IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA- A.D. 2021

CORAM: APPAU, JSC (PRESIDING)

DORDZIE (MRS.), JSC

PROF. KOTEY, JSC

AMADU, JSC

PROF. MENSA-BONSU (MRS.), JSC

CIVIL APPEAL
NO. J4/40/2017

7TH JULY, 2021

DAVID AGBELI ..... PLAINTIFF/APPELLANT/APPELLANT

VRS

MERCHANT BANK GHANA LTD. ..... DEFENDANT/RESPONDENT/RESPONDENT

JUDGMENT

DORDZIE (MRS.) JSC:-

Facts:

Until 6th February 2008, the Appellant herein was in the employment of Merchant Bank Ghana Ltd, the respondent, (the bank) as the acting head of the Credit Risk Management Department. He was employed in August 2005 and worked as next in command in the said department until his elevation to the acting position of the head of the said department.

In or about October 2007, the respondent found cause to complain about the manner the appellant was performing his role as head of the Credit Risk Management Department of the Bank. Therefore on 6/10/2007 it wrote to the appellant, (a query) to explain his actions which was found to have breached the rules of the bank's credit policy; details of the breach were particularized in the said letter, (exhibit C). On 9/10/2007, the bank wrote the appellant to proceed on leave while it investigated matters.

The appellant wrote a response to the query dated 13/10/2007. The bank found appellant's explanations unsatisfactory, it therefore wrote, summarily dismissing him on 6/02/2008. Following the bank's required proceedings in such matters, the appellant petitioned the Board of Directors of the bank. He did not find favour with the board and the petition was turned down.

The appellant turned to the court for remedy and on 24/07/2008, he instituted an action against the bank in the High Court Accra.

The averments in the amended statement of claim give the facts upon which the appellant instituted this action and they are reproduced as follows:

1. Plaintiff was until the 6th of February 2008, an employee of the Defendant Bank occupying the position of acting Head, Credit Risk Management Department.
2. Defendant is a commercial bank registered in Ghana and doing business in the country
3. Plaintiff was employed by the Defendant bank sometime on 15th August 2005 and worked diligently and efficiently till 6th February 2008, when the Defendant wrote a letter dismissing Plaintiff from its employment.
4. Prior to the letter of dismissal dated 6th February, 2008, the Defendant wrote a letter dated 6th December 2007, to the Plaintiff leveling charges of non-compliance of the Plaintiff with approval limits of the Defendant's bank.
5. Plaintiff will show that he provided explanation to show that the facilities which were granted to the named customers were all done by the Plaintiff after proper and reasoned memos have been prepared by the Corporate Department of the

Bank with approval of the Managing Director who was entitled under the Group Credit Policy of the Bank to exercise discretion to approve facilities above his approval limit where the overall interest of the bank will be properly served.

6. Plaintiff will show that the mere approval of a loan or credit facility above the credit limit of a relevant officer did not amount to misconduct punishable by dismissal. In fact, this practice abound in the Defendant bank and in the banking industry as a means of facilitating business among loyal customers in the custom of the bank.
7. The Plaintiff will further show that under the rules, the only thing the officer approving the excess facility has to do is to bring the excess approval to the attention of the "next higher authority" and to explain the rational. The approval itself did not amount to unacceptable conduct. These are recognized as "Policy Exceptions" under paragraph 2:3:1 of the Defendant's Bank's Group Policy.
8. Plaintiff will show that he never on his own personally approved any excess facility for any customer of the bank without reference to the next higher authority to himself (i.e. the Managing Director) of the Defendant bank who approved and or ratified in accordance with paragraph 2:3:5 of the "Merchant Bank Group Credit Policy" Regulations which is the regulator manual for all Credit and Risk Administration of the Bank.
9. Additionally, plaintiff will aver that there were strong business rationale supporting the proposals to grant those facilities with proposed tangible benefit accruals to the defendant bank since all the excess approvals were supported by reasoned and convincing memos from the Corporate Department of the bank giving reasons for the grant of the loans or facility. This is evidenced by Defendant's letter of 6th December 2007 titled "Re Leave" leveling the allegations of approval excess facilities without authority which made copious references to the memos initiating the various transactions involving the Plaintiff.
10. Plaintiff will show that so long as the rationale or reasons are properly and convincingly laid in reasoned memos from the Corporate Department and approved by both the Plaintiff and Plaintiff's 'next higher authority' (i.e. the Managing Director) the actions of Plaintiff was perfectly within the regulatory limits

of the Defendants bank and in accordance with the Defendant Bank's Group Credit Policy.

11. Plaintiff will also lead evidence to establish that between July 2007 and September 2007 the Board of Directors at their meetings agreed and asked that those facilities belonging to these customers be brought to the board for ratification. The minutes of the Board on or around this period will show this fact.
12. By reason of the lawful authority of the Plaintiff within the credit policy, the excess grant to the following customers of the bank namely:
    (i) Volta River Authority
    (ii) Exton cubic
    (iii) Holman Brothers
    (iv) MBG Limited
    (v) Western Steel
    (vi) Myroc
    (vii) B.5 Plus
    (viii) Broadband Home
    (ix) BCM Ghana Limited
    (x) Crystal Homes
    (xi) Mustek Engineering Limited
    (xii) Lancaster Plant Hire Limited
    (xiii) Plamers Green International Limited
    (xiv) Umadi Company Limited
    (xv) Foto-X Limited
    (xvi) Bamson Company Limited
    (xvii) TV Afrcia
    (xviii) JFK Limited
    (xix) Letap Pharmacy

    were all within the Plaintiff's authority as acting Head, Credit Risk Management Department.

13. All grants of loans and facilities in monthly and quarterly reporting compiled by the bank and deliberated upon by management of the Bank and every month's or quarter's report was assiduously sent for management approval. It is therefore surprising that the alleged misconduct charges preferred against the Plaintiff included some facilities which had been granted as far back as 2005, against which no query have been raised by management.
14. Plaintiff says that in the case of the customer PSG International, which was cited by the Defendant in a letter dated 6th December 2007, the Plaintiff had nothing to do with any transfer of any amount in respect of the Advance Payment by Ministry of Education and the said allegation is a veiled attempt to implicate him.
15. Plaintiff sought to resign after the allegation had been made against him without prejudice but same was refused by the Defendant Bank and instead dismissed.
16. Procedurally Plaintiff will challenge the steps taken before and during the investigation to dismiss him and will say that Managing Director was the sole person competent to sign his dismissal letter.
17. Plaintiff will show at the trial that he has not misconducted himself in any way since his 2 years employment with the Defendant Bank and that rather he had had favourable yearly recommendations by the bank's management since he joined.
18. Plaintiff was also compelled by the Bank to pay back all loans owed upon his dismissal.
19. (a) Plaintiff aver that

    (b) By reason of the perceived label in the banking and financial sectors, he was labelled as a dishonest and incompetent financial sector worker and has suffered severally both financially and in terms of his reputation.
20. Wherefore the Plaintiff is aggrieved and has suffered damage and claims as follows:

    (i) A declaration that Plaintiff's dismissal from the employment of the Defendant bank by a letter dated 6th February 2006 is unlawful.

(ii) An order that Defendant Bank pays all Plaintiff's salary and other entitlements due him from the date of his suspension on January 22nd to date of final payment.

(iii) General damages for wrongful dismissal

(iv) Special damages amounting to GH¢80,187.03 per year or GH¢6,682.25 per month being loss of income in alternative employment as a result of the pendency of the allegations of financial impropriety leveled by the Defendants.

(v) Special damages amounting to GH¢80,187.03 per year or GH ¢6,682.25 per month being loss of income in alternative employment as a result of the pendency of the allegation of financial impropriety leveled by the Defendants.

The appellant lost the action in the High Court. He appealed to the Court of Appeal and lost as well. The appellant is in this court praying that this court sets aside the judgment of the first appellate court plus the cost awarded by the said court.

Initially he canvassed the sole ground that the judgment is against the weight of evidence; subsequently the appellant filed as many as 15 additional grounds. The said additional grounds of appeal are as follows:

1. The Court of Appeal erred and misconceived the meaning of the word ratify when it held that the various ratifications of board did not absolve the Appellant from the alleged liability for excess loans.
2. That the Court whilst dismissing the ground which gave the managing director the exclusive mandate to sign the dismissal letter, ruled that the credit loan committee was the highest specialized body for credit approval and therefore could take any management decision whilst in the same breath holding that the ratification by same credit loan committee and the board of Directors was not effective to validate "unauthorized loans" perpetrated grave injustice on the Appellant.

3. The appellate Court failed to appreciate the discretionary clause 2.3.1 and 2.3.2 of the credit policy (Exhibit "D") which gave the Appellant and management the discretion where there is a strong business rational to grant excess loans.
4. It was wrong for the appellate Court to classify the exercise of discretion in granting excess loans as "misconduct" when there is no evidence on record of misconduct under the contract policy of the Defendant's bank.
5. With the overwhelming evidence of improvement in the bank's net worth, it was wrong for the Appellate Court to uphold the trial Court's finding that the actions of the Appellant brought financial distress to the bank
6. The appellate Court fell in the same error of the trial High Court, when it failed to appreciate that ratification of any excess loan by the Credit Committee, Managing Director and the board amounted to regularizing same and therefore absolved the Appellant from blame.
7. The Court of Appeal having found out that the Appellant as head of the credit risk Department could grant excess loan above his limit "where there was a strong business rationale under the policy" was wrong in holding further that the Appellant has misconducted himself in the exercise of that discretion,.
8. The Court of Appeal's conclusion that Plaintiff/Appellant neglected his duties to show that there was "a strong business rationale" was wrong in Law and was not borne out by the evidence and therefore led to a wrongful dismissal of ground 'j' before it.
9. The Court's decision to dismiss ground (a) based on a conclusion that, even though the trial Court erred by holding that the Managing Director has no approved authority disabled the Court from properly considering the fact the Appellant was instructed by the Managing Director to grant excess loans.
10. The Court misunderstood and misapplied the concept of ratification of excess loans thereby leading to a mistaken conclusion that even excess loans which had been ratified amounted to misconduct.
11. The appellate Court's holding that the trial Court did not find any evidence of ratification to enable it to absolve the Appellant of wrongdoing is itself a clear

indication of injustice in the face of multiple evidence of ratification of excess loans on the record.

12. The Court of Appeal's conclusion that the Appellant's defence is the Managing Director's directives to Appellant to grant excess loans could not stand because the Managing Director himself had been dismissed should have been reversed, when Appellant produced evidence of the Managing Director being cleared by a High Court decision in suit No. AHR 39/2009 intituled; BLAISE OFOE MANKWA VRS MERCHANT BANK (GH) LTD.

13 . The Court's conclusion that Appellant's conduct led to the Respondent's Bank running into liquidity problems with the Bank of Ghana was unsupported by the evidence on record.

14 . Both the Appellate Court and the trial Court ignored the many incidents of loans granted above limits before, during and even after the dismissal of the Plaintiff/Appellant and therefore could not make a valid finding on the practice as a convention in the Respondent's bank.

15 . The Court of Appeal misinterpreted s.40 of the rules and the conditions of service which exclusively empowered the Managing Director's office as the only office competent to dismiss the Plaintiff/Appellant led to a wrongful conclusion that the Appellant's dismissal was lawful.

Most of these additional grounds are repetitive, this observation reflects in the trend counsel for appellant followed in arguing the grounds. Apart from additional grounds 3, 4 and 15 I deem it appropriate to subsume the rest of the additional grounds under the initial ground and consider them together. To make this position clear I will set down the grounds of appeal we will consider in this appeal. They are -

1. The judgment is against the weight of evidence

2. The appellate Court failed to appreciate the discretionary clause 2.3.1 and 2.3.2 of the credit policy (Exhibit "D") which gave the Appellant and management the discretion where there is a strong business rational to grant excess loans.

3. It was wrong for the appellate Court to classify the exercise of discretion in granting excess loans as "misconduct" when there is no evidence on record of misconduct under the contract policy of the Defendant's bank

4. The Court of Appeal misinterpreted S.40 of the rules and Conditions of Service of the bank, which exclusively empowered the Managing Directors office as the only office competent to dismiss the Plaintiff/Appellant, led to a wrongful conclusion that the Appellant's dismissal was lawful

The Trial Court

At the trial the appellant apart from the oral evidence by himself and one witness, his former managing director, he produced numerous documentary evidence in proof of his case.

In relation to the accusation leveled against him that he breached the bank's group credit policy by granting loans above his credit authority, he tendered the bank's Group Credit Policy' as exhibit D. The appellant stated that the bank's Group Credit Policy gives guidelines for credit approvals. He also tendered exhibit C the letter written to him by the respondent bank (a query) which gives a list of the bank's customers he is accused of entering unauthorized transactions with. The appellant maintained that he complied with the policy guidelines, and he did not breach the guidelines in approving credits in excess of his limit in the list of transactions presented by his employers in which he is accused of misconduct. He made particular reference to paragraphs 2.3, 2.3.1, 2.3.2, 2.3.5, 2.5 and 2.6 (iv) to demonstrate that he complied with the policy guidelines in granting the credit to the various customers of the bank listed in exhibit C, the letter alleging his misconduct.

According to the appellant, by the credit policy of the bank he had the authority to approve credit up to USD 300,000. However, there are exceptions where the policy allows him to exceed this limit provided he got the approval from his next in authority he referred to paragraph 2.3.5 of the Credit Policy. He further stated that all the transactions on

which the charges against him are based were given approval by his next in command of the hierarchy of approving authorities which was the Managing Director.

He maintains that it is the practice of the Bank that where a business is beneficial to the bank and where there is competitive pressure and the bank stands the chance of losing the business, the exception clause in the credit policy of the bank, that is clause 2.3.5 could be relied on to grant a credit and later steps are taken to ratify the transaction. He tendered exhibit B and K series, which are reports of the credit committees meeting ratifying credit approvals that were done under the exception or emergency clause and which include companies whose transaction he was accused of. He maintained he excised the discretion given him under the particular clauses properly. His actions did not amount to misbehavior warranting summary dismissal

He denied that the approvals he was accused of caused financial loss to the bank, rather he said the bank made a lot of profit and he was commended for his hard work throughout his work period with the bank. He tendered exhibit G his performance appraisal to support this. He said it was a big surprise to him that he was suddenly accused and asked to go on leave. He offered to resign his position but the management of the bank refused and summarily dismissed him. Moreover, the transactions he was accused of, which did not have the Credit Committee's approval before he was asked to go on leave were in the process of being approved.

According to him the bank's liquidity problems that the Central Bank's report complained of, had been a situation the bank had faced for a long time. His actions did not contribute to that.

The appellant's former Managing Director gave evidence as PW2 confirming plaintiff's evidence. He was the plaintiff's next in command from whom he took authority to give approvals under the emergency clause of the credit policy.

According to PW2 he joined the bank in 2003 at that time the bank was in total insolvency. Its capital was in the negative, as at 31st March 2003, the bank's capital was minus 6.9 billion. He joined the bank in April 2003 and was given the responsibility to restructure

the bank. He worked with a team that included the appellant and by June 2007, they had accumulated a profit of over 400 billion cedis for the bank to build its capital. Between 2003 and 2007 the bank's capital steadily increased. The central bank's examination reports exhibit L series confirm this evidence.

PW2 who was the appellant's immediate boss confirmed that the appellant was appraised as a strong performer at the bank (Exhibit G, 2006 end of year appraisal on appellant.)

The witness confirmed that the charges leveled against the appellant in exhibit C have no substance. The excesses complained of were normal practice of the bank. The bank raised more than 200 excesses in a day and his team generated a lot of profit for the bank. It is not true for example that the VRA transaction with the bank was outside the bank's normal practice with VRA, who was one of the bank's prime customers for a long period of time. That the appellant granted 4,600,000.00 credit and that was above 25% of the bank's net worth was false. The bank's net worth at the time was 40,000,000.00 and 25% of that is 10,000,000.00. It is also false that the credit was not syndicated. Various banks, e.g. GT Bank, Fidelity Bank took part in the syndication, exhibit H pages 434 and 444 of the record confirm this. The witness maintained that all the customers listed in the charges against the appellant had their authorization put through for ratification. The credit committee and the board ratified most of them so the appellant could not be accused of any infractions. Apart from that, the excesses did not pose any problems to the bank; the bank was making a lot of profit from those transactions with the named customers. Applications were processed for approval starting with the relationship managers. They make sure that the business conforms to the bank's regulations. They then prepare appraisal report, which is approved by the head of that department. It goes to the appellant for review then to the credit committee for approval or ratification depending on whether the business had been done already or not.

According to the witness, the appellant had never been reckless in handling these transactions.

The witness admitted in cross-examination that the respondent bank dismissed him (PW2) on the same charges as those levelled against the appellant therefore, he sued the respondent bank. The writ and pleadings in that suit were tendered through the witness by the defendant as Exhibits 1 and 2.

According to the witness, he resigned from the bank in October 2007 however; in January/February 2008, he received a letter that he had been dismissed so he sued the bank for wrongful dismissal.

It was confirmed through cross-examination that the companies from whose transactions the appellant was charged were the same as those the witness was accused of.

The appellant subpoenaed an officer of the bank who testified as PW1 and tendered some documents in custody of the bank, which could not be produced by the bank upon application by counsel. These are Bank of Ghana Examination Reports exhibit L series, Minutes of the Credit Committee meetings, exhibit K series and extracts from minutes of Merchant Bank Board of Directors meetings.

Defendant's Case

The defendant bank in their statement of defence simply denied all the claims of the plaintiff.

The executive director of finance of the respondent bank gave evidence on behalf of the bank. He tendered the conditions of service of the senior staff of the bank as Exhibit 3.

He maintained the group credit policy that guides the bank's credit transactions at the time of the transactions the appellant was accused of was not Exhibit D, which is dated 2006, but one dated July 2005. He tendered this as Exhibit 4. What is peculiar about these two documents is that the contents are the same except paragraph 2.5. Paragraph 2.5 of exhibit 4 omits the Managing Director as a credit granting authority.

According to the witness, the internal audit of the bank investigated certain credits granted by the bank. Their report was submitted to a committee for review; he chaired that committee. Investigations revealed that the appellant granted some credits that were

above his credit limit. He was given a query and he responded to same, he tendered these in evidence as Exhibits 5 and 6.

The committee gave a hearing to the appellant on the charges leveled against him. Thereafter the committee issued a report, which is Exhibit 7. The committee recommended that the appointment of appellant should be terminated but the board decided to dismiss him. According to the witness, the appellant breached the bank's credit policy and granted credits beyond his limit. The then Managing Director of the bank according to him had no credit authority therefore the appellant's position that he took authority from the Managing Director is not in place.

It is significant to note that apart from a few of the transactions in exhibit C which have no stated dates, the majority have dates on which the appellant was alleged to have approved the loans in excess of his authority, the dates are between 2006 and 2007. Exhibit C is the defendant's making, if in the face of the dates on exhibit C the defendant wants to rely on exhibit 4 as the Group Credit Policy that guided those transaction, it has to provide the evidence justifying that assertion. Regrettably, the defence failed to provide the necessary evidence. It is therefore not the right statement of the facts, looking at the contents of exhibit C to say generally that exhibit 4 was the Group Credit Policy that guided the alleged transactions. In any case, the trial court relied on exhibit D as the applicable group credit policy; in our view, it rightly did so. The trial court however committed some blunders in its findings of fact; details of that will soon be demonstrated.

Findings of the Trial High Court

The trial judge made the following findings of fact from the evidence presented to him:

a) The Managing Director is not an approving authority under the group credit policy; the policy excludes the office of the Managing Director as an approving authority. The Managing Director was dismissed for approving the same transactions that formed the basis of plaintiff's dismissal. This finding is in error; he referred to Exhibit D as the group credit policy he was basing his findings on (see page 60 of

the record); which is the correct credit policy covering the transaction in question. However, he quoted paragraph 2.5 of Exhibit 4, giving the list of the various levels of approval authority, which excludes the office of the Managing Director. Exhibit D has the Managing Director as number 4 in the level of approving authorities (see page 46 of the record). The evidence provided by the defence on the question of PW2, the former MD's dismissal is exhibits 1 and 2. These are the pleadings in a pending case in the High Court on the MD's dismissal. No evidence was before the trial court that the case had been decided and it went in favour of the defendant. To hold that the MD was dismissed on the same charges levelled against the plaintiff therefore the alleged approvals he gave to the plaintiff were wrong is the trial court's own speculative view; there is no evidence supporting such a finding.

b) The trial court further found as a fact that plaintiff could not produce any document to support the alleged practice of the bank he followed to grant approvals in excess, This finding is contrary to exhibit H, exhibit M series and exhibit B series, therefore erroneous.

c) PW1 was subpoenaed by the plaintiff to tender various documents in the custody of the bank, which the bank failed to produce upon application. The trial court made a finding that the evidence of PW1 in cross-examination admitted the suggestion that plaintiff's approval of credits in excess of his authority caused liquidity challenges to the bank. That admission according to the trial court corroborates the defendant's case therefore the plaintiff's acts amounted to misconduct. It is important to note that PW1 tendered various documents; that was the purpose for which she was subpoenaed. In analyzing the evidence of PW1 the trial court did not identified any of those documents that demonstrate that the actions of the plaintiff caused liquidity problems to the defendant. That is the assertion of the defendant but there is no evidence from answers of PW1 in cross-examination that establishes that fact. The premise on which the trial court based this finding in our view is erroneous.

The Court of Appeal

Though the Court of Appeal held that the trial judge erred in its findings that the Managing Director under the Group Credit Policy of the bank had no approving authority, it upheld the conclusions the trial court drew that the appellant breached the policy therefore his dismissal was not wrongful. The court rightly stated that an appeal is by way of rehearing but failed to do what is required in the re-hearing process. This court re-stated the principle of re-hearing in the appeal process in a recent decision in the case of **King v Gyan [2017-2020] 1 SCGLR 912, at 918.** The court made reference to earlier decisions in the cases of **Koglex Ltd. (N0 2) v Field [2000] SCGLR 175; Tuakwa v Bosom [2001-2002] SCGLR 61** and held that ……..**` an appeal at whatever stage is by way of rehearing as every appellate court has a duty to examine the record of proceedings by scrutinizing pieces of evidence on record and ascertain whether the judgment is supported by the evidence. In that respect the appellate court can draw its own inferences from the established facts and in arriving at its judgment, the appellate court can affirm the judgment for different reasons or vary it."**

As at the time the Court of Appeal gave its judgment the case before the High Court against the former Managing Director on the same charges had been delivered. It is significant to note that the said judgment was delivered on 20th March 2014. The Court of Appeal judgment is dated 31 July 2014. The appellant has stated in paragraph 12 of his additional grounds of appeal that he drew the attention of the Court of Appeal to the outcome of that case which was pleaded by the defendant but the court gave no consideration to the outcome of that case; rather, it endorsed the trial court's finding based on the premise that the Managing Director who gave the approval to plaintiff to approve credits in excess was also dismissed on the same charges. The lack of proper scrutiny of the record by the Court of Appeal led to it overlooking relevant documentary evidence to enable it draw an independent conclusion on the established facts. In this appeal, the appellant is essentially attacking the findings of fact made by the trial court and concurred in by the lower appellate court.

The law on the circumstances in which the second appellate court like the Supreme Court may interfere with concurrent findings of fact of the two lower courts have been firmly established in many often-cited decisions of this court. In the case of **Gregory v Tandoh IV & Hanson [2010]SCGLR 971** this court per Dotse JSC at page 896 -897 of the report re-stated the circumstances and held as follows: **"It is therefore clear that, a second appellate court, like the Supreme Court, can and is entitled to depart from findings of fact made by the trial court and concurred in by the first appellate court under the following circumstances: First, where from the record of appeal, the findings of fact by the trial court are clearly not supported by the evidence on record and the reasons in support of the findings are unsatisfactory; second, where the findings of the trial court can be seen from the record of appeal to be either perverse or inconsistent with the totality of evidence led by the witnesses and the surrounding circumstances of the entire evidence on record; third, where the findings of fact made by the trial court are consistently inconsistent with important documentary evidence on record; fourth, where the first appellate court had wrongly applied the principles of law…..the second appellate court must feel free to interfere with the findings of fact in order to ensure that absolute justice is done in the case"**

From our analysis of the findings made by the trial court, partly affirmed by the first appellate court, important documentary evidence were overlooked or ignored by both lower courts. To do total justice therefore, it is lawful for this court to review the evidence anew and draw its own conclusions both on the facts and on the law.

Submissions of counsel for the appellant

In arguing the appeal, counsel for the appellant made the following submissions:

The court of Appeal disregarded the evidence of the defence admitting plaintiff's assertion that the credits he granted in excess were subsequently approved by the Credit Committee, a higher approval authority; therefore, the responsibility of those approvals had been taken from the plaintiff and should not be held liable for those excesses.

Though the defendant qualified this admission by saying that the bank was compelled to regularize those excesses to protect the bank's assets, the defence did not provide any evidence on how plaintiff's acts exposed the bank's assets to danger.

Though the Court of Appeal held that the trial court erred in its fact finding that the Managing Director of the defendant had no approval authority, it failed to set aside the conclusions of the trial court based on the said finding (that the plaintiff breached the bank's credit policy by taking instructions from the Managing Director who had no approval authority).

That the trial court and the Court of Appeal totally ignored clause 2.6 (iv) of the Credit Policy Exhibit D. This accounts for the Court of Appeal's failure to consider all the evidence (documentary inclusive) before coming to its conclusions as required of the Appellate court.

It is a further submission by counsel for appellant that the plaintiff tendered documentary evidence supporting his assertion that the bank's fortunes increased during his tenure of office as the head of the Credit Risk Management between 2005 and 2007. He referred to Exhibit L series. According to counsel, the two lower courts ignored these documentary evidence and based their decision on Exhibit J. Exhibit J however does not give any satisfactory support to the conclusions of the two lower courts that the bank faced liquidity problems and this was due to the acts of the plaintiff. He further argued, that the appellant tendered a number of documentary evidence to demonstrate that it is the bank's normal practice that the Managing Director and the Credit Risk Manager approve credits that are in excess of their authority when that becomes necessary; such approvals are ratified later by the Credit Committee. These pieces of evidence show that even before the Plaintiff was employed and after his dismissal, the practice continued. It was therefore wrong for the two lower courts to conclude that the plaintiff's acts amounted to misconduct.

Submission by defendant

In reply to the above submissions counsel for the respondent bank argued that the appellant failed to follow due process in approving credits that were beyond his authority. The defendant bank was therefore justified in dismissing him summarily. Counsel urged this court not to disturb the conclusions reached by the two lower courts because those conclusions are supported by the evidence on record. It is the defence's argument that the ratification the appellant relied on to defend his actions are ratifications of PW2, the managing director at the time and not the Credit Committee. This argument is contrary to the documentary evidence on record. Exhibit K series has reports of the Credit Committee's ratification of the appellant's approvals.

Counsel further argued that an illegal act could not be validated by subsequent ratification. It is a further argument of Counsel that Exhibit J particularly page 805 of the record, the Bank of Ghana Examination report laid the liquidity problems the bank had at the feet of the appellant, PW2 and one other staff who were dismissed from the bank. Unfortunately, page 805 of the record does not reflect the above submission; page 805 of the record is the first page of the 2006 bank of Ghana Examination report exhibit L4. Moreover, the entire report does not specifically attribute any of its findings to the appellant's mismanagement. This submission therefore is misleading.

It is a further submission by Counsel that our courts have followed the Common Law principle that an employer is justified in summarily dismissing an employee where the employee's actions are injurious to the business of the employer.

Counsel's argument on the question of the signing of the dismissal letter is that the Board of Directors was responsible for the administrative running of the bank at the time there was no Managing Director in office. They authorizing the writing of the dismissal letter cannot be faulted.

Issues

Upon considering the evidence on record and the submissions made for and against the appeal, we identify the following as issues for determination by this court:

a) Whether the appellant's acts breached the Credit Policy of the defendant bank.
b) Whether the appellant's acts amounted to misconduct
c) Whether his summary dismissal is justified.
d) Whether the dismissal letter breached S 40 of the bank's Rules and Conditions of Service

The resolution of issues a), b) and c) would determine grounds 1, 2, and 3 of the grounds of appeal as set out in the earlier part of this judgment.

Analysis of the evidence

From the appellant's evidence clause 2.3 of the bank's credit policy gave him the discretion to grant approval to the transactions his employers accused him of. Paragraph 2.3 provides exceptions to the credit policy guidelines. The relevant portions of the credit policy to the issues are reproduced below

"2.3 Policy exceptions

2.3.1 It is recognized that in any dynamic business environment, there are changing customer needs, competitive pressures and certain economic variables such that certain propositions may fall outside this policy. Where there is a strong business rationale for supporting proposals that fall outside this Policy, credit applications must clearly state and if possible, quantify the tangible benefits that will accrue if the proposition is approved.

2.3.5 If the exception is done it must be reported for subsequent approval/ratification by the next higher authority."

It is clear from the wording of the paragraphs of the policy quoted above that the policy recognizes circumstances where the bank may stand to gain from a particular transaction, but the policy may not have made any provision for the situation; therefore an approving

officer may exercise his discretion in the interest of the bank's business. In the exercise of such discretion, the guiding principles however must be:

i) The proposal that falls outside the policy must have a strong business rational
ii) ii) The application must state a tangible quantification of the benefits that will accrue to the bank if the credit is approved.
iii) iii) Upon approving an application in these circumstances a report of the transaction must be made 'for subsequent approval/ratification by the next higher authority.'

In the case of the appellant, the next higher authority in the hierarchy of authorities is the Managing Director.

Clause 2.5 of the credit policy exhibit D provides the levels of authority and the amounts permitted at every level, it reads as follows:

"2.5 Limits and Credit Policy

Credit decisions will only be made within authority levels formally delegated through credit authority letters. For the time being, the following subsists:

Approving Authority	*Limit**
Board of Directors	*Above 20% of the bank's net worth*
Finance Sub Committee	*Up to 20% of the bank's net worth*
Credit Committee	*Up to 15% of the bank's net worth*
Managing Director	*Up to 2.5 of the Bank's net worth*
Head, CRM	*Up to 0.3 M*
M/CRM	*Up to 0.1m*

**Or Cedi equivalent of USD*

The bank's net worth refers to the net worth as at the end of the last quarter. In all levels of approving authority, the due process must be followed. Periodic reports on approvals made will be advised to the Credit Committee on approved formats. Authority levels can be curtailed as well as extended in line with performance. Credit authority is personal to the approver and must not be delegated to other persons who may even be relieving incumbent"

The appellant produced evidence to establish that he followed the procedure laid down as stated above in granting the credits his employers are complaining of. He provided further evidence to confirm that the approvals he made did not stop at the managing director, his next in command but went to a further approval authority, the Credit Committee for ratification. Exhibits B, K and M series the Credit Committee reports confirm that some of the credit committee's approvals were ratifications. He cited transactions with VRA under the emergency clause, which he said always brought a lot of profit to the bank. The first charge against the appellant in exhibit C is that he approved an overdraft of Ghc 4.6 million to VRA without syndication contrary to Bank of Ghana requirement. The Bank of Ghana examination report exhibit L series have it that the loans were syndicated by other banks. The problem however was that the booking of the loans was wrong. The syndicated loan was put solely in Merchant Bank's loan books. The charge against the appellant in respect the VRA transaction therefore has proved to be false.

The appellant's evidence further established that none of the transactions complained of brought any injury to the respondent's business. In proof of this assertion, he tendered his performance appraisal report exhibit G that highly commended him as a diligent worker. The central bank rated the yearly performance of the defendant bank as satisfactory. The report Exhibit L series covers 2005/2006 and 2006/2007 periods these are the periods the appellant worked with the bank. The liquidity of the bank was rated satisfactory for those periods. The respondent admitted, confirming PW2's evidence, that during the tenure of the appellant as the head of the credit risk unit of the bank the solvency situation of the bank improved year by year. The respondent alleged the loss the bank incurred through penalties were as the result of the acts of the appellant. The

respondent maintain the appellant's actions brought liquidity problems to the bank and caused the bank to pay penalties. The Bank of Ghana Examination reports, exhibits L, L1, L2, L3 and L4, from 2003 to 2007 all commented on the respondent banks liquidity problems and blame it on poor management, particularly poor treasury management. The court of appeal missed it when it quoted the Bank of Ghana Examination comments on the liquidity problems the respondent bank faced from exhibit L4 and said it was exhibit J and that is documentary proof that linked the appellant's act to the respondent's liquidity problems. The Bank of Ghana examination reports comments on the respondent's default in liquidity requirements show that the respondent's liquidity problems had been long standing before the appellant was employed. The reports exhibit L1 dated 31st March 2004 and L2 dated 31st March 2005 testify to this. In exhibit L4 dated 30th June 2007 the report made this general comment on the respondent bank's performance. "MBG's management has exhibited weakness in the management of credit and liquidity risks which undermine good corporate governance practices"

If it is the respondent's case that the poor corporate management practices can be laid at the feet of the appellant, it bears the onus to prove it. Unfortunately, the respondent failed to produce any convincing evidence to establish that the appellant's acts led to its liquidity requirement defaults that existed since 2003.

From our analysis of the evidence, the respondent's allegation that the appellant breached the bank's credit policy cannot be true. He had the discretion to grant credits beyond his limit under clause 2.3.1 provided he met the conditions set out in 2.3.5, he met those conditions. The contrary finding made by the lower court on these facts do not support the evidence on record.

The document regulating the relationship between the parties is Merchant Bank Rules and Conditions of Service exhibit 3. The respondent followed the required disciplinary procedure and gave the appellant a hearing by constituting a committee that investigated the charges leveled against him. The committee's report is exhibit 7, and the recommendations of the committee are that:

"Mr. Agbeli's conduct constitutes a breach of rules and regulations of service, unsatisfactory service and causing substantial loss to the bank. It is recommended that his appointment be terminated."

Based on the above recommendations the respondent wrote exhibit A dismissing the appellant summarily. The relevant paragraphs of the dismissal letter are paragraphs 1 & 2 and they read, "We refer to the queries in our letter to you dated 6th December, 2007, your response dated 7th December, 2007 and your subsequent meeting with a Committee on Thursday, 24th January, 2008.

We are instructed to inform you that the Board has considered your explanations carefully and found your conduct unacceptable. You are hereby dismissed from the services of Merchant Bank (Ghana) Limited with immediate effect."

Section 7 (41) & (42) of the conditions of service of the bank gives a list of what consists a misconduct of an employee warranting summary dismissal and penalties the subsections read:

"Summary Dismissal and Other Penalties

It is misconduct for an employee:

(i) To be consistently absent from duty without leave or reasonable excuse;

(ii) To be insubordinate or refuse to obey a legitimate and reasonable instruction;

(iii) Without reasonable excuse to refuse or fail to proceed on transfer or leave when directed to do so;

(iv) To use without the consent of the appropriate authority, any property or facilities provided for the purpose of the Bank's business for any purpose not connected with his official duties;

(v) To engage in any activity outside his official duties which is likely to involve him in conduct likely to bring the Bank into disrepute or to lead to his taking improper advantage of his position with the bank.

42.

(i) An employee aiding and abetting another employee to infringe any Rule or Condition of Service, shall render himself liable to dismissal from the service of the Bank or to such other disciplinary action as the Bank may decide to take against him.

(ii) The following are the penalties that may be imposed in disciplinary proceedings in respect of the misconduct, breach of rules and regulations of service or unsatisfactory service of an employee:

(a) Issue of a warning letter;

b) Suspension without pay

c) Withholding annual increment;

d) Reduction in salary, that is immediate adjustment of salary to a lower point on the salary scale attached to the post in question;

e) Reduction in rank; that is removal to another grade with an immediate reduction in salary;

f) Dismissal/termination of appointment with or without a reduction in end-of-service benefits;

g) Summary dismissal (that is termination of an appointment with forfeiture of all end-of-service benefits) for just and proper cause involving dishonesty, fraud, negligence involving the Bank in a substantial loss and gross misconduct."

From our analysis of the evidence on record, the two lower courts failed to take into consideration the contents of the numerous important documentary evidence the appellant tendered in proof of his case therefore erred in the conclusions they came to. The established facts are clear that the appellant exercised his discretion under paragraphs 2.3.1 and 2.3.5 of the bank's credit policy therefore did not breach the credit policy of the bank. That aside the credit approvals he made were subsequently ratified by the Credit Committee. There is no evidence on record proving that the bank's liquidity requirement breaches, which led to penalties imposed on the respondent by the Central

Bank, were caused by the appellant. The appellant in the circumstance cannot be accused of any misconduct warranting summary dismissal

Black's Law Dictionary 5th Edition defines misconduct as "a transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior…."

In the case of ***Sule v Nigerian Cotton Board (1985) 2 N.W.L.R (pt5)17 The Supreme Court of Nigeria held: "to warrant a summary dismissal, it is enough... that the conduct of the servant is one of such a grave and weighty character that undermines the relationship of confidence which should exist between master and servant***."

The appellant's conduct in the employment of the respondents did not fall into the above definition. We hold that his dismissal was wrongful.

On the final ground of appeal that S. 7 (40) of the respondent's Rules and Conditions of Service was breached in the signing of the dismissal letter, the appellant's argument is that the trial judge erred when he admitted that the signing of the letter of dismissal by the head of human resources contravenes S. 40 of the Rules and Conditions of service of the bank and yet held that the practice was right. The Court of Appeal's approach to the issue is that he who appoints has the power to dismiss, the Credit Risk Manager is appointed by the Board of Directors, therefore the board has the power to delegate signing of the dismissal letter. It is indeed the Board of Directors who appoints a credit risk manager.

Section 1 (4) (iii) of the Rules and Conditions of Service provides*: "The divisions of the Bank are as follows:*

a) *Credit Risk Management*
b) *Operations*
c) *Finance*
d) *Merchant Banking*

e) Corporate Relations and Research & Product Development.

They shall be headed by General Managers who shall be appointed by the Board of Directors from the Management staff of the Bank"

Per the provisions of the Rules and Conditions of Service of the Bank, the Board of Directors is the authority that appointed the appellant, in the absence of the Managing Director it is in place if the Board delegates it authority to the officers who signed the dismissal letter. This ground of appeal fails. All other grounds succeeds. We hold that the appellant's dismissal by the respondent was wrongful

Having declared the appellant's dismissal wrongful, we will next consider his claims in damages. We will re-state the said claims

(i) An order that Defendant Bank pays all Plaintiff's salary and other entitlements due him from the date of his suspension on January 22nd 2008 to date of final payment.

(ii) General damages for wrongful dismissal

(iii) Special damages amounting to GH¢80,187.03 per year or GH¢6,682.25 per month being loss of income in alternative employment as a result of the pendency of the allegations of financial impropriety leveled by the Defendants.

Wrongful dismissal is a breach of contract of employment, the usual remedy for wrongful dismissal is award of damages. The general principle for calculating damages or loss is that the damages should put the claimant in the position that he would have been had the contract been properly performed, to the extent that money can achieve this. This principle has been the guideline in considering measure of damages in issues related to breach of contract. Thus in the case of ***Royal Dutch Airlines (KLM) and Another v Farmex Ltd. [1989 -90] 2 GLR 632 this court held that "On the measure of damages for breach of contract, the principle adopted by the courts in many cases is that of restitutio in integrum, i.e. if the plaintiff has suffered damage***

that is not too remote, he must, as far as money can do it, be restored to the position he would have been in had that particular damage not occurred"

As to the measure of damages the appellant is entitled to, we would be guided by the previous decisions of this court on the issue. In the case of Nartey ***-Tokoli & Others v Volta Aluminum Co Ltd. (N0 2) [1989-90] 2 GLR 341*** held that ***"The measure of damages for wrongful dismissal from employment was not to be confined to only loss of wages or salary but in addition the employee was to receive his entitlements under the contract of employment"***

In a subsequent decision in the case of ***Ashun v Accra Brewery Ltd.[2009]SCGLR 81*** this court followed its previous decision in the Narte-Tokoli case and held that ***"In principle, in the absence of any contrary statutory or contractual provision, the measure of damages for wrongful termination of employment under the common law of Ghana was compensation based on the employee's current salary and other conditions of service for a reasonable period within which the aggrieved party was expected to find alternative employment. In other words the measure of damages was the quantum of what the aggrieved party would have earned from his employment during such reasonable period, determinable by the court after which the employee should have found alternative employment."*** See also ***Okrah v Agricultural Development Bank [2016-2017] GLR*** where Appau JSC made a brilliant exposition of the law on measure of damages discussing the various previous decisions of this court.

Per section 7 (42) (g) of the respondent's Rules and Conditions of Service, summary dismissal connotes 'termination of appointment with forfeiture of all end of service benefits.' This means the appellant lost all end of service benefits. To put him back in the position he would have been had the breach not occurred. We hold that the appellant is entitled to his salary and allowances for a reasonable period within which the appellant could have secured an alternative employment. We consider fifteen months a reasonable period; we therefore order that the appellant be paid his salaries and allowances as at the time of his dismissal for fifteen months. In addition, he should be paid his retirement

benefits; that ought to be whatever package 'retirement benefits' as captured in the Rules and Conditions of service of the respondent bank entails for the position he held in the bank before his dismissal.

The appellant took steps to mitigate his loss, he looked for employment in other institutions and got one with Guaranty Trust Bank he tendered exhibit E, his appointment letter from that bank. This letter sets out the terms of his engagement and the emolument due him as follows:

"Dear David,

APPLICATION FOR EMPLOYMENT

Further to your application and interview, we are pleased to offer you the position of a senior manager in our bank.

Your primary responsibility and professional loyalty will be to Guaranty Trust Bank (Ghana) Limited. You will be prepared to serve the bank anywhere within and outside Ghana and in whatever capacity the Managing Director deems appropriate from time to time.

A schedule of your duties and responsibilities will be given to you on your resumption of duty. Your employment is also subject to the terms contained in the Staff handbook and other rules of employment.

The current annual compensation package attached to your position is as follows:

Basic salary - 28,980.00

Lunch subsidy - 875.00

utility allowance - 4069.03

entertainment allowance -3150.00

housing allowance - 11,550.00

Clothing allowance - 4200.00

furniture allowance - 4200.00

passeges - 12,600.00

education subsidy - 5250.00

13th month pay - 2415.00"

On 8th of February 2008 Guaranty Trust Bank terminated his appointment per exhibit F which reads:

*"**TERMINATION OF EMPLOYMENT***

In view of the circumstances surrounding the exit of your previous employment with Merchant Bank limited we have no choice than to void the offer you accepted.

Thank you for your interest in Guaranty Trust Bank and we wish you great success in your future endeavours yours faithfully."

For this loss the appellant claims special damages in the sum of Ghc 80, 187.03 being his earnings per annum with Guaranty Trust Bank had his appointment not been terminated due to respondent's acts. Special damages is quantifiable loss suffered by a claimant, the law requires that it is specifically pleaded and strictly proved. This court, in a number of cases had drawn distinction between general damages and special damages and explained the rationale behind the award of compensation under these headings. ***In Delmas Agency Ghana Ltd v Food Distributors International Ltd. [2007-2008] SCGLR 748 at 760*** the court per Dr. Twum JSC drew the distinction in the following words: ***General damages is such as the law will presume to be the natural or probable consequences of the defendant's acts. It arises by inference of the law and therefore need not be proved by evidence. The law implies general damage in every infrigment of an absolute right. The catch is that only nominal damages are awarded. Where the plaintiff has suffered a properly quantifiable loss, he must plead specifically his loss and prove it strictly." (see also Yugdong Industries Ltd v Ro Ro Services [2005-2006] SCGLR 816***)

The appellant in his evidence gave the account of how he built up his carrier as a banker; he holds a professional certificate in banking and had worked in the banking industry for over twenty years. Exhibit F demonstrates he has lost credibility in the banking industry and may not be able to ever get any employment in the banking industry. What he has lost as a result of his termination by Guaranty Trust bank is specifically quantified in exhibit E.

We however hold the view that the appellant is entitled to general damages in the circumstances. We would take the package he lost in the alternative employment into consideration and award him three months salary in his previous employment as at the time of his dismissal as general damages.

The appeal succeeds; the judgment of the Court of Appeal is hereby set aside.

A. M. A. DORDZIE (MRS.)
(JUSTICE OF THE SUPREME COURT)

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

PROF. N. A. KOTEY
(JUSTICE OF THE SUPREME COURT)

I. O. TANKO AMADU
(JUSTICE OF THE SUPREME COURT)

PROF. H. J. A. N. MENSA-BONSU (MRS.)
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