IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – A.D. 2018

CORAM: ADINYIRA (MRS), JSC (PRESIDING)
AKOTO-BAMFO (MRS), JSC
BENIN, JSC
APPAU, JSC
PWAMANG, JSC

CIVIL APPEAL
NO. J4/25/2018

12TH DECEMBER, 2018

FRANK ODURO …….. PLAINTIFF/RESPONDENT/APPELLANT

VRS

GRAPHIC COMMUNICATION GROUP LTD. …. DEFENDANT/APPELLANT/RESPONDENT

JUDGMENT

BENIN, JSC:-

The Plaintiff/respondent/appellant, hereinafter called the Plaintiff, was in the employment of the Defendant/appellant/respondent, hereinafter called the Defendant, from October 2005 until his appointment was terminated by letter on or about 4th April 2013. The reasons assigned in the letter of dismissal were negligence of duty and causing financial loss to the Defendant. The dismissal letter further surcharged the Plaintiff and one other named person with the amount of GH₵41,195.66 which was said to have been lost to the Defendant as a result of Plaintiff's alleged negligence. Not only was the Plaintiff denied all his benefits, the Defendant went further to deduct the sum of GH₵23,507.27 from his provident fund contributions to defray part of the sum alleged to have been lost to the Defendant.

The Plaintiff maintained his innocence of all allegations made against him by the Defendant.

The whole matter arose from some adverts placed by or on behalf of the Electoral Commission (EC) in the Daily Graphic. The bone of contention was whether the adverts were placed directly by the EC or through a third party, a company called Driwald Advertising Agency; Driwald, for short. The case set up by the Plaintiff at the trial was that the adverts were placed by Driwald on behalf of the EC, for which reason it was entitled to a 10% discount, being a registered agent of the defendant. So he, as the Manager in charge, granted the discount to Driwald. This was contrary to the position taken by the Defendant which maintained that the adverts were placed directly by the EC so the Defendant was negligent in performing his duty and had thereby caused financial loss to the Defendant. Following investigations by a committee set up by the Board of Directors of the Defendant, the Plaintiff's appointment was terminated with loss of benefits as earlier mentioned.

The Plaintiff therefore instituted an action at the High Court and claimed these reliefs:

a. General damages for wrongful dismissal.

b. An order that the Plaintiff be re-instated.

c. An order that the Plaintiff be paid all salaries, allowances, bonuses and any other entitlements unpaid from the date of the purported dismissal of Plaintiff up to and inclusive of the date of re-instatement.

d. An order directed at the Defendant to refund to the Plaintiff the amount of GH₵23,507.27 which the Defendant unlawfully deducted from the Plaintiff's provident fund contribution.

e. Interest on all sums of money at the commercial bank lending rate from the date of the purported dismissal to the date of re-instatement.

f. Costs.

The trial High Court made findings of fact on all core issues against the Plaintiff. However, the said court accepted the submission by Plaintiff's counsel that the investigative proceedings were conducted in violation of section 17.5 of the Defendant's Management Conditions of Service (MCS). The reason was that since the Plaintiff was in an executive management position, it was the duty of the Board to have heard the case, and not a committee appointed by the Board. For that procedural non-compliance, the trial court upheld the Plaintiff's claim and made certain awards in his favour.

The Defendant appealed to the Court of Appeal. The Plaintiff also applied for a variation of the High Court's findings of fact that Plaintiff was negligent and also dishonest. The appellate court upheld the appeal, reasoning, inter alia, that the Plaintiff never pleaded the fact that the investigations were procedurally flawed and also under section 138 of the Companies Act, 1963, Act 179, the Board could act by a committee of its members. The court held that absence of evidence on the composition of the investigation committee was not fatal to the respondent's case. The court faulted the trial court for relying on the MCS. The Court refused to go into the merits of the decision of the Board reasoning that judicial review was not concerned with the merits of the decision. For that reason too, it refused to grant the order of variation that the appellant herein was seeking.

The Plaintiff has brought this appeal praying this court to reverse the decision of the Court of Appeal on these grounds:

(a) The learned Justices of the Court of Appeal erred when they held that the appellant's action did not question the validity of the procedure and substance of respondent's disciplinary proceedings that led to his dismissal.

(b) The learned Justices of the Court of Appeal erred when they held that the respondent company had no obligation to produce evidence about the composition of the disciplinary committee when on record the said committee's report was tendered in evidence through the respondent's witness without any objection whatsoever.

(c) The learned Justices of the Court of Appeal erred in holding that the court cannot review the merits of the dismissal of the appellant when the respondent had strenuously justified the merits of its decision in the trial court.

(d) The learned Justices of the Court of Appeal erred in their evaluation of exhibit F, the Management Conditions of Service document, in spite of the overwhelming evidence that the proceedings that resulted in the dismissal of the appellant was not determined by the Board of the respondent company.

(e) The learned Justices of the Court of Appeal erred when they failed to decide on the substance of the appellant's prayer for variation of the decision of the trial High Court which found the appellant negligent and dishonest.

(f) The judgment is against the weight of the evidence.

It is clear from the grounds of appeal, as argued, that this appeal can be determined on two broad fronts, namely:

(1) whether the findings of fact made by the trial High Court and endorsed by the Court of Appeal could be supported by this court, having regard to the evidence on record; and

(2) whether the disciplinary proceedings that resulted in the dismissal of the Plaintiff followed due process.

On the concurrent findings of fact by the courts below, it has been pointed out time without number that the second appellate court cannot substitute its own views for those of the courts below, even if given the same facts the second appellate Court would have reached a different conclusion on the facts. However, the second appellate court can upset the findings of fact if certain questions, or some of them, are answered in the affirmative. Did the court fail to consider vital pieces of evidence, oral as well as documentary? Did the court take into consideration and rely on irrelevant and immaterial evidence? Did the court rely on legally inadmissible evidence? Did the court wrongfully exclude relevant, material and admissible

evidence? Did the court fail to identify and allocate the burden of producing evidence and of persuasion and thereby failed to consider the party's case properly? Did the court fail to identify the standard of proof required on a particular issue and thereby failed to assess the party's case accordingly? Did the court embark upon a proper evaluation of the evidence as a whole? These are by no means exhaustive. Answers to such questions and others may guide the court to reach a decision whether to disturb the findings of fact or otherwise.

Let us refer to the findings of fact made by the trial court, to begin with. We quote extensively from the court's decision. The court said:

"The facts as gathered from the records that led to the loss of the sum of GH₵41,195.66 is that a business by name Driwald Advertising Agency Limited purported to be an agent of the Electoral Commission having the task of placing advertisement with the Defendant on the Commission's Biometric Voter Registration. The Plaintiff exercised his powers under the Defendant's Credit Policy and granted Driwald....10% volume discount on the advertisements. The question is, was Driwald.....entitled to any payment at all from the Defendant?

Exhibit F Appendix 3 is a letter from the Electoral Commission dated 23-03-12 headed 'Award of Contract for the Placement of Adverts. The first two paragraphs read as follows:

'We refer to your quotation for the placement of adverts on the notice of Biometric Voter Registration. We wish to inform you that your quotation exclusive of VAT and NHIL, has been accepted.

You have therefore been awarded the contract to place Electoral Commission's advert on the Notice of Biometric Voter Registration in the Daily Graphic.'

The letter dated 23-03-2012 refers to a quotation the Electoral Commission received from the Defendant and based upon the quotation, the Defendant was awarded the contract on the said advert.

It is significant that the letter from the Electoral Commission was addressed to the Defendant's Adverts and Business Development Manager. That position was held by one Mr. Ebo Acquaye who worked under the supervision of the General Manager (Marketing and Public Affairs) Mr. Frank Oduro, the Plaintiff herein.

For a further letter dated 11-11-2012 from the Defendant, in response to a request for information by the Defendant, the Electoral Commission had this to say:

'I refer to your letter dated 09-11-2012 on the above subject and wish to respond as follows:

**The Commission has not dealt with or contracted any agent to deal with the Graphic Communications Group Limited on its behalf. As a result, both cheques issued for the Biometric Voter Registration (BVR) advertisement were written in the name of Graphic Communications Group Limited.*"*

The trial court continued thus*:*

"Indeed, two invoices were sent to the Electoral Commission being Appendix 1 and 2 in exhibit F. The invoice dated 19-03-2012 was supplied to the Electoral Commission by Michael Twum Barimah. The invoice dated 14-06-2012 was supplied to the Electoral Commission by Ebo Acquaye. Michael Twum Barimah worked under the supervision of the Plaintiff as the Defendant's Assistant Marketing Officer.....The payments for the adverts were received on behalf of the Defendant in respect of cheque number 158577178, amounting to GHc35,642.64 by Ebo Acquaye whilst cheque no. 581982183 amounting to GHc172,272.76, was received by Frank Oduro, the Plaintiff as per Appendix 10, in exhibit F.....

In all these documentary evidence proffered at the trial, there was no mention of Driwald.....whatsoever."

The trial court then turned attention to the role played by the Plaintiff and his justification for paying the discount to Driwald. The court continued thus:

“In respect of the clear evidence that Driwald....was never contracted by the Electoral Commission to place any advert with the Defendant on the Biometric Registration exercise, the plaintiff conducted himself as per paragraphs 13, 14 and 15 of the statement of claim. The plaintiff said:

'In respect of the placement of the Adverts on the BVR the Plaintiff was met in Plaintiff's office by the Chief Executive Officer of Driwald.....in the presence of the Adverts Manager.

The Plaintiff was then shown a work order from Driwald ....in respect of the Adverts and informed that Driwald.....has requested for a discount of 10% which could not be granted by the Adverts Manager according to the terms of the Defendant's Credit Policy.

It is the Plaintiff's act of exercising the.....powers under the Defendant's Credit Policy to grant Driwald.....the 10% volume discount based on the work order from Driwald.....in respect of the Adverts for the Biometric Registration exercise which the Defendant alleges amounts to negligence of duty and for which the Defendant has actually dismissed the Plaintiff.'

The trial court dismissed the plaintiff's assertions above in these words:

“Indeed, how ill it lies in the mouth of the Plaintiff to be talking like this. In my candid opinion, Plaintiff was not only negligent but downright dishonest in his dealings with the Defendant. Can the Plaintiff be heard to be posturing himself as meeting the Chief Executive Officer of Driwald.....with.....Mr. Ebo Acquaye to whom the direct award of the contract to the Defendant was channeled or addressed without knowing that Driwald.....was not an agent of the Electoral Commission?”

The trial court then proceeded to draw inferences from the evidence on record as follows:

"There is no doubt that under the circumstances if the Plaintiff did not know the serious business happenings in his department and concerning Ebo Acquaye and Michael Twum Barimah, then he was in breach of the duty of care due from him to the Defendant. But in any event, it is not my view that the Plaintiff never knew that Driwald.....was not an agent of the Electoral Commission as he strenuously seems to be holding on to. My view is that he knew that the advert was placed directly by the Electoral Commission to the Defendant and this is evidenced by the fact that the plaintiff himself personally went to the Electoral Commission for a payment of the advert by a cheque drawn in the Defendant's name without Driwald stepping foot in the corridors of the Electoral Commission to do so. To authorize the payment of monies to Driwald.....was therefore a betrayable evidence of the skill and competence expected of the Plaintiff by the Defendant. I have come to this length to show that on the facts before me, the Plaintiff's action ought to have been dismissed for being negligent, to say the least, and causing financial loss to the Defendant"

These findings of fact by the trial court are based on solid evidence on the record. The Plaintiff's position based on a supposed work order was rightly rejected by the trial court. Was the work order issued and authorized by the Electoral Commission, the contracting party? Did the Electoral Commission communicate the supposed work order to the Defendant through a letter or other proper official notification? Did Driwald produce any contract between them and the EC for this job? Was it before or after the Commission had notified the defendant it was not using any agent? These are questions the Plaintiff ought to have addressed to enable the court place some weight on his version.

Be that as it may, the Court was not bound to accept what the Defendant said, especially in view of the material pieces of evidence from the Defendant. The Electoral Commission had made it clear it was not using the services of any agent in the procurement of this contract, so the Plaintiff was put on inquiry as to any person who purported to be working for the Electoral Commission in respect of this same contract. The Defendant issued invoices directly to the EC for payment. And the Defendant, per the Plaintiff and one other named staff, received payment directly from the EC. The Plaintiff has not been able to demonstrate to this court where the

trial court went wrong in the evaluation of the evidence on record. The fact that the courts below rejected the Plaintiff's account or version is not a good or sufficient reason for this court to intervene and substitute its view for that of the courts below. On the available evidence before the trial court, it was entitled to accept the Defendant's version on a balance of probabilities. And even if the standard of proof required was one beyond reasonable doubt, the evidence was sufficient to satisfy that standard, but this was not the required standard of proof in this case. The courts below were right on the matters of fact. The trial court's conclusion that the Plaintiff was negligent and downright dishonest is fully supportable on the evidence and we would affirm same.

The other issue for consideration in this appeal is one of law, what proper construction is to be placed on clause 17.5 of the Management Conditions of Service (MCS) applicable to the Defendant and its employees and whether due process was followed. In construing a section of a deed, it may become necessary to make reference to other provisions of the same deed, and even to statute law in order to render the provision meaningful. That is exactly the approach adopted by the Court of Appeal, as against the rather narrow and restrictive approach adopted by the trial High Court. Once more, we have to refer to the trial court's opinion on this. Having made positive findings of fact as recounted above, the court decided, however, to enter judgment for the Plaintiff on account of procedural infractions of the MCS. In the words of the court, *"providence has come to the rescue of the Plaintiff. In the address.....counsel for the Plaintiff made submissions that have weighed on my mind. Counsel submitted.....as follows: 'the record shows clearly that the Plaintiff was an executive manager that is the General Manager Marketing and Public Affairs.....and by the provisions of section 17.5 of the MCS, it was the Board of the Defendant itself that ought to determine the Plaintiff's case and not an investigative committee. The Board had no power under the conditions of service to set up an investigative committee to investigate the Plaintiff, an executive manager.....the Board breached section 17.5 in setting up the investigative committee and accepted its recommendations to dismiss the Plaintiff. The Defendant flagrantly violated section 17.5 of the MCS.....'*

I have critically read 17.5 of the MCS, 2011.....I have also gone back to the pleadings of the plaintiff and nowhere did he plead the foregoing as a material fact. The rules, specifically Order 11 rule 7 of C. I. 47, requires no doubt, that a material fact relied upon in support of a claim or defence must be pleaded. However, the evidence of this unpleaded fact, which is exhibit F, has gone on record having been tendered in evidence by the Plaintiff and without objection from the Defendant. It is therefore part of the proceedings."

Citing the case of Asamoah v. Sevordzie (1987-88) 1 GLR 67 at 74, on reception of evidence without objection, the trial court felt bound to apply section 17.5 of the MCS in favour of the plaintiff. Indeed the court considered sub-clauses 1, 2 and 4 of the MCS as well.

The provisions cited by the court read:

17(1) The Disciplinary Authority of the Company is vested in the Board of Directors who may exercise the authority either directly or through an individual or committee.

17(2) Pursuant to clause 17(1) above, the Board of Directors shall establish an investigation/disciplinary committee to which management may refer any case requiring action.

17(4) Where the alleged offence is likely to result in suspension or dismissal, the investigative committee shall investigate and/or hear the matter and the Managing Director shall refer the findings to the Board of Directors.

17(5) In the case of an Executive Manager, the Board shall determine the entire proceedings in cases which may result in suspension or dismissal.

Having examined these provisions, the trial court delivered itself as follows:

"Per Clause 17.5, the proceedings in the Plaintiff's case was mandatorily required exclusively of the Board of Directors to undertake without reference to any committee whatsoever. The Board's investigative committee report, which is exhibit

D confirms in its page one that the committee was mandated by the Board to investigate, make findings and recommendations involving the Plaintiff.

Exhibit E, the Plaintiff's dismissal letter also stated inter alia:

'The Board of Directors has considered the reports of the investigative committee of the Board and has decided that you be dismissed with immediate effect.....'

Exhibits D and E referred to provide evidence of the breach of the Defendant of Clause 17.5. .....Under Clause 17.5, the Board has no such delegating powers and the committee that investigated the Plaintiff lacked capacity to do so and therefore acted without jurisdiction just as the Board."

Consequently, the trial court declared the proceedings null and void, citing the popular dictum by Lord Denning in Macfoy v. UAC (1962) AC 152 at 160.

Apparently, the trial court's decision was based on the law that an administrative action may be reviewed on ground of procedural impropriety, see the case of Council of Civil Service Unions v. Minister for the Civil Service (1985) AC 374, per Lord Diplock at 411; (1984) 3 All ER 935 at 951. The impropriety may arise from a failure to follow a procedure expressly provided for by statute or an instrument that has the force of law.

The Court of Appeal examined the rules on administrative justice and the scope of judicial review. They relied on cases like Awuni v. West African Examinations Council (2003-2004) SCGLR 471; Aboagye v. Ghana Commercial Bank (2001-2002) SCGLR 797. The court below explained the object of judicial review. The court also explained the function of pleadings and why it was necessary for every material fact to be pleaded. The court made reference to the trial court's admission that the Plaintiff did not plead the facts upon which the court rested its judgment. On whether or not there was a violation of clause 17.5 of the MCS the Court of Appeal agreed with counsel for the Defendant that this provision did not mean the entire board should conduct the investigations. And that by the provisions of section 138 of Act 179, a committee of the Board would suffice. It rejected the submission by

counsel for the Plaintiff that the provisions in section 138 of Act 179 should be read as general provisions, as against clause 17.5 of the MCS which was specific. The court also rejected the Plaintiff's view that there was no evidence on the record that the committee members belonged to the Board, reasoning that there were no pleadings so this was not a triable issue.

In resolving this issue, the first observation is that in an action for wrongful termination of employment, the Plaintiff must spell out his terms of employment and go on to tell the court where the employer has gone wrong in relation to his claim. This calls for the pleadings to be explicit on what issues the Plaintiff wants the court to address. Where there is a document that spells out the terms and conditions of employment, the plaintiff must plead those provisions or facts evincing intention to rely on specific provisions of the document. This will enable the Defendant to know the nature of the case he has to meet and prepare his defence accordingly. It is not enough to tender the document in evidence and in addressing the court point out for the first time which provision/s in the document the Defendant is said to have been in breach of, in the absence of pleadings and more importantly when there is no evidence on the record to support the submission.

In the instant case, all the pleadings were directed at whether or not the Plaintiff had done anything wrong in relation to the EC adverts. There was no pleading that suggested even remotely that the Defendant had breached section 17.5 of the MCS. The submission on breach of clause 17.5 has been put in because of the pleadings that it was a committee of the board that investigated the Plaintiff. But that was not enough in view of the fact that the Board is entitled by law to act by a committee of its members under Section 138(a) of Act 179 which provides that:

“Unless otherwise provided in the regulations, the board of directors

(a) may exercise their powers through committees consisting of such member or members of their body as they think fit.”

Administrative rules and/or regulations are subject to various legislations and laws recognized under article 11 of the 1992 Constitution, particularly the Constitution,

statute law and regulations governing the organization must be respected. The internal contractual arrangements, like the MCS, do not enjoy the status of law, therefore any of its provisions, which is in conflict or appears to be in conflict with any legislation, must be construed in one of two ways. The court will consider whether the two provisions can be read together and reconciled; if they can, the statute will be incorporated by reference into the contract and the court will give effect to both. If on the other hand, they cannot be reconciled, the provisions in the contract will not be enforced by the court, the statute will prevail.

In the case of Republic v. High Court, General Jurisdiction, Accra; ex parte Zanetor Rawlings, (Ashittey & National Democratic Congress Interested Parties) (2015-2016) SCGLR 53, the argument was made that under the constitution of the NDC the applicant was disqualified from contesting the parliamentary primaries on the party's ticket because she was not a registered voter in the records of the Electoral Commission and in terms of the NDC constitution. When the matter landed in the apex court, the court held that a person was only disqualified if he/she was not qualified in terms of article 94 of the Constitution. This decision effectively meant that the NDC could not draw up constitutional provisions that took out relevant provisions of the 1992 Constitution. Consequently, the High Court was directed to determine the party's constitutional provisions on primaries to elect parliamentary candidates in the light of the interpretation given to article 94 of the Constitution, in order to bring the party constitution to be in harmony with what the national Constitution says.

Thus in this case, clause 17(1) which entitles the Board to act by a committee should be read as one with clause 17(5) as well as section 138(a) of Act 179 in order to give effect to the provisions of the MCS. Therefore, if the Defendant acted by a committee of members of the Board, it would be justified.

However, the Plaintiff is saying that there is no evidence that the committee members belonged to the Board. This is where the essence of pleadings becomes critical. The Plaintiff did not make section 17.5 an issue. He did not plead any facts to indicate that the committee was improperly constituted and for that reason it had

no capacity. The Defendant did not assume the initial burden of producing evidence on the capacity of the committee members, since it did not become an issue in the case. In the case of Kusi v. Kusi (2010) SCGLR 60, per Georgina Wood CJ at 78, this Court re-stated the rule of evidence that "where no issues are joined as between parties on a specific question, issue or fact, no duty was cast on the party asserting it to lead evidence in proof of that fact or issue." The learned judge went on to caution that "most of the delays associated with civil trials would be avoided, if this simple elementary evidentiary rule were strictly adhered to." Indeed the principle applies to every party in a case, he assumes no burden to produce evidence if no issue is joined on a particular issue or matter.

All that the Defendant had to do was that it set up a committee of its members, as required by section 138(a) of Act 179 and clause 17(1) of the MCS. And from the report of the committee-exhibit D-as well as the pleadings, the Court is able to say, in the absence of pleadings and evidence to the contrary, that the Defendant satisfied the requirement of the law in the composition of the committee.

To begin with, exhibit D is titled "BOARD INVESTIGATIVE COMMITTEE". Next the report opens with the expression: "This Committee of the Board....." When you turn to the second page of the report, the recommendation was made that the Board was to conduct its own investigation, hence the setting up of the committee of the Board. The plaintiff in paragraph 7 of his own pleadings described it as "the Investigative Committee of the Board", and Defendant admitted it in its statement of defence. The parties were thus under no illusion that the committee comprised Board members. The ordinary dictionary meaning of the word 'of' confirms this construction. The Oxford Dictionary of English gives the meaning of the word 'of' as "expressing the relationship between a part and a whole". Thus the ordinary meaning ascribed to the expression "committee of the Board", will mean the committee is part of the Board. Hence, the plaintiff assumed the burden to prove the contrary, since he was aware of the report before he issued his writ. On the other hand, if the Plaintiff thought 'Investigative Committee of the Board' meant something different, he ought to have pleaded the facts and made the composition of the committee a triable issue. As it turned out, the Plaintiff contested the case on

grounds that he did not commit the wrong attributed to him. Not even when the Defendant's representative testified were these matters of the composition of the committee suggested to him in cross examination. And the Defendant's representative in answer to a question that the Plaintiff had said he was wrongly dismissed, made this significant statement: “the communication from the board to management concerning the matter indicated that due process, in terms of cases of such nature, was applied in relation to the management service conditions.” This was not challenged under cross examination, and the Plaintiff's version in respect of due process was not put across in cross examination.

In concluding, we reiterate the point that in the absence of pleadings, the composition of the investigative committee was not an issue. And even if it was, the ordinary construction of the expression used in the proceedings meant it was the committee of the board. The Defendant's evidence that due process was observed in terms of the MCS was not disputed. The Plaintiff did not plead any facts or lead any evidence from which it could be concluded that the composition of the committee did not satisfy the requirement of the law. Consequently, we conclude that there is no merit in the appeal and we dismiss same accordingly.

A. A. BENIN
(JUSTICE OF THE SUPREME COURT)

ADINYIRA (MRS.), JSC:-

I agree with the conclusion and reasoning of my brother Benin, JSC.

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

AKOTO-BAMFO (MRS.), JSC:-

I agree with the conclusion and reasoning of my brother Benin, JSC.

V. AKOTO-BAMFO (MRS.)
(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-

I agree with the conclusion and reasoning of my brother Benin, JSC.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

PWAMANG, JSC:-

I agree with the conclusion and reasoning of my brother Benin, JSC.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

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