IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA AD 2015

CORAM: AKUFFO (MS.), JSC (PRESIDING)
GBADEGBE JSC
AKOTO BAMFO (MRS) JSC
BENIN JSC
AKAMBA JSC

CIVIL APPEAL
NO.J4/11/2015

17TH JUNE 2015

J. K. AGYARBENG & 62 ORS ... PLAINTIFFS/ RESPONDENTS /RESPONDENTS

VRS

SG/SSB BANK LTD (NOW SOCIETE GENERALE GHANA) ... DEFENDANT/APPELLANT APPELLANT

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JUDGMENT

BENIN, JSC: -

The plaintiffs/respondents/respondents, hereafter called the respondents, were employees of the defendant/appellant/appellant bank, hereafter called the appellant. The relationship of employer-employees was terminated when the appellant decided to embark upon a re-organisation exercise which entailed the down-sizing of its staff. To this end the appellant issued a notice dated 13 December 2001, tendered in evidence as Exhibit A addressed to the Chairman of the Local Union and copied to the Chairman of the Senior Staff Association(SSA). For its full force and effect, we quote exhibit A here:

'BANK RE-ORGANISATION

Owing to full scale implementation of the Flexcube programme and other Transformation initiatives it has now become necessary for the bank to re-organise its core structure for competitive advantage.

The need therefore has arisen for the rightsizing of staff by 28th February 2002.

In line with the requirements of our Collective Bargaining Agreement (Item 11.3 under redundancy) we have to schedule a meeting between the Local Union and Management Representatives to negotiate on the benefits package that will be paid to the affected staff.

In this regard we are proposing that the Standing Joint Negotiation Committee should meet on the 21 December 2001 for the above purpose'.

It is apparent that the meeting could not convene on 21 December 2001; there is nothing on the record to indicate that the meeting was held. What is undisputed is that the appellant had decided to embark upon a re-organisation exercise which necessitated a reduction in staff hence the decision to invoke the redundancy provision under the Collective Bargaining Agreement (CBA). It is to be noted from the onset that the CBA was applicable to only the junior staff, otherwise known as the unionized staff. Exhibit A gave no indication as to which members of staff were to be affected by the exercise. Thus subsequent to exhibit A the appellant issued a circular, exhibit B, on 11 January 2002 addressed to all members of staff

in which it reiterated the subject-matter of re-organisation and redundancy. It stated further that:

'In order to ensure a smooth and uninterrupted staff rationalization exercise, members of staff who wish to be considered for separation benefits packages are invited to forward their letters of intent to Head, Human Resources Management Department by 25th January 2002.

The separation is planned to be in two phases. The first batch will leave at the end of January 2002 and the final batch 28 February 2002'

By exhibit B the appellant was inviting the staff to volunteer for the redundancy exercise. The appellant later explained that if enough staff did not volunteer for separation then they would embark upon compulsory lay-off. A number of staff volunteered to accept the offer to go home. But what remained unresolved was the severance benefits package, which according to the respondents was to be negotiated by the Standing Joint Negotiation Committee (SJNC) comprising the appellant, the Local Union, the SSA and the Industrial and Commercial Workers Union (ICU). The undisputed evidence on record is that the joint committee met a couple of times but did not reach any conclusion before the appellant began implementing the programme and started laying off some staff who had volunteered to go. According to the appellant, the negotiations by the SJNC were to benefit only members of the local union who belonged to the ICU, and not members of the SSA to which the respondents belonged. According to the appellant they negotiated personal benefits with each affected member of the SSA which they all accepted. Thus the bone of contention between the parties was whether the members of SSA were to benefit from the joint negotiations. It was also in contention whether by statute law or some form of contract or usage of trade the appellant was bound to negotiate a severance benefits package with the respondents before embarking upon the process of laying off staff volunteers or otherwise. According to the respondents whilst these competing positions were going back and forth, the appellant nevertheless began to lay off staff, beginning from the end of January 2002 and ending some three months later. Each of the respondents signed two documents, first a notice to the effect that the affected staff had voluntarily decided to leave, and second that he/she had accepted the severance package award.

Notwithstanding these two notices which no doubt are standard form documents except in respect of names and amounts paid and received, the respondents claim they were unilaterally imposed on them by the appellant, since nothing was negotiated. They engaged a solicitor to talk to the appellant but to no avail. They therefore decided to take action in the High Court on 1st June 2004 claiming the following reliefs:

a. "A declaration that Defendant's so-called voluntary separation benefits packages under its reorganization exercise was wrongful and unlawful being inconsistent with and in contravention of the Labour Decree 1967 (NLCD 157) particularly sections 34 and 35 thereof.
b. A declaration that the standard form letter titled RE: VOLUNTARY PHASE OF REORGANISATION prepared by Defendants for Plaintiffs to sign is null void and of no legal effect.
c. A declaration that the termination of employment of Defendants was accordingly wrongful.
d. Damages for wrongful termination of employment.
e. Damages for refusal by Defendant to pay plaintiffs severance award in accordance with law or in the alternative an order of the court directed at defendant to negotiate severance award with plaintiffs within a specified time.
f. Interest on severance award from the date of purported termination to the date of final payment".

The trial High Court entered judgment for the respondents herein having accepted their claim that the appellant failed to negotiate the severance award package with them before terminating their appointments, contrary to the provisions of sections 34 and 35 of NLCD 157 as amended by the Labour (Amendment) Decree, 1969 (NLCD 342). The appellant appealed to the Court of Appeal, which held that the respondents were laid off as a result of amalgamation within the meaning of section 34 of NLCD 157 as amended. The Court of Appeal did not accept that the respondents' appointments were wrongfully terminated but on the contrary it held that the termination was lawful. But having accepted that they were terminated as a result of amalgamation and consequently the severance pay was to have been negotiated, and holding that with the present legal status of the appellant it was not

possible to ask the parties to go and renegotiate the severance package, it affirmed the award of damages by the trial court.

The appellant was not satisfied with the decisions by the Court of Appeal therefore it brought an appeal to this court on these grounds:

a) That the holding that the termination of the appointment of the Plaintiffs/Respondents/Respondents herein was the result of an amalgamation of SSB Bank Ltd and not a redundancy exercise is unwarranted by the evidence.
b) The Court of Appeal erred in law when it affirmed the award of damages to the Plaintiffs/Respondents/Respondents when there was no basis to support same.
c) The Court of Appeal erred in law when it held that sections 34 and 35 of the repealed Labour Decree, 1967 (NLCD 157) as amended by NLCD 342 imposed a duty on SSB Bank Ltd to negotiate severance award with the Plaintiffs/Respondents/Respondents when it carried out the reorganization exercise under which their appointments were terminated.

Ground (a) Counsel for the respondents conceded this ground in his statement of case. We agree that the court below erred for there was no evidence from which the conclusion could be reached that there was amalgamation by the appellant which resulted in the termination of the appointments. On a more serious note, the respondent did not even plead amalgamation as the reason for the redundancy exercise. The Court of Appeal was thus substituting for a party a case it did not set up and this is seriously deprecated. This ground of appeal succeeds.

We shall deal with ground (c) before ground (b), because unless a finding is made that there was liability on the part of the appellant the question of damages would not arise. Both courts below relied on sections 34 and 35 of NLCD 157. This statute was pleaded by the respondents as the basis for their claim that the appellant was duty bound to negotiate the severance award with them, and having failed to do that they were in breach of the law thereby entitling them to damages. The relevant provisions of NLCD 157 as amended provide that:

34(1) Where an organization is closed down or where an organization undergoes an arrangement or amalgamation and the close down, arrangement or

amalgamation causes a severance of legal relationship of the employee and employer between any person and the organization as it existed immediately before the close down, arrangement or amalgamation, then, if as a result of and in addition to such severance the person becomes unemployed or suffers a diminution in his terms and conditions of employment, he shall be entitled to be paid by the organization in whose employment he was immediately prior to the close down, arrangement or amalgamation, compensation, in this Decree referred to as "severance pay".

34(2) In determining whether a person has suffered any diminution in his terms and conditions of employment under sub-paragraph (1) of this paragraph account shall be taken of the past services and the accumulated benefits (if any) of such person in or in respect of his employment with the organization before it was closed down, or before the occurrence of the arrangement and amalgamation.

35. The amount of any severance pay to be paid under paragraph 34 of this Decree as well as the terms under which payment is to be made shall be matters for negotiation between the employer or his representative and the employee or his representative.

Both parties agree that the words 'close-down' and 'amalgamation' do not apply to this case. The bone of contention is with regard to the expression 'arrangement'. Whereas the appellant says that it is not applicable to this case, the respondents maintain the position that it does apply. It thus appears that the determination of this appeal has come down to the meaning and application of the word 'arrangement' in the context of sections 34 and 35 of NLCD 157, which has no definition of that word or expression, and whether it is applicable to this case.

Arguments by counsel for appellant

Counsel relied on three points. To start with, whilst arguing the first ground of appeal, counsel for the appellant argued that in reference to the definition of 'arrangement' in section 229 of the Companies Act, 1963 (Act 179), the facts of this case do not support the lower Courts' decisions. Section 229 of Act 179 defines 'arrangement' to mean any change in the rights or liabilities of members, or debenture holders or creditors of a company or any class of them or in the

Regulations of a company, other than a change effected under a provision of this Act or by the unanimous agreement of all parties affected by the arrangement. Counsel's view was that the redundancy exercise embarked upon by the appellant did not come within this definition. By what authority did counsel think that he could just import the definition of a particular word specifically defined in one statute and apply same in another? We would address this question if it becomes necessary.

Secondly counsel made reference to the Labour Act, 2003, (Act 651) wherein, in addition to 'close down', 'arrangement' and 'amalgamation', the expression 'reorganization' was introduced as one of the grounds for termination of appointment of staff which should compel an employer to negotiate severance award with the employee affected by the exercise. In counsel's view this goes to confirm that the expression' arrangement' as applied in sections 34 and 35 of NLCD 157 did not include 'reorganization'. Here too, counsel failed to tell us the authority for interpreting an earlier enactment by reference to a later one. Here again we would address the question when the need arises.

Finally, counsel said the Court of Appeal was bound to follow its earlier decision which was endorsed by the Supreme Court. That was the unreported case of **Lt. Col. S. B. Eshun (Rtd.) vs. Accra Brewery Ltd. Civil Appeal No. J4/18/2007** delivered by this Court on 12th November 2008, described hereafter as the Accra Brewery case, wherein the court held that sections 34 and 35 of NLCD 157, as amended, did not apply in cases of redundancy.

Arguments by respondents' counsel

On the applicability of the Accra Brewery case, Counsel sought to distinguish the facts of the two cases. Counsel said in the Accra Brewery case, the employee accepted the severance pay that was offered by the employer without any protest. But in the present case the respondents have insisted on negotiating the severance package all through. And the trial court found there were no negotiations.

Secondly counsel stated that "while it is true that in both the Accra Brewery case and the instant case, there was no provision in the senior staff association concerning redundancy following re-organisation. The significant difference between the two cases is, in the instant case, there was an established corporate

practice and usage, which set out how the redundancy pay of senior staff was to be determined, namely by applying mutatis mutandi, the decision arrived at the standing joint negotiating committee…….to the affected members of the senior staff. Exhibit MM, in that regard, puts the matter to rest, as it confirmed indisputably the existence of this established practice and usage in Defendant bank. On the other hand, in the Accra Brewery case, no such practice existed."

Thirdly, counsel stated that "the Supreme Court having found in the Accra Brewery case that the plaintiff did not protest the offer but accepted same wholehearted, there was absolutely no need, with respect, to decide the case on the question whether or not sections 34 and 35 of the Labour Decree, 1967, as amended, applied to a case of redundancy simpliciter. Any comment by this Honourable Court on that issue would therefore, with respect, be obiter dicta, and not really part of the ratio decidendi of the Court. This Honourable Court in our respectful view, is thus, free to look at this question without the constraint of the strictures of judicial precedent."

Counsel seemed to have responded to the first two arguments of counsel for the appellant together under the sub-heading: 'whether or not sections 34 and 35 of NLCD 157 apply to a situation of redundancy following re-organisation or restructuring'. Counsel said that where the legislator found it necessary, it defined particular words and expressions in the interpretation section of NLCD 157. However, it failed to define any word or expression used in sections 34 and 35. Counsel submitted that "the correct judicial approach to interpreting words found in that section ought therefore to be the general ordinary meaning of the words, unless there is a compelling reason otherwise. In other words, the legislator did not intend to use the words 'close-down', 'arrangement' and 'amalgamation' in a technical manner or as a term of art. To import the very specialized and technical meaning of 'arrangement' and 'amalgamation' of section 299 (we believe this should read 229) of the Companies Act, 1963 (.Act 179), into the Labour Decree, is, therefore, with respect, grievously wrong. Had the law makers intended to give those words a technical meaning what better means would they have employed than to have given these words their specific interpretation, as has been done in the case of other words in the Decree."

Counsel then proceeded to provide several meanings of the word, 'arrangement' as defined in some dictionaries, both ordinary and legal. We do not propose to set out these definitions at this stage, let alone to consider their influence in defining the word or expression under consideration. We intend first of all to take a look at the decision in the Accra Brewery case and consider if this court should follow it, as urged on us by the appellant, or to distinguish it or depart from it as urged by the respondents.

Consideration by the court

Contrary to the submissions by counsel for the respondents, the question relating to sections 34 and 35 of NLCD 157 was an issue in the Accra Brewery case, the same having been pleaded and relied on by the plaintiff therein. Indeed the trial court made reference to it and interpreted same. The Supreme Court rejected the trial court's conclusion that these provisions applied to cases of redundancy. This was not obiter, but the ratio decidendi. The court having made a definitive pronouncement on the very provisions which are in issue herein, it is obliged to follow it unless it finds good and compelling reason to depart from it. In this case the wording of sections 34 and 35 of NLCD 157 as amended is clear that where termination results from 'close-down, arrangement or amalgamation', then the severance pay should be negotiated between employer and employee. It does not include termination that results from declaration of redundancy or any other ground. We hold therefore that sections 34 and 35 as amended by NLCD 342 do not apply in this case. We therefore do not consider it necessary to discuss the other points argued by counsel.

We take note of the reliefs endorsed on the writ, whereby the respondents pleaded these provisions as the basis for their claim, relief 1, which they claimed was breached by the appellant, relief 2, as a result of which their termination was wrongful, relief 3. Since the provisions under reference do not apply, it follows that going by the reliefs sought, the termination was not wrongful. Be that as it may, as the undisputed evidence was that the respondents voluntarily opted to take advantage of the redundancy exercise without making the negotiations for severance award a precondition, the Court of Appeal was right in concluding that the termination was lawful. And it is significant that neither party is challenging that decision in this appeal.

Since the termination was lawful all that the respondents could ask for is a severance package either under statute or under their agreed conditions of service or under any acceptable legal contract agreed between them. As held earlier the statute they relied upon is not applicable in that the appellant was not enjoined by that law to negotiate with them. And their service conditions do not contain any provision for severance pay upon redundancy. The respondents therefore sought to rely on corporate usage. Even though they pleaded this fact, it was denied by the appellant. It was thus the duty of the respondents to lead evidence to establish the custom and usage. The trial court did not decide the case for the respondents on this question. From a careful reading of the record, we are inclined to believe that the evidence proffered was scanty and unsatisfactory, for contrary to what Counsel for the respondents stated in his address Exhibit MM, the instance relied upon, was a one-time event and was not conclusive proof of the alleged custom and usage. Be that as it may, the respondents did not make this a ground of appeal at the Court of Appeal and it is not the subject of appeal before this court either. In the result we allow ground 3 also.

The second ground relates to the award of damages. Reliefs 4, 5 and 6 endorsed on the writ relate to the claim for damages. Relief 4 seeks damages for wrongful termination of employment. This fails in view of our holding that the termination was lawful. Relief 5 seeks damages for refusal by the appellant to pay respondents severance award in accordance with law or for the court to order the parties to the negotiating table. It is certain there was no law which entitled the respondents to severance award. And there is no law or contract which specified how the quantum of the severance pay was to be calculated in case of redundancy. The respondents admitted signing for severance awards but they claimed they were imposed on them by the appellant. But exactly how much was each of them entitled to be paid in their own estimation? The evidence is completely silent on it. It was the duty of the respondents to have led evidence to the effect that they were entitled to be paid so much but the appellant paid them less than what they were entitled to be paid. In the absence of that kind of claim in the first place, and worse still evidence to that effect, the respondents could not be heard to say that the respondents failed to pay them their severance award when in fact they admitted having been paid what they claimed the appellant had determined unilaterally. They were not bound to accept the award that they signed for if they believed the appellant was obliged to

negotiate with them before payment. And if they believed that what they were paid was not sufficient to satisfy their expectations they should have made that their case at the trial court, in which case the court would have determined the quantum. But as earlier on pointed out, that was not their claim in both the reliefs endorsed on the writ as well as in the statement of claim. Thus there was no basis for the award of damages to the respondents by the courts below. Ground 2 therefore succeeds.

In conclusion we find merit in the appeal and we do uphold same accordingly.

We hereby set aside the decision of both the High Court and the Court of Appeal.

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT

(SGD) S. A. B. AKUFFO (MS)

JUSTICE OF THE SUPREME COURT

(SGD) N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

(SGD) V. AKOTO BAMFO (MRS)

JUSTICE OF THE SUPREME COURT

(SGD) J. B. AKAMBA

JUSTICE OF THE SUPREME COURT

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