IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – AD 2019

CORAM: AKOTO-BAMFO (MRS), JSC (PRESIDING)

BENIN, JSC

APPAU, JSC

MARFUL-SAU, JSC

KOTEY, JSC

CIVIL APPEAL
NO. J4/23/2018

6TH FEBRUARY, 2019

MARTIN A. ATUAHENE FOR HIMSELF AND
ON BEHALF OF OTHER FORMER EMPLOYEES
OF THE GHANA COCOA MARKETING BOARD …. PLAINTIFF/RESPONDENT/APPELLANT

VRS

GHANA COCOA MARKETING BOARD
HEAD OFFICE, ACCRA ……. DEFENDANT/APPELLANT/RESPONDENT

J U D G M E N T

MARFUL-SAU, JSC: -

In this appeal we are called upon to determine whether the Plaintiff/ Respondent/ Appellant, who sued on behalf of 683 persons, herein referred to as Appellants, lost their employment with the Produce Buying Company Ltd and for that matter entitled to severance award under the Labour Act.

The Court of Appeal sitting at Kumasi in its judgment under appeal had reversed the decision of the trial High Court, Kumasi which held that Appellants were entitled to severance award. The Appellants are therefore urging this Court to set aside the decision of the Court of Appeal on six grounds formulated in their Notice of Appeal as follows:-

"i. The judgment is against the weight of evidence on record.

ii. The Court of Appeal fell into error when they held that relief (i) endorsed on the Writ of Summons was without merit because the Plaintiff/ Respondent/Appellant and his colleagues had not at any time lost their employment with the Defendant/ Appellant/Respondent, Ghana Cocoa Board or Produce Buying Company Limited.

iii. The Court of Appeal erred in faulting the Plaintiffs/Respondents/ Appellants for failing to call evidence to prove the negative that is to say, their denial that they did not receive any entitlement, end of service benefits or redundancy payments apart from their Provident Fund Contributions.

iv. The Court of Appeal erred in pronouncing that the Plaintiff/ Respondent/Appellant and his colleagues' action was not brought bona fide.

v. The Court of Appeal erred in reversing the judgment of the trial High Court and upholding the appeal of the Defendant/Appellant/Respondent.

vi. The costs awarded against the Plaintiffs/Respondents/Appellants is unjustified in the circumstances."

Before proceeding to address the grounds of appeal, we deem it necessary to state the facts of the case albeit briefly. One Martin Atuahene for himself and on behalf of 683 former employees of the Produce Buying Company Ltd took out a Writ of Summons in the High Court, Kumasi claiming three reliefs namely:-

"i. a declaration that the defendants are liable to pay to the plaintiff and each of the persons on whose behalf the plaintiff brings this action severance pay for loss of employment.

ii. an order that the defendant shall duly calculate and pay to the plaintiff and each other person for whom the plaintiff has sued the amount due to them by way of severance pay.

iii. interest on the sums so found."

The case of Martin Atuahene who testified for himself and all the other 683 persons is that he was employed by the Defendant/ Appellant/ Respondent, herein referred to as Respondent, in 1974 as a driver. In 1983, Martin Atuahene and the 683 persons were transferred to the Produce Buying Agency (PBA), a Department of the Respondent Company. From the record, in or before 1999, the Respondent converted PBA into a Limited Liability Company but remained a subsidiary of the Respondent. The new subsidiary was the Produce Buying Company Limited (PBC Ltd). Martin Atuahene and his colleagues continued to work with PBC Ltd, as a subsidiary of the Respondent, until the year 2000, when the Respondent wholly privatised PBC Ltd, by off-loading its shares and got it listed on the Stock Exchange. Martin Atuahene and his colleagues continued to work with the PBC Ltd until he retired as a Chief Driver in May 2005.

The claim of Martin Atuahene and the 683 persons is that when the PBC Ltd was wholly privatised to a third party and was listed on the Stock Exchange, they severed all connection with the Respondent and therefore entitled to severance award. They further alleged that their condition of service was adversely affected by the privatisation of PBC Ltd. In particular they pleaded that they were no longer entitled to apply for Scholarship and Bursary for their children; they were charged fees for attending Respondent's clinics and that they had lesser remuneration than their colleagues in the service of Respondent.

The Respondent denied Appellants claims and contended that by the privatisation exercise about 2,255 of the staff were made redundant. These workers were laid off and their entitlements paid, in accordance with, an Agreement reached by the Joint

Negotiating Committee between the PBC Ltd and the Respondent on one side and the Industrial and Commercial Workers Union (ICU) and the General Agricultural Workers Union (GAWU), on the other hand. According to the Respondent those workers who were retained, per the Agreement, were to enjoy continuous service from the first date of employment with PBC or the Respondent. From the evidence on record the Appellants fell into the category of staff retained and therefore were to enjoy continuous service as agreed.

The Respondent posited that in order to adequately compensate the affected staff of PBC Ltd the salaries of all staff of the Respondent and PBC Ltd were re-aligned and their annual increments updated in June and October 1999 to be at par. According to the Respondent in view of the salary re-alignment the retained staff in PBC Ltd did not experience any loss in their conditions of service, as compared to workers of the Respondent.

From the pleadings of the Appellants and the evidence of Martin Atuahene, it is clear that their claim for severance award is based on the fact that PBC Ltd was wholly privatised to a third party. In other words, Appellants are claiming that since the Respondent had off-loaded its entire shares in PBC Ltd to third parties, they had severed industrial relationship with the Respondent and therefore entitled to severance award.

Now, having established the basis of Appellants claim, we will proceed to address the grounds of this appeal. We observed that the grounds formulated against the Judgment of the Court of Appeal stated above are interrelated, since the import of all the grounds is that the Court of Appeal, was wrong in holding that the Appellants did not lose their employment and were not entitled to severance award. The real issue therefore in this Appeal is whether or not the Appellants by the privatisation of PBC Ltd on the Stock Exchange lost their employment and thus entitled to severance pay. We therefore intend to address ground (i), which is that the judgment of the Court of Appeal was against the weight of evidence on record.

The import of this ground of appeal is trite. By that ground this Court is enabled to review the entire record of appeal to ascertain whether or not the decision of the first appellate court, is justified in law or not.

The law that regulated the relationship between the Appellants and their employer at the time Appellants alleged that their employment was severed in the year 2000, was the **Labour Act, 1967 (NLCD 157)** as amended by the **Labour (Amendment) Act, 1969 (NLCD 342),** section 34 (1) and (2) of which provided as follows:-

> ***'' 34 (1) When an organization is closed down or when an organization undergoes an arrangement or amalgamation and the closedown, arrangement or amalgamation causes a severance of the legal relationship of the employer and employee between any person and the organization as it existed immediately before the close down, arrangement or amalgamation, then, if as a result of and in addition to such severance that person becomes unemployed or suffers any diminution in his terms and conditions of employment, he shall be entitled to be paid by the organization in whose employment he was immediately prior to the close down, arrangement or amalgamation, compensation, in this Act referred to as Severance Pay.***
>
> ***(2) In determining whether a person has suffered any diminution in his terms and conditions of employment under sub section (1) of this section, account shall be taken of the past services and accumulated benefits (if any) of such person in or in respect of his employment with the organization before it was closed down or before the occurrence of the arrangement or amalgamation.''***

It is important to state that in 2003 the Labour (Amendment) Act, 1969 (NLCD 324) was repealed by the Labour Act, 2003, Act 651. The new Labour Act, Act 651 had in its section 65, provisions very similar to section 34 of the repealed Labour (Amendment) Act, 1969, (NLCD 324). The said **section 65(2) to (5) of the**

Labour Act, 2003, Act 651, which is the current law regulating severance of labour relations provides as follows:-

> ***''2. Without prejudice to subsection (1), where an undertaking is closed down or undergoes an arrangement or amalgamation and the close down, arrangement or amalgamation causes:***
>
> ***a. severance of the legal relationship of worker and employer as it existed immediately before the close down, arrangement or amalgamation; and***
>
> ***b. as a result of and in addition to the severance that worker becomes unemployed or suffers any diminution in the terms and conditions of employment,***
>
> ***the worker is entitled to be paid by the undertaking at which that worker was immediately employed prior to the close down, arrangement or amalgamation, compensation, in this section referred to as redundancy pay.***
>
> ***3. In determining whether a worker has suffered any diminution in his or terms and conditions of employment, account shall be taken of the past services and accumulated benefits, if any, of the worker in respect of the employment with the undertaking before the changes were carried out.***
>
> ***4. The amount of redundancy pay and the terms and conditions of payment are matters which are subject to negotiation between the employer or a representative of the employer on the one hand and the worker or the trade union concerned on the other.***
>
> ***5. Any dispute that concerns the redundancy pay and the terms and conditions of payment may be referred to the Commission by the aggrieved party for settlement, and the decision of the Commission shall subject to any other law be final''.***

We note however that the law applicable to this appeal was the Labour (Amendment) Act, 1969 (NLCD 324) whose section 34 has been quoted above. We are of the opinion that section 34 of the Labour (Amendment) Act, 1969; (NLCD 324) is clear and must be given its ordinary meaning.

Our understanding of the said provision is that for a worker to be entitled to severance or redundancy pay it is not only enough that, the legal relationship between the worker and the employer as existed be severed, as a result of a closed down, arrangement or amalgamation of the entity; but the worker must also have become unemployed or suffer diminution in his conditions of service, as a result of the severance. The close down, arrangement or amalgamation of the entity must trigger the two conditions before severance could be paid.

So what happened in this case? As discussed above the Appellants were originally employed by the Cocobod and transferred to the Produce Buying Agency (PBA), a unit under Cocobod. Later in the course of their employment, the Respondent transformed PBA by incorporating the unit into a Limited Liability Company and called it Produce Buying Company Limited, but remained a subsidiary of the Respondent and as such wholly owned by the Respondent. As at that point, Respondent ceased to be the employer of the Appellants. By virtue of the incorporation, PBC Ltd became the new employer of the Appellants and not Cocobod. The reason simply is that even though at the time, Cocobod was the sole shareholder of PBC Ltd, by virtue of the principle in **Salomon v Salomon [1897] AC 22,** PBC Ltd had acquired a separate legal personality from its shareholders and could sue and be sued. It follows that if any of the Appellants had a cause of action against the employer at that point, the action will be against PBC Ltd and not Cocobod, even though it was the sole shareholder.

The law is clear that shareholders of a Limited Liability Company are not the employers of the staff; rather the employer is the company as distinct from the shareholders**. In Morkor v. Kuma(East Coast Fisheries Case) {1998-99} SCGLR 620. At page 632 of the report, Sophia Akuffo, C.J (then JSC) delivered as follows:-**

''Save as otherwise restricted by its regulations, a company, after its registration, has all the powers of a natural person of full capacity to pursue its authorised business. In this capacity, a company is a corporate being, which, within the bounds of the Companies Act, 1963 (Act 179) and the regulations of the company, may do everything that a natural person might do. In its own name, it can sue and be sued and it can owe and be owed legal liabilities. A company is, thus, a legal entity with a capacity separate, independent and distinct from the persons constituting it or employed by it.''

From the record, at the time the Respondent decided to off- load its shares in PBC Ltd and wholly privatised PBC Ltd on the Stock Exchange, Appellants were employees of PBC Ltd and not Cocobod. The Appellants remained employees of PBC Ltd even after the privatisation of PBC Ltd and its share off-loaded to third parties on the Stock Exchange.

Now, applying the criteria set by section 34 (1) of the Labour(Amendment) Act, (NLCD 342) to the evidence on record as discussed above the questions below may be posed and the answers, in our view will help resolve the fundamental issue in this appeal:-

Q. Who was the employer of Appellants before the whole privatisation of PBC Ltd, in year 2000?

A. From the evidence on record the employer was PBC Ltd, but owned by Cocobod.

Q. Who was the employer of the Appellants after the whole privatisation of PBC Ltd, with the off-loading of Cocobod shares to third parties?

A. The answer again is that the employer was PBC Ltd, but now owned by third parties.

From the above answers therefore, there was no severance between the Appellants and their employer as required by section 34(1) of the Labour (Amendment) Act,

(NLCD 342). Indeed, the employer that existed before the arrangement was PBC Ltd. and the employer after the arrangement was still PBC Ltd. As we have stated earlier, shareholders of Limited Liability Companies are not employers of the staff or workers of the company. We are of the opinion that there was no termination or severance of the employer/ worker relationship between the Appellants and their employer PBC Ltd. The Appellants from the evidence became employees of PBC Ltd from 1999, when the company was incorporated. Accordingly we hold that the Court of Appeal was right when it found that the Appellants employments were never severed by the arrangement in year 2000.

In this Appeal, even if there was a severance of a Worker/ Employer relationship, the Appellants would still not be entitled to any severance award due to the circumstances under which the arrangement was effected. It is on record that before the privatisation was effected, an Agreement was reached between the respective Unions of the workers on one side and Cocobod / PBC Ltd on the other hand. By clause 6 of the said Agreement which was tendered at the trial as Exhibit 1, all the workers who were retained as a result of the privatisation arrangement, were to enjoy continuous service as at the date they were employed by Cocobod. The said Clause 6 of Exhibit 1, the Agreement provided thus:-

> *''Cocobod confirmed that the number of years by PBC employees being carried on to the new company shall have all future entitlements calculated on the basis of their original date of employment with PBC/Cocobod i.e. service shall be deemed to be continuous for all retained employees from date of appointment with PBC/Cocobod."*

Appellants were among the employees who were retained and so were covered by the above clause. Martin Atuahene who testified for the Appellants in his evidence stated at page 86 and 87 as follows:-

''Q. And do you know the month in which the separation between Produce Buying Co. Limited and Cocoa Board took place?

A. Yes, I do. My Lord the separation came in the year 2000 that is January 2000.

Q. When did you retire from the Produce Buying Co. Limited, in which year and month?

A. My Lord, I retired from the service in the year May, 2005.(sic)

Q. So for how long did you continue working for Produce Buying Co. (PBC) Limited after the separation?

A. My Lord, I worked for PBC after separation for five years, five months.

From the above evidence, it is clear that the Appellants did not lose their employment as they enjoyed the provision under Clause 6 of the Agreement executed in furtherance of the privatisation of PBC Ltd. By this evidence Appellants could still not have benefited from section 34 (1) of the Labour (Amendment) Act, (NLCD 342) as they were never unemployed as a result of the arrangement. Again, we find that the Court of Appeal was right in so holding that the Appellants never lost their employment as they were fully covered by clause 6 of the Agreement.

The next issue we like to address is whether the Court of Appeal was wrong in its decision that the Appellants did not suffer any diminution in the terms and conditions of employment. Appellants pleaded the diminution they allegedly suffered at paragraph 9 of the Statement of Claim as follows:-

"(i) The plaintiff and his fellow workers, as employees of Produce Buying Company Limited, are no longer entitled to apply for and obtain Cocobod scholarship and bursary for their wards; a right they enjoyed as employees of the Defendant company.

(ii) The plaintiff and his colleagues are now charged fees for attendance at the Defendants' clinics.

(iii) The plaintiff and his fellow workers, as employees of Produce Buying Company Limited enjoy lesser remuneration than their counterparts in the service of the Defendants."

We agree with the Court of Appeal that Appellants failed to prove that they suffered diminution in their conditions of service. As demonstrated above, diminution of service was a requirement for a worker to be entitled to severance award under section 34 (1) of the Labour (Amendment) Act, (NLCD 342). The undisputed evidence on record is that the award of scholarship and bursary was a privilege and not a right to be enjoyed by all employees of Cocobod. Martin Atuahene himself admitted under cross examination that Respondent's scholarship scheme is for brilliant children of workers. If a worker had no brilliant child, he does not benefit from the scholarship. In other words Respondent's scholarship scheme was not automatic for workers' children. On the issue of the medical fees, Martin Atuahene admitted that their medical bills were paid by Produce Buying Company Ltd.

The fact as pleaded by the Appellants that they were charged fees for attendance at the Respondent's clinics was thus false.

On the point that Appellants had less remuneration, the Court of Appeal found from the evidence that before the privatisation in 2000, the salaries of all the workers of PBC Ltd were re- aligned to be at par with staff of Respondent. Martin Atuahene and PWI Francis Akpoh admitted the re-alignment but testified that after 2000, their salaries lagged behind as compared to the salaries of workers of the Respondent. This however, was attributed to the bargaining power of the unions and their respective management. After the privatisation, PBC Ltd was under a different Board or Management from the Respondent and as such, it was absurd for the Appellants to still compare their conditions of service to workers of Respondent and complain that they were taking lesser remuneration. We understand the Appellants to be suggesting that whenever Respondent's workers received any salary increment, then such increment should be extended to workers of PBC Ltd. The argument is flawed simply because the two entities operated differently and are under different Management.

In conclusion, we are of the opinion that there is enough evidence on record to support the decision of the Court of Appeal. The first appellate court was right in setting aside the judgment of the trial High Court, which entered Judgment for the

Appellants herein. For the reasons stated in this judgment, we hold that the Appeal to this Court has no basis in law and same is accordingly dismissed.

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

AKOTO-BAMFO (MRS.), JSC:-

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

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

BENIN, JSC:-

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

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

APPAU, JSC:-

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

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

KOTEY, JSC:-

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

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

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