THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2019

CORAM: ANSAH, JSC (PRESIDING)

DOTSE, JSC

YEBOAH, JSC

MARFUL-SAU, JSC

KOTEY, JSC

CIVIL APPEAL
NO. J4/52/2018

24TH JULY, 2019

FAUSTINA TETTEH ..... PLAINTIFF/RESPONDENT/APPELLANT

VRS

1. T. CHANDIRAM & CO. GH. LTD.

2. DECORPLAST LTD.

3. MR. INDRU MAHBUBANI

4. ARUN MALKANI ..... DEFENDANTS/APPELLANTS/RESPONDENTS

J U D G M E N T

MARFUL-SAU, JSC: -

This appeal is taken against the judgment of the Court of Appeal sitting in Accra. By the judgment which is dated 1st February 2018, the decision of the trial High Court, which entered judgment for the plaintiff/respondent/appellant was set aside. In this appeal, the plaintiff/ respondent/appellant shall be referred to as appellant and the defendants/ appellants /respondents shall be referred simply as respondents. The facts of this case briefly are that the appellant was an employee of the 1st and 2nd

respondents' companies since 1985. She was appointed a Director of the 1st and 2nd respondents after the death of one of the Directors. According to the appellant, relationship between her and the 3rd respondent, who was the Managing Director of the 1st respondent company became unpleasant in 2010. As a result, she was removed as a director of the companies, her work schedule was taken from her, she was denied payment of some allowances and was generally discriminated against in the work place. The appellant then took out a writ in the High Court claiming the following reliefs:

''1. A declaration that the purported ''Termination of appointment as director'' of the 1st defendant company is void.

2. Declaration that the purported ''Termination of appointment as director'' of the 2nd defendant company is void.

3. An order that the plaintiffs' monthly allowance of GHC 500 as Director in the two companies be paid.

4.The sum of GHC 3,500 being the unpaid amount due to plaintiff as director's allowance for the months of June, July and August in the year 2010 and for the months of September, October, November and December, 2011.

5. The sum of US$400,000.00

6.The plaintiff's monthly allowance equivalent to the Sales Manager's monthly commission on sales from December 2010 to date.

7.Refund of all payments of medical bills and monies paid for repairs and maintenance of vehicle used by plaintiff for official duties.

7 a. An order directed at the defendants to pay to the plaintiff all other entitlement found due to the plaintiff.

8.Compensation for sexual harassment and victimization by the 3rd defendant and also discrimination against the plaintiff by defendants contrary to the provisions of the 1992 Constitution.

9.An order of injunction to restrain the 3rd defendant from further sexual harassment of plaintiff.

10. An injunction to restrain the defendants from victimizing and discriminating against the plaintiff.

11. Interest on all sums found due and owing from the defendants to the plaintiff at the prevailing commercial bank lending rate from the date when those monies became due to date of payment.

12. Costs.

The respondents denied above claims and counterclaimed for the following:

'i. order of perpetual injunction restraining plaintiff from using the defendants' official business address for her private and personal business;

ii. order restraining plaintiff from using and privately benefitting from defendants' trade secrets and valuable commercial information;

iii. order restraining plaintiff from perpetrating further unlawful acts against the defendant companies;

iv. damages for breach of trust and confidence'

v. general damages;

vi. costs.

The record of appeal revealed that the respondents rescinded the decision to terminate the appellant's position as a director thus reliefs 1 to 3 relating to the termination of appellant's directorship became moot and same were dismissed. The trial High Court however entered judgment for the appellant on all the reliefs except reliefs (8) and (9). The trial High Court also held that the 3rd and 4th respondents were jointly and severally liable for the acts of the 1st and 2nd respondent companies. The respondents' counterclaim was dismissed by the trial High Court.

The respondents who were dissatisfied with the decision of the High Court appealed to the Court of Appeal, which set aside the judgment of the High Court. The appellant is now before this court, urging us to set aside the Judgment of the Court of Appeal

on 11 grounds formulated in her Amended Notice of Appeal. We observed that out of the 11(eleven) grounds of appeal formulated by the appellant, grounds (1) to (10) all allege error of law but no particulars were furnished by the appellant, contrary to the rules of this court.

Rule 6 (1) (f) of the Supreme Court Rules, CI 16 require an appellant who alleges error of law as a ground of appeal to provide the particulars of error alleged. This court has in several decisions expressed the need for practitioners to strictly comply with the rules that regulate proceedings in the court. Besides, it is trite that appeals are conferred by statute and for that matter parties who intend to exercise their right to appeal, must strictly satisfy the provisions of the statute conferring the right and rules of procedure regulating the appeal. **In Dahabieh v S.A. Turqui & Brothers {2001-2002} SCGLR 498,** this court speaking through Adzoe, JSC reiterated why appellants who allege error of law as ground of appeal ought to provide particulars thereof. At page 504 of the report, the learned jurist delivered as follows:

'' We think that having regard to rule 6, grounds(i) and (iii) as set out above, do not comply with the rules. Clearly, the intention behind rule 6 is to narrow the issues on appeal and shorten the hearing by specifying the error made by the lower court or by disclosing whether or not a point at issue had earlier on been raised. By that way, both the court and counsel for the respondents would be enabled to concentrate on the relevant parts of the evidence in the record of proceedings and not waste time on irrelevant parts of the evidence. With respect to questions of law, it is necessary that the respondent and his lawyer know well in advance what points of law are being raised so that they may prepare their case and marshal their authorities.

The appellant failed to particularised the errors alleged by the said grounds, to enable this court effectively address same as required by law. The errors alleged cannot also be inferred sufficiently from the wording of the grounds to enable us address same. Accordingly, the offending grounds (1) to (10) of the appeal will be struck out, as they are non-compliant with the rules of this court.

The only competent ground of appeal is ground (11), which is that the judgment of the Court of Appeal is against the evidence adduced at the trial. We will thus address this ground for the determination of the appeal. It is now trite that when an appellant allege this ground of appeal, the appellate court is entitled to re-examine the entire record to ascertain whether the trial court or as in this case, the first appellate court, whose judgment is the subject of the appeal, arrived at its decision after a proper evaluation of the evidence on record. In this appeal therefore, our primary duty is to review the totality of evidence adduced at the trial and determine whether on the balance of probabilities the appellant was entitled to win the contest or not.

See Republic v. Conduah; Exparte Aaba(Substituted by) Asmah { 2013-2014} 2 SCGLR 1032.

It is also trite that the onus is on the appellant who alleged this ground of appeal to demonstrate from the record that the court whose decision is impugned erred in its evaluation of the evidence on record or that the court misapplied a law in arriving at its judgment occasioning substantial injustice.

See Abbey & Others v. Antwi V {2010} SCGLR 17

Owusu- Domena v. Amoah {2015-2016} 1 SCGLR 790.

We have examined the record of this appeal and the respective statement of case submitted to us by the parties and we are of the considered opinion that the appeal raises one fundamental issue, which is, whether or not appellant adduced credible evidence to proof her claims before the trial court, to justify the ground that the Court of Appeal failed to properly evaluate the evidence led by the appellant in proof of her claims. We consider it very crucial to address this issue, since the appellant is urging this court to set aside the decision of the Court of Appeal and judgment entered for her as per the reliefs endorsed on her amended writ of summons.

From the writ of summons, we observed that all the claims endorsed by the appellant were capable of positive proof as required under section 11 of the Evidence Act, 1975, NRCD 323. The appellant was thus under a duty to discharge the evidential burden by proving that her case was more probable. Section 11 (1) and (4) of the Evidence Act, provides thus: -

‘’ 11 (1). For the purposes of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party.

(4). In other circumstances the burden of producing evidence requires a party to produce sufficient evidence which on the totality of the evidence, leads a reasonable mind to conclude that the existence of the fact was more probable than its non- existent.’’

We will now examine appellant’s reliefs and consider the evidence led to prove same. For the sake of clarity, we shall examine the evidence adduced, if any, for each of the reliefs addressed in the judgment of the Court of Appeal, since that judgment is the subject of this appeal. We will first deal with the claim for the US$ 400,000.00. The appellant case was that she was one morning called into a meeting and the 3rd and 4th respondents promised to pay her US$ 50,000.00, every year as a Director and reward for her contribution to the growth of the companies. The record revealed that the appellant in her pleadings and evidence before the trial court could not remember the year this promise was made to her. She only pleaded that the promise was made in or about year 2004. The appellant from the record could not also tell the court who between the 3rd and 4th respondent specifically made the promise to her.

The record is clear that apart from repeating the pleading that she was offered the sum of US$ 50,000.00 a year, no credible evidence was adduced by the appellant in proof of this huge claim. The appellant sought to link an air ticket paid for her vacation in Canada in 2006 as evidence of part payment of the sum promised her. Now, granted that the promise was made in or about 2004, as testified by appellant, then as at 2006, when the air ticket was purchased for her, the companies owed her US$ 150,000.00, representing payments due her for 2004, 2005 and 2006. It is strange that appellant being a Director of the companies, would accept an air ticket as part payment for the sum due her and would not even write to the Finance Department of the companies to demand payment for some money, on account, out of the sum allegedly owed her, especially when she was travelling outside the jurisdiction on vacation. Besides, is the appellant submitting to this court that for the eight years that the amount allegedly remained outstanding (from 2004 to 2012, when the writ was

issued), she never raised the issue at any of the Directors meetings or even demanded payment from the Director of Finance of the companies?

There is no dispute that the onus was on the appellant who alleged this promise to prove same. The respondents having denied the claim of the US$400,000.00, it became the duty of the appellant to adduce credible evidence to prove the claim and not to mount the witness box to repeat her pleadings. As we have stated earlier in this judgment, the claim for the US$400,000.00 was capable of positive proof by appellant but from the record she failed woefully, to lead credible evidence as required by law to prove same. In the circumstances, the Court of Appeal did the right thing by setting aside the decision of the trial court. Indeed, examining the record, we find it difficult to discern the basis for that award to the appellant by the trial court, since there is no evidence on record to support the claim. We accordingly, affirm the decision of the Court of Appeal setting aside the award of the US$ 400,000.00 to the appellant.

See Zabrama v Segbedzi {1991} 2 GLR 221

Finally, on this claim we are of the considered opinion that, the trial court was very wrong in awarding same without evidence from appellant in the form of an ordinary resolution from the companies. As rightly held by the Court of Appeal, the claim for US$ 400,000.00 could only have been enforced by the court if it was in compliance with the then Companies Act, 1963, Act 179. It is provided by section 194 (1) of the Companies Act as follows:

> **'' Subject to this section, the fees and other remuneration payable to the directors in whatever capacity, shall be determined from time to time by ordinary resolution of the company, and not by a provision in the Regulations or in an agreement, which provision or agreement is void.''**

Clearly, applying the above provision in the Companies Act, the Court of Appeal was right in setting aside the claim as observed above.

We will next address the claim for GHC 3,500 as Director' fees. From the writ, appellant alleged that respondents failed to pay her director's allowance for the months of June,

July and August in the year 2010 and for the months of September, October, November and December 2011. On this claim it was the respondent who tendered exhibits 10 to 18, being vouchers indicating that appellant received payment for fuel allowance and director's fees for the period. Exhibits 10,11,12,13,14,15 and 16 were all signed by only two people, the Cashier and a Director of the company, obviously not the appellant. Counsel for appellant at the trial submitted that appellant did not receive the amounts stated on the vouchers, because they were not signed by appellant. Exhibit 17 and 18, on the other hand, had three signatures on them so there seemed to be no dispute as to whether appellant received the amounts thereon.

The respondents however, contended that appellant had been paid her Director's fees and no arrears was owed. Indeed, respondent called DW 6, Mr Kamlesh Jha, the Financial Controller of the 1st and 2nd respondent companies, who testified on the 15th October 2015. He tendered exhibits 10 to 18, the vouchers which were used to pay appellant's Director's fees and fuel allowance. Under cross-examination, he insisted that even though appellant signature did not appear on some of the vouchers, he tendered, appellant did receive the amounts. DW 6's evidence is at page 611 to 625 of the record of appeal, volume 2. He stated at page 615 of the record of appeal, volume 2, that as at September 2015, the respondents did not owe appellant Director's fees. The Director's fees for the month of September 2015, was paid on the 30th September 2015 with voucher tendered as exhibit 18.

The record of appeal showed that the appellant did not sue for fuel allowance, which means respondent was paid her fuel allowance. Indeed, the fact that appellant was paid her fuel allowance is clear from the record of appeal. In her evidence in chief at page 165 of the record of appeal, Volume 1, which was on the 18th of November, 2013, the appellant testified as follows:

'Q. Now, I want you to tell the court. You described series of treatment and acts committed by these defendants on you which prompted you to bring this action. Can you tell the court the state of affairs now? Have these treatments ceased?

A. My Lord, presently I am still going through these treatments because all my schedules have been taken away from me; no medical bills are paid, no fuel

allowance, I am given limited amount for fuel allowance whilst others are still presenting their receipts for refund for the fuel they purchased for their cars, at the same time I still don't drive, I still don't have my medical bills being paid, I still don't have my vehicle running expenses being paid."

The appellant then confirmed that she had been paid her fuel allowance of GHC 250 a month at page 173 of the record of appeal, Volume 1. She again testified as follows:

''Q. How about you? You are a senior officer what about you?

A. Unfortunately, when I resumed from leave in the year 2010 my privilege was withdrawn and I was given a fixed amount i.e. GHC 250 per month from 2010 till present for my fuel allowance."

From the above evidence, it is very clear that appellant was paid her fuel allowance. Now, exhibits 10 to 18 were tendered by the respondents to dispute the claim by appellant that she was owed Director's fee of GHC 3,500.00, for the period stated. The said exhibits, as shown are payment vouchers and each narrates the payment of fuel allowance of GHC 250 and Director's fee of GHC 500.00 per month. Now, if the appellant admits that she received the fuel allowance, then it follows that she received the Director's fees, as well, since both amounts were paid with one voucher. The fact that appellant did not sue for fuel allowance and did not also produce any evidence, for example, that she wrote to demand payment or protested for the non-payment of the Director's fees, confirms our reasoning that the appellant was paid the Director's fees as found by the Court of Appeal. On the evidence, we think that the Court of Appeal, did the right thing by setting aside the award of GHC 3,500.00 being arrears of Director's fees to the appellant and we do affirm the decision.

We shall now consider the claim for monthly allowance equivalent to the monthly commission on sales paid to the Sales Manager. Our first observation on this claim is that no specific amount was claimed by appellant, on her amended writ of summons. Secondly, we note that the appellant failed to led evidence as to how much commission was paid to the Sales Manager, the equivalent of which was promised her. According to appellant, her work load increased so the respondents agreed to pay her monthly allowance, the equivalent of the Sales Manager's monthly commission.

To prove the claim, appellant tendered exhibit D1 to D12. The respondents denied the claim of monthly allowance and contended that the payment to her as shown in exhibits D1 to D12, were rather commissions paid to the appellant for introducing a good customer from Burkina Faso to the companies. The exhibits tendered by appellant as evidence of the allowance were however described on the face as ''Fausty Commission" and not allowance. The description on exhibit D1 to D12, therefore vitiates the testimony of appellant that the payments were monthly allowance for increased workload.

From the evidence on record, we do agree with the counsel for respondents that the appellant failed to prove this claim too. Indeed, we think that if the respondents were rewarding the appellant in view of her increased work load, at least the appellant would have been written to and her alleged hard work recognised as the basis for the alleged allowance. We are therefore convinced in our minds that what was paid to the appellant per exhibits D1 to D12, were commissions, as indicated on the exhibits and not allowances as alleged by the appellant. The Court of Appeal was thus right in setting aside this claim too.

Now, on the claim for the payment of medical bills, it was the testimony of the 3rd respondent that, payment for such claims must conform to the Collective Agreement for Senior Staff, which was tendered by the appellant as exhibit A and is at pages 769 to 785 of the Record of Appeal, Volume 2.

Article 14 of the Collective Agreement provides that the company shall pay or refund the cost of medical care, including prescribed drugs only for officers at the company's clinic or any medical establishment specified by the company. The appellant tendered exhibits K, K1 to K3. The exhibit K is from First International Clinic however the appellant did not lead any evidence to show that this was one of the clinics approved by the company. The other exhibits were receipts for drugs purchased by the appellant from Pharmacy shops, but same were not accompanied by prescriptions as required by article 14 of the Collective Agreement. The argument by counsel for appellant in his statement of case that when drugs are purchased the prescriptions are retained by the Pharmacy shops cannot be true. The practise is that on request the Pharmacy shop will supply the prescribed drug and cancel the prescription as supplied and hand

it over to the customer, to enable the customer claim the amount thereof. This is a standard practise by most Pharmacy shops and we take judicial notice of same.

In this case without the prescriptions attached to the receipts, the respondents were right in refusing to refund the amount claimed by the appellant. The appellant being a director of the company was expected to comply with article 14 of the Collective Agreement and the Court of Appeal was right in setting aside this claim too, since the evidence lead to prove same was not credible and a breach of article 14 of the Collective Agreement, the trial court should have rejected same.

The claim to be addressed next is that for Vehicle Maintenance. We observed again from the record that just like the claim for medical bills the appellant did not endorse any specific amount on her writ of summons. Appellants relief 7 was for the" refund for all payments of medical bills and monies paid for the repairs and maintenance of vehicle used by plaintiff for official duties." We agree with the Court of Appeal that the claim for monies paid for repairs and maintenance was in the nature of special damages and same ought to have been pleaded and particularized. The trial court was thus wrong in law when it granted the relief without a specific amount to be recovered by appellant. The award was at large and we wonder what amount the appellant was entitled to recover from the respondent. We think that this claim was rightly set aside by the Court of Appeal, as the appeal against the setting aside of this particular claim to this court, just like the medical claim had no basis in law.

From the record, the trial court dismissed reliefs 8 and 9 which were claims related to compensation for sexual harassment and victimization by the 3rd respondent and also for discrimination. However, the trial court proceeded to grant an injunction against 3rd and 4th respondents from victimizing and discriminating against the appellant. This was relief 10 of the appellant. The allegation of discrimination of the appellant was based on facts she had failed to prove as demonstrated in this judgment. The fact that her schedule was changed without more is not enough evidence to justify a claim for discrimination and or victimization. There is no evidence on record that the appellant was a contract employee and as such it was a breach of service contract when her schedule was changed. We are of the opinion that in the circumstances of appellant employment, the job schedule assigned to her was administrative and it is

not for the court to order the respondents to keep the appellant on a particular job schedule. Injuncting the respondents, as the trial court did under relief 10 was wrong and the Court of Appeal did the right thing by setting aside the award of injunction.

The last issue we will address in this appeal under the ground that the judgment of the Court of Appeal is against the evidence adduced at the trial, is the issue, whether or not the trial court was wrong in holding respondents jointly and severally liable to appellant. This issue is purely one of law but same may be addressed under this ground of appeal. **See Owusu – Domena v. Amoah, (supra).**

The records revealed that appellant's claims as endorsed on her amended writ of summons was based on her employment relationship with the 1st and 2nd respondent companies. Apart from the allegation of sexual harassment against the 3rd respondent, which was dismissed, the evidence on record does not show any cause of action against the 3rd and 4th respondents, since the pleadings did not disclose any personal liability against them. They were joined to the suit because they were officers of the two companies. Now, having dismissed the claim of sexual harassment against the 3rd respondent, we fail to understand how the 3rd and 4th respondents were found jointly and severally liable with 1st and 2nd respondent companies.

The trial court however, decided to lift the veil of incorporation and held the 3rd and 4th respondents liable on appellant's claims. The record does not disclose any evidence that entitled the trial court to lift the veil of incorporation.

A company is a juristic entity which is separate from its officers. The company can sue and be sued. This is trite and known as the principle in **Salomon v. Salomon {1897} AC 22.** This has been the law on the subject of legal capacity of companies and same was applied by this court in the case of **Morkor v. Kuma (East Coast Fisheries Case) {1998 - 1999} SCGLR 620,** which was relied upon by the Court of Appeal. The Court of Appeal stated the law correctly when it held at page 97 of the record of appeal, Volume 3 as follows:

> ***'The Morkor v. Kuma case numerated some of the circumstances in which the corporate veil may be lifted as (i) where it is shown that the company was established to perpetuate fraud: See the case of Re***

Darby; Ex parte Brougham {1911} 1 QB 95; (ii) the veil may also be lifted to prevent deliberate evasion of contractual obligation."

Indeed, we do not find any legal basis on which the trial court sought to lift the corporate veil of the 1st and 2nd companies to hold the 3rd and 4th respondents jointly and severally liable to the appellant. The Court of Appeal rightly decided the issue on appeal and we endorse the decision. Consequently, the decision of the Court of Appeal setting aside the trial court's order that 3rd and 4th respondents were jointly and severally liable with the other respondents is hereby affirmed.

In conclusion, we are of the opinion that from evidence on record the appeal has no merits whatsoever and same will be dismissed. The appeal is accordingly dismissed and we affirm the judgment of the Court of Appeal.

(SGD) S. K. MARFUL-SAU
(JUSTICE OF THE SUPREME COURT)

ANSAH JSC:-

I agree with the reasoning and conclusion of my brother Marful-Sau JSC.

SGD J. ANSAH
(JUSTICE OF THE SUPREME COURT)

DOTSE JSC:-

I agree with the reasoning and conclusion of my brother Marful-Sau JSC.

SGD V. J. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

YEBOAH JSC:-

I agree with reasoning and conclusion of my brother Marful- Sau JSC.

SGD. ANIN YEBOAH

(JUSTICE OF THE SUPREME COURT)

PROF KOTEY JSC:-

I agree with the reasoning and conclusion of my brother Marful-Sau JSC.

SGD. PROF. N. A. KOTEY

(JUSTICE OF THE SUPREME COURT)

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