THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2019

CORAM: DOTSE, JSC (PRESIDING)

YEBOAH, JSC

APPAU, JSC

PWAMANG, JSC

MARFUL-SAU, JSC

CIVIL APPEAL
NO. J4/05/2018

12TH JUNE, 2019

HFC BANK (GHANA) LTD
(SUING PER ITS LAWFUL ATTORNEY
EXPERTS CONSULT LIMITED) ……. PLAINTIFF/APPELLANT/RESPONDENT

VRS

JACOB ABEKA ……. DEFENDANT/RESPONDENT/APPELLANT

JUDGMENT

YEBOAH, JSC:-

The facts of this case appear not to be controverted by the parties. Briefly, the defendant/respondent/appellant (hereinafter referred to as the appellant) was at the material time to this action a customer of the plaintiff/appellant/respondent (who for sake of brevity shall be referred to as the respondent.) Between June and August of 2008, the Respondent allowed the appellant to overdraw his accounts to the tune of

Gh₵200,000 to enable him construct a warehouse. The parties herein did not execute any formal agreement but the appellant deposited the title deeds of his property known as plot No. 31 Block ADB Parakuo Estate, Adiembra, Kumasi as security for the credit facility so granted.

The appellant, however, failed to pay off the debit balance on his account. The respondent thereafter commenced this action per his attorney at the High Court, (Commercial Division) Kumasi, for the following reliefs:

a. Recovery of the sum of one Hundred and Thirty-one Thousand, one hundred and Forty-Nine Ghana Cedis, fourteen Ghana pesewas (Gh₵131, 149.14) inclusive of interest being outstanding balance of an overdraft facility extended to defendant by plaintiff.
b. Interest at the prevailing bank rate from 1st May 2011 till date of final payment.
c. Penal interest of 10% per annum from 1st May, 2011 till date of final payment.
d. **And or in the alternative**

   Judicial sale of property situate at plot No. 31 block ADB, Parakuo Estate, Adiembra, Kumasi, in satisfaction of the facility."

The appellant traversed most of the allegations and contended that he had originally applied to the respondent bank for a loan of Gh₵300,000 to be repaid within four years. On the 18th of June, 2008 the respondent granted the appellant an initial Gh₵100,000.00 which was converted into an overdraft facility instead of a loan facility. On the 7th and 12th of August 2008 the appellant was given the further sums of Gh₵80,000,00 and Gh₵20,000 respectively. Before the last amount of Gh₵100,000 was released, the respondent informed the appellant that due to a change in

government the final instalment could not be advanced. The appellant further alleged that failure on the part of the respondent to give him the entire Gh₵300,000,00 loan led to his inability to complete the building of the warehouse within time and therefore resulting in the collapse of his business and the inability to pay the debt. Based on the above allegations the appellant contended that the conduct of the respondent in refusing to grant him the loan in full constituted to breach of the loan agreement and therefore proceeded to counterclaim against the respondent for the following reliefs:

1. An order directing the plaintiff to release the last instalment of Gh₵210, 00 to enable him complete the project.
2. In the alternative the plaintiff be made to pay to the defendant damages for breaching the loan agreement.
3. An order directing the plaintiff to release his title deeds to him.

The respondent filed a reply and defence to counterclaim and contended that the appellant rather insisted on a loan agreement but the respondent offered to grant an overdraft to appellant to the tune of Gh₵100,000,00 whereupon the parties executed an agreement. Thereafter Gh₵80,000 and Gh₵20,000 were given to the appellant which he accepted. The respondent denied the counterclaim of the appellant in the reply and defence to counterclaim.

As the suit was commenced at the Commercial Division of the High Court, parties appeared before a judge for pre-trial settlement conference. The appellant partly submitted to judgment to the tune of Gh₵90,00.00 on 17th of August, 2011. However, the parties agreed that the sum so admitted would be paid over six months and in

installments without computation of interest within the period when the payment would be made. There was default clause which the parties also agreed. The learned judge made a full record of the partial settlement of the claim for the outstanding balance thereby leaving the court to resolve only three simple issues at the trial.

It appeared later that the appellant could not pay the admitted sum of Gh₵90,000.00 within the time the parties had agreed and as at 20/01/2012 he had paid only Gh₵54,998.

At the trial, the learned judge found that the facility in issue was an overdraft and proceeded to dismiss the claim of the respondent and the counterclaim of the appellant. The trial judge even held that the plaintiff's attorney had no capacity to institute the action for the reliefs sought.

The respondent lodged an appeal against the judgment of the High Court, to the Court of Appeal, Kumasi on two main grounds. The Court of Appeal received the entire evidence on record and allowed the appeal, entered judgment for the respondent in the sum of Gh₵131,149.14 with costs.

The issue of the capacity of the respondent's attorney was fully considered in detail and the court was of the opinion, rightly so, that since no issue was joined on the pleadings and regards the capacity of the respondent there was no burden on the respondent to have proved the capacity of the respondent's attorney.

The appellant has sought to challenge the judgment of the Court of Appeal by filing a notice of appeal on 27/01/2017 and has listed six grounds of appeal for our consideration as follows:

I. The Court of Appeal erred in entering judgment for the plaintiff/appellant/respondent to the tune of Gh₵131, 149.14 as at May 2011.

II. The Court of Appeal erred in entering judgment for the plaintiff/appellant/respondent to the tune of Gh₵131,149.14 as at May 2011.

III. The Court of Appeal erred in granting interest on the amount of Gh₵131, 149.14 at the prevailing rates from May 2011 until date of final payment to the plaintiff/appellant/respondent.

IV. The Court of Appeal erred in holding that the plaintiff had given the consent on authorization to the attorney to institute the action.

V. The Court of Appeal erred in holding that the plaintiff/respondent's attorney had the capacity to institute the action on behalf of the plaintiff/appellant/respondent.

Before we proceed to address the issues raised by the grounds of appeal, there is one important matter which must be addressed by us as the final court of the land. In actions in which the issue of capacity is raised, the authorities like **SARKODIE** V **BOATENG II** [1982-83] IGLR 715 SC, **FOSUA & ADU POKU** V **DUFIE** (dec'd) **ADU-POKU MENSAH** [2009] SCGLR 310, **DUAH** V **YORKWAH** [1992-93] 1 GBR 278 CA, establish the principle that no matter the merits of the case of the suitor, failure to prove his capacity should rock the very foundation of the action. It is therefore the position of the law that if a plaintiff lacks capacity and it is so found by a trial court,

the merits of the case should not be considered as the proper parties to the suit are not before the court. Indeed, in the Sakordie's case (supra) the Court of Appeal and the Supreme Court for that matter never proceeded to consider the merits of the case in any manner whatsoever. In this case the learned trial judge, with due respect, should have rested her judgment on the lack of capacity without more. Discussing the merits of a suit when the proper parties are not before the court is erroneous in law. However, this point was not raised before the Court of Appeal.

In this appeal before us, learned counsel for the appellant, Kwame Boafo has urged on this court to revisit the issue of capacity which was adequately considered by the Court of Appeal against his client. Procedurally, the appellant as the defendant at the trial court was enjoined by basic rules of pleadings to find out whether the issue of capacity had been raised against the respondent as a suitor. The statement of defence was silent on it and the statement of defence filled in answer to the statement of claim was accompanied by a counterclaim without any challenge to the capacity but rather a counterclaim against the plaintiff whose attorney allegedly lacked capacity. The rules of pleadings enjoins parties to specifically deny allegations of their adversary if in doubt. See **ARMAH** V **ADDOQUAYE** [1972] IGLR 109 CA, **HESSE** V **ACCRA MUNICIPAL COUNCIL & OR** [1964] GLR 399 SC, **ADDO** V **ASARE** [1967] GLR 231 and Order 11 rule 13 of the High Court [Civil Procedure] Rules CI 47 Failure on the part of a party to specifically deny an allegation of fact of an adversary would be considered an admission. It was therefore wrong for the learned High Court judge to have held that the plaintiff's attorney lacked capacity. We think that the Court of Appeal adequately considered the issue about the Power of Attorney and it would

serve no purpose for us to repeat same in this judgment. The grounds (IV) and (V) are therefore resolved in favour of the respondent for this appeal to be considered on the merits.

The other grounds of appeal could be considered together by reviewing the evidence on record as we are enjoined to do as the last appellate court to see whether substantial justice was done. The parties and the trial judge did not find it fit to order accounts in a simple matter in which the plaintiff's claim was being disputed by the defendant on the basis of payments made to the bank to reduce the indebtedness of the appellant at the early stages of the trial. Evidence was led by both parties to ascertain whether the appellant's indebtedness stood at Gh₵131,149.14. It was clear from the evidence of the respondent's witness that the appellant had indeed paid an amount of Gha₵90,000,00 leaving a balance of Gh₵41,000.00. The appellant at the trial cross-examined the witness on Exhibit "B" the bank statement of the appellant. It appeared from the evidence that the only witness of the respondent could not speak to the bank statement and the contents therein. The mere tendering of a bank statement may be prima facie evidence of the state of a customer's financial transaction with a bank; it may not conclusively establish on the balance of probabilities the exact and accurate state of a customer's financial transaction.

Counsel for the respondent has contended that since the appellant was allowed to overdraw money from his accounts, he is obliged by law to pay the outstanding valance. Reliance was placed on this court's decision in **SG-SSB** V **HAJJARA FARMS**

LTD [2012] ISCGLR 1. From the evidence, the appellant is not denying that he owed the bank. The controversy arose from the amount due and owing to the respondent.

The respondent who sued the appellant to recover the amount stated in the claim was to prove on the balance of probabilities that the amount was the balance to be paid by the appellant. On the evidence the learned trial judge found as a fact supported by the evidence that the respondent had failed to prove the claim indorsed on the writ. The trial judge also found as a fact that the respondent as plaintiff failed to prove that the interest which the respondent imposed on the Gh₵41, 149.14 and other charges were not justified during the period the overdraft remained unpaid. Other charges like filing fees to the Attorney debited to the appellant's account on 23/06/2011 were not satisfactorily explained to the trial judge.

Indeed, the Court of Appeal in its judgment, with due respect, did not consider the details of the amount due and owing in the manner the trial judge did. We think that from the evidence if the Court of Appeal had critically examined the uncontroverted facts it would have limited the outstanding amount to only Gh₵41,149.14 taking into consideration the payments made by the appellants.

The appeal is therefore allowed in part as stated supra, save that the judgment of the Court of Appeal is affirmed as varied.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

DOTSE, JSC:-

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

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

APPAU, JSC:-

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

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

PWAMANG, JSC:-

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

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

MARFUL-SAU, JSC:-

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

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

COUNSEL

SULLEY SAMBIAH FOR THE PLAINTIFF/APPELLANT/RESPONDENT.

KWAME A. BOAFO FOR THE DEFENDANT/RESPONDENT/APPELLANT.