IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - GHANA

CORAM: AKUFFO (MS), J.S.C(PRESIDING)

BROBBEY, J.S.C

ANSAH, J.S.C

ADINYIRA (MRS), J.S.C

ASIAMAH, J.S.C

CIVIL APPEAL

NO. J4/3/2008

12TH NOVEMBER, 2008

DANIEL SACKEY QUARCOOPOME.. PLAINTIFF/RESPONDENT/ APPELLANT

-VRS –

SANYO ELECTRIC TRADING & ANOR. .. DEFENDANTS/APPELLANTS/ RESPONDENTS

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JUDGMENT

ANSAH JSC.

This is an appeal against the judgment of the Court of Appeal dated the 1st day of March, 2007, dismissing the appeal by the appellant, hereafter called the plaintiff against the decision of the High Court dated 25th October, 2004.

The plaintiff, was a Director on the Board of Directors of the 2nd Defendant between 1974 and 2001.

The 1st defendant/appellant/respondent, hereinafter referred to as the 1st defendant, is a company incorporated under the laws of Japan and a Shareholder of the 2nd Defendant/appellant/respondent company, hereafter called the second defendant, registered under the laws of Ghana.

The plaintiff claims he was appointed by the 1st Defendant to serve as its representative or Director on the Board of the 2nd Defendant in 1974 after previously serving on the same Board as a nominee of the Government of Ghana between 1965 and 1972. Prior to the appointment, the plaintiff averred that he reached an oral agreement with a representative of the 1st Defendant, that he would be earning the same as he (the representative was earning) and this oral agreement was confirmed by Exhibit C purported to be a letter of appointment copied to the 2nd Defendant and the Government of Ghana, as a shareholder. It was signed by the Executive Managing Director of the 1st Defendant. Thereafter, the plaintiff served in that capacity on the Board of Directors of the 2nd Defendant Company till 2001 when he was relieved of his position by the 2nd Defendant upon the recommendation of the 1st Defendant.

In reaction the plaintiff sued the 1st and 2nd Defendants jointly and severally claiming the following:

1. Damages for breach of an oral contract made in or about June/July 1974, appointing the plaintiff Director to serve on the Board of Ghana Sanyo Company Limited and witnessed in writing by letter dated October 4th 1974, under and by virtue of which the plaintiff has worked and rendered services to the 1st and 2nd defendant companies as Director, from which the defendants have failed and refused to pay the plaintiff reasonable Director’s fees and lump sum remuneration as agreed.

Alternatively;

2. Adequate remuneration and compensation for services rendered to the defendants from 1974 to 2001 as Director on the Board of the 2nd Defendant company

3. Interest on the said amount at the prevailing bank rate.

The defendants denied reaching any oral agreement with the plaintiff and contended that Exhibit C was a mere ‘circular’. I shall presently set out the contents of Exhibit C in full for its full effect and weight to be made manifest in this opinion.

The trial court found that the plaintiff's action could not succeed in contract "due to the hazy and unclear terms of the oral agreement", but granted the alternative relief and, considering the claim in Quantum Meruit, awarded a tidy sum of ¢350,000,000.00 to the plaintiff.

On appeal to the Court of Appeal, the court set aside the award of the trial court for the alternative claim in quantum meruit because the court held it was unlawful and in clear contravention of section 194 of the Companies Code 1963, Act 179, (quoted below), and amounted to usurping the functions of members of the 2nd Defendant Company conferred by the same provision of the Code. The present appeal is from the judgment of the Court of Appeal dated 1st March 2007. The grounds of appeal relied upon and argued before us are that:

1. The judgment of the Court of Appeal is against the weight of the evidence before the court.

2. The decision of the Court of Appeal, that quantum meruit does not apply in the case of the appellant, when the court of appeal had itself agreed with the finding of the court below that the appellant was not appointed in the legally proper manner, but had rendered service as director to the respondents who also received benefit from that service, is per incuriam.

3. The Court of Appeal having itself set down the issue 'Whether quantum meruit applies to this case', failed to consider, the remedy of quantum meruit, its nature, its purpose and its effect, on the unanimous evidence, that in pursuance of whatever agreement there was, hazy or void, the plaintiff rendered invaluable service to the defendants.

4. The Court of Appeal failed to deal with the real issue between the parties, namely; 'whether the plaintiff was entitled to claim the value of the service rendered to the defendants.'

5. The Court of Appeal erroneously proceeded to consider the plaintiff's alternative relief not under quantum meruit but under the Companies' Code, particularly section 194 and thereby misdirecting itself in arriving at the erroneous conclusion that quantum meruit could not succeed.

6. The Court of Appeal erred in proceeding as if quantum meruit was in conflict with the Companies Code and therefore failed to appreciate that quantum meruit comes in where there is no contract or the contractual provisions as to remuneration are inapplicable..

7. The Court of Appeal, having taken cognizance of the defendants' evidence which was placed before the court below, that the directorship of the plaintiff was not a matter for dispute, erred in failing to consider what ought to happen to the invaluable services rendered by the plaintiff to the defendants, and thereby caused injustice in setting aside the judgment of the Court below.

The appellant filed the following additional Grounds of Appeal;

1. The judgment of the Court of Appeal is not supported by the evidence before the court below.

2. The Court of Appeal misdirected itself when it said, ".... The plaintiff claims that on his appointment to the 2nd Defendant Board in 1974, he served the 2nd Defendant till year 2001...." thereby, changing the plaintiffs cause of action from one of breach of contract appointing him a director to one of a director appointed under the Companies Code, and ignoring the evidence led before the court below.

3. The Court of Appeal seriously misdirected itself in thinking or assuming that because a man worked as a director, he was or must be or must have been a director, covered absolutely by the Companies Code and therefore the Companies Code applied to him, thereby loosing sight of the plaintiff's cause of action founded on breach of a contract which the trial judge found to be hazy.

4. The Court of Appeal misdirected itself in finding that the plaintiff was made a director against the overwhelming evidence to the contrary, found by the trial judge, and as a result, wrongly used the Companies Code to strangle and displace the common law and the remedy of quantum meruit.

The reliefs sought from this court were to set aside the judgment of the Court of Appeal, and to re-instate the judgment of the trial High Court.

It is discernible from the original and additional grounds of appeal that they encompassed the same grounds as they related to

(1) the weight of evidence,

(2) the position of the plaintiff appellant as a director of the company and

(3) the monetary payment made to the appellant on quantum meruit basis.

The grounds of appeal will be considered together in so far as it is convenient so to do.

It was necessary to state at this stage that certain facts were not in dispute, evidence having been sufficiently led in support thereof. They were that:

1 The plaintiff appellant rendered services to the defendant/respondent

company.

2 He rendered the service as a Director of the 2nd defendant/respondent

company.

3 That there were years that the Board of Directors of the 2nd

Defendant/respondent company, of which the plaintiff/appellant was a member, decided not to pay directors remuneration due to financial constraints in the company.

Throughout the total gamut of the record of proceedings, the fulcrum around which all issues revolved, is whether the unpaid plaintiff/appellant's remuneration for service rendered as a director of the respondent company was maintainable and if so, whether it was to be determined in Quantum Meruit or in accordance with Section 194 of the Companies Act, 1963, Act 179?

Needless to say the High Court resolved the issue in favour of the plaintiff, but the first appellate Court took a diametrically opposing view to that. The dominant issue is could the Court of Appeal have been right in so saying?

In this opinion, I shall consider first the issue relating to the position of the directorship of the plaintiff in the company. There was ample evidence that he acted as a Director of the defendant company for quite a long period of time and as stated above, in that capacity, he rendered services to and for the benefit of the company. But in spite of this the question is, was he duly appointed by the company into that position? This was largely a matter of law the answer lying squarely in the provisions of the Companies Code, 1963, Act 179.

Section 181 thereof provided on appointment of directors that:

"(1) No person shall be appointed a director of a company unless he shall prior to such appointment, have consented in writing to be appointed.

(2) The first directors of a company shall be named in the company's Regulations.

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

(5) Notwithstanding any provision in the company's Regulations, any casual vacancy in the number of directors may be filled by,

a) the continuing directors or director notwithstanding that their number may have been reduced below that fixed as the necessary quorum of directors; or

(b) by ordinary resolution of the company in general meeting:

Provided that,

…….(a) in exercising their power to fill such vacancy the directors shall observe the rules laid down in sections 203 and 204 of this Code and shall not appoint any person to be a director unless they have taken reasonable steps to satisfy themselves that he is a person of integrity and suitable to be a director of the company.

(b) if the casual vacancy so filled is one which, under the terms of the Company's Regulations, should be filled by an appointment by any class of shareholders, debenture holders, creditors, employees, or other persons, the director appointed by the continuing directors or by an ordinary resolution of the company in general meeting, as the case may be, shall cease to hold office so soon as any other director is duly appointed in accordance with the Regulations."

Apart from these legal provisions, the plaintiff relied on Exhibit C, made by Mr. E Kamuro, the Managing Director of the company, to prove that he was a director of the company. Portions of Exhibit C read:

"Dear Sirs,

We have pleasure to inform you that the management of Sanyo Electric Trading co. Ltd has appointed Mr. D.S. Quarcoopome as one of the Sanyo Directors on the board of Ghana Sanyo Electrical Mfg. Cop. Ltd. With effect from 1st October, 1974 in lieu of Mr. S Miyamoto the directorship of Japan Sanyo shall then consist of:

Mr. K Kamuro (Being acted by general manager),

Mr. D. S. Quarcoopome (newly appointed),

Mr. Y Shikatani (General Manager)."

By Exhibit C, the plaintiff was appointed a director of Sanyo Electric Trading Company, the first defendant respondent herein.

Construing the exhibit, the trial High Court judge said it was 'hazy and unclear', an observation which the Court of Appeal affirmed in its judgment.

It must also be borne in mind there was no evidence the plaintiff signified his consent in writing before he was appointed a director of the company. Neither was it shown that the appointment of the plaintiff as a director of the company was covered by the company's Regulations as required by section 272 of the Code. The Regulations of the company did not contain the name of

the plaintiff as one of the first directors: See paragraph 4 of Exhibit B, the Regulations of the company.

But, there was also the evidence of the DW 2 to consider; he said under cross-examination:

"Q Now you agree that exhibits D –D8 and 6-6J are all minutes of the company which shows (sic) that the Defendant was in Board of Directors of Sanyo Ghana Limited?

Ans. Yes I do not think Mr Quarcoopome's Managing Directorship is in dispute. Nobody is saying that Mr Quarcoopome was not a Director in Ghana Sanyo, so I feel a little disturbed about this."

Next to that, there were the pleadings and evidence of the defendants to consider; they pleaded that there was no oral contract to make the plaintiff a director, (see paragraph 9 of statement of defence), a point they continued to harp on in their evidence in court. The representative of the plaintiff herself admitted there was no ordinary resolution passed to appoint the plaintiff a director of the company.

The inference to draw from consideration of this welter of evidence was that the plaintiff was not 'duly' appointed a Director of the defendant company and the Court of Appeal decision that he was so appointed, was against the weight of evidence.

The position of the plaintiff that he was a Director of the defendant company was not to be inferred from only the fact that he worked for the company for such a long time that he could be called and treated as a Director under the Companies Code.

That the plaintiff was appointed a Director of the company was a positive fact that was capable of direct proof, by simply producing evidence on the existence of a resolution passed to that effect, and evidence of his prior written consent to be so appointed.

On the evidence there was no such written consent and the issue was could this requirement be dispensed with especially in the teeth of evidence that he did in fact serve as a Director in the company for that long period of time? The trial court found for the plaintiff that he was appointed a director of the second defendant company. The learned trial judge based her reasons for so holding on the facts that Exhibit C was written to the Ministry of Trade and Industry to inform the Directors of the 2nd defendant that plaintiff had been appointed to serve on the Board of Ghana Sanyo Manufacturing Company Limited by the defendant and had sat on the same board with Mr Funabashie for four years, that was, from 1970 to 1974 when he Funabashie recommended him to serve on the board as a representative of the first defendant company.

She found further support in first, Exhibit B, the Regulations of the company, that the Directors were appointed by ordinary resolution; though the Regulations did not say the plaintiff had in fact been appointed as a Director of the company. Second, the plaintiff did not claim end of service benefits for they were paid only to salaried workers or Executive Directors; the plaintiff did not fall into either category of persons in the company and thus did not qualify to be paid any end of service benefits.

The Court of Appeal upheld the fact made by the trial judge that the directorship of the plaintiff in the second defendant company was not in doubt, referring to the evidence of the representative of the defendants quoted above, and also the fact that the plaintiff rendered services to the company and evidently affirmed the trial court that the plaintiff was a Director of the defendant company..

Section 179 of Act 179 is relevant for our consideration whether or not the plaintiff was appointed a director of the company. The section read:

"179 (1) For the purpose of this Code the expression 'director' means those persons, by whatever name called, who are appointed to direct and administer the business of the company.

(2) Any person not being a duly appointed director of a company,

(a) who shall hold himself out or knowingly allow himself to be held out as a director of that company or

(b) on whose directions or instructions the duly appointed directors are accustomed to act,

Shall be subject to the same duties and liabilities as if he were a duly appointed director of the company.

Provided that nothing in this subsection contained shall be deemed to derogate from the duties or liabilities of the duly appointed directors, including the duty not to act on the directions or instructions of any other person.

(3) If any person, not being a duly appointed director of a company, shall hold himself out or knowingly allow such person to hold himself out, as a director of the company, such person or the company, as the case may be, shall be liable to a fine not exceeding one hundred pounds."

Thus, a person who had not been duly appointed a director of a company, (which was to say, in accordance with the legal provisions quoted above), but nevertheless acted or held himself out, or allowed himself to be held out as such director, committed an offence punishable by a fine prescribed by law. Can such a person be entitled to any remuneration for work done or services rendered by him? Such persons are commonly referred to as de facto directors. In Commodore v Fruit Supply Ghana Ltd [1977] GLR, 241, CA, the facts were that a non-shareholder of a company who had not been appointed a director of the company had functioned together with the Managing Director of a company, and had had his name allowed to be printed on the company's letter head as director, and transacted business on behalf of the company; it was held that even though the non-shareholder had not been appointed a director of the company, the trial judge ought to have held that on the facts, he had been held out as a director of the company and the company thereby estopped from denying that he was a director of the company.

Thus, applying the material holding in Commodore v Fruit Supply (supra) to the facts of this appeal, it was reasonable to say even if the plaintiff was not duly appointed a director of the company, he ought to have been considered a de facto director of the respondent company. The issue in this appeal was could such a director be held entitled to any remuneration?

The answer is provided in section 194 of Act 179 which provided that:

"(1) subject as hereafter provided in this section, the fees and other remuneration payable to the directors in whatsoever capacity, shall be determined from time to time by ordinary resolution of the company, and not by any provision in the Regulations or in any agreement, which provision shall be null and void.

(2). The fees payable to the directors as such shall be determined from time to time by ordinary resolution of the company and not in any other way (emphasis supplied).

(Regulation 66 of the regulations of the company (Ghana Sanyo Electrical Manufacturing Corporation Limited, Exhibit B, was couched in similar terms).

Section 185 (7) of Act 179 is also relevant in connection herewith as it provided that:

"Nothing in this section shall be taken as depriving any director who has a service agreement with the company of any right to compensation to which he is lawfully entitled under such agreement on the termination of his directorship or of any right to damages if his removal from his directorship constitutes a breach of such service agreement."

The trial judge held that the plaintiff was not entitled to claim 1 endorsed on his writ of summons but rather on quantum meruit, by which was meant "[Latin "as much as he has deserved"] 1 The reasonable value of services; damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship. 2. A claim of right for the reasonable value of services rendered….Quantum meruit is still used today as an equitable remedy to provide restitution for unjust enrichment, often pleaded as an alternative claim in a breach of contract case so that the plaintiff can recover even if the contract is unenforceable" see Black's Law Dictionary Eighth Edition p 1276 referred to in the judgment of the trial court.

It was significant to observe the lower courts were ad idem the plaintiff was entitled to some payment for services rendered to the company on the basis of quantum meruit.

In Hammond v Ainooson [1974]1GLR 176, an action for a sum of money for services rendered for work rendered for the benefit of the defendant, Abban J (as he then was), said at page 183 that:

"In any case, even if I had found that there had been no concluded and enforceable agreement between the parties as to the amount of allowance the plaintiff was to receive for her services during the time the boat was under repairs, or for the other services during the time the boat was under repairs, or for the other consideration supplied by her, I would still have held that the plaintiff could recover on quantum meruit basis for the value of the benefit she conferred on the defendant and the defendant accepted. The principle is that where a person rendered services in pursuance of a transaction, supposed by him to be a contract, but which in truth is without legal validity, he can recover for the value of his services In quantum meruit….The implied obligation to pay reasonable remuneration is a obligation imposed by law and not an inference of fact arising from the performance and acceptance of the services: see Craven-Ellis v Canons, Ltd [1936] 2 K.B 403, CA. Greer L.J., delivering his judgment in that case said at page 410:

"This would certainly be strictly logical if the inference of a promise to pay on a quantum meruit basis were an inference of fact based on the acceptance of the services or of the goods delivered under what was supposed to be an existing contract; but in my judgment the inference was not one of fact, but is an inference which a rule of law imposes on the parties where work has been done or goods have been delivered under what purports to be a binding contract but was not so in fact."

I fully endorse and approve of the dictum by Abban J (as he then was), in Ainooson's case (supra) and allow myself to be persuaded by Craiven-Ellis just as the Court of Appeal was. I must be quick to admit that though, Ainooson was not a company law case, the principle on Quantum meruit was well stated therein.

The dominant issue was whether the trial court was justified in law in awarding the colossal sum of ¢350, 000,000.00 (three hundred and fifty million cedis) to the plaintiff in quantum meriut. The court sought to justify the award in the following terms:

"The essential elements of recovery under quantum meruit are 1 valuable services were rendered or materials furnished, 2 for persons sought to be charged, 3 which services and, materials were accepted by persons sought to be charged, used and enjoyed by him, and 4 under such circumstances as reasonably notified person sought to be charged that the plaintiff, in performing such services was expected o be paid by the person sought to be charged. Montes v Naismith & Trevino Const. Co. Text Civ. App. 459 SW Sd 691, 694."

The Court of Appeal was of the view that:

"The law on the issue to be resolved by this appeal is that fees or other remuneration payable to directors are to be determined by ordinary resolution of the company and not by any provision in the company's Regulations or in any agreement."

Furthermore the court held that the consequential award to the plaintiff in quantum meruit offended the clear provisions of section 194 of the Companies Code (quoted above) for it amounted to usurping the functions of members of the 2nd defendant company. There being no evidence that such a resolution has ever been passed by the company, the trial judge erred in deciding to remunerate the plaintiff for services rendered to the second defendant in his capacity as a director.

It was for this reason that the Court of Appeal concluded that the trial judge erred in its judgment and set it aside.

It must be pointed out that In granting the alternative claim as she did, the trial judge was bound to advert her mind to the provisions of the Company's Code which obviously governed the issues at stake, especially when it came to remunerations for the plaintiff for services rendered the company and his director's fees which she said were not controverted. The trial judge asked in her judgment:

"Now having established that the plaintiff was entitled to be remunerated for his services rendered the question is how is he entitled to?"

She should have adverted her judicial mind to the provisions of the Company's Code that regulated all relevant issues in the alternate claim she was

considering; to be very precise, section 194 (1) and (2) on remuneration for directors.

It is curious why the learned trial judge did not make any reference whatsoever to this legal provision or cast a glance to the Company's Code for assistance and guidance. Her judgment was per incuriam, to say the least. The penalty was that such a judgment would be interfered with and set aside on appeal which the Court of Appeal did.

An appeal to this court is by way of rehearing and the court will examine the record including the judgment of the trial court to see how justified the judgment of the first appellate court, to wit the Court of Appeal was. If the trial court had looked at the provisions in the Companies Code its judgment in all probability would have been different. It did not and that influenced it to usurp the functions reserved for resolution by the company.

In the result, I am of the opinion that the judgment of the Court of Appeal was right and ought to be preferred to that of the trial court. I affirm the judgment of the Court of Appeal that the judgment of the trial court was clearly in contravention of Section 194 of the Companies Code and pro tanto unlawful, unjustified ought to be affirmed by this court.

The appeal is dismissed.

J.

ANSAH

(JUSTICE OF THE SUPREME COURT)