+IN THE SUPREME COURT OF JUDICATURE
IN THE SUPREME COURT OF JUSTICE
ACCRA - GHANA

CORAM: **BROBBEY, JSC (PRESIDING)**
ADINYIRA (MRS), JSC
YEBOAH, JSC
GBADEGBE, JSC
AKOTO-BAMFO (MRS), JSC

CIVIL APPEAL

SUIT NO. J4 /7 / 2010

22ND JUNE, 2011

DACHEL & COMPANY LIMITED - - - PLAINTIFF/RESPONDENT

VRS

FRIESLAND FRICO DOMO - - - DEFENDANT/APPELLANT

now known as FRIESLAND FOODS BV.

J U D G M E N T

ADINYIRA (MRS), JSC:

This is an appeal from the judgment of the Court of Appeal delivered on 4 February 2011 affirming the judgment of the High Court Accra dated 7 March 2001 entered in favour of the Plaintiff /Respondent / Respondent

(hereinafter referred to as the Plaintiff) against the Defendant/Appellant/Appellant (hereinafter referred to as the defendant).

The real issues in this appeal border on the lapse in procedure in Order 2 r.4 of the High Court (Civil Procedure) Rules, 1954 (LN 140A) and the award of compensation for termination of an agency agreement. The facts of the case narrated in this opinion would therefore be centred on what relates to these issues.

The Plaintiff a company incorporated under the laws of Ghana was in 1978 appointed, in terms of an agency agreement Exhibit A, the sole agent in Ghana of the branded products of Pierson Munier & Company (PMC), a company incorporated under the laws of the United Kingdom. In 1980, the Defendant took over PMC and retained the Plaintiff as its agent. The parties executed a document, Exhibit B, dated 31 July 1980, by which Exhibit A was varied by changes in the brand name of products named in the agreement and by the introduction of a 90 day written notice requirement for the termination of the agreement. Mr. Hendrik Anno Vanderveen a legal adviser to the defendant company who represented the Defendant at the hearing admitted in cross-examination that Exhibit A was validated by the Defendant. Some of the branded products were Peak Milk, Dutch Baby Food and Frisolac. According to the Plaintiff, it was a clear understanding of the parties that their relationship was to be governed not only by the Agency Agreement but by the customs, practices, and regulations of the European Community, England and /or Holland.

The defendant terminated the agency agreement in January 1994 by giving the plaintiff the requisite 90 days notice and offered the latter and amount of NLG 120,000 (equivalent of $70,000) as compensation. The plaintiff was dissatisfied with the termination of the agreement and rejected the quantum of compensation for the reason that it had promoted and expanded and established a thriving market in Ghana for the brand products of the defendant. The plaintiff contended that by the termination of the agreement it has been deprived of the opportunity to reap the benefits of the programs and market strategies it had put in place while expenses on same stood unpaid.

After attempts at settlement have failed, the plaintiff on 9/5/94 filed a writ of summons and statement of claim at the Accra High Court. The writ bore the Defendant's foreign address to wit: Leeuwarden Holland. The Plaintiff further filed on 11/5/94 a notice of writ of summons to be served out of the jurisdiction under Order 11 rules 6 and 8. This notice was directed to the Defendant's address in Holland. There is no record that leave was granted to serve the notice of the writ.

The Plaintiff claimed among other reliefs, compensation for the damage and or loss by plaintiff as a result of the termination of the agency agreement, special damages of GH¢ 4,700 incurred in promoting the sale of baby food products, account of import of defendant's products into Ghana from the period 1/1/91 to 30/4/94 and from 1/5/94 to 31/12/96 to determine Plaintiff's entitlement to commission as agent and importer.

The defendant entered appearance by the same counsel in this case on 26/5/94 and filed a statement of defence and counterclaim on 27/6/94. In the statement of defence the defendant contended that the agency having been terminated by proper notice it was not liable to pay any compensation to the plaintiff. The defendant said it contributed to increase the volume of the sale of its products in Ghana and made available an advertising budget for that purpose. The defendant counterclaimed for an account of the advertisement imprest, and the sum of US$51,612.65 for ordered and received products by the plaintiff from the defendant.

Judgment was given in favour of the plaintiff and was awarded damages to the tune of US$500,000 and GH¢4, 700 as special damages. An appeal by the defendant against the judgment of the High Court was dismissed in its entirety by the Court of Appeal. The defendant being dissatisfied has appealed to this Court practically on the same grounds of appeal canvassed before the Court of Appeal.

Grounds of Appeal

a. That the judgment is against the weight of evidence
b. That the learned Justices of Appeal erred by failing to draw a distinction between void and voidable, and thereby held that

failure to invoke the jurisdiction of the court was a mere irregularity curable by Order 70 of L.N 140A.

c. That the learned Justices of Appeal wrongly held that the Solicitors and Counsel of the Defendant were served within the jurisdiction thereby making it unnecessary for the Plaintiff to comply with the rule that required it to obtain leave not only to issue but also to serve the Defendant out of the jurisdiction.
d. That the learned Justices of Appeal erred by using speculative and hypothetical grounds in confirming damages awarded by the High Court.
e. That the learned Justices of Appeal erred in their application of foreign law which was not pleaded nor proven by the Plaintiff to justify their award of compensation to the Plaintiff.
f. That the learned Justices of Appeal erred in holding that non-compliance with the rules for change of solicitor under Order 7, r.2 (1) of LN140A was a mere irregularity curable by Order 70 of L.N 140A.
g. That the learned Justices of Appeal failed in holding that the subsequent acts of the Defendant amounted to a waiver of their right to object to the non-compliance with the rules for change of solicitor.
h. That the learned Justices of Appeal in holding that the awards of compensation, special damages of GH¢47,000 and interest made by the learned trial judge were all covered by appropriate amendments.

Consideration

Non-compliance with Order2 r.4 of the High Court (Civil Procedure) Rules, 1954 LN140A

Order 2 r.4 of LN140A provides as follows:

> 2. "No writ of summons for service out of the Jurisdiction, or of which notice is to be given out of the Jurisdiction shall be issued without leave of the Court or a Judge."

The Defendant submits that the Plaintiff did not comply with the rule of procedure that an intended plaintiff must first obtain leave of the court

before issuing a writ out of the jurisdiction. Similarly the intended plaintiff must seek leave to serve notice of the writ out of jurisdiction as required by Oder 11.rr.6 and 7. He complained that the plaintiff filed a notice of a writ of summons to be served outside the jurisdiction of the court; he never obtained the mandatory leave as required by LN140A. He argued that the jurisdiction of the High Court was therefore not properly invoked and as a result the writ of summons and the whole proceedings based on it are null and void.

He submitted further that:

> " The Learned Justices of Appeal based their evaluation of the validity of the trial entirely on Order 70 of the High Court (Civil Procedure) Rules, 1954 LN 140A without drawing a distinction between fundamental error and irregularity."

It is recalled that Order 70 r.1 of LN140A provided as follows:

1. **"Non-compliance with any of these rules** or with any rule of practice from the time being in force **shall not render any proceedings void** unless the Court or a Judge so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such a manner and upon such terms as the Court or Judge shall think fit."[Emphasis mine]

Counsel for the Plaintiff in response invites this Court to give the word **'any'** used in the expression **'any of the Rules'** its ordinary meaning in the context. He contends that given the clear terms of Order 70 r.1 which bars any breach of any of the rules from rendering the proceedings void:

> "[t]he authorities are presently overwhelming that the distinction between cases on non-compliance with the rules of procedure under LN 140A (now C.I.147) which resulted in proceedings or acts which were automatically void and so could not be waived on the one hand and cases of non-compliance which constituted mere irregularities which can be waived, is clearly untenable on account of the clear provisions of Order 70 r.1 of LN140A."

He referred us to some authorities on rules of interpretation in Gray *v. Pearson [1857] HLC 61 at 106; Pinner v. Everett [1969] 3All ER 257 Maunsell v. Olins [1975] AC 373;* Sam v. Comptroller of Customs and

Excise [citation] We agree with Counsel for Plaintiff on his submissions and authorities cited that the words in Order 70 r.1 of LN140 should be given its ordinary meaning in order to serve the end of justice. In that respect non-compliance with any of the rules does not render the proceedings automatically void.

Unfortunately, in spite of the clear language of Order 70 of L.N 140A the Courts have been drawn into making distinction between irregular and void processes. Accordingly, Apaloo JA (as he then was) in the case of *Omane v Opoku [1973] 2 GLR 66* at page *71* of the law report in considering the effect of failing to take summons of directions admonished that:

> "The Court should not readily treat a defect as fundamental and so a nullity, and should be anxious to bring the matter within the umbrella of Order 71 when justice can be done as a matter of discretion."

We note that Order 81 of the High Court (Civil Procedure) Rules, 2004 (C.I 47) and the extinct Order 70 of LN140A both provide in clear terms that non-compliance with the rules of procedure shall not render any proceedings void but be regarded as a mere irregularity which might be allowed, amended or set aside on terms at the discretion of the court upon an application brought within a reasonable time and the person applying has not taken a fresh step after becoming aware of the irregularity. See *the Republic v. High Court, Accra, ex parte Allgate Co. Ltd. (Amalgated Bank) Interested Party [2007-2008] SCGLR1041* for a detailed discussions on these two rules.

This Court has since then taken a radical attitude to arguments claiming nullity in respect of procedural lapses. In *Boakye v. Tutuyehene [2007-2008] SCGLR 970* and *Ankumah v City Investment Co. Ltd. [2007-2008] SCGLR 1065*; failure to take summons for direction under Order 30 r.1 was held to be mere irregularity and not vitiating the proceedings.

In *The Republic v. High Court, Accra, Ex parte Allgate Co. Ltd. (Amalgated Bank) Interested Party* ***supra***, the defendant/applicant was short-served by one day with the hearing of an application for summary judgment but failed to appear for the hearing. The High Court, Accra, went on and granted the summary judgment. In an application by

the defendant/applicant for an order of certiorari to quash the ruling on the ground of non-compliance with the mandatory provision of Order 14 r 2(3) of C.I. 47, which requires the defendant to be served with notice for four clear days before the hearing of the application for summary judgment; this Court in dismissing the application held, per Dr. Date-Bah JSC at page 1053 that:

> "... [N]on service of a process where service of same is required, in my view goes to jurisdiction. Non-service implies that *audi alteram partem;* the rule of natural justice is breached. This is fundamental and goes to jurisdiction. **Thus the reason why, even after the coming into effect of Order 81 of our Rules, non-service of a process results in nullity is not because of non-compliance with a rule of procedure, but rather because it is an infringement of a fundamental principle of natural justice, as recognized by common law.** Similarly, breach of the principle of *nemo index causae suae* would result in a nullity. In contrast, short service need not be treated as fundamental enough to go to jurisdiction...It should thus be regarded as an irregularity that may serve as a ground for setting aside the proceedings following it, but it does not make those proceedings null and void."[Emphasis mine]

In *The Republic v. High Court, Koforidua, Ex parte Ansah-Otu [2009]SCGLR 141,* the High Court in breach of Order 25 r. 9(1) and (2) failed to order the successful party to give an undertaking to damages in a contested application for interim injunction before granting the application. In an application for the order of certiorari to quash the decision of the High Court, this Court held that even though the trial judge erred by not complying with the mandatory rule of procedure as specified under Order 25 r 9(1) and (2) of C.I 47, before making the order, the non-compliance was a mere irregularity that was curable under Order 81.

Counsel for the Defendant referred us to authorities such as *Seyire v. Anemana [1971] 2 GLR 3C.A 2*; *MacFoy v. United Africa Co. Ltd. [1962] AC 152 PC; Lokko v. Lokko (1991) 2 GLR 184 CA* and *Mosi v Bagyina [1963] 1 GLR 133* SC, where the courts drew a distinction between fundamental error and mere irregularity and invited us to hold that

breach of Order 2 r.4 was a fundamental error that could not be saved by Order 70 r.1

We do not find the reasoning in those decisions persuasive as the distinction between void and voidable proceedings cannot be maintained on account of the plain and ordinary meaning of the said Order. In any event this Court is not bound to follow the decision of any other court except its own and may even depart from its own previous decision. Article 129(2) of the 1992 Constitution.

We are of the view that to determine the effect of non-compliance one has to examine the provision of the same LN140A /CI 47 and not indulge in any theories of what acts or omissions can be described as null and void or mere irregularity. This Court has had the occasion to comment in *Boakye v. Tutuyehene*, **supra** that the application of the so called Mosi Bagyina principle has been eroded by time and therefore otiose. Dr Seth Twum JSC at page 979 to 980 of the law report stated that:

> "The application of the so-called Mosi Bagyina principle (as stated in *Mosi V. Bagyina [1963] 1GLR337 SC)* by the court was seriously flawed. Fortunately, Order 30 does not exist in its pristine form in the new High Court (Civil Procedure) Rules, 2004 (C.I 47). Further, the new Order 81 has made it clear that perhaps apart from lack of jurisdiction in its true and strict sense, any other wrong step taken in any legal suit should not have the effect of nullifying the judgment or the proceedings. This means the principle stated in *Mosi V. Bagyina [1963] 1 GLR 337 SC* has been rendered otiose."

In summary, non-compliance with the rules of procedure or any existing practice is a mere irregularity that does not automatically render proceedings following the non-compliance void. A party who becomes aware of the non-compliance is at liberty to bring an application to the Court and have the proceedings set aside.

However we wish to stress that the language in Order 70 of LN140A or for that matter Order 81 of C.I.47 cannot be interpreted to overcome or waive a High Court's actual lack of jurisdiction. *Ex parte Allgate Co. Ltd* ***supra.*** So where for example the whole subject-matter of the action affect an immovable property situate outside the jurisdiction of Ghana,

then non-compliance of Order 2 r4 now Order 8 of C I 47 cannot be waived to cure the deficiency in jurisdiction. The subject matter of the action begun by the writ issued by the plaintiff for compensation for the termination of an agency agreement executed by her in Ghana on behalf of the defendant is manifestly within the jurisdiction of the court. Accordingly we hold that the non-compliance of Order2 r.4 of LN140A in this case was a mere irregularity which did not derail the jurisdiction of the court.

Setting aside for irregularity

The rules require that no application to set aside any proceedings for irregularity shall be allowed unless it is made within a reasonable time and the party applying has not taken any fresh step after knowledge of the irregularity.

The Court of Appeal held that counsel received service of the writ in Ghana and fully participated in the proceedings till judgment and so the defendant can be said to have waived its objection to the jurisdiction of the court.

The defendant submits that the above findings were wrong as the writ was served on the defendant in Holland and the brief referred to counsel by defendant's solicitors in England. Counsel claimed he only realised the breach after he received the record of appeal. We are taken aback by this statement as the address for service of the writ was that of Holland where the defendant was served. In the circumstances it is reasonable to expect that the first and primary duty of any astute lawyer who received a brief from a client domiciled abroad was to ascertain and be satisfied that the rules regarding service out of the jurisdiction has been complied with before taking any further step aside from entering appearance. Such information could easily be obtained by simply filing a search in the High Court registry. We regret to say that Counsel was indolent and failed to exercise due diligence in the matter.

We do not think Counsel's failure to discover the non-compliance in time should render the whole proceedings, in which the defendant actively participated and pursued a counterclaim, a nullity. We consider the objection at this time trifle and highly unreasonable, more so, as the

subject matter of the action began by the writ falls within the jurisdiction of the court.

Under the then Order 70 of LN140A, as under Order 81 of C. I. 47 this Court has discretion to either set aside the proceedings or make any orders as it deems fit. Looking at the circumstances of this case we see no evidence of disadvantage occasioned by the irregularity, or erosion of natural justice. Accordingly we do not think it is fit and just to set aside these whole proceedings for a mere irregularity.

For these reasons the appeal fails on this ground.

For the other grounds of appeal counsel for the defendant merely relied on the submissions filed on its behalf before the Court of Appeal without showing us where the Court of Appeal erred in dismissing the appeal. We frown upon such practice as the appeal before us is not against the judgment of the trial court but that of the Court of Appeal. Even though an appeal is said to be a rehearing, the defendant bears the burden of satisfying this Court that the judgment rendered by the Court of Appeal is defective. It follows that the defendant should identify the alleged errors of law and errors of fact and or misdirection in the judgment and state the grounds relied on in asserting that the judgment is defective. It is not sufficient for an appellant to state that he or she disagrees with the outcome of the case or merely repeat the arguments submitted before the Court of Appeal without pointing out what went wrong.

AWARD OF COMPENSATION

At the Court of Appeal the defendant questioned the legal basis of award of compensation to the plaintiff following the termination of the agency relationship between the parties. He submits that at common law, in the absence of express agreement to the contrary, a principal is not obliged to pay compensation to an independent agent on termination of the agency. He submits further that there was no provision in the various contracts, Exhibits A and B that in the event of termination, compensation should be paid to the agent, neither is there a provision in the contract that any issue not provided for in the contract should be resolved by resort to rules in Holland and England.

The plaintiff responded that in clause 19 of Exhibit A it was the express understanding of the parties that all matters relating to the agency agreement were to be construed in accordance with the laws of England. The Court of Appeal affirmed the decision of the High Court on this issue.

The Defendant has failed to demonstrate where the Court of Appeal erred. We find that on the evidence the plaintiff was entitled to compensation in accordance with the laws of England as agreed upon in Exhibit A which Mr. Hendrik Anno Vanderveen a legal adviser to the defendant company in cross-examination admitted the company validated when they signed Exhibit B.

We find that under the regulations 17 (1) (3) (6) and (7) of the Statutory Instrument, 1993, No. 3053, Commercial Agents (Council Directive) Regulations, that was tendered in evidence as Exhibit E by the plaintiff, commercial agents are entitled to be indemnified or compensated upon termination of the agency agreement.

We therefore affirm the finding by the Court of Appeal that the plaintiff is entitled to compensation. We therefore dismiss the appeal on this ground.

Quantum of Damages.

The Court of Appeal affirmed the quantum of general damages awarded by the High Court to the plaintiff in the sum of $500,000 with interest from 1/5/94 to date of payment. We find this amount excessive as the Court of Appeal unjustifiably gave too much weight to Exhibit Aa that contained a claim of $1.3million against the defendant notwithstanding that it had been admitted in evidence. We find the claim for the sum of $1.3 million exaggerated as borne out by the evidence of PW2.

According to PW2, the defendant offered the plaintiff NLG 120,000, the equivalent of $70,000 being one year commission which was rejected. He added at page 77 of the record that:

> "We are claiming an amount of $1.3 million but the actual claim is for $500,000."

From this statement we even doubt if the actual claim is $500,000 and the contents of Exhibit Aa are trustworthy. In *Ghana Ports & Harbours Authority & Another v. Nova Complex Ltd. [2007-2008] GLR 806 at 835* Georgina Wood CJ held that:

> "Under section 125 (1) of the Evidence Act (NRCD 323), it is not every entry of a business record that may be admitted in evidence or accorded full weight if received in evidence, but only those entries of transactions which satisfy these three statutory requirements, namely: that (i)the entry was made in regular course of business; (ii) the entry was made contemporaneously with the event in question; and (iii) the sources of information, the time and method of preparation were such that the facts contained in the entry can be said to be reasonably trustworthy.

The defendant offered the plaintiff $70,000 as one year compensation which in our view was to low in view of the effort the plaintiff has made to promote the defendant's products in Ghana and the heavy investment she had made in respect of the agency, which as a result of the termination of the agency she would not be able to amortise the cost and expenses incurred in the performance of the agency contract.

We find the award of $500,000 rather excessive. In the circumstances we think the award of $280,000 i.e. compensation for 4 years at $70,000 per year would meet the justice of the case. This court awards interest thereon at the prevailing United States dollar rate as stipulated by the Bank of Ghana to be calculated at simple interest from the date of the judgment of the High Court to date of final payment.

Special Damages

We do not find any reasons to disturb the award of GH¢ 4,700 of special damages.

Other grounds of appeal

All the other grounds of appeal are hereby dismissed as the defendant has not shown us the defects in the findings made by the Court of Appeal on those issues. We find no reasons to disturb those findings.

Conclusion

Except for the variation in the award of compensation the appeal is dismissed.

(SGD.) S. O. A. ADINYIRA (MRS)
JUSTICE OF THE SUPREME COURT

(SGD.) S. A. BROBBEY
JUSTICE OF THE SUPREME COURT

(SGD.)
ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

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