IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – A.D. 2017

CORAM: DOTSE, JSC PRESIDING
YEBOAH, JSC
GBADEGBE, JSC
BENIN, JSC
PWAMANG, JSC

CIVIL APPEAL
NO. J4/34/2016

6TH APRIL, 2017

OPPONG BANAHENE - PLAINTIFF/APPELLANT/APPELLANT

VRS

SHELL GHANA LIMITED - DEFENDANT/RESPONDENT/ RESPONDENT

JUDGMENT

BENIN, JSC :-

This is an appeal from the unanimous decision of the Court of Appeal dated the 19th day of January, 2012. Oppong Banahene, the Plaintiff/Appellant/Appellant is hereinafter referred to as the Plaintiff and Shell (Ghana) Ltd. which is the Defendant/Respondent/Respondent is hereinafter referred to as the Defendant.

THE FACTS

The Plaintiff entered into a written haulage agreement with the Defendant on the 13th day of May 1996. The agreement, however, was said to have commenced on the 1st day of January, 1996 and was scheduled to terminate on 31st December, 1996; it was for one year certain. Under the agreement, the Plaintiff was to transport petroleum products belonging to the Defendant from Tema Oil Refinery (TOR) to their customer called Sonitra at Yawkwei, near Konongo on the Accra-Kumasi Road. A copy of that agreement was put in evidence as exhibit A.

The haulage relationship between the parties continued without a formal renewal after the one year duration. In short, the parties continued to conduct business under the same terms and conditions as contained in exhibit A. This business arrangement continued until late 1998. To be precise, in November, 1998 the defendant introduced a Fleet Rationalisation Scheme (FRS) whereby companies or persons operating hauling business with the defendant with fewer than ten vehicles were to operate under bigger companies with ten or more vehicles. The Plaintiff had two trucks which were Mercedes Benz with registration number GT 4408 E and Man Diesel with registration number GR 7805 F. He therefore fell under persons with fewer trucks. Consequently, if he was to continue in business with the defendant, he was bound to place his two trucks under one of the bigger operating companies. Pursuant to the FRS, the plaintiff's vehicles were placed under the control and management of Benko Limited. There was some disagreement as to who actually placed the plaintiff's

trucks under the aegis of Benko Ltd which was a bigger company within the terms of the new scheme. But that misunderstanding was uncalled for because the evidence was clear that the plaintiff did not qualify under the FRS and being desirous to continue working with the defendant, he accepted to work under Benko Ltd. and had no problem with that.

A written agreement was executed between the defendant and Benko Ltd. to which the plaintiff was not a party; that agreement took effect from January 1999 and was renewed from time to time on the same terms and conditions. Thenceforth, the Plaintiff operated under Benko Ltd. and therefore he received his payments from Benko Ltd and not directly from the defendant. In effect the defendant had no direct dealing with the plaintiff as from January, 1999. The plaintiff, however, retained ownership of his two trucks and employed his own drivers.

On the following dates: 1st October 2003; 6th, 19th and 30th January 2004 respectively; 12th as well as 20th February 2004, the Plaintiff's Mercedes Benz truck was loaded with petroleum products but none was delivered to the designated consignee, Sonitra. Of all the six loads only the one on 30th January, 2004 bears the signature of the Plaintiff's driver, Emmanuel Lawerter. The defendant surcharged the plaintiff via Benko Ltd. with the total cost of the six loads amounting to ₵621,900,180.00 (now GH₵62,190.18), from the earnings of his plaintiff's two trucks placed in Benko Ltd's pool, at a monthly deduction rate of ₵50,000,000.00, (now GH₵50,000.00), after Benko Limited had approved of the said deductions. The plaintiff also wrote to the defendant approving of the deductions

pending police investigations into the diversions. But that approval was otiose because the defendant required only the authorisation of Benko Ltd. as the contracting party.

The plaintiff believed that he was not responsible for the five consignments for which his driver did not sign the delivery notes. Hence on the 12th day of November, 2004, Plaintiff issued a Writ of Summons against the Defendant claiming the following reliefs:

(i) Account of all freight earned by the plaintiff since March 2004 under the bulk petroleum haulage agreement with the defendant under which the plaintiff uses his two articulated tanker trucks, Mercedes Benz No. GT 4408 F and Man Diesel No. GR 7805 F, to convey the defendant's bulk petroleum products from the Tema Oil Refinery for redelivery to Sonitra at Yawkwei near Konongo and all deductions made from the said freight earnings by the defendant to pay the cost of six consignments or the products which were loaded by the defendant into the Mercedes Benz truck No. GT 4408 F between 1st October 2003, and 20th February 2004 but which were diverted and not so delivered to Sonitra.

"(ii) Refund of the deductions in excess of the value of one of the six consignments loaded into the said truck on 30th January 2004 per delivery note No. 70188844 and invoice No. 70127021 for which the plaintiff's authorised driver Emmanuel Lawarter signed the delivery note.

"(iii) Interest on the said excess deductions at the prevailing bank rate from the date of the deductions up to the date of judgment.

The Plaintiff's case as placed before the trial court was that though his vehicles were placed under Benko Ltd, he did not cease to be the owner thereof. Plaintiff also claimed that it was the practice of their business arrangement that the driver of the truck who is to deliver the load must be given a delivery note and which he must sign. Of all the six consignments, it was only the load diverted on the 30th of January 2004 that the Plaintiff accepts responsibility for because it was only that load his driver signed the delivery note. For the plaintiff, it is the essence of a bailment that goods are delivered by the bailor to the bailee so that in the case of carriage of goods, the goods must be delivered to the carrier. Since his authorized driver did not sign the delivery note, the loads were not delivered to him and therefore he is not liable to pay for the five consignments that the driver did not sign for.

It was also the plaintiff's case that under the agreement he had to submit to the defendant a qualified driver who would be trained by the defendant. The driver is assigned a specific vehicle and apart from this driver, no other person is authorised to drive the vehicle. According to the plaintiff it was the duty of the defendant to check the identity of the person authorized to drive that vehicle whenever loaded with products and in this case, the defendant had to ensure that only Emmanuel Lawerter was allowed to bring the vehicle to the depot to be loaded and drive it away from the depot. If the defendant failed to detect the person who impersonated Lawerter as the driver of that vehicle and allowed that person to load the truck with the five consignments, drive it away and divert the products

then it failed to discharge its duty with due care and attention. The defendant therefore breached the duty of care under the haulage contract and any loss caused should be placed at the door of the defendant and not the plaintiff. It follows that the plaintiff cannot be surcharged, consequently the deductions were wrongful.

The defendant on its part denied having any contract with the Plaintiff. The defendant argued that it had a contract with Benko Ltd. only because the FRS ended their relationship with the plaintiff. It was Benko Ltd. that warranted that they owned the trucks and gave approval for the deductions.

The learned trial Judge found as a fact that the defendant knew that the trucks of the plaintiff operated under Benko Ltd. after the FRS for business convenience of the defendant and exigencies of the haulage business as determined by the defendant. The evidence, however, did not disclose any contract between the plaintiff and the defendant, indeed there was none after the FRS; the only contract as from January 1999 was between the defendant and Benko Ltd.

Again, the trial court held the view that "*the vehicle with which the products were diverted was at all material times under the control of the plaintiff's driver. The plaintiff's driver held the keys to the vehicle. The truck could be driven by engaging the keys which the plaintiff's driver kept exclusively. In all probabilities, the plaintiff's driver who had custody of the vehicle's keys was the one who drove the vehicle with the consignments in issue and should be held responsible for the diversion*"

The learned trial Judge held that the deduction of ₵50 million per month agreed to by Benko Ltd. was in order, therefore the plaintiff was not entitled to his reliefs. Consequently in its judgment dated the 29th day of June, 2009 the trial court dismissed the plaintiff's action.

The plaintiff was not satisfied with the judgment of the High Court, so he appealed against it to the Court of Appeal on these grounds:

"(i) The judgment is against the weight of evidence.

(i) The judgment is wrong because it was based on irrelevant matters and not on matters relevant to the case before him."

The Plaintiff's argument before the Court of Appeal was that the case is one that falls within the law of carriage of goods which is a branch of the law of bailment. For Plaintiff to be liable, the products must be bailed with him through his driver. According to Counsel for Plaintiff, bailment of the products would arise when they were put onto the vehicle and its owner becomes a bailee of the products if they were delivered to a person he had authorised to drive the vehicle on each occasion by signing the delivery note. Counsel's contention therefore is that since the Plaintiff's authorised driver did not sign for five of the six consignments the Plaintiff is not liable because he did not become the bailee of the products.

Counsel also contended that the learned trial High Court Judge in determining the issue took into account irrelevant matters which, inter alia, were questions raised by the learned trial Judge regarding the person who kept the keys to, and exercised control over, the Plaintiff's vehicle.

Defendants on their part quoted from Halsbury's Laws of England, 4th Edition, Vol. 2 paragraph 1801 at page 830 on the definition of bailment and added that the learned trial Judge was satisfied that all the elements of bailment were present. Counsel for defendant contended that: "it is the requirement of the contract that the driver should acknowledge receipt by signing the delivery note that constitutes bailment. Admittedly, if the driver had signed the delivery note that would have been clear evidence of the delivery and possession. His failure to sign the delivery note cannot negate bailment especially where, in the circumstances of this case, there is other material before the court in the form of admission by the plaintiff in his pleadings that the defendant's products were loaded into his vehicle for delivery at Yawkwei which clearly shows delivery and possession."

It was the case of the defendant that the appeal should be dismissed for the reason that the Plaintiff was a bailee of the products and submitted that the plaintiff was responsible for making good the loss incurred by the defendant.

The Court of Appeal in its judgment pointed out the dichotomy between "issuance of delivery notes" and "signing of the delivery notes". The Court, per Aduama Osei JA, stated that: *"to say therefore that a delivery note was not signed is not the same as saying that the delivery note was not issued. Since the Plaintiff does not plead that in the present case the delivery notes were not issued the inference of what I draw from what has been pleaded is that the usual practice prevailed and the delivery notes were issued but were not signed by the Plaintiff's driver."*

The Court of Appeal also held, again per Aduama Osei JA, that *"if the Plaintiff's vehicle has been loaded and his driver has been issued with a delivery note, then there has been delivery in fact. The failure of the driver to sign the delivery notes does not negate what has in fact taken place."* For his part, Ofoe JA took the position that under the express terms of the contract between the parties herein-exhibit A-as well as the various contracts between the defendant and Benko Ltd, delivery took place when the defendant loaded the truck with products, and so he concluded it was not the driver's signature that constituted delivery.

On the issue of the learned trial High Court Judge taking into account irrelevant matters, the Court of Appeal was of the view that the trial Judge did not ponder over irrelevancies. The Court of Appeal concluded that the Plaintiff was liable for the diversion and the trial Court was justified in denying him the reliefs he claimed in this suit. The Court therefore dismissed the appeal and affirmed the trial Court's judgment.

It is from the judgment of the Court of Appeal delivered on the 19th day of January, 2012 that the plaintiff has appealed to this Court. The grounds of appeal filed on 26th January, 2012 are:-

(i) The Court of Appeal misdirected itself in failing to appreciate that the delivery note issued in respect of every consignment put on board the plaintiff's vehicle when signed by the plaintiff's agent, his authorised driver, performs the same receipt function which a bill of lading performs, when signed by the master of a ship in respect of goods put on board the ship.

(ii) The Court of Appeal misdirected itself in law by thinking that whenever the Defendant puts a consignment on board the plaintiff's vehicle it ipso facto rendered the plaintiff liable to pay for the consignment if undelivered to the consignee.

(iii) The Court of Appeal erred in failing to appreciate the legal significance of the course of business which required that, apart from every other security check in respect of every consignment put on board the plaintiff's vehicle the accompanying delivery note must be signed by the plaintiff's authorised driver to signify that the driver had received the consignment on board.

(iv) The Court of Appeal erred in law in not appreciating that owing to the course of business that existed between the two it was the duty of the Defendant to ensure that a delivery note is issued in respect of each consignment it put on board the plaintiff's vehicle was signed by the plaintiff's authorized driver as his agent and that it was negligent on the part of the Defendant to allow the vehicle to leave its yard with the five consignments on board when the authorized driver was not the one who signed the delivery notes accompanying them before the vehicle left the yard.

(v) The Court of Appeal erred in failing to appreciate that the plaintiff's authorised driver would be acting outside the scope of his authority or employment with the plaintiff any time he drove

the plaintiff's vehicle with consignment on board out of the Defendant's yard without the delivery note.

Additional ground of appeal filed by the plaintiff was that:

Having regard to the peculiar defence the defendant put up in its statement of defence to the plaintiff's actions, the trial court and the Court of Appeal were wrong in dismissing the action after the trial court had made findings of fact that the Mercedes Benz and Man Diesel trucks belonged to the plaintiff which he used in carrying the petroleum products under an agreement with the defendant.

CONSIDERATION OF GROUNDS OF APPEAL

The crux of plaintiff's argument to the Supreme Court is that his authorized driver did not sign the delivery notes so he is not liable. The defendant maintained that they had no contract with the plaintiff. Indeed the present arguments are not materially different from those before the High Court and the Court of Appeal. In view of this we will treat all the grounds of appeal together, but additionally grounds (iv), (v) and the additional ground will each be addressed in some detail.

This appeal is against the concurrent findings of fact and conclusion of the Court of Appeal and the High Court. The Supreme Court has, in a number of cases, given the criteria for allowing an appeal against the concurrent findings of fact and conclusions of the lower courts that had dealt with the case. The Supreme Court has held that as a second appellate court it will not ordinarily interfere with findings of fact made by a trial court and

confirmed on appeal by an appellate court; it will intervene only in some circumstances and situations, the categories of which are not closed. So the intervention in each case will depend on its peculiar facts. See the following cases: (1) **Fynn v. Fynn & Osei [2013-2014] 1 SCGLR 726; (2) Mensah v. Mensah [2012] 1 SCGLR 391; (3) Musah v. Musah [2011] 2 SCGLR 459; (4.) Fabrina Ltd v. Shell Ghana Ltd [2011] 1 SCGLR 429; (5) Gregory v. Tandoh IV & Hanson [2010] SCGLR 971; (6) Obeng v. Assemblies of God Church, Ghana [2010] SCGLR 300; (7) Ntiri v.Essien [2001-2002] SCGLR 459; (8) Achoro v. Akanfela [1996-97] SCGLR 209.**

According to the Black's Law Dictionary, 9th edition, edited by Bryan A. Garner, at page 162 bailment has been defined as **"a delivery of personal property by one person (the bailor) to another (the bailee) who holds the property for a certain purpose under an express or implied-in-fact contract"**

In law, in order for bailment to exist, the bailee must have both the intent to possess the property, and actual possession of the property. The bailor intends that the property will be returned to him at the end of a specified period of time, or after the purpose for which the property was given has been accomplished. It does not necessarily arise from an express contract.

In this case the bailment arose any time the defendant loaded products on the plaintiff's truck and it ended upon the products being offloaded at Yawkwei to Sonitra as the consignee appointed by the defendant. And as

long as the products remained undelivered to Sonitra, the carrier was responsible for it.

It was not disputed that all the six consignments were in fact put on board the Mercedes Benz truck number GT 4408 F. The plaintiff asserted this fact in paragraph 5 of his statement of claim wherein he pleaded that:

"On the following dates, that is 1st October 2003, 6th January 2004, 19th January 2004, 30th January 2004, 12th February 2004 and 20th February 2004 the Mercedes Benz truck was loaded at the Tema Oil Refinery by the defendant with petroleum products to be delivered at Yawkwei to Sonitra but the products were diverted and never delivered there or at any other place to Sonitra."

In his evidence-in-chief the plaintiff testified on this matter as follows:

”I rely on paragraph 5 of the statement of claim. The products collected as stated in the paragraph were not in fact delivered. Invoices and waybills were prepared on each of the dates referred to in the paragraph. On all those dates, Emmanuel Lawartey was my driver.”

Despite these clear admissions, the Plaintiff’s contention is that, as long as his driver, Emmanuel Lawarter did not sign the delivery notes, the consignments were not delivered. He argued that it was a practice of the parties that the driver should sign the delivery notes.

At this point it is necessary to consider the nature of the agreement between the defendant and Benko Ltd. which enabled the plaintiff’s trucks

to be used to cart petroleum products for the defendant. Three of such agreements were put in evidence but even a cursory look at them would show that the contents were the same except the dates and vehicle details.

It must be noted here that in all the series of Agreements entered into between the defendant and Benko Ltd it is stated that after every vehicle was loaded, there shall be given to the driver a delivery note, without specifically providing for signature. For instance it is provided in article 2(b) of exhibit 4 that:

"The Company shall provide the Contractor or the driver of the vehicle with delivery tickets, invoices or other necessary documents for the delivery of products and Contractor shall deliver products only in accordance with such delivery tickets, invoices or other documents. Contactor shall be responsible for the safekeeping and proper handling of all such documents."

The plaintiff does not allege that his driver was not given the said delivery notes. In fact the plaintiff himself swore to an affidavit in support of a summons and attached all the six delivery notes; these were marked as Exhibits OB.1 - OB.6. The following extracts from the cross examination of the plaintiff by counsel for the defendant is relevant:

"Q On 17/12/04 you swore to an affidavit in support of a summons for an order for accounts.

A. Yes

Q. Kindly look at this document. Is that your application and affidavit attached?

A. Yes

Q You noticed that there are several exhibits attached to that affidavit, is that correct?

A Yes

Q I believe the Exhibits number OB.1 - OB.6. What are Exhibits OB.1 to OB.6?

A They are delivery notes of products.

Q When is OB.1 dated?

A 1/10/03

Q Does OB.1 name the Carrier? Does it have the name of the Carrier on it?

A Yes

Q Who is the carrier?

A Benco Ltd.

Q Does it identify the vehicle?

A Yes

Q What is the number of the vehicle?

A GT 4408 F

Q I believe that is the Mercedes Benz Truck; right

A Yes

Q Does it identify the driver of the vehicle?

A Yes

Q What is the name of that driver?

A Emmanuel Larwatey

Q And as you said that delivery note is from Shell.

A Yes

Q Who was the product to be delivered to?

A Sonitra

Q. Look at OB. 2 and tell us when it is dated.

A 6/1/04

NB. Counsel applies to tender the summons and affidavits in evidence through plaintiff. No objection by counsel for plaintiff. Admitted and marked Exhibits 1, 1(a) - 1(f)

Q Exhibits 1(a) - 1(f) relate to GT 4408; is that (sic).

A Yes

Q In all of them the carrier is Benco Ltd. Is that correct?

A. Yes

Q In all of them the driver is Emmanuel Larwartey

A Yes, Emmanuel Larwetey

Q And in all of them the consignee is Sonitra is that correct?

A Yes"

It is therefore clear from the exhibits that OB.1 and 1(A) are the delivery notes issued on 1st October 2003, OB.2 and 1(B) are the delivery notes issued on 6th January 2004, OB.3 and 1(C) are delivery notes issued on 19th January 2004, OB.4 and 1(D) are delivery notes issued on 30th January 2004, OB.5 and 1(E) are delivery notes issued on 12th February 2004 and OB.6 and 1(F) are delivery notes issued on 20th February 2004.

It is noted that Emmanuel Lawartey's name appears on each of the six delivery notes. It is therefore undisputed that Lawartey took possession of all the six consignments. At any rate there is no other evidence that apart from Emmanuel Lawertey any other driver took the truck there to be loaded. In effect the presumption that Emmanuel Lawertey was the driver at all material times has not been rebutted; indeed the plaintiff admitted it in his own testimony as quoted above.

Consequently, the issue that remains to be resolved is whether the absence of the driver's signature on five of the six delivery notes in respect

of the consignments absolves the carrier Benko Ltd and by extension the plaintiff from responsibility for the diverted cargo.

As earlier pointed out, the agreement does not specifically state that the driver should sign the delivery note as issued by the defendant. But the plaintiff pleaded that the practice that has been accepted by the parties is that the driver should sign. The defendant did not specifically deny or admit this averment. But there was a general traverse which was sufficient to put the matter in issue.

It is clear from all the delivery notes put in evidence, namely exhibits OB1 through OB6 that there was a portion for the carrier's signature. At the hearing the defendant did not deny that it was a practice that the carrier or his authorized agent who is his driver should sign each delivery note. As stated by the learned author Goode in his book titled Commercial Law, 4th edition at page 97: "***Where parties have consistently contracted on certain terms, so that it may reasonably be assumed that the transaction under consideration was intended to be governed by the same terms, the court will usually be willing to find that the terms apply, even if not expressly adopted in relation to the transaction."*** See these cases**: McCutcheon v. David Macbrayne Ltd. (1964) 1 All ER 430; Henry Kendall & Sons v. William Lillico & Sons Ltd (1969) 2 AC 31; Vacwell Engineering Co. Ltd. v. B.D.H. Chemicals Ltd. (1971) 1 QB 88; Circle Freight International v. Mideast Gulf Exports (1988) 2 Lloyd's Rep. 427.**

From the foregoing, it is correct that it was the practice of the parties in the carriage business between the defendant and Benko Ltd that the carrier should sign the delivery note, but it was never intended to replace article 10 of the contract. What then was the effect on the bailment if the carrier or his agent failed to sign the delivery note? This is the meat of this matter which has inexplicably lasted several years in the court system.

Let us examine the specific terms of the contract to find out when delivery to the carrier is deemed to have taken place. The plaintiff contends that delivery takes place when and only when his agent, being his driver, has signed the delivery note. The defendant contends that delivery takes place when it has loaded the products on board the truck and issued a delivery note to the driver. In this regard we shall make reference to the earlier agreement between the parties herein, exhibit A, as well as the subsequent agreements between the defendant and Benko Ltd. in order to discover what the parties actually intended should constitute delivery. The relevant provisions of these contracts are the following:

Article 4 of exhibit A is headed 'DELIVERY' and it states in clause 4.1 that: ***Delivery of products shall be deemed to take place upon loading into the Contractor's vehicle. Risk and property in the products shall pass to the Contractor and remain with the Contractor until re-delivery of the product to the designated consignee. Re-delivery shall be deemed to take place upon the Contractor obtaining a signed Consignee sign and Return invoice confirming actual delivery of the products therein stipulated.***

Article 10(a) of exhibits 2, 3 and 4 provides that:

The Contractor shall be responsible for the Products once delivered into the vehicle of the Contractor and shall be liable to the Company for any loss, damage or destruction of products, whether due to leakage, fire, theft, damage, contamination, collision with any object or from any cause whatsoever excluding the sole negligence of the Company……

From the provisions of the contracts just quoted above, it is clear the parties understood and intended that delivery should take place the moment the supplier loaded the carrier's truck with their products. Whatever happened thereafter was the responsibility of the carrier, unless the fault could be attributed to only supplier, the defendant herein.

But the parties did not agree nor was it within their contemplation that even if the driver took the consignment but failed to sign the delivery note the carrier would not be responsible. In effect it is not their agreement or understanding that the driver's signature puts finality to the whole agreement. The driver remains the plaintiff's driver and agent, a fact the plaintiff admits. Their prime responsibility was to cart petroleum products from Tema to Yawkwei and deliver same to Sonitra. The defendant's core responsibility is to pay for the service when rendered. These are the key terms of the contract. Failure to sign the delivery note becomes a factor if and only if either party is disputing that a particular transaction has taken place; on the part of the carrier, that his truck was never loaded with any particular consignment. But that is not the situation on hand where the

plaintiff admits his vehicle was loaded with all six consignments on the six occasions. He does not attribute the diversion to the defendant, and indeed he does not say that the defendant was the cause of the diversion or knew about it or facilitated it. His driver even diverted the one that he signed for. And once the products were taken by the plaintiff's approved driver and on the vehicle designated for that purpose, Benko Ltd. and by extension the plaintiff was fully answerable for the diversion. The plaintiff's interpretation of the role to be played by the signature has elevated the practice to the status of 'sine qua non' of the contract which clearly was not intended by the parties. The practice cannot and does not supersede the clear intent of the parties as expressed in article 10 of the contract quoted above. Indeed actual loading of goods to the driver is paramount to the contract and constitutes delivery within the meaning of the contract and not the signature, and that makes more business sense.

On the facts before the court, the plaintiff bore the burden to lead evidence from which it could be concluded that the diversion of the product after it had been loaded on his truck was attributable to the defendant. It is not sufficient to say the plaintiff was not responsible because the practice, albeit an implied term of the contract, was violated when that violation could not be attributed to the defendant. There was no evidence before the court that any other person than the carrier's driver took the vehicle there to be loaded. There is no evidence the defendant knew that somebody other than the plaintiff's driver had taken the vehicle there to be loaded. That explains why all the delivery notes bore the same vehicle

number and the same driver's name. There has been no explanation as to why five of the six delivery notes bore different signatures from that of Lawartey; everything is being left to conjecture. The only person, Lawartey, who could have assisted the court unravel the mystery was not called to testify and no acceptable explanation for his absence was proffered. The plaintiff was obliged to explain why his driver who he admits was in charge of the vehicle at all material times did not sign the delivery notes. If somebody else signed without his knowledge and authorisation, why did he not make a complaint to anybody after the first diversion? The fact that this continued on five occasions without any complaint leads to the irresistible conclusion that the plaintiff's driver was involved in the deals. At the end of the day, the court is unable to determine with certainty, on a balance of probabilities, that the defendant was culpable. The plaintiff who assumed the burden of producing evidence and of persuasion would be adjudged to have failed in the light of sections 11(1) and 14 of the Evidence Act, 1975 (N.R.C.D. 323).

EFFECT OF FAILURE TO SIGN DOCUMENT

The issue of whether or not failure to sign a document will invalidate the document or affect its validity or effectiveness has received judicial pronouncements in a number of constitutional cases. Even though the instant case is one based on contract, the principles enunciated in the constitutional cases can be applied.

One such case is ***In Re Presidential Election Petition; Akuffo-Addo & 2 Others (No. 4) v. Mahama and 2 Others (No. 4) (2013) SCGLR (Special Edition) 73,*** where it was noted that even though the

Constitution 1992 used the words "shall sign" in article 49, the Supreme Court per the majority decision held that failure to sign the pink sheets did not invalidate the declared results. The presiding officers who failed to sign did not do so because of any wrong doing; for example being compelled not to sign or because of any fraud or irregularity, inter alia. As a matter of fact no evidence was led to show that failure to sign was as a result of any wrong or influence from someone.

It is noted that failure to sign the delivery notes could be as a result of an error. ***In re N (A Minor) (1972) I WLR 596,*** where one of the three justices failed to sign the reasons for the decision, Sir George Baker P said at page 597:

In the present case the justice's reasons are signed by two justices. We have been told by Mr. Eady, who was present before the justices, that in fact three justices sat and that it appears from a letter from the justices' clerk that the justice who has not signed was the chairman of the justices. The inference which I would draw from that is that the chairman dissented from the view of the other two justices. It is not satisfactory that this court should be left to draw that inference, which may be wrong. It may be that the failure to sign is simply an administrative error, or because the chairman has been ill or abroad, or something of that kind…"

In effect the court was left conjecturing what might have accounted for the failure to sign the document. In the instant case, the court is left wondering why the signature on the delivery notes is not that of Lawartey

even though he was in charge of the truck at all times. Was he the one who authorized somebody else to sign because he was busy or what? Or did he intentionally place a false signature on them in order to conceal the deal? There are numerous unanswered questions because the key witness did not testify on the material fact which was capable of proof. thus apart from sections 11 and 14 of the Evidence Act, the principle in **Majolagbe v. Larbi (1959) G.L.R. 190** is applicable to deny the plaintiff's claim for lack of evidence. Thus there must be certainty about the reason for the lack of signature, for the absence of a signature should not be fatal to the substance of an agreement if it has in fact been executed by either party in accord with the terms of the contract.

In ***Plymouth Corporation v. Hurrel (1968)1 QB 455 CA*** a statute required the signature of the town clerk in order to render a notice issued under the legislation the act of the local authority. Salmon L. J. commenting on the signature of a town clerk on a notice to a person in control of a house under the authority of the local council said this at pages 465-466: "***Clearly the only purpose of having the town clerk's signature upon the notice is to provide some evidence that it has been duly authorised by the local authority. The signature in itself has no magic about it. It would be absurd for the legislature to provide for proof that the notice had been given or issued by the authority of the local authority and yet leave a signature upon it still to be strictly proved. "***

From the statement of Salmon L.J, the signature is just to provide some evidence that the notice was issued by the appropriate officer, but the

validity of the notice did not depend on the clerk's signature, if indeed a notice was issued. Applying this principle to the instant case, the driver's signature provides some form of evidence that delivery to him has been made. Hence, in instances where he does not sign but other evidence showed that delivery was in fact made to him in terms of the specific provisions of the contract in force, it would be unjust to hold otherwise.

The reason for failure to sign a document covering a transaction must clearly exist and the defendant must be found to have induced it or at least contributed to it for his benefit, in order to establish liability against him. It should not be left to conjecture or guess work as to what might have prompted the failure to sign; for it is not in every case of lack of signature that renders an agreement invalid in the absence of clear agreement to that effect. And even in those cases where there has been a failure to sign in clear breach of an agreement, equity would not allow the plaintiff to take the benefit of the service rendered under the terms of the contract without paying for it, albeit on a *quantum meruit* basis. It would only entitle a plaintiff to resile from the rest of the agreement. For the principle of unjust enrichment would not allow a court of equity to allow the plaintiff to get away with the gains made by his agent to the detriment of the defendant.

DUTY OF CARE

In ground (iv) of the appeal, the plaintiff is saying that the defendant had the duty to ensure that his driver signed the delivery notes. And in his earlier submissions, he said defendant should have ensured that no other driver than plaintiff's driver brought the truck to the yard to be loaded, sign the delivery notes, and drive the truck away. In effect he is raising

negligence against the defendant. This, with respect to the plaintiff, is not supported by the agreements and evidence on record.

The plaintiff did not plead negligence against the defendant; he was required to plead it specifically, and indicate the nature of the duty of care in what ways it was breached. It was held in the case of **Gautret v. Egerton, Jones v. Egerton (1867) L.R. 2 C.P. 371; 15 W.R. 638**, that negligence should be pleaded and the pleading should contain the facts upon which the supposed duty is founded and the duty to the plaintiff with the breach of which defendant is charged. It is not enough to show that defendant has been guilty of negligence without showing in what respect he was negligent and how he became bound to use care to prevent the loss.

Order 11 Rule 8 of the High Court (Civil Procedure) Rules, 2004, C.I. 47 requires inter alia, that a party should plead specifically any matter, both factual and legal, which he alleges makes the claim or defence of the opposite party not maintainable. Negligence is one such matter that ought to be raised on the pleadings to enable the other party the opportunity to react to it and not to be taken by surprise.

But the plaintiff did not raise this in his pleadings, not even in his reply after the defendant had denied the existence of any agreement between them. But from existing authorities and statute, the court could consider the question of duty of care arising from negligence if evidence to that effect was adduced at the hearing without objection. Reference is thus made to the provisions of sections 5 and 6 of the Evidence Act, (1975) N.R.C.D. 323, which enable a court to consider evidence adduced at the

trial without objection. Moreover, in cases where fraud was not pleaded but the record disclosed some evidence was led at the hearing the court accepted and relied on it to establish fraud. See these cases**: Edward Nasser & Co. Ltd. v. McVroom & Another (1996-97) SCGLR 468; Amuzu v. Oklikah (1998-99) SCGLR 141; Apeah and Another v. Asamoah (2003-2004) 1 SCGLR 226.** The principle deducible from these cases is applicable to an issue founded on negligence, that even if it is not pleaded but evidence is admitted on the record without objection and the evidence is not rendered inadmissible on legal grounds, the court cannot ignore it, unless it will result in a miscarriage of justice.

The position is not different from what has obtained in England. For instance in the case of **S.S. Pleiades & Page v.S.S. Jane & Lesser (1891) A.C. 259; 65 L.T. 169; 60 L.J.P.C. 59**, it was held that where negligence was not raised on the pleadings and no evidence of it was led by either party at the hearing, it could not be raised for the first time at the final appellate court.

Thus for ground (iv) to hold, there must be some evidence on the record even in the absence of a plea. Upon an examination of the record, one does not find any direct evidence alluding to the alleged duty of care that is the subject of this ground of appeal. It appears it was an inference drawn from the evidence that since the vehicle was driven to the defendant's yard to be loaded it was the defendant's duty to ensure that the driver would sign the delivery note.

A court is entitled to draw inferences from accepted evidence but in a civil case it must reach the required standard of proof on a balance of

probabilities. We would examine it as there appears to be an inference of negligence deducible form the plaintiff's total presentation. So it is in that light that the question of duty of care founded in negligence is being examined. In the case of ***Allassan Kotokoli v. Moro Hausa (1967) GLR 298*** *Edusei* J. spelt out the three elements of negligence namely: duty, breach of that duty and damage resulting from the breach. These elements impose an obligation on the plaintiff to prove that the defendant owes him a duty; that the defendant has breached the duty and thirdly, the breach must have occasioned damage to the plaintiff.

Looking at the practice which the plaintiff complains of, it is the driver who is supposed to sign the delivery note. The Plaintiff cannot therefore put the duty on the defendant when the latter had delivered the note to the driver. Nonetheless, it could be explained that it was in the interest of the defendant as well to ensure that the plaintiff's driver did sign the delivery note if only to avoid controversy and litigation such as has engulfed the parties herein. But for its part the defendant is relieved from any such duty in the face of undisputed evidence that it loaded the truck with the products on all the dates in question and issued the delivery notes to the driver. In these circumstances, no negligence is attributable to the defendant for the failure by the plaintiff's driver to sign the delivery notes.

AGENCY

Turning next to ground (v) of the appeal, supra, it borders on agency. Under Agency relationship, the Principal is liable for the actions of his agent within the scope of the authority given to the Agent. What has been in issue is the signature of the driver. The evidence on record shows that

Plaintiff's driver was given the delivery notes. If the driver leaves defendant's yard without the delivery notes, it is the negligence of the driver. The driver is the Agent of the plaintiff. The Plaintiff being the principal is liable for the actions of his agent in that agency relationship. The failure to sign does not constitute a major departure from the task given to the driver. The driver's key duty was to drive the truck to the loading point and ensure that it was loaded and he was issued with a delivery note and carry the consignment to Sonitra at Yawkwei. Once the truck leaves the loading point, the defendant has nothing to do with the truck again until it has discharged the product at its destination. The carrier's responsibility for the driver and the vehicle remain throughout and does not shift to the defendant unless there is evidence to the contrary that the defendant did not put the particular consignment on board the truck. Then the defendant would have to satisfy the court that it did in fact load the truck. The plaintiff has accepted that the defendant had discharged its prime duty of giving the plaintiff's agent the consignments against delivery notes. The lack of signature, it is stressed again, does not derogate from the fact that the driver took the consignments on the Mercedes Benz truck on each of the six occasions. It must also be pointed out that even if no delivery notes were issued, the fact that the plaintiff had admitted that his truck was loaded with the products and that his driver was at all material times in charge of the truck, it would be sufficient proof of delivery to his driver. And in the absence of any evidence of any collusive fraud against the defendant, the plaintiff would be responsible for

his agent's actions. The carrier should therefore be liable for the diversion of the consignments.

NATURE OF CONTRACT

Finally reference is being made to the Plaintiff's additional ground of appeal. This ground is being discussed in detail because the plaintiff is still saying that he has a separate agreement with the defendant despite the FRS. This claim is seriously contested by the defendant who has maintained throughout that it did not have any contractual relationship with the plaintiff and that they had agreement with Benko Ltd, per paragraphs 1 to 4 of their statement of defence and also at the hearing. Their case had consistently been that after the FRS, it had no contract with the plaintiff so in effect the plaintiff could not claim under the contract between them (defendant) and Benko Ltd.

In his reply, the plaintiff admitted being aware of the FRS but said it was merely an administrative action by the defendant. But he went on to admit in paragraph 8 of the reply that his vehicles went under Benko Ltd. whilst he still retained his ownership of the vehicles. However, the plaintiff maintained in his reply that notwithstanding this administrative arrangement, he continued to operate with the defendant under the terms of the contract between them and that is exhibit A. He emphatically pleaded in paragraph 13 of his reply that: "…….there is a contract of carriage still in existence between him and the defendant under which he has been surcharged."

The parties set this issue down for determination:

(6) Whether at the material time the plaintiff had a contract with the defendant to carry its petroleum products.

As earlier mentioned, the defendant has maintained that it did not have any contract with the plaintiff after the FRS in 1998. So at the trial court the defence counsel urged the court "to dismiss the plaintiff's action on the ground that there is no contract between the plaintiff and the defendants whereby the defendants would be an accounting party to the plaintiff."

And before this court defendant's counsel submitted that "as far as the defendant was concerned, the plaintiff was a stranger to the haulage agreement and the deductions it made in respect of the diversions were made against the account of Benko Limited. It was therefore not liable to the plaintiff for his claim."

It is necessary to determine whether exhibit A was in force as from January 1999. One of the key elements in the haulage contract was that the carrier was to make available his vehicles which would be incorporated as a term of the contract. Indeed the list of vehicles was always annexed to each contract. Any subsequent variation in the availability of a vehicle would have to be notified to the supplier and agreed to by him. It was also a key element that the carrier would be paid directly, (according to PW1 into their bank account) for each service rendered to the supplier. Paragraph 5 of exhibit A stated in clear terms that payment shall be made to the contractor, in other words the carrier. Therefore the plaintiff was being paid directly by the defendant pursuant to exhibit A. But the undisputed evidence on record shows that since the plaintiff's vehicles

went under the aegis of Benko Ltd. he did not receive any payment from the defendant again, except through Benko Ltd.

From the foregoing, it was very obvious that the plaintiff was no longer dealing directly with the defendant because exhibit A was no longer in force. It had been replaced with the various agreements between the defendant and Benko Ltd following the FRS. These agreements also contained similar clauses that payment would be made to the contractor or carrier in respect of the vehicles which had been incorporated into the contracts to cart the products. The plaintiff's own witness PW1 stated that they were the ones who dealt with the defendant and they were the ones who paid for any service rendered by the plaintiff's vehicles which they had placed in their own pool of vehicles under the agreements.

As earlier pointed out, another key element in the contract is the insertion of the particular vehicles to be used in executing the contract. In exhibits 2, 3 and 4 either or both vehicles belonging to the plaintiff were listed in the schedule as part of the vehicles being operated by Benko Ltd. and plaintiff was aware of this arrangement and agreed to it and accepted the benefits under them through Benko Ltd.

It is thus wrong for the plaintiff to maintain that he had a separate agreement with the defendant after the FRS. The defendant was therefore right in their position that they have nothing to do with the plaintiff as there is no contractual relationship between them. That explains why the surcharge was made against the account of Benko Ltd.; and it was the latter which passed it on to the plaintiff because it was his truck which was involved.

It is also significant to note that the agreements between the defendant and Benko Ltd. were not made to benefit the plaintiff as a third party so section 5(1) of the Contracts Act, 1960, (Act 25) cannot even be applied in his favour. The said section 5(1) provides that:

Any provision in a contract made after the commencement of this Act which purports to confer a benefit on a person who is not a party to the contract, whether as a designated person or as a member of a class of persons, may, subject to the provisions of this Part, be enforced or relied upon by that person as though he were a party to the contract.

It is therefore understandable why the plaintiff was still relying on exhibit A, for without that he would have no cause of action against the defendant. Counsel for the plaintiff recognized the fact that the defendant's contention had been that the plaintiff had no cause of action for stated reasons. It is, however, inexplicable why the plaintiff resorted to the non-existent contract, exhibit A, even when he had admitted in cross-examination that from November 1998 the defendant did not enter into any haulage agreement with him. He was also not party to the agreement between defendant and Benko Ltd. He also admitted under cross examination that between the period of rationalization and 2004 his Mercedes truck was carting products for the defendant but not under his name. Indeed Pw1 admitted under cross-examination that all invoices for payment in respect of the plaintiff's trucks were issued in the name of Benko Ltd. and payments for them were made directly to Benko. The only logical inference is that for that period his truck was working under Benko Ltd. under the terms of the agreements between Benko Ltd. and the defendant.

The plaintiff could not sue to enforce the agreements between the defendant and Benko Ltd since they were not made for his benefit as a third party. And there was also no agreement between him and the defendant; consequently, there was no basis for the claim. The defendant's contention was therefore justified.

CONCLUSION

From the foregoing, it is apparent that the Plaintiff's truck was loaded with all six consignments though plaintiff's driver did not sign five out of the six delivery notes. The plaintiff failed to lead evidence to establish any fault on the part of the defendant, and no evidence was forthcoming that any other person than his driver took charge of the truck at all material times. The plaintiff also failed to rebut the defendant's claim that there was no contract between them. The appeal therefore fails and the decision of the Court of Appeal is hereby affirmed.

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

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

(SGD) ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

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