the 1st Defendant/Respondent herein, the Plaintiff requested for a meeting between herself and the 1st Defendant ***as shareholders of the Company*** in order to discuss governance issues affecting the Company. The Plaintiff also suggested that she wanted to control seventy percent of the shares of the Company whiles the 1st Defendant controls thirty percent. In exhibit 'E', the letter which the Plaintiff wrote in response to the 1st Defendant's letter received as exhibit 'D', the Plaintiff stated in the penultimate paragraph that: "***For the sake of the smooth running of the Company, I hope we would reach an agreement, in the absence of which we may pursue the buy-out option which***

you once suggested". Now, if the 1st Defendant is not a shareholder in the Company, Pergah Transport Limited, then what was the essence and the need to suggest that one party may 'buy-out' the shares of the other?

Section 30 of the Companies Act, Act 179 provided that:

> *"30. Constitution of membership*
>
> *(1) The subscribers to the Regulations are members of the Company and on its registration shall be entered as members in the register of members referred to in section 32.*
>
> *(2) Any other person who agrees with the Company to become a member of the Company and whose name is entered in the register of members is a member of the Company.*
>
> *(3) A member has the rights, duties and liabilities that are by this Act and the Regulations of the Company conferred and imposed on members.*
>
> *(4) In the case of a Company with shares each member is a shareholder of the Company and shall hold at least one share, and a holder of a share is a member of the Company.*
>
> *(5) Membership of a Company with shares continues until a valid transfer of all the shares held by the member is registered by the Company, or until all the shares are transmitted by operation of law to another person or forfeited for non-payment of calls under the Regulations, or until the member dies."*

As stated in section 30(5) of Act 179, a person does not lose his membership of a Company by virtue of the fact that he has, for the time being, not paid for shares acquired by him in the said Company. Within the meaning of section 30(5) of Act 179, a member of a Company may lose his membership (a) through a valid transfer of all his shares in the Company (b) by the transmission of all the shares held by the member by operation of law to another person (c) by forfeiture of the shares for non-payment of calls under the

Regulations of the Company and finally (d) by the death of the member. Under cross examination, the Plaintiff/Appellant herein was questioned as follows:

> *"Q. Madam, you have not made any written demand for the payment for the shares. Is that correct?*
>
> *A. My lord, I had not made any written request. No, I have not.*
>
> *Q. Do you know any process which requires a shareholder to pay for shares before they are registered. Do you know or you don't know?*
>
> *A. My lord, I know shares are paid for and transfer is done*
>
> *Q. Now, in seeking to revoke the shares issued to Mr. Thompson was there any Board resolution to that effect?*
>
> *A. My lord, there was no Board resolution to even offer the shares so my lord if you want to talk about that then the process was fraught right from the onset.*
>
> *Q. Was there any notice issued by the Board calling on Mr. Thompson to pay for the shares that had been given him as per exhibit 'A' or he will lose the shares?*
>
> *A. My lord, the board has never been involved in this transfer right from the beginning."*

From the answers given above by the Plaintiff/Appellant it is clear that neither the Plaintiff nor the Company, qua Company had made any demand upon the 1st Defendant to make any payment for the shares acquired by the 1st Defendant. It can therefore not be said that, the 1st Defendant had defaulted in paying for the value of the shares which he acquired. For that reason, it was premature for the Plaintiff to purport to revoke, even if she had the power to do so, the shares acquired by the 1st Defendant/Respondent herein.

As submitted on behalf of the 1st Defendant/Respondent, the Plaintiff/Appellant's case is anchored on the allegation of non-payment for the seventy percent shares owned by the

1st Defendant. And, according to the Plaintiff, in so far as the 1st Defendant had not paid for the shares, the Plaintiff had the right to revoke the shares. On this issue, this Court in **Adehyeman Gardens Ltd and Another vs. Assibey [2003-2005] 1 GLR 391**, speaking through Sophia Akuffo, (JSC as she then was), stated at page 403 of the report that:

> *"Accordingly, Counsel for the respondent is correct in his submission that under Act 179, there are two kinds of members of a Company; those who become members at the inception of a Company by subscribing to its Regulations and those who, after the Company comes into existence, agree to become members. The membership of a subscriber is, by legal prescription and, in the absence of a valid forfeiture, is not predicated on full or partial payment of the consideration for the shares taken. Indeed, even in the case of a non-subscribing member of a Company, his membership is not dependent on whether or not he is fully paid-up".*

We hold therefore that the stance held by the Plaintiff/Respondent that the 1st Defendant ceases to be a member of Pergah Transport Limited by virtue of an alleged non-payment of the seventy percent shares acquired by him and also in view of the purported revocation of the shares held by the 1st Defendant, is not backed by law. A member of a Company does not lose his membership by virtue of his non-payment for shares registered in his name. As pointed out in the Adehyeman Garden case on page 405 of the report:

> *"By the terms of Act 179, until all of his shares are forfeited for non-payment of a validly made call (or until the occurrence of any of the other said eventualities), a subscriber remains a fully-fledged member and shareholder of the Company, even if he has not paid a pesewa for his shares. Act 179 does not prescribe any mode for forfeiture of shares and rather leaves this to be spelt out in the Regulations of the Company."*

We hold further that, in so far as the 1st Defendant holds shares in the Company, albeit seventy percent of the issued shares of the Company, a fact which has been admitted variously by the Plaintiff/Appellant herein, the 1st Defendant is a shareholder and a member of Pergah Transport Limited.

The evidence on record shows that no specific time was stated or mentioned in exhibit 'A', the Deed of Transfer, for the payment of the amount stated therein as the cost of the shares and this fact was clearly admitted by the Plaintiff under cross examination as appear on page 253 volume 1 of the record of appeal. That being so, there was virtually no basis for the rejection of the payment made by the 1st Defendant upon receipt of exhibit 'C' from the Plaintiff. By exhibit 'D' the 1st Defendant indicated in no uncertain terms that *"for reasons that both you and I know, the consideration for transfer of shares from you to me was taken as done"*. This observation notwithstanding, the 1st Defendant went ahead to enclose a cheque for the sum of GH₵24,500.00 which was quoted in exhibit 'A'. The Plaintiff however, rejected the cheque enclosed by the 1st Defendant for the value of the shares; yet still, the Plaintiff, in exhibit 'E', stated that she wanted to be the majority shareholder and for that reason she was not prepared to accept the sum of money being given to her by the 1st Defendant. **The reasons indicated in the said exhibit 'E' reveals the true motive for the issuance of the instant writ of summons against the 1st Defendant; that is, to enable the Plaintiff recover the shares given to the 1st Defendant in order to pave way for the Plaintiff to become the majority shareholder.** Thus, the writ was not issued because the 1st Defendant had not paid for the shares acquired by him. As pointed out, above, an allegation that issued shares have not been paid for, without more, is not a good ground for a shareholder to lose his membership of the Company in which he holds the shares.

ORAL AND DOCUMENTARY EVIDENCE:

In the next ground of appeal, the Plaintiff/Appellant says that "*the Court of Appeal erred in preferring oral evidence to clear undisputed and uncontroverted documentary evidence.*"

Under this ground of appeal, Counsel submitted that exhibit 'A' was clear and unambiguous, however, the cases relied upon by the Court of Appeal were all cases relating mainly to the interpretation of agreements where the intention of the parties were not clear. It is the submission of Counsel that parties are bound by their agreement and are not permitted to lead evidence to contradict their agreement and that the Court of Appeal considered oral evidence to contradict the documentary evidence. Counsel says that the Court of Appeal admitted and relied heavily on contradictory facts/evidence to supplant the clear terms of exhibit 'A'. Counsel says the 1st Defendant/Respondent is estopped from denying the contents of the Company's Regulations, exhibit B, which shows that the Plaintiff/Appellant is the sole shareholder and exhibit 'A' by which the Appellant attempted to transfer shares to the Respondent but which attempt failed for lack of consideration and subsequent repudiation.

Counsel for the 1st Defendant/Respondent responded by submitting that "the crucial issue before the trial Judge was whether or not the consideration in exhibit 'A' had been satisfied as was the case with the Plaintiff or that the consideration ought to be taken as having been paid which was the case of the 1st Defendant/Respondent and the respective legal consequences flowing from both stances". Counsel stated that one of the main issues for consideration was whether or not the Plaintiff was justified in repudiating the agreement in exhibit 'A'.

The evidence on record shows that throughout the trial, the 1st Defendant in particular, contrary to the submission by Counsel for the Appellant, heavily relied on exhibit 'A' the Deed of Transfer to establish his case to the effect that exhibit 'A' represented the written aspect of an oral agreement which the two parties had entered into and by which the Plaintiff transferred seventy percent of the issued shares of the Company which she held

in trust for the 1st Defendant. Exhibit 'A', as already pointed out, bore no specific date for the payment of the cost of the shares legally transferred to the 1st Defendant. The evidence also shows that the Plaintiff never made any demand for payment to be made. The Company also, never made any demand for payment to be made either. Meanwhile, as soon as the Plaintiff wrote to the 1st Defendant, he immediately enclosed a cheque for the alleged costs of the shares transferred. The failure to accept the cheque was evidence of lack of good faith on the part of the Plaintiff given that, the Company was established by the 1st Defendant and entrusted to the Plaintiff to manage, a fact which the first Company Secretary as well as the first Chairperson of the Board of Directors of the Company admitted on the strength of having been told by the Plaintiff herself. From the foregoing therefore, it cannot be correctly argued that the Court of Appeal relied on oral evidence given by the 1st Defendant to contradict a written agreement in the nature of exhibit 'A'. On the other hand, the Court of Appeal rather upheld the terms of exhibit 'A'. With respect to exhibit 'B', the Company's Regulations, the Court of Appeal never relied on any oral evidence which contradicted same. The totality of the evidence on record shows that the shares held by the Plaintiff was held in trust for the 1st Defendant. The testimonies of DW1 and DW2 corroborated the case of the 1st Defendant, that the Company was formed by the 1st Defendant but he entrusted the shares thereof to be held in trust by the Plaintiff. According to DW1 and DW2, both of whom worked with the Plaintiff for several years, the Plaintiff herself confided in them that the Company, Pergah Transport Limited, belongs to the 1st Defendant. Indeed, the Company Secretary, DW1, was questioned as follows in respect of the consideration stated in exhibit 'A' which was the sole basis for the purported repudiation of exhibit 'A':

> *"Q. You see, from exhibit 'A' (the deed of transfer) that there is a consideration of a sum of 245 million old cedis. What do you have to say about that consideration?*

A. *If I may, Your Lordship, I will like to repeat what I told the Plaintiff on this matter. My lord, the Plaintiff never instructed me on this amount. And when I confronted her in the presence of her husband, she admitted that she never gave me those instructions. The Plaintiff herself had admitted the ownership of the Company by the 1st Defendant. This figure was inserted so the Deed of Transfer would not seem fictitious. My lord, I confronted her in the presence of her husband and she admitted it. She and I all know that the document was only formalizing an existing relationship over which she was the one who gave me instruction, i.e. the 70/30 percentage ratio".*

In considering the evidence of the parties, the Court of Appeal speaking through Bright Mensah J.A., stated, among others, in its judgment, on page 367 of the record that:

> *"To determine the intentions of the parties in this case, particularly exhibit 'A', I shall have regard to all the evidence both documentary and oral and make a finding on it as to preponderance of probabilities which of the two stories is more probable and preferable. That is common sense approach and that is justice. Justice because both parties to the case would have been offered the opportunity to be heard to avoid the court being accused of breaching the fundamental rule of natural justice. Now, having critically and painstakingly read and analyzed the evidence led in the case, the judgment of the learned trial judge, the submissions of both Counsel as well as cases cited to me, it is my judgment that the trial court was right in preferring the evidence of the respondent to the Appellant's, given the peculiar circumstances under the Company. Pergah Transport Limited was formed and the transferred shares to the Respondent registered. The reasons are not far-fetched."*

Counsel for the Plaintiff/Appellant referred to sections 25 and 177 of the Evidence Act, 1975, NRCD 323 and submitted that the Court of Appeal committed an error by determining the intentions of the parties outside exhibit 'A' because, according to him, exhibit 'A' is clear and does not lead to any ambiguity. Counsel referred to sections 25

and 177 of the Evidence Act and submitted that once parties have reduced their understanding into writing, oral evidence cannot be admitted to vary or add to the terms agreed upon by the parties. According to Counsel, the Court of Appeal relied on facts /evidence to supplant the clear provisions of documents including exhibit 'A'.

Section 25 AND 177 of the Evidence Act, 1975, NRCD 323 provides that:

> "25. Facts recited in written instrument
>
> (1) Except as otherwise provided by law, including a rule of equity, the facts recited in a written document are conclusively presumed to be true as between the parties to the document, or their successors in interest.
>
> (2) Subsection (1) does not apply to the recital of consideration."
>
> "177. Extrinsic evidence affecting the contents of a writing
>
> (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 those terms may not be contradicted by evidence of a prior declaration of intention, of a 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, but 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 of agreement; and
>
> (b) by a course of dealing or usage of trade or by course of performance.
>
> (2) Subsection (1) does not preclude the admission of evidence relevant to the interpretation of terms in a writing."

It will be noticed, right from the onset that recitals in a written agreement, as far as they affect, considerations stated in the agreement are not conclusively presumed to be true as between the parties thereto or their successors under section 25 of the Evidence Act. Oral evidence is thus admissible, where appropriate, with regards to the consideration stated in a document executed by the parties thereto. Further, in both section 25 and 177 of the Evidence Act, the provisions stated therein are not absolute in so far as the very sections contain exceptions to the various provisions. Thus, under section 25 of the Act, a rule of law including a rule of equity may operate to render inconclusive, the facts recited in a written document even between the parties to the said document. So also, rules of equity may operate or permit oral evidence to be given to contradict the terms of a written agreement.

Equally, there is no law which prohibit a court, in evaluating evidence adduced by the parties before the court, from considering the oral testimonies of the parties just because documentary evidence had been tendered before the court. The rule of law is for the court to consider the evidence adduced by the parties, oral and documentary alike, and on the balance of probabilities, determine which of the opposing evidence is more probable than the other and, in all cases, leaning favourably towards the documentary evidence, if its integrity is established and at the same time it is shown that the oral testimonies are contradictory and unreliable. There is no rule of law that once documentary evidence had been given, the court must ignore the oral testimonies and adopt, hook line and sinker, the documentary evidence adduced. In **Duah vs. Yorkwa [1993-1994] GLR 217** the Court of Appeal explained the position of the law to the effect that:

> "Whenever there is in existence a written document and oral evidence over a transaction, the practice in this court is to consider both the oral and the documentary evidence and often to lean favourably towards the documentary

evidence, especially where the documentary evidence is found to be authentic and the oral evidence conflicting"

The established evidence before the trial High Court was that the Company in question was established by the 1st Defendant but because at the material time, he was the Managing Director SSB Bank, he entrusted both the registration and the management of the Company to the Plaintiff in this matter. The 1st Defendant provided the funds for the registration and the capitalization of Pergah Transport Limited and this fact was known to the Company Secretary as well as the Chairperson of the Board of Directors. It follows therefore that the Plaintiff held the shares in the Company in trust for the 1st Defendant. Trust is a rule of equity in respect of which evidence could be adduced to show that notwithstanding the terms of a writing between two parties and notwithstanding the fact that the legal estate in property is expressed in writing to beholden in one party, the factual and true situation is different, in that, the beneficial interest yields to a different party whose name may be completely absent from the terms in the writing. **In re Koranteng (Decd); Addo vs Koranteng & Others [2005-2006] SCGLR 1039**, this court speaking through Dr. Date-Bah on page 1054 stated the position as that:

"In essence, a resulting trust, in this context, is a legal presumption made by the law to the effect that where a person has bought property in the name of another, that other would be deemed to hold the property in trust for the true purchaser. It is a trust implied by equity in favour of the true purchaser or his estate, if he has died. The trust is regarded as arising from the unexpressed or implied intention of the true purchaser. Obviously, though, for such a resulting trust to be implied, certain factual preconditions must exist and the issue is whether on the facts of the current case a resulting trust may validly be implied"

In **re Fianko Akotuah (Decd.); Fianko &Another vs Djan & Others [2007-2008] SCGLR 165**, this court again expressed itself on the principles of resulting trust as follows:

> It is settled law in equity that the trust of a legal estate, whether freehold, copyhold or leasehold; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name or several, whether jointly or successive, results to the man who advances the purchase money. In such cases, the provider of the purchase-money or the true owner in equity is not estopped from averring and proving that to be the truth of the transaction; neither can they be estopped from relating the real truth known to them at the time of making the statement. In such circumstances, a person with his own equal and clear knowledge to the contrary, cannot contend at common law or in terms of section 26 of the Evidence Decree, 1975, NRCD 323 that the other party in question has, by his own statement, act or omission, intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon such belief. Clearly, section 26 does not apply to such situations.

As stated above, where there is evidence of a trust or any rule of equity to the contrary, both sections 25 and 177 of the Evidence Act, 1975, NRCD 323, permits such evidence to be adduced in order that the truth of the transaction will be laid bare and known and the fact that the parties have entered into an agreement which speaks to the contrary is no ground to disallow such evidence from being received. The reason is to prevent parties from reaping where they have not sown. Equity will not suffer a wrong to be without a remedy. Therefore, in the face of such overwhelming evidence as to the establishment of the Company in this matter, it is no answer, for Counsel to say that the Court of Appeal relied on oral evidence as opposed to documentary evidence or that the Court of Appeal failed to consider documentary evidence in coming to its conclusion. The Court of Appeal was right in considering both the oral and documentary evidence adduced by the parties in coming to its conclusion which we have no cogent reason to disturb.

ACTION STATUTE BARRED:

Next, the Plaintiff/Appellant argues that the *"Court of Appeal, erred when it held that the action of the Appellant was statute-barred; which holding was contrary to the evidence and facts on the record"*.

It has been submitted under this ground of appeal, on behalf of the Plaintiff/Appellant that the Plaintiff does not rely on exhibit 'A' for any claim against the 1st Defendant and that it is rather the 1st Defendant who relies on exhibit 'A' for his claim to shares in the Company. Counsel says the Plaintiff relies on facts contained in exhibit 'A' but does not claim any relief from exhibit 'A' and that "a party is not caught by statute of limitation for relying on facts contained in a document no matter how old the document is. The issue of limitation arises if the party claims a right that accrued under the agreement." Counsel submitted that in an action on contract, time starts to run from the date of the breach. Counsel submitted that the Plaintiff's action is for the confirmation of the rescission or repudiation of the contract resulting from the 1st Defendant's failure to pay for the shares. Counsel says the rescission took place on the 23rd March 2011 by exhibit 'C'. By the claims of the Plaintiff, according to Counsel, the question of limitation does not arise at all.

Counsel argues that since exhibit 'A' does not specify when the payment was to be done, a reasonable time was required for the performance of obligations thereunder and that being so, the contract cannot be said to be statute barred.

In response, Counsel for the 1st Defendant/Respondent says that exhibit 'A', the contract between the Plaintiff and the 1st Defendant, was executed on the 1st January 2004. The 1st Defendant says that the Plaintiff seeks to repudiate exhibit 'A' by virtue of the alleged lack of payment of consideration. According to Counsel for the 1st Defendant, "the actual effect of all the averments in the statement of claim as well as the reliefs sought in the instant action is to set aside the contract executed between the parties herein. Undeniably, the instant action was filed on 21st November 2021, almost eight (8) years after the contract

between the Plaintiff and the 1st Defendant. The specific time lapse between the date of execution of exhibit 'A' and the instant action is 7 years and 11 months." Counsel therefore submitted that "the instant action having been commenced 7 years 11 months after the accrual of a cause of action, same is statute barred"

At page 385 volume 3 of the record the Court of Appeal, stated, in respect of the issue of limitation as follows:

> "I have seriously looked at the evidence and submissions of both Counsel on the issue and the cases cited to us in that regard. I have no doubt in my mind that the agreement, the parties entered into in 2004 for the transfer of shares is a simple contract. That being so, if there was any breach, the affected party ought to have taken action within the statutory period of six years as stipulated by law. In the instant appeal, the evidence however is that it took the Appellant 7 years 11 months to mount her action. Undoubtedly, her action is caught by section 4 of NRCD 54 and therefore statute barred"

Section 4(1)(b) and (c) of the Limitation Act, 1972, NRCD 54 provides that:

> 4. Actions barred after six years
>
> (1) A person shall not bring an action after the expiration of six years from the date on which the cause of action accrued, in the case of
>
> (b) an action founded on simple contract;
>
> (c) an action founded on quasi-contract;

From section 4(1) of NRCD 54, the limitation kicks-in after six years from the date the cause of action accrued to the claimant. It is after 6 years had elapsed from the date the cause of action accrued that the claimant is prohibited from suing upon the contract. It is therefore very important that the date on which the cause of action accrued is correctly

ascertained before one could determine whether or not an action to enforce a simple contract is statute barred. In this vein, Brobbey JSC pointed out, at page 105, in **Ghana Commercial Bank Ltd. vs. Commission on Human Rights and Administrative Justice [2003-2004] SCGLR 91**, that:

> "NRCD 54, section 4 provides that no action founded on tort or simple contract shall be brought after the expiration of six years."

At page 107, Your Lordship continued that:

> "In the instant case, the cause of action accrued in 1984. Under section 4 of the Limitation Decree, 1972 the complainant has six years to institute an action to enforce his rights. He took action by lodging the complaint with the commission in 1993, nine years later. Therefore, by the time he took action on the complaint at the commission and the commission made its decision or recommendation and referred it to the High Court for enforcement, section 4 of the Decree had barred the enforcement by the High Court. The remedy barred by law could not by any stretch of the imagination or strength of argument be described as remedy available in the High Court of justice, like the High Court in the instant case."

Indeed, the accrual of a cause of action is inextricably linked to a breach committed in either tort or contract or both as far as private law and rights are concerned. That is to say: until a complainant is able to show that his rights had been breached either in contract or tort it cannot be said that a cause of action had accrued to the complainant. It is the accrual of a cause of action that entitles a claimant or the person whose rights have been breached to bring an action in law or equity to seek remedy for the infringement of his rights. Hence, a cause of action cannot exist, in private law, without a breach of a right.

From the pleadings and the evidence on record, the case of the Plaintiff is anchored on an alleged failure by the 1st Defendant to honour his obligations under a contract executed

by the two persons for the transfer of seventy percent of the issued shares of Pergah Transport Limited to the 1st Defendant. The Plaintiff says that the 1st Defendant failed to pay for the cost of the shares transferred to him and for that matter, the Plaintiff claims to have repudiated the share transfer. An examination of the agreement, exhibit 'A' herein, however, shows that no date was specified therein within which the 1st Defendant was to pay for the shares. Exhibit 'A' was entered into on the 1st January 2004 whiles the instant suit mounted by the Plaintiff was filed on the 21st November 2011. For this reason, the Court of Appeal came to the conclusion that the Plaintiff's action is statute barred because the suit was filed 7 years 11 months after the execution of the contract. Indeed, this conclusion of the Court of Appeal presupposes that a cause of action accrued to the Plaintiff right from the very date that the contract was entered into. This cannot be right because there is no stipulation in the contract, exhibit 'A', which required the 1st Defendant to pay for the cost of the shares transferred on the very date the contract was executed or on any particular date thereafter. In other words, the parties failed to agree on a date or the period within which the 1st Defendant was required to perform the obligation of paying for the cost of the shares; the failure of which may entitle the Plaintiff, as it were, to repudiate the contract. In Chitty on Contracts (28th edition), Sweet & Maxwell (1999), the learned editors state at page 1109 at paragraph 22-020 that:

> "Where a party to a contract undertakes to do an act, the performance of which depends entirely on himself, and the contract is silent as to the time of performance, the law implies an obligation to perform the act within a reasonable time having regard to all the circumstances of the case."

In the instant matter, where the parties failed to agree on the time within which performance, that is: the payment for the shares was to be made, there is an obligation on the 1st Defendant to pay within a reasonable time after the execution of the contract. It is after the failure of performance by the 1st Defendant within a reasonable time that a

breach could be said to have occurred and consequently a cause of action may be said to have accrued to the Plaintiff. In the instant matter, the Court of Appeal failed to indicate when the breach occurred consequent upon which the cause of action accrued to the Plaintiff. Without first, establishing the date that the breach occurred it is impossible to state when the cause of action accrued and consequently, one cannot say that the Plaintiff instituted her action after the expiration of the six years given under section 4(1) of the Limitation Act. The finding by the Court of Appeal in this respect is therefore not supported by the law and same is therefore set aside.

Nonetheless, we agree with the finding by the Court of Appeal, which concurred the finding by the trial Judge that the Plaintiff/Appellant, on the preponderance of probabilities, failed to prove her claim against the 1st Defendant. We also agree with the finding by the Court of Appeal, which again, concurred the finding by the trial High Court that the 1st Defendant, on the balance of probabilities, succeeded in proving his counterclaim against the Plaintiff in this matter. Indeed, as stated in **Hydrafoam Estate Ltd. vs. Kumnipa & Agyeman [2017-2020] SCGLR 255**;

> "Where findings of fact had been made by a trial court and concurred in by the first appellate court, the second appellate court, that is, the Supreme Court, must be very slow in coming to different conclusions. However, where the second appellate court was satisfied that there were strong pieces of evidence on the record of appeal which appeared manifestly clear that the findings of the trial court and the first appellate court were perverse, depart from those findings and conclusions. In such instances, the advantages that a trial court derived from the observations of the demeanour of the parties and witnesses which appeared before it, must be taken into consideration by the Supreme Court in the assessment of the evidence."

In **Oduro vs. Graphic Communications Group Ltd [2017-2018] 2 SCLRG 112**, this court held that:

> "The Supreme Court, as a second appellate court, cannot substitute its own views for that of the courts below, even if the court would have reached a different conclusion on the same facts. The Plaintiff failed to demonstrate to the court where the trial court went wrong in the evaluation of the evidence on record. The fact that the courts below rejected the Plaintiff's account or version of the evidence is not a good or sufficient reason for the Supreme Court to intervene and substitute its views for that of the courts below. On the available evidence before the trial court it was entitled to accept the defendant's version on the balance of probabilities. And even if the standard of proof required was one beyond reasonable doubt, the evidence was sufficient to satisfy that standard, but this was not the required standard of proof in this case. The courts below were right on the matters of fact…"

We must state that the observations made in the two cases quoted above fits and applies to the facts of this case. Apart from the conclusion by the Court of Appeal that the action instituted by the Plaintiff is statute barred, which finding we have set aside, we agree with the findings of fact and conclusions made by the trial judge on the issues of the shareholding structure between the Plaintiff and the 1st Defendant herein which were concurred in by the Court of Appeal and we have no reason to interfere with the said findings and conclusions. We proceed to dismiss the Plaintiff's appeal and affirm the judgment of the Court of Appeal.

CONSEQUENTIAL ORDERS:

In view of the above holdings, the following consequential orders are made:

1. This court hereby declare that the 1st Defendant is the legal and beneficial owner of 70% percent of the issued shares of Pergah Transport Limited totaling 7,000,000 shares.
2. We hereby restrain the Plaintiff/Appellant/Appellant herein from holding herself as the sole shareholder of Pergah Transport Limited.
3. The order that the Plaintiff/Appellant/Appellant accounts to the 1st Defendant herein is hereby set aside since accounts are rendered by management to members of the Company at the annual general meetings.
4. The court awards to the 1st Defendant against the Plaintiff/Appellant/Appellant the sum of GH₵20, 000.00 as damages for breach of trust.

S. K. A. ASIEDU

(JUSTICE OF THE SUPREME COURT)

P. BAFFOE-BONNIE

(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

I. O. TANKO AMADU

(JUSTICE OF THE SUPREME COURT)

B. F. ACKAH-YENSU (MS.)

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