**IN THE SUPERIOR COURT OF JUDICATURE**
**IN THE SUPREME COURT OF GHANA**
**ACCRA- GHANA , A.D.2014**

**CORAM: ATUGUBA, J.S.C. (PRESIDING)**
**ANSAH, J.S.C.**
**BAFFOE BONNIE, J.S.C.**
**GBADEGBE, J.S.C.**
**AKOTO BAMFO (MRS), J.S.C.**

**CIVIL APPEAL**
**NO.J4/45/2013**

**7TH MAY 2014**

| | |
|---|---|
| **AMOS WEDZI** | **PLAINTIFF/RESPONDENT** |
| **VRS** | |
| **HOTEL MAJORIE 'Y' LTD** | **1ST DEFFENDANT/APPELLANT/ APPELLANT** |
| **RICHARD YAO WEDZI** | **2ND DEFENDANT** |
| **MICHAEL YAO MONYO** | **3RD DEFFENDANT/RESPONDENT /RESPONDENT** |

# JUDGMENT

## **BAFFOE-BONNIE JSC**.

The facts leading to this appeal are fairly simple and uncontroverted. When the appellant company was formed the initial share holding structure was as follows; 60% to the 2nd Defendant Richard Yao Wedzi, 20% to plaintiff/respondent Amos Wedzi and 20% to Welbeck Wedzi (now deceased). These three persons were also the first Directors of the company, For some reasons which are not necessary for the resolution of this appeal, the 2nd defendant and Welbeck Wedzi purported toforfeit the 20% shares of the plaintiff and sold same together with the 20% shares of Welbeck Wedzi for $350,000 to the 3rd def/resp/resp, Michael Yao Monyo. The plaintiff was also removed as a director of the company and the 3rd defendant was made a Director in his stead

Aggrieved by the forfeiture of his shares and removal as director, Amos Wedzi hereafter the plaintiff, brought an action before the High court challenging the procedure for the forfeiture and sale of his 20% shares. After a lengthy trial, the court found the forfeiture of the shares and the removal of the plaintiff as director as wrongful same having been done in breach of the company regulations. The court held as follows;

"The evidence shows that the 2nd defendant sold 40% shares in the 1st defendant company to the 3rd defendant. This sale was evidenced by an agreement dated 2nd May 1997 between the 2nd defendant and the 3rd defendant and which was tendered by the plaintiff as Exhibit 'D'. Subsequent to the acquisition of the shares the 3rd defendant was also appointed a director of the company. The 3rd defendant was later issued with a share certificate which was tendered by the 3rd defendant in evidence as Exhibit '1B'. Thus by the said sale and transfer of shares the 3rd defendant became a 40% shareholder whilst the 2nd defendant became a 60% shareholder. The 20% shares held by the plaintiff and their father Welbeck Kwesi Wedzi thus ceased to exist. I have earlier on in this judgment held that the purported forfeiture of the plaintiff's share was illegal and void and that the plaintiff is still a member and shareholder of the company. I should say in passing that Welbeck Kwesi Wedzi (the father of the plaintiff and 2nd defendant) was also a 20% shareholder whose shares were affected by the said sale agreement. He is said to be deceased. The evidence shows that he died in 2004. The evidence shows that at the time of the execution of Exhibit

'D', Welbeck Kwesi Wedzi was present. He indeed appended his signature to Exhibit 'D' as a witness for the 2nd defendant. That probably explains why he did not in his lifetime challenge the forfeiture of his shares. In any event the forfeiture of his shares is not an issue before me."

Since I have held that the plaintiff is a 20% shareholder and the sale of his shares to the 3rd defendant is void, I hereby order the sale and transfer of the plaintiff's 20% share to the 3rd defendant be and is hereby set aside. Thus 3rd defendant will no more be a 40% shareholder; he will be left with 20%."

The 3rd defendant bought the 40% shares for $300,000. I will therefore declare that the 3rd defendant is a 20% shareholder and that he is a creditor of the company in respect of the sum of $150,000 representing the value of the 20% shares of the plaintiff wrongfully sold to him.

It is also obvious that the appointment of the 3rd defendant as a director to fill the vacancy left by the wrongful removal of the plaintiff was also in violation of section 181 and 272 of the code. I hold that the appointment of the 3rd defendant as a director was illegal and therefore void. I hold therefore that the 3rd defendant is not a validly appointed director of the 1st defendant."

The summary of the judgment of the trial court was that

1The sale of the plaintiff's 20% share was wrongful and therefore reversed

2Welbeck Wedzi had not challenged the sale of of his 20% shares in his lifetime. In fact, unlike the first defendant who was deemed not to have had proper notification of the forfeiture and sale of his shares, Welbeck Wedzi was a signatory of the sale agreement that divested himself of his 20% shares. And in any case, as the trial judge remarked, the issue of the forfeiture of the shares of Welbeck Wedzi was not before him.

3 Since the sale of the plaintiffs 20% shares had been reversed, the 3rd defendant respondent was entitled to only 20% shares, ostensibly, those shares belonging to Welbeck Wedzi, which was not being challenged. He then became a creditor to the Company in the amount of $150,000.

4 3rd def/resp appointment as Director of the company was also declared null and void.

Feeling aggrieved by this judgment the 1st and 2nd defendants appealed to the court of appeal on the following grounds

A)The learned Trial judge erred in law in his interpretation of S.155 and S262 of Act 179 in respect of the service of the notice of call on the plaintiff by the appellants and subsequently holding that the notice of call was not served on the plaintiff

b) The learned trial judge erred in law by holding that the plaintiff was still a member of the 1st defendant company

c) Judgment is against the weight of evidence

d) Further grounds will be added on receipt of the records.

Without seeking leave the Appellant filed an additional ground of appeal and proceeded to argue same in his statement of case. The fresh ground of appeal in his statement of case was couched as follows;

***"The learned trial judge erred in law by declaring the 3rd defendant respondent to be a 20% shareholder of the 1st defendant company when at all material times there had not been a valid call and forfeiture of the shares of Welbeck Kwesi Wedzi as prescribed by both the companies Act, 1963(Act 179) and the regulations of the 1st defendant company.***

The learned justices of the Court of Appeal took issue with the procedure adopted by the appellant in filing and arguing the additional ground of appeal without the leave of the court. After a lengthy discourse on rule 8(8) of the court of appeal rule CI 19. Their lordships concluded as follows

*"But in the present case, as noted above, counsel for the first defendant has filed an additional ground of appeal and has argued the same in his written submission without leave of the court, This in my view is in breach of rule 8(8) of CI 19 and the said additional ground and the submissions of 3rd Defendant's counsel thereon, will therefore not be considered in this appeal."*

Their Lordships thereafter considered the other main ground of appeal and dismissed the appeal in the following terms;

***"In the light of the evidence on record, I think the trial court was a right in holding that there had been proper service of the documents in issue on the plaintiff within the meaning of Act 179, It follows that the trial court's***

***determination that no valid calls had been made on the shares of the plaintiff before they were purportedly forfeited, and further that the plaintiff was not given an opportunity to state his case before he was purportedly removed as a director of the 1st Defendant company, cannot be assailed, To my mind, therefore, the forfeiture of the plaintiffs shares and his removal as a director of the 1st defendant company were properly annulled by the trial Court.***

***It follows that this appeal fails and I accordingly dismiss the same. The judgment of the trial court is affirmed."***

Dissatisfied with the judgment of the Court of Appeal the1st defendant has appealed to this court on the following grounds

(a) The learned Justices of the Court of Appeal erred in law in failingto consider and determine the additional ground of appeal filed and argued by the appellant without leave of the court.

Particulars of Error of Law

(i)The learned Justices of the Court of Appeal limited themselves to only Rule 8(7) of the Court of Appeal Rules ( CI 19) even though Rule 8(8) overrides the said Rule8(7) and the respondent had contested the additional ground by filing his written submission.

(b) The learned Justices of the Court of Appeal erred in failing to declare the remaining 20% shares purportedly acquired by the 3rd defendant/respondent to be a nullity and of no effect.

(c)Additional grounds of appeal will be filed on receipt of the records.

Before us no additional grounds has been filed or argued.

GROUND ONE

The appellant had not obtained leave to file and argue a fresh ground of appeal as required by Rule 8(7). And when he had the first chance to comment on his failure to obtain leave this is how he started his submissions.

***"My Lords, before proceeding further with these submissions, I would want to address the vexed question of whether an appellant who seeks to file and argue an additional ground of appeal, should apply formally by way of a***

***motion on notice supported by an affidavit and can proceed to argue the said additional ground only after the said application has been granted or an appellant can go ahead to file the additional ground(s) and at the hearing of the appeal seek leave viva voce, or draw the court's attention to the said additional ground which would have been argued by the appellant in the written submissions? I must hasten to add that the latter procedure is the accepted or recognized practice in the Supreme Court.***

***……My Lords, I submit that strict adherence to seeking leave formally by way of motion on notice is not, with all due respect, sanctioned by the Rules as demonstrated supra and it is not the province of the courts to be redrafting statutes or legislations, but rather to give meaning to them by way of enforcement in furtherance of the intention of the draftsman."***

Before us the appellant has forcefully, but in a toned down language, argued that the Court of Appeal was wrong in not adjudicating on the additional ground of appeal which was filed and argued without leave because in his view rule 8(7) which requires leave to be sought before an additional ground is argued is overridden by rule 8(8) of CI 19. After citing the two rules counsel continued as follows;

*"To my mind, it is imperative that both Rules 8(7) and 8(8) of CI 19 are read together in order to arrive at its true meaning and effect in law. Rule 8(7) seeks to set out a general rule that no ground of objection which has not been mentioned in the notice of appeal can be argued by the appellant. He can only argue same subject to leave granted by the court of appeal in which case the notice of appeal will have to be amended. However, Rule 8(8) creates a proviso which seems to override the seemingly strict and mandatory provisions of Rule 8(7) of CI 19."*

Counsel has submitted that the real reason for the need to seek and be granted leave to file additional grounds of appeal before same is argued is not to overreach a respondent and to afford him the chance of filing submissions in response to the new ground of appeal. In effect the need to ensure that the audi alteram patem is not breached, is the main reason why rule 8(7) of CI 19 exists. So if as in this case, where even though, he had not obtained leave to argue a fresh ground of appeal, the respondent had the chance to and had responded to this fresh ground, Rule 8(8) of CI 10 should be deemed to have overridden Rule 8(7).

***Rules 8(7) and 8(8) of CI 19 read.***

***8(7):The appellant shall not, without the leave of the court, urge or be heard in support of any ground of objection not mentioned in the notice of appeal, but the court may allow the appellant to amend the grounds of appeal upon such terms as the court may think just".***

***8(8) Notwithstanding sub rules (4) to (7) of this rule, the court in deciding the appeal shall not be confined to the grounds set out by the appellant but the court shall not rest its decision on any ground not set out by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground".***

It is admitted that pursuant to Rule 8(8), on several occasions the Court of Appeal and even this Court have called on counsel to address them on points of law which have been overlooked by both counsel , but which would eventually form the basis of the final judgment. This has often been done in order to deal with the real issue in controversy, avoid multiplicity of suits and also to do substantial justice to the parties and the issues at stake. It is also right to say that it also satisfies the audi alteram paterm rule in that once a fresh issue is raised each party is given the chance to have a go at this fresh issue before a decision is taken on it.

But clearly it would be wrong to postulate that Rule 8(8) overrides rule 8(7) and that the audi alteram patem is the only reason for rule 8(8) and so once the respondent had the chance to respond to the fresh ground and he did actually respond to it, then leave is no longer required. Grounds of Appeal are like pleadings at the beginning of a trial. They form the basis of any trial and elaborate provisions exist in the rules of court as to how pleadings are supposed to be done. The rules of procedure and evidence show how pleadings are supposed to be formulated and what can go or should not go into pleading; when to amend pleadings with or without leave are all taken care of by the rules. In the same way CI 19 make elaborate provision for what should go into the notice of appeal. For example, Rule 8(2) reads;

*"The notice of appeal shall be filed in the registry of the court below and shall*

*(a) Set out the grounds of appeal*

*(b) State whether the whole or part only of the decision of the court below is complained of and in the latter case specify the part*

(c) *State the nature of the relief sought*

***(d) State the names and addresses of all parties directly affected by the appeal.***

***8(5) reads;***

***"The grounds of appeal shall set out concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal without any argument or narrative and shall be numbered consecutively****.*

It is not for nothing that these elaborate rules have been made to regulate appeals in court. A breach of these regulations have led to the dismissal of many an appeal from the Court of Appeals, and for that matter, the Supreme Court.

We very well appreciate the stance taken by the Court of Appeal in not exrcising their discretion in favour of the appellant by refusing to deal with the fresh ground of appeal that was argued without leave. The language of the rule 8(7) connotes the exercise of discretion by the Court of Appeal. And judicial discretion is exercised within certain parameters. The need to observe the audi alteram patem rule is only one of the reasons why leave ought to be sought. It is wrong to say that it is the only reason and utterly wrong to say that Rule 8(8) overrides 8(7) once the respondent has the chance to respond. That the rules says the court may grant leave subject to terms, shows that grant of leave is not automatic and in the form as requested. And for a person who has breached the rules to come before the Court of Appeal, not in a sombre mood but in a brazen cavalier manner like he did, seeking to justify an obvious breach of the rules, he was not likely to endear himself to Their Lordships as to get their discretion!

However, before us the appellant has toned down his language and coupled with the facts that:

1) this is the final court of the land

2) it will be unfair to visit the sins of counsel on the litigant and

3) there is the need to do substantial justice and deal finally with all outstanding issues,

we will overlook the obvious breach of rule 8(7) and adjudicate on the additional ground of appeal argued without obtaining leave. In coming to this conclusion we have been influenced greatly by a decision of this court cited to

us by counsel for the appellant. Faced with a similar situation in the Supreme Court in the case of **Volta Aluminium Co.Ltd vrs Akuffo &ors [2003-2005] 1 GLR 502 at 511,** our very esteemed brother Date-Bah JSC said,

"***Additional grounds of appeal were filed by the defendant company, but leave was not sought by their counsel from this court for them to be argued. Accordingly, strictly speaking, according to Rule 6(6) of the Supreme Court Rules 1996 CI 16, the arguments of the defendant based on the additional grounds should be ignored. The failure by the defendant to secure leave for the additional grounds would mean that much of its statement of case would be rendered less relevant than it might have been since it focused on the additional grounds .On the other hand, by the rule 6(7) of C.I 16, notwithstanding the requirement for an appellant to set forth the grounds of appeal, the court is not obliged, in deciding the appeal to confine itself to the grounds set forth by the appellant nor is it precluded from resting its decision on a ground not set forth by the appellant . Accordingly in the interest of justice, I would take account of such of the additional grounds of appeal as I find helpful in the hearing of this case, by way of appeal. There will be no injustice in resting any decision I take on any of the additional grounds since the plaintiffs were given notice of them (and the arguments in support of them) and in fact, addressed them in their statement of case".***

Taking a cue from our esteemed brother, we would reluctantly, interfere in the discretion exercised by our Learned brothers in the Court of Appeal and deal with the fresh ground of appeal as if same has been regularly argued. Since the second ground argued before this court is the same as the fresh ground that was sought to be argued before the court of appeal, and since an appeal is said to be by way of rehearing, we do not deem it necessary to remit the matter to the court of appeal for a pronouncement on the fresh ground. We will, as the constitution permits in Article 129 (4), assume jurisdiction and deal with the fresh ground, which as pointed out is also set out as the second ground of appeal before us.

The additional ground that was argued without leave before the Court of Appeal was couched as follows;

***The learned trial judge erred in law in declaring the 3rd defendant/respondent to be a 20% shareholder of the 1st defendant company when at all material times there had not been a valid call and forfeiture of the shares of Welbeck***

***Kwesi Wedzi as prescribed by both the Companies Act,1963 and the regulations of the 1st defendant company.***

Before us the second ground of appeal has been couched as follows

***The learned justices of the court of appeal erred in failing to declare the remaining 20% shares purportedly acquired by the 3rd defendant/respondent to be a nullity and of no effect.***

The summary of the submission of counsel was that since the trial court had found as a fact that there had not been a proper call pursuant to the regulations of the company that had led to the forfeiture and sale of the 20% shares of the plaintiff Amos Wedzi, and since the sale of Welbeck's shares was part of the same transaction which the trial judge had found and declared unlawful, the said declaration should be extended to the part of the transaction involving the shares of Welbeck Kwesi Wedzi.

We find this position rather hypocritical and unsupported by the evidence adduced at the trial. Hypocritical in the sense tha**t,** the1st and 2nd defendants or appellants herein, defended the transaction which they are now condemning, to the hilt, all through the trial and even in the grounds of appeal. Further, the evidence adduced at the trial indicate that the declaration of the transaction in respect of the plaintiff as a nullity was more in tune with the breach of natural justice than anything else. The plaintiff was deemed to have forfeited his shares because he was said to have been a subject of investigation for fraud and stealing. Therefore a call of the directors had been made and this had led to the forfeiture and sale of his 20% shares and also his removal as a director. The court found that no such investigation had been conducted to the knowledge of the plaintiff and that no processes had been properly served on the plaintiff in accordance with the law. The trial judge therefore concluded as follows

***"There is no evidence whatsoever that the plaintiff was convicted of any offence involving fraud or dishonesty by any court. Indeed it seems to me that the decision of the directors to remove the plaintiff was taken at a hurriedly arranged directors meeting without the proper procedure in section 185 being followed. The whole removal process was clearly in breach of section 185 of the code and clearly in breach of the audi alteram partem principle of natural justice."***

The same thing cannot be said of the sale of the shares of Welbeck Yao Wedzi. In fact the court found as a fact that the transaction that led to the acquisition of the combined shares of Welbeck and Amos was witnessed by Welbeck who also appended his signature. Even though Welbeck is now deceased, there is no evidence that he ever sought to challenge the sale of his shares to the 3rd defendant. The estate of Welbeck has also not sought to challenge the said transaction. I do not see the locus of the 1st defendant in challenging transaction which it has benefitted from. To grant this prayer will tantamount to allowing the plaintiff to benefit from its own wrong doing to the detriment of an innocent person like the 3rd defendant who was entitled to believe that things had been regularly done regarding the sale of the shares. See the case of **Royal British Bank v Turquand(1856) 6 E&B 327** where their lordships laid down the now notorious rule of Turquand as follows;

***"A person dealing with a company is entitled to assume in the absence of facts putting him on enquiry, that there has been due compliance with all matters of internal management and procedure required by the articles."***

Finally we wish to note that before the trial court the issue for determination was not the regularity or otherwise of the whole transaction that led to the acquisition of the forty percent shares by the 3rd defendant. The plaintiff had gone to court to challenge the forfeiture of his 20% shares and his removal as Director of the 1st defendant company. After pronouncing on the claim of the plaintiff, the trial judge noted as follows;

***"I should say in passing that Welbeck Kwesi Wedzi (the father of the plaintiff and 2nd defendant) was also a 20% shareholder whose shares were affected by the said sale agreement. He is said to be deceased. The evidence shows that he died in 2004. The evidence shows that at the time of the execution of exhibit'D' Welbeck Kwesi Wedzi was present. He indeed appended his signature as a witness for the 2nd defendant. That probably explains why he did not in his life time challenge the forfeiture of his shares. In any event the forfeiture of his shares is not an issue before me".***

So the question is, at this late stage can the issue of the regularity of the sale of the shares of Welbeck Kwesi Wedzi be raised as part of this case? We do not think so. The principle as laid down in various authorities is that except under very limited and special circumstances, a party is not entitled to raise on appeal any issue which could have been raised but was not raised before the trial court.

See the case of **Royal Dutch Airline( KLM) vrs Farmex ltd 1989-90 1 GLR 46 (CA).**

We find no merit in the appeal and so same is dismissed.

**(SGD) P. BAFFOE BONNIE**

**JUSTICE OF THE SUPREME COURT**

**(SGD) W. A. ATUGUBA**

**JUSTICE OF THE SUPREME COURT**

**(SGD) J. ANSAH**

**JUSTICE OF THE SUPREME COURT**

**(SGD) N. S. GBADEGBE**

**JUSTICE OF THE SUPREME COURT**

**(SGD) V. AKOTO BAMFO (MRS)**

**JUSTICE OF THE SUPREME COURT**

**COUNSEL**

OSAFO BUABENG ESQ. FOR THE 1ST DEFENDANT/APPELLANT /APPELLANT.

KWAME AGATI ESQ. WITH HIM MICHAEL AKANBEK FOR THE 3RD DEFENDANT/RESPONDENT/RESPONDENT.