

IN THE SUPERIOR COURT OF JUDICATURE. IN THE HIGH COURT
OF JUSTICE (COMMERCIAL DIVISION) ACCRA HELD ON FRIDAY
THE 17TH DAY OF FEBRUARY, 2023 BEFORE HER LADYSHIP JUSTICE
AKUA SARPOMAA AMOAH (MRS.)

SUIT NO.: CM/BDC/0523/2018

KWAW PAINTSIL ANSAH - PLAINTIFF

VRS

GROUP IDEAL - DEFENDANT

PARTIES: ABSENT

**COUNSEL: PATRICK DANSO HOLDING BRIEF FOR FRANK
DAVIES FOR PLAINTIFF – PRESENT**

COUNSEL FOR DEFENDANT – ABSENT

J U D G M E N T

INTRODUCTION

The background to this dispute may be summarized as follows: The Plaintiff is the Chief Executive Officer of Film Africa (Film Africa), a

company incorporated under the laws of Ghana. The Defendant is also a Ghanaian registered Limited liability Company.

On the 10th of August, 2016, Film Africa (as Seller) acting by the Plaintiff and the Defendant (as Purchaser) acting by its President Nii Kotei Dzani entered into an “Agreement of Sale and Purchase of Shares” owned by the Seller in Television Africa Limited (TV Africa).

By the said agreement the Defendant purchased **632,400** of the said shares representing 60% of the Seller’s 94.88% ownership of issued shares of TV Africa. Attached to the said agreement was a Schedule of liabilities of TV Africa at the 31/07/16. The said Agreement was tendered in evidence by Plaintiff as *Exhibit A*.

By the terms of *Exhibit A*, the price payable for the said shares was *One Million United States Dollars (US\$1,000,000.00)* which was to be paid for by the Defendant directly to the Seller as follows; an initial commitment payment of *Five Hundred Thousand United States Dollars (US\$ 500,000.00)* upon execution of *Exhibit A* and a final payment of *Five Hundred and Thousand United States Dollars (US\$ 500,000.00)*, Sixty (60) days after the payment of the initial amount.

The terms of *Exhibit A* further required the Defendant to conduct due diligence into the affairs of TV Africa within 30 days after the initial commitment payment and thereafter issue a “Notice of Satisfaction of Due Diligence” if such due diligence was satisfactory to Defendant. Thereafter the Defendant was to take over management of the TV Africa.

PLAINTIFF'S CASE

I must state at the outset that the inconsistencies inherent in the pleadings in Plaintiff's Statement of Claim initially rendered his case rather confusing. I say so because the Plaintiff appeared to be swinging between two assertions which in my view could not be made in the alternative or interchangeably- that is, the claim of the said loans having been advanced to Film Africa on the one hand and the same having been advanced to TV Africa on the other. The fact that each of the said companies has a separate legal persona is a principle that is so well- received that I find no need to cite any authorities in support of same.

My confusion was indeed heightened by the Reliefs endorsed on the Plaintiff's Writ of Summons since they were sought against Film Africa and not TV Africa.

This confusion was however laid to rest by the Plaintiff's Reply and Defence to Counterclaim filed on the 8th of February, 2019, which explained that this error was inadvertent and that the beneficiary of the said loans was TV Africa and not Film Africa.

Now, according to Plaintiff, the Defendant has long taken over the management of TV Africa but has reneged on its obligations to Plaintiff under *Exhibit A*. Plaintiff points this Court to the fact that attached to *Exhibit A* was a Schedule of Liabilities of TV Africa which itemized various sums in the Director's current account, specifically the sums of *Six Hundred and Thirty-Two Million United States Dollars (US\$ 632,000.000), Two*

Hundred and Fifty-Four Thousand Seven Hundred and Forty-Two United States Dollars Sixty-One Cents (US\$ 254,742.61), and Three Hundred and Eighty-Six Thousand Eighty Hundred and Twenty-Eight United States Dollars and Seven Cents (US\$ 386,828.07).

The respective sums, according to Plaintiff were loans that he personally advanced to TV Africa to shore up its “capital adequacy requirements.”

Plaintiff says the Defendant has always been aware of the financial obligations owed him by TV Africa as the director’s current account was acknowledged by its new management in the minutes of a meeting held by the TV Africa Sub-Committee held on the 24/ 07/17. These minutes were tendered in evidence by Plaintiff as *Exhibit B*.

Exhibit C series also show that after Plaintiff’s unsuccessful attempts at recovering the said sums from the Defendant, certain correspondence passed between the Parties’ lawyers. However their dispute could still not be resolved.

Plaintiff avers that the failure or refusal of the Defendant to settle liabilities owed him after having taken over the management of TV Africa, constitutes a breach of contract. He laments that Defendant’s conduct has caused him inconvenience, embarrassment and financial loss. Hence his present suit praying inter alia for;

- a) *A declaration that the failure, neglect and/ or refusal of the Defendant to pay Plaintiff the outstanding liabilities comprised of Directors current*

account (i.e loans advanced to Film Africa Limited acting by its chief executive Kwaw Painstil Ansaah seller of 94.88% holding of the issued shares of Television Africa Limited i.e. Film Africa Ltd) and Groupe Ideal (acting by its president , Nii Kotei Dzane) purchaser of 632 400 of ordinary shares owned by the seller in Television Africa Limited representing 60% of the shareholding of ownership in Film Africa Limited) is a breach of contract.

- b) An amount of **Eight Hundred and Eighty-Six Thousand, Seven Hundred and Forty-Two Ghana Cedis Sixty-One Pesewas (GH¢ 886,742.61) & Two Hundred and Fifty-Four Thousand, Seven Hundred and Forty-Two Ghana Cedis and Sixty-One Pesewas (GH¢ 254,742.61)** same being the aggregate of monies advanced by the Plaintiff to Film Africa Limited contained in the schedule of liabilities attached to the agreement of purchase & sale of shares and owed to Plaintiff as at the 31/ 07/2016.*
- c) Interest on (b) above at the prevailing bank rate and/ or commercial lending rate from the 31/07/16 continuing and until date of payment.*
- d) An amount of **Three Hundred and Sixty-Eight Thousand Eight Hundred and Twenty-Eight United States Dollars Seven Cents (US\$368,828.07)** same being monies advanced by the Plaintiff to Film Africa contained in the schedule of liabilities attached to the agreement of purchase and sale of shares and owed to the Plaintiff as at the 31/ 07/ 16.*

e) *Interest on (d) above at the prevailing bank and/or commercial lending rate of interest from the 31/07/2016.*

f) *Damages for breach of contract.*

DEFENDANT'S CASE

Plaintiff's suit was met with a stout Defence. Defendant does not deny executing *Exhibit A*, however its basis for disputing the Plaintiff's claim, in sum, is this:

A reading of *Exhibit A* particularly *Clause 4 (1) (o)* will show that the purpose of the Schedule of Liabilities attached to *Exhibit A* was to warrant to Defendant (as Purchaser of shares of Tv Africa) that the said company had no other liabilities aside those set out in the said schedule. It had nothing to do with liabilities owed the Plaintiff personally. Defendant therefore claims that it was surprised to find out subsequently that the term sheet set out in Schedule 1 of *Exhibit A* included liabilities for which the "Plaintiff is personally responsible" instead of liabilities owed by Tv Africa. This the Defendant says smacks of fraud.

Particulars of fraud pleaded by Defendant included the following;

- a) *Representing to the Defendant that the list of liabilities set out in the schedule to **Exhibit A** were liabilities of TV Africa Ltd when Plaintiff knew same to be false.*
- b) *Deliberately including in the attached schedule liabilities owed 'by' the Plaintiff contrary to the express terms of **Exhibit A** without drawing the Defendant's attention to same.*

Defendant contends that a careful reading of **Exhibit A** will in any event, reveal that the inclusion of Plaintiff's "personal liabilities" is clearly incongruent with the provisions of **Exhibit A** and that it was not the intention of the Parties that the Defendant be responsible for Plaintiff's personal liabilities but those of TV Africa. Consequently Defendant counterclaims for rectification of **Exhibit A**.

ISSUES FOR TRIAL

Having failed to resolve their dispute upon further attempts made at the Pre-Trial Settlement Conference, the following issues were settled for determination at trial of the suit:

1. *Whether or not the Plaintiff was a party to the contract of sale and purchase of shares of TV Africa Limited, executed between Film Africa Limited as a seller of the shares of the one (1) part and the Defendant as Purchaser of the other part on 10th August, 2016?*

2. *Whether or not the schedule of liabilities attached to the purchase and sale of Shares Agreement between Film Africa Limited and Groupe Ideal on 10th August, 2016 forms part of the Agreement?*
3. *Whether or not the Plaintiff has capacity to sue Defendant on the said Agreement?*
4. *Whether or not Plaintiff has a cause of action against Defendant arising from the said contract?*
5. *Whether or not under the said contract Defendant's contractual obligations exceeded payment of the purchase price of the shares (i.e. 632,400 shares of TV Africa Limited being 60% shareholding of TV Africa Limited) which price was **One Million United States Dollars (US\$ 1,000,000.00.)**?*
6. *Whether or not Plaintiff advanced an amount of **Eight-Six Thousand, Seven Hundred and Forty-Two Ghana Cedis, Sixty-One Pesewas (GH¢886,742.61)** (i.e. **Six Hundred and Thirty-Two Thousand Ghana Cedis (GH¢ 632,000.00)** plus **Two Hundred and Fifty-Four Thousand, Seven Hundred and Forty-Two Ghana Cedis, Sixty-One Pesewas (GH¢254,742.61)** and **Three Hundred and Eighty-Six Thousand, Eight Hundred and Twenty-Eight Dollars and Seven Cents (US\$386,828.07)** to Film Africa Limited same being the aggregate of monies contained in the schedule of liabilities attached to*

the Purchase and Sale of Shares Agreement? (i) If so, whether those transactions were done in good faith for and on behalf of TV Africa Limited by Plaintiff?

7. *Whether or not the Director's current account in the schedule of liabilities attached to the Purchase and Sale of Shares Agreement is the personal liability of the Plaintiff and does not form part of the liabilities of TV Africa Ltd as at 31st July, 2016?*

8. *Whether or not the transactions between Plaintiff in his capacity as Shareholder and Chief Executive Officer of TV Africa Limited of the one (1) part and TV Africa Limited of the other part which led to the liabilities, the basis of Plaintiff's suit were enforceable against TV Africa Limited?*

9. *Whether or not the Defendant's failure, neglect and/or refusal to pay the outstanding liabilities on the Director's current account constitutes a breach of the Purchase and Sale of Shares Agreement executed between the Parties on 10th August, 2016.*

10. *Whether or not the Defendant having conducted due diligence as expressly stipulated under Clause 3 of the Purchase and Sale of Shares Agreement and executed same with the schedule of liabilities attached is estopped by its own contract, deed and representation from denying the outstanding liabilities owed Plaintiff?*

11. *Whether the Plaintiff is entitled to his claims against the Defendant?*

Having carefully examined the record, it is my view that issues 1 to 5 suffice to dispose of this suit.

EVALUATION OF EVIDENCE

In my opinion, proof in this case should ordinarily not present much difficulty. I say so because each Parties' case turns on the interpretation to be placed on *Exhibit A*.

As in every civil suit, the Plaintiff's was required to prove his case on a balance of probabilities. See *Sections 12* of the *Evidence Act, 1975 (NRCD 323)*. Plaintiff's pleadings and evidence will therefore be examined in my quest to determine whether this standard of proof was met.

CAPACITY OF PLAINTIFF TO SUE ON EXHIBIT A

The issue which lies at the heart of this suit is whether or not the Plaintiff has capacity to sue on *Exhibit A*. It is trite that want of capacity strikes at the very root of an action. It is also the general principle that it is only a party to a contract can sue on it.

Consequently, a finding that Plaintiff lacks capacity to sue on *Exhibit A* should mark the end of his case. This is because capacity, it is said "is not

concerned with the merits” of a party’s case. See the case of *FOSUA & ADU-POKU v DUFIE (DECEASED) & ADU-POKU MENSAH* [2009] SCGLR 310

The Defendant’s case is that the Plaintiff being a stranger to *Exhibit A* has no capacity to mount the instant suit to enforce any rights or obligations arising thereunder. It is evident that the Defendant relies on the doctrine of privity of contract to resist Plaintiff’s claim. This doctrine seeks to exclude persons from enforcing the terms of a contract to which they are not parties. The rationale behind this doctrine is not too hard to discern. As noted by *Date – Bah S.K* (as he then was) in his article titled “*The Case for the Enforceability of Third Party Contractual Rights* [1971] Vol. VIII 2 UGLJ 76-79 the doctrine exists to ensure that a contracting party deals only with persons he has voluntarily chosen to deal with. In the absence of this doctrine, unforeseen persons otherwise described as “incidental beneficiaries” could emerge to claim or sue a contracting party on some benefit that they could or would have received had that contracting party performed his side of the bargain.

The Plaintiff however maintains in the written address filed by Counsel on his behalf that *Exhibit A* confers a benefit on him which by law clothes him with capacity to sue on same.

Yes, I accept that *Section 5* of the *Contracts Act, 1960 (Act 25)* provides that;

“Any provision in a contractwhich purports to confer a benefit on a person who is not a party to the contract, whether as a designated person

or as a member of a class of persons, maybe enforced or relied upon by that person as though he were a party to that contract."

However, for a person to successfully sue on a contract to which he is not a party, that person must demonstrate that he was an intended beneficiary and not an incidental one. In other words it must be clear from the terms of the contract itself that the parties to the contract had this third party within their contemplation at the time the contract was made. The views expressed by the *Christiana Dowuona Hammond* in her elucidating book on the "*Law of Contract in Ghana*" may be of some enlightenment here.

Referring to the memorandum to the *Contracts Bill, 1960 @ page 180* of her book the learned author explains that;

".....section 5(1) of the Act does not apply merely because a contract in fact confers a benefit on a third person". In other words, the fact that the third-party claimant stands to gain some benefit from the contract is not sufficient. It must be established that the parties to the contract in fact contemplated benefitting the third party and that such intention is evident in the contract..."

This Court is therefore faced with the task of ascertaining whether *Exhibit A* on its face, discloses that the parties to the contract had the Plaintiff within their contemplation as someone upon whom they intended to confer some right or benefit.

First, it is important to note that one cardinal rule of construction is that a document must be read as a whole in order to gather its true meaning and effect. With this prelude in mind, I must say I consider the caption of *Exhibit A* quite instructive. It is described simply as an “*AGREEMENT FOR THE PURCHASE AND SALE OF SHARES*”. This fact is further reinforced by the wording of *Clause 1.1* which clearly discloses under the sub-heading “*SUBJECT- MATTER*” that the subject matter of *Exhibit A* is an agreement between the Seller to sell and the Purchaser to buy **632,400** of the ordinary shares owned by the Seller in “the Company” being TV Africa Ltd and no more. There is no provision in *Exhibit A* that requires any payment to be made to the Plaintiff by any of the parties to the contract.

Indeed the combined effect of *Clauses 2.1* and *3(v)* is that the only payments to be made by the Defendant under *Exhibit A* was to Film Africa in respect of the shares purchased. Nowhere is it stated that the Defendant becomes liable to pay debts owed the Plaintiff by virtue of having purchased shares in TV Africa.

This position indeed finds statutory backing under *Section 37* of the repealed *Companies Act, 1963 (Act 179)* i.e. the statute in force at the time *Exhibit A* was executed. The relevant provisions provided that;

“37. Liability of members

- a) In the event of a company being wound up every present or past member is liable to contribute to the assets of the company to an*

amount sufficient for payment of its debts and liabilities and for the costs, charges and expenses of the winding up and for the adjustments of the rights of the members and past members among themselves but subject to the following qualifications:

b) In the case of a company limited by shares, a contribution shall not be required from a member or past member exceeding the amount unpaid on the shares in respect of which that member is liable as a present or past member...

6) Except as otherwise provided in this section, a member or past member of a company is not liable as member or past member for any of the debts or liabilities of the company."

The position in Ghana remains the same under the current *Companies Act, 2019 (Act 992)*

Consequently all a shareholder of a company is required to pay for is the value of shares he acquires, in accordance with the terms of agreement under which the said shares were issued.

In the instant case, the terms are clearly set out in *Exhibit A* which terms certainly do not impose a liability on the Defendant to pay the Plaintiff for loans advanced to TV Africa. The said loan even if indeed granted to TV Africa remains the debt of TV Africa. It is only upon winding up that the obligation imposed on members to contribute to the assets of the company

kicks in. Even then, it is clear that a member's liability by law is limited to the unpaid liability on the shares held by that member.

I should however not be understood to be saying, that the parties to this suit could not under any circumstance have entered into an agreement by which Defendant could have undertaken to be liable for the payment of the said loans. After all the law guarantees freedom of contract. But there is no evidence of such an agreement before me. Plaintiff's evidence therefore lacks the quality that justifies a finding being made in his favour.

On the other hand, I am persuaded by the Defendant's contention that the attached schedule of assets and liabilities were only aimed at giving Defendant (as investor) a clear picture of the commercial potential of TV Africa.

The phrase "*due diligence*" has been defined by the *Black's Law Dictionary* as;

"a prospective buyer's or broker's investigation and analysis of a target company, a piece of property or a newly issued security"

The text and the tenor of *Clauses 3 and 4 of Exhibit A* make it tolerably clear that the purpose of the schedule of assets and liabilities attached to *Exhibit A* was to apprise the Defendant of the viability of TV Africa. It is for this reason that the Defendant by *Clause 3.4(i)-(v)* reserved certain rights to Defendant which included the right to withdraw from the transaction if it found the information provided by the Seller to be misleading upon the

conduct of due diligence. It is also for the same reason that the Seller was required under *Clause 4 (o)* to undertake that there were no other liabilities pending against TV Africa as far as the Seller was aware.

The absence of any express provision requiring Defendant to pay the Plaintiff for loans allegedly advanced to TV Africa reinforces the view that I have formed that Plaintiff was not an intended beneficiary of *Exhibit A* and I so hold. Indeed Plaintiff does not even qualify as an Incidental Beneficiary in respect of *Exhibit A* for it is essentially a transaction between Defendant and another entity ie. Film Africa. His cause of action remains against TV Africa, the company he says he lent the monies to.

This conclusion reached should ordinarily mark the end of the Plaintiff's case as he has no right to approach this Court for judicial relief in respect of *Exhibit A* Nevertheless, I shall for the sake of completeness, briefly address other important aspects of the case.

EFFECT OF THE DEFENDANT TAKING OVER THE MANAGEMENT AND CONTROL OF TV AFRICA.

The point the Plaintiff seems to have overlooked is that the Defendant as shareholder is separate and distinct from management of the company. The failure to recognize this distinction appears to be what has bedeviled this case from the onset.

By *Section 137* of the repealed *Act 179* now *Section 144* of *Act 992*.

- 1) *“A company shall act through the members in general meeting or the board of directors or through officers or agents appointed by or under authority derived from the members in general meeting or the directors”*

The above –quoted section makes it clear that the primary organs of a company are the members in general meeting (shareholders) and the Board of Directors and the Managing Director who derives his authority from the Board or members in general meeting. I note that *Clause 5 (c) of Exhibit A*, vested Defendant with the management and control of TV Africa. But that was only by reason of its significant shareholding. The fact that Defendant was closely identified with management did not change the fact that management maintained a separate legal persona from the Defendant as shareholder.

Once the Defendant assumed the reins of management, its fiduciary duty was to the Company and not to any shareholder or to its appointor. In that capacity Defendant is seen as acting in the interest of the company and no other person.

Put differently, the fact of being the majority shareholder or being in charge of the day to day running of TV Africa did not or does not make Defendant personally liable for the payment of the debts of the said company. The debts of the company remain its debts as already noted, and the Plaintiff

(like any other creditor of the company) may take the necessary steps to vindicate his rights.

DEFENDANT'S COUNTERCLAIM

Turning to the Defendant's Counterclaim. I note that the Defendant, whether through error or otherwise continued to refer to "Plaintiff's personal liabilities" instead of the liabilities owed the Plaintiff. This is quite misleading as it is obvious from the record that the Plaintiff is before this Court in respect of liabilities allegedly owed him by TV Africa and not by him personally.

That said, it is my understanding that the equitable remedy of rectification is only available to a party where there is clear and convincing proof that there was a mistake in recording the parties' intention. Its purpose is not to improve the agreement or change or terms.

I must concede though that the said remedy may be granted where there is evidence of fraud. I however do not think that the Defendant led sufficient evidence to substantiate the allegation of fraud levelled against the Plaintiff. *See Section 13 of NRCD 323.*

My analysis so far, I believe, should make it obvious that I find no mistake in *Exhibit A* that should warrant a grant of this relief sought by Defendant.

DECISION

In the result both the Plaintiff's suit and Defendant's counterclaim are dismissed. However I see no reason why the Defendant should not be

entitled to costs. This is because it has been substantially successful, failing only on its demand for rectification of *Exhibit A*.

Accordingly, I award costs of *Ten Thousand Ghana Cedis (GH¢10,000.00)* in favour of Defendant.

(SGD)

AKUA SARPOMAA AMOAH (MRS)
JUSTICE OF THE HIGH COURT

Case referred to:

FOSUA & ADU-POKU v DUFIE (DECEASED) & ADU-POKU MENSAH
[2009] SCGLR 310

Statute referred to:

The Evidence Act, 1975 (NRCD 323).

Companies Act, 2019 (Act 992)

The Contracts Bill, 1960

The "Law of Contract in Ghana

The Contracts Act, 1960 (Act 25)

Stated Edition

Black's Law Dictionary

The Enforceability of Third Party Contractual Rights [1971] Vol. VIII 2
UGLJ 76-79

