IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2017

CORAM: AKUFFO (MS), CJ PRESIDING

ANSAH, JSC

ADINYIRA (MRS), JSC

YEBOAH, JSC

BENIN, JSC

CIVIL APPEAL
NO. J4/63/2016

21ST JUNE, 2017

STANDARD BANK OFFSHORE TRUST COMPANY LIMITED

STANDARD BANK HOUSE,
47-49 LA MOTTE STREET
ST. HELIER, JERSEY, CHANNEL ISLANDS JE4 4XR

(SUING ON BEHALF CERTAIN INVESTORS IN PROMISSORY NOTES:
1. SPYNX CAPITAL MARKETS PCC INVESTORS &
2. TRICON TRADE MANAGEMENT LIMITED

SUBSTITUTED BY:
DOMINION CORPORATE TRUSTEES LIMITED
47 ESPLANADE, ST. HELIER
JERSEY. JE1 OBD **…… PLAINTIFF/RESPONDENT/RESPONDENT**

VRS

1. NATIONAL INVESTMENT BANK LIMITED **….. 1ST DEFENDANT/APPELLANT/ APPELANT**
2. ELAND INTERNATIONAL GHANA LIMITED **…. 2ND DEFENDANT**
3. DANIEL CHARLES GYIMAH **…. 3RD DEFENDANT**

JUDGMENT

BENIN, JSC:-

This matter began as a result of what was said to be a default on the part of the 1st Defendant/Appellant/Appellant, called the Appellant, to honour its obligations by way of a guarantee of certain promissory notes issued by the 2nd Defendant herein. The

Appellant, through its then Managing Director, the 3rd Defendant herein, was thought to have guaranteed payment of the promissory notes upon maturity. The holders of the promissory notes considered that in the normal course of business, upon maturity the Appellant would honour its obligations under the guarantee and pay up. But it did not do so for reasons that will be disclosed shortly.
Consequently, by an amended writ of summons, the Plaintiff/Respondent/Respondent, called the Respondent, who claimed to be representing certain investors in the promissory notes, issued a writ of summons at the High Court and sought these reliefs against the Appellant:
(i) Recovery of the sum of sixty million United States dollars ($60,000,000.00) being the unpaid guarantee per Aval granted by 1st Defendant in respect of Promissory Notes issued by Eland International Ghana Limited and discounted to beneficiaries of the Plaintiff and which said Per Aval Guarantee the Defendant has failed and/or refused to honour upon default by Eland International Ghana Limited despite several and repeated demands made therefor.
(ii) Interest on the said amount at the agreed rate of eleven percent (11%) per annum from the 29th day of January 2009 till date of final payment.
(iii) Costs.
But as earlier mentioned, the Appellant resisted the claim on five grounds which are:

a. That it did not guarantee the promissory notes issued by the 2nd Defendant.
b. That it did not confirm any alleged guarantee.

c. That it had not held the 3rd Defendant out as having the sole authority or the authority of its Board of Directors to sign any guarantee or confirm any guarantee on behalf of the Bank.
d. That the entire transaction was tainted with fraud. Particulars of the alleged fraud were given.
e. The Respondent was negligent by failing to conduct due diligence.
The Appellant's case did not find favour with the trial court so the Respondent's claims were upheld. The Court of Appeal also endorsed the Respondent's claims. The Appellant has appealed to this court on several grounds on the merit of the case.
The Appellant also, per learned counsel, raised in the statement of case, what appears to be a technical but profound legal objection to the entire proceedings on ground of non-compliance with the provisions of Order 2 Rule 4(2) of the High Court (Civil Procedure) Rules, 2004 C.I. 47 and urged the court to dismiss the action. Indeed they were challenging the capacity of both the original and the substituted plaintiff, per paragraph 4.0 of their statement of case. They followed it up with an application to specifically address this question of capacity and non-compliance with the rules. The application was granted by this court on 6th April 2017. They filed the supplementary statement of case on 11th April 2017. We intend to deal with this question, to begin with.
The said Order 2 Rule 4(2) provides that:
"Before a writ is filed by a plaintiff who acts by an order or on behalf of a person resident outside Ghana, the writ shall be indorsed with a statement of that fact and with the address of the person so resident."
There was a similar provision under the repealed High Court (Civil Procedure) Rules, 1954, L.N. 140A which became the subject of construction by this court in the case of NAOS HOLDINGS PSC v. GHANA COMMERCIAL BANK (2005-2006) SCGLR 407, hereafter called NAOS Holding case. The provision under L.N. 140A was Order 3 rule 4 which provided in relevant terms that:

"**If an action is brought by or on behalf of a person resident outside……the indorsement shall so state and state the residence of such person."**
The court, speaking through Sophia Akuffo, JSC, (as she then was), said:
"In arriving at its decision, the Court of Appeal, per Ansah JA (as he then was) found that the terms of Order 3 rule 4 were clear and imperative, and required that where an action is commenced by or on behalf of a person resident outside the jurisdiction that fact must be disclosed in the indorsement and the residential address of such person also must be disclosed. The Court also found that there was no such endorsement on the writ and concluded that this failure to satisfy the requirements of the Rule was fatal to the Appellant and that the writ was a nullity.....We have thoroughly examined the judgment of the Court of Appeal and have no cause to disturb the same. The real effect of the Respondent's motion in the High Court was to challenge the very existence of the Appellant as a corporate legal entity and place in issue the Appellant's capacity to sue.....In conclusion the Court of Appeal committed no error in upholding the High Court's ruling. The writ was void for failure to state the residence of the plaintiff....."
Counsel for the Appellant relied on this authority in his statement of case, and said it's on all fours with this case. That case, like the instant, involved the issuance of promissory notes which had been guaranteed by the defendant bank. The plaintiff sued in its capacity as the holder in due course of the promissory notes. The defendant entered conditional appearance and applied to have the writ dismissed on this relevant ground that the existence of the plaintiff as a foreign entity was not disclosed and so too was its address not provided in the endorsement. This court affirmed the decision of the courts below that had upheld the application to dismiss the writ.
The Appellant has raised three issues in respect of the endorsement on the writ. The first is that it does not disclose the fact that the plaintiff is suing on behalf of foreign based person/s. Secondly, that the foreign residential address of the investors or companies the plaintiff represents has not been disclosed on the writ. Thirdly, the persons on whose behalf the plaintiff issued the writ were not disclosed or identified with specificity.
The starting point of any discussion under this rule is the original writ that was issued by the plaintiff. In the instant case the original writ was issued on 4th March 2010 and it bears the title:
STANDARD BANK OFFSHORE TRUST CO. LTD.
STANDARD BANK HOUSE
47-49 LA MOTTE STREET, ST. HELIER, JERSEY
(SUING ON BEHALF OF CERTAIN INVESTORS)
C/O HESSE& HESSE
NO. F460/4 GBATSUNA STREET
NYANIBA ESTATES
OSU-ACCRA

Vs.

NATIONAL INVESTMENT BANK LIMITED
37 KWAME NKRUMAH AVENUE, ACCRA.
The title did not disclose who the "certain investors in promissory notes" were. The record shows that the plaintiff's title was altered in accordance with an order for amendment granted by the High Court on 21st June 2010. Even though there is no such record of the order allowing the plaintiff to amend the title of the plaintiff, yet there was no issue raised so we would grant that there was such an order, on the strength of the presumption of regularity, appearing on the face of the amended writ.

Following this amended writ, the endorsement on the writ seems to suggest, by the use of a colon after the expression "on behalf of certain investors in promissory notes", that Sphynx Capital Markets PCC Investors and also Tricon Trade Management Limited are the investors on whose behalf the plaintiff had sued out the writ. But the statement of claim, as amended, gives a different picture. Paragraph 13 of the statement of claim reads:

"On the 23rd day of May 2007 Eland International Ghana Limited, through Iroko Securities Limited of London, United Kingdom, discounted the said Promissory Notes to investors of Sphynx Capital Market PCC, a Mauritian incorporated entity and others."

This pleading readily shows that Sphynx is not the investor per se as the title endorsed on the writ suggests. It also shows that besides the investors of Sphynx, there were other persons who also bought into the discounted promissory notes. And from the statement of claim, the only other person mentioned is Tricon, per paragraph 18 thereof. This was confirmed by a director of Dominion Corporate Trustees Limited, Mr David King in paragraph 3 of his affidavit sworn in support of an application for his firm to be substituted for the plaintiff. The deposition in the said affidavit reads:

"That on 4th March 2010 the Plaintiff herein commenced the instant suit against the 1st Defendant in its capacity as the Security Trustee of Promissory Notes issued by the 2nd Defendant and acquired by investors of Sphynx Capital Markets PCC Investors and Tricon Trade Management Limited."

But paragraph 18 of the statement of claim introduces yet another dimension to this matter of who or what the plaintiff represents. It reads:

"18. Plaintiff says that as of the 23rd day of February 2010 the 1st defendant was indebted to the plaintiff (as, inter alia, Trustee of the said Promissory Notes, SBOTCJ is also representing Tricon, who held its participation outside of the Sphynx Capital Markets PCC structure) as per Aval Guarantee in the sum of sixty million United States dollars....."

Here again the capacity of the plaintiff appears to have been shifted; it claims to be the Trustee of the promissory notes. They are also representing Tricon, who it is said also participated in the acquisition of the promissory notes. The affidavit of David King quoted above affirms these facts. If they are trustees, the law requires them to sue in that capacity and this must reflect in the title to the case. But it is not so stated, so we would dismiss any suggestion or implication that they sued as trustees of Sphynx and Tricon or of the Promissory notes, whichever description best fits.

Even a cursory reading of paragraph 13 of the statement of claim would suggest that Sphynx and others, identified as Tricon are not the "certain investors in promissory notes" mentioned in the writ, at best they represent the investors. Hence the issue of who the "certain investors" are still remains unanswered.

The same paragraph 13 discloses the fact that Sphynx is a foreign registered company in Mauritius. Hence the rule under reference requires the fact that it is a foreign company to be disclosed on the writ, in addition to its foreign address both of which are required to be provided. The same considerations apply to Tricon.

Subsequently, Dominion Corporate Trustees Limited, hereafter called Dominion, was substituted for the plaintiff, Standard Bank Offshore Trust Company Limited. It is necessary to identify the capacity in which Dominion entered the case. In the affidavit in support of the application for substitution which was deposed to by David King, it was stated in paragraph 4:

"That as of 4th May 2011 the Plaintiff herein ceased being the Trustee of the said Promissory Notes by assigning its Trustee rights and responsibilities to the Applicant herein. A copy of the Trust Deed transferring trust responsibilities to the Applicant as Security Trustee to the notes is exhibited and marked as Exhibit RK1."

In the said exhibit RK1, Standard Bank, the original plaintiff, is described as "Outgoing Trustee and Outgoing Registrar", whilst Dominion, the substituted plaintiff is described as "Incoming Registrar". The position of a Trustee or Registrar is not synonymous with ownership; they are expressions which imply that they are acting for somebody else. Therefore, whether they are Trustees or Registrars neither Standard Bank nor Dominion can claim to be holders of the promissory notes as owners thereof. It was thus clear that they were acting for the true holders of the promissory notes who are said to be investors of Sphynx and Tricon. It was in the same capacity as the original plaintiff that Dominion entered this case.
This conclusion is buttressed by the fact that the statement of claim was not amended following the substitution of the plaintiff by Dominion. Indeed the key pleadings contained in the original statement of claim filed on 4th March 2010, paragraphs 13 and 18 thereof, remained unchanged when the first amendment was effected on 4th February 2011 following the addition of Sphynx and Tricon to the title of the plaintiff and the addition of the 2nd defendant to the suit. And after Dominion was substituted for the plaintiff, it had another opportunity to amend the statement of claim when the 3rd defendant was added as a party and again paragraphs 13 and 18 remained intact. Consequently, the plaintiff's case, (even after Dominion had come in as the plaintiff), remained that the promissory notes were held by the investors of Sphynx and Tricon, inter alia, per paragraphs 13 and 18 of the statement of claim, affirmed by David King. Thus Dominion had stepped into the shoes of the original plaintiff suing on behalf of Sphynx and Tricon, (going by the endorsement on the writ) or on behalf of certain investors of Sphynx and Tricon, (going by the statement of claim).
The plaintiff/respondent confirmed the capacity disclosed on the endorsement on the writ in paragraph 27 of their statement of case filed in this Court in these words:

"In the instant case it behoved on 1st Defendant to raise any query it had regarding **the existence of Sphynx and Tricon and or their authorization of SBOTCJ and subsequently Dominion,** in the trial court where evidence could have been readily produced by the Plaintiff in answer." (Our emphasis). Be that as it may, the capacity disclosed on the endorsement is what will prevail, having regard to the apparent discrepancy between the endorsement and the statement of claim, for the reason that Order 2 rule 4(2) requires the capacity to be stated on the endorsement on the writ.
Dominion was in no doubt that it had only stepped into the shoes of Standard Bank, suing on behalf of certain investors of the Promissory Notes namely Sphynx and Tricon. And it is undisputed that both Sphynx and Tricon are foreign based companies. And from the plaintiff's own pleadings, Sphynx and Tricon are only Trustees for the real holders of the Promissory notes, whose identity was never disclosed. These are the core facts upon which this issue of capacity will be addressed.

Arguments by Counsel for the appellant

Counsel's arguments were quite simple and straightforward. The first point was that the addresses of Sphynx and Tricon were not endorsed on the writ of summons. The second point is that the writ also failed to disclose the fact that the plaintiff was suing on behalf of persons resident outside the jurisdiction. Therefore on the strength of the authority of the NAOS Holding case, the court should dismiss the writ and with it all the proceedings emanating therefrom. The third reason was that "certain investors in promissory notes" stated on the writ does not sufficiently describe who the claimants are, counsel concluded. They also filed a reply wherein they debunked all the points that the respondent raised in their statement of case; reference will be made to the

material parts as and when it becomes necessary.

Arguments by Counsel for the respondent

In response to the issue that they did not state the address of Sphynx and Tricon on the writ, the Respondent counsel in paragraph 24 of their statement of case stated that the address of Sphynx was to be found in exhibit C which was tendered at the trial. Yet they conceded that the address of Tricon was not disclosed anywhere. But they stated that "for purposes of serving court processes SBOTCJ and its replacement, Dominion Corporate Trustees Limited were always available." This point can quickly be disposed of in the sense that the rule does not require the address for service of the plaintiff; what is required is rather the address of the foreigner on whose behalf the plaintiff has sued. And there are good reasons why this requirement is in place. The reasons will unfold in a short while.
Counsel then made the following interesting arguments:
"25. We respectfully submit that upon reading the Amended Writ together with the accompanying Statement of Claim, the alleged defect in the Writ can be cured. This is the current position of the law as was expounded by Gbadegbe JSC in the case of OPOKU (No 2) v. AXES CO. LTD (No2) (2012) 2 SCGLR 1214 in which his Lordship said as follows:
'……the writ of summons ought to be read together with the statement of claim in order to determine if there was any cause of action before the court. This is so because a statement of claim may, in appropriate cases as provided for in rule 15(2) of Order 11 of …….C. I. 47, amplify or diminish the scope of the writ on which it is founded.'
26. The above dictum was cited with approval by Anin Yeboah JSC in the recent unreported case of NANA YAW OWUSU & OTHERS v. HYDROFOAM ESTATES LIMITED, Civil Appeal no. J4/62/2013 dated the 26th day of March 2014."
This argument would easily be dismissed on the facts, for nowhere in the pleadings did the Respondent state that Tricon is a foreign-based firm, and nowhere in the pleadings did they provide the foreign resident address of Sphynx and Tricon, as required by Order 2 rule (4)(2) of C.I. 47.
Counsel continued that:

"27. In the instant case it behoved the 1st Defendant to raise any query it had regarding the existence of Sphynx and Tricon and or their authorization of SBOTCJ and subsequently Dominion, in the trial court where evidence could have been readily produced by the Plaintiff in answer. Having failed to do so, 1st Defendant is deemed to have waived any objection it had.

28. We are fortified in our stance by the fact that 1st Defendant filed a Defence to Plaintiff's claim showing that it fully appreciated Plaintiff's capacity to sue and the case being made against it. Again, 1st Defendant being fully aware of the non-resident status of the Plaintiff applied for the Plaintiff to deposit security for costs in the trial court even before the amendment of the Writ of Summons in 2011 .....
29. What is striking here is that the endorsement of Plaintiff's capacity on the Writ of Summpons was sufficient to put 1st Defendant on notice of the non-resident status of the Plaintiff right from the inception of the suit. Indeed, in the affidavit in support, 1st Defendant also recognized the Plaintiff as a trustee of the promissory notes issued by 2nd Defendant when it was deposed on its behalf as follows:

'3. That on 23rd day of May 2007 EIGL through Iroko Securities Limited in

the United Kingdom, discounted the said Promissory Notes to investors Sphynx Capital Markets PCC, a Mauritius Company.
4. That the current holder of the Promissory Notes (plaintiff) is a trustee of the Promissory Notes for certain holders thereof.'
31.....It is also instructive to note that throughout the trial and even on appeal to the Court of Appeal 1st Defendant never queried Plaintiff's capacity. Had the Plaintiff's legal status and its corporate capacity been placed in issue, it would have been incumbent upon Plaintiff to produce cogent evidence of the existence of Sphynx and Tricon.....such as their registered office address or certificates of incorporation to satisfy the trial court that they have the requisite capacity to sue.
33. In the event that this Honourable Court finds that the Plaintiff's Statement of Claim does not sufficiently cure the endorsement of Plaintiff's Writ then it is our respectful contention that failure to strictly comply with a procedural rule such as Order 2 rule 4(2) of.....C.I. 47 should not lead to an automatic dismissal of this suit due to the saving grace of Order 81(1) of C.I. 47. Order 81 provides that the failure to comply with the requirements of the Rules, whether in respect of time, place, manner, form or content shall not nullify proceedings."
The learned Counsel for the Respondent cited this Court's decision in the case of REPUBLIC v. HIGH COURT; EX PARTE ALLGATE CO. LTD. (AMALGAMATED BANK LTD. INTERESTED PARTY) (2007-2008) SCGLR 1041 and said their understanding of that decision was that "all breaches of the Rules of Court are curable and may be waived by the court in the exercise of its discretion except three main irregularities that cannot be waived. These are:
i. A breach or a violation that borders on want of jurisdiction of the court.
ii. A breach of a statutory provision or an enactment other than a breach of the rules of court; and
iii. A breach of any of the constitutional provisions."
Counsel then submitted that "the alleged non-compliance with Order 2 rule 4(2) does not fall within any of the three categories or exceptions that are beyond the curative powers of the court and should therefore not nullify the proceedings."
Counsel also cited this Court's decision in the case of HALL & SONS v. BANK OF GHANA & ANOR. (2011) 1 SCGLR 378 at 384 where the Court, per Sophia Adinyira, JSC said: "Although I agree that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of a handmaiden rather than a mistress, and the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what would cause injustice in the particular case."
Counsel submitted that in the worst case scenario, the Court could "grant the Plaintiff leave to amend the endorsement of its Writ by including the addresses of Sphynx and Tricon." They cited this Court's decision in the case of OBENG v. ASSEMBLIES OF GOD CHURCH, GHANA (2010) SCGLR 300 at 324 where the Court allowed an amendment as to the plaintiff's capacity. Consequently, they submitted that "the present case is a proper case in which to grant the Plaintiff leave to insert the address of Sphynx and Tricon if required, in order to do substantial Justice in this case."
We shall examine the implication of the ex PARTE ALLGATE case, supra, which counsel said decided that the court could waive non- compliance with all rules of practice. To the extent that the court has discretion in waiving non-compliance with a rule of practice in appropriate cases, the submission is correct. But Order 81 rule 2(a) entitles the court to set aside either wholly or in part the proceedings in which the failure to comply with a rule occurred, including any judgment or order made therein. What this means is that even after judgment, the entire proceedings may be set aside for non-compliance with a rule of practice. It depends on the particular breach complained of.

In view of this provision, the ex PARTE ALLGATE decision cannot be construed as creating an inflexible rule that the court has discretion to waive non-compliance with any rule. That cannot be correct. This is what was actually said in that decision at page 1049, per Date-Bah, JSC:

"This argument of the interested party raises the issue of how to distinguish between a non-compliance which can be saved by the invocation of Order 81 and a non-compliance which cannot. Clearly, the language of Order 81, r.1 is intended to prevent non-compliance with the rules of procedure resulting automatically in the invalidity of the proceedings. The rule gives the court discretion to waive the non-compliance or to set aside the proceedings which follow from the non-compliance. In spite of the absolute nature of the statement in Order 81 r. 1 that the non-compliance shall not nullify the non-compliant proceedings, is there still, even after the commencement of the new rules, some non-compliance that would result in the nullity of the proceedings?"

The Court acknowledged the fact that in some situations the entire proceedings in a case could be set aside for non-compliance with a rule of practice. What the Court discountenanced was the view that non-compliance automatically resulted in an invalidation of the proceedings in which the breach had occurred. The Court proceeded to cite some instances of violation of the rules which result in invalidation thereof. And these included want of jurisdiction as decided in FREMPONG v. NYARKO (1998-1999) SCGLR 734. The other is a proceeding which is a nullity or void. In this connection, at page 1050 of the report, the Court cited and approved of the decision in the case of OPPONG v. ATTORNEY-GENERAL (2000) SCGLR 275. Even though that case was decided under rule 79 of the Supreme Court Rules, 1996, C.I. 16, the Court said it was "broadly similar in purpose to Order 81" of C.I. 47. It quoted this relevant passage from that decision, per Atuguba JSC:

"The scope of this rule was extensively considered by this court in Republic v High Court, Kumasi; Ex parte Atumfuwa…..(2000) SCGLR 72…There, I said at length that, where the step by a party to proceedings before this court is fundamentally wrong, such error is not within the purview of the rule and cannot be waived."

These decisions confirm what has been earlier stated that this provision gives the court discretion to set aside proceedings for breach of a rule of practice even after judgment. But where the proceeding is a nullity in terms of a particular rule of practice, it cannot be waived by the court. We can for instance envisage a situation where the writ is not endorsed with any cause of action and none is disclosed in the statement of claim. Such non-compliance cannot be waived by the court. Hence this court's decision in the case of REPUBLIC v. HIGH COURT, TEMA; EX PARTE OWNERS OF MV ESSCO SPIRIT (DARYA SHIPPING SA INTERESTED PARTY) (2003-2004) 2 SCGLR 689, dismissing a writ which was not endorsed with a cause of action in accordance with mandatory provisions of the prevailing High Court rules on ground that it was a nullity. This decision was cited with approval in the case of ROCKSON v. ILIOS SHIPPING CO SA & WILTEX LTD (2010) SCGLR 341, where the action was dismissed because the endorsement did not disclose a cause of action. Both cases were cited by the appellant in support of this issue. The principle espoused in those cases is applicable to this case in the sense that in those cases there was infraction of the rules of court as regards the endorsement of the writ which resulted in the writ being declared a nullity by the Supreme Court.

Let us take another instance where on appeal it comes to light that a person who sued as an attorney for the plaintiff did not in fact hold a power of attorney as at the date he issued the writ. He secured the power of attorney in the course of the trial. The issue of the attorney's capacity to sue could be raised on appeal and the writ will be declared a nullity because it is fundamental to the authority to sue and this clothes the plaintiff with capacity to mount the action and this must be present before the writ is issued.

A typical example occurred in the case of AKRONG and Another v. BULLEY (1965) GLR 469. In that case the plaintiff sued in her capacity as the successor and next-of-kin and later amended it to include a new capacity as personal representative of her deceased son whose death was caused by the negligence of a motorist. Whilst the action was pending in court the plaintiff secured letters of administration. The High Court gave her judgment. On appeal to the Supreme Court the question of the plaintiff's capacity to sue was raised and the court upheld it. The court's reasoning was based on the decisions in these cases: INGALLv. MORAN (1944) 1 All E.R. 425, CA; HILTON v. SUTTON STEAM LAUNDRY (1945) 2 All E.R. 425, CA; FINNEGAN v. CEMENTATION CO., LTD. (1953) 1 All E.R. 1130, CA. The ratio in these cases was that an administrator as such has no cause of action vested in him before he has obtained letters of administration and that a writ issued by him in that capacity before obtaining grant is a nullity. In his concurring opinion at page 477, Mills-Odoi, JSC said this:

"…….the plaintiff's action was bad as being brought by a person who had no title to sue. Her action could not be cured by amendment into a valid action, because it was an action which was never issued at all. For this reason, the subsequent proceedings in the supposed action, including the judgment of the learned trial judge were likewise nugatory……." (emphasis supplied)

A person's capacity to sue, whether under a statute or rule of practice, must be found to be present and valid before the issuance of the writ of summons, else the writ will be declared a nullity. In the case of a company, it's authority to bring a lawsuit is one of capacity and not standing. Capacity to sue is a very critical component of any civil litigation without which the plaintiff cannot maintain any claim.

The issue of capacity to sue has been the subject of several writings, commentaries and court decisions, such that every practitioner of the law should consider it before preparing a case for court. In an article titled 'IN LOCUS STANDI-A COMMENTARY ON THE LAW OF STANDING IN CANADA (TORONTO: CARSWELL, 1986)', Prof. Thomas Cromwell, who later became a judge of the Supreme Court of Canada, wrote at page 3 that:

"Capacity has been defined as the power to acquire and exercise legal rights. In the context of the capacity of parties to sue and be sued, to say that a party lacks such capacity is to acknowledge the **existence of some procedural bar to that party's participation in the proceedings-**one that is personal to a party…..and imposed by law for one or more of various reasons of policy usually quite divorced from the substantive merits……**It concerns the right to initiate or defend legal proceedings generally."** (Emphasis supplied) This passage was quoted with approval in the Canadian case of PROVINCE OF NEW BRUNSWICK v. MORGENTALER, 2009, NBCA 26 at 43.

That the legal authority to act is that which gives a party capacity was also affirmed in the case of DALLAS FORT WORTH INTERNATIONAL AIRPORT v. COX, 261 SW 3d 378 (Court of Appeals of Texas at Dallas, 2008), per Justice Ritchter who said "…..a party has capacity when it has legal authority to act, regardless of whether it has a justiciable interest in the controversy."

It must be emphasized that the capacity to sue must be present before the writ is issued; such authority must appear in the endorsement and/or statement of claim accompanying the writ; it cannot be acquired whilst the case is pending; and an amendment cannot be sought to introduce it for the first time. A writ that does not meet the requirement of capacity is null and void. Nullity may be raised at any time in the course of the proceedings, even on a second or third appeal. The charge of tardiness that was raised by the respondent against the appellant is thus a red herring and does not hold water.

It is to be stressed that the provisions of Order 2 rule 4(2) of C.I. 47 are obligatory, and

it is not one of those provisions which the court is permitted by Order 81 to waive for non-compliance. As decided in the NAOS Holding case, supra, non-compliance with this provision renders the writ void. That which is void or a nullity cannot be waived by the court under Order 81 of C. I. 47. That rule is there to ensure that foreigners, human as well as corporate, are in existence in fact and have an address at which they may be reached by the defendant and by the court, if need be. This ensures that the identity of the real plaintiff is known by the defendant and the court lest an impostor should secure judgment only for the real claimant to surface later and saddle the defendant with another suit. It also ensures that a judgment or order obtained against a foreigner could be executed against him in his country of residence, through the address supplied on the writ, if need be. Lack of authority to sue amounts to contempt of court by virtue of Order 1 r. 4 of C.I. 47, therefore this provision affords the only avenue whereby the defendant may cross check with the real claimant whether or not he has authorized the plaintiff to sue, and if not to bring a charge of contempt against the plaintiff. These are clear legal as well as policy considerations that justify the construction placed on this rule by this court in the NAOS Holding case.

Counsel for the appellant submitted that as a last resort, the respondent could be allowed to amend the writ to supply the address of Sphynx and Tricon, especially having regard to the fact that the address of Sphynx is found in exhibit C. Unfortunately that submission cannot apply here. The rule is that these requirements of disclosing the foreign identity of Sphynx and Tricon as well as their residential address must be in place prior to the issuance of the writ of summons. The writ cannot be amended after it has been issued to comply with the requirements as that will be contrary to the express terms of the rule. In the NAOS case the argument that the plaintiff's address had been disclosed in the power of attorney did not find favour with the Court. The authority of NAOS Holding is clear that if the writ is issued without satisfying the requirements imposed by the rule, it is void. The court cannot grant an amendment to cure that which is void. If the writ is void it gives the defendant a right to have it set aside wholly in accordance with Order 81 rule 2(a). It may be likened to allowing a plaintiff to amend his case which has the effect of defeating a defence which has, since the issuance of the writ, inured to the benefit of the defendant, the court will not allow it. More importantly, since the writ is void it cannot be amended.

This situation is clearly distinguishable from that in OBENG v. ASSEMBLIES OF GOD, supra, which was relied on by the Respondent. In that case, the plaintiff had sued in its corporate name which was correct but had added the words "Executive Presbytery". The court only deleted the additional words by the amendment. It is instructive to note that the amendment was not what conferred capacity on the plaintiff. In the AKRONG v. BULLEY case, supra, the Supreme Court was minded to allow the case to stand if they had found something on the writ and statement of claim to show that the plaintiff had also sued in her capacity as a dependent, meaning they would not have dismissed the writ if another legal capacity had been disclosed, besides the one which was found to be illegal. In other words, the addition of improper title to a proper one will be cured by amendment as in the OBENG v. ASSEMBLIES OF GOD case, as the writ has already disclosed a valid capacity in law. But where the amendment is to enable the plaintiff to acquire capacity for the first time, it cannot be granted.

Before winding down, it must be noted that in all the cases cited whereby this court had declared non-compliance with a rule of practice to be fatal to the proceedings, it has been based on mandatory provisions of the rules. The rules of court form an integral part of the laws of Ghana, see article 11(1)(c) of the 1992 Constitution. Consequently, they must be treated with equal amount of respect in order to produce sanity in court proceedings. Where a rule is mandatory by the use of the expression 'shall', it should be so regarded in view of section 42 of the Interpretation Act, 2009, (Act 792). Where a

court finds it necessary to express 'shall' as directional only, it must be forthcoming with reasons before deciding to exercise discretion to waive non-compliance. There must be reasons why some of the rules are mandatory whilst others are discretionary, a fact which the court must always bear in mind in deciding whether to waive non-compliance or otherwise.

In conclusion we re-state the position of the law that failure to comply with prerequisites to the issuance of a writ under Order 2 rule 4(2) renders the writ void and it can neither be saved by an amendment, nor can it be waived by the court. Where the writ of summons issued by a foreign based firm claims to be suing on behalf of certain investors, it is not an acceptable disclosure of the identity of the "certain investors", thus it becomes an essential ingredient or prerequisite for the plaintiff to disclose who the persons are on whose behalf it is suing. And if they happen to be foreigners this fact must be disclosed as well as their address and both must appear on the face of the writ of summons as endorsement, else the writ would be void. In this case since (i) the fact that Sphynx and Tricon are foreign based companies and (ii) their foreign address were not disclosed on the endorsement of the writ, the prerequisites for the issuance of a writ of summons under Order 2 r 4(2) of C. I. 47 had not been met and this non-compliance rendered the writ void. And it is repeated for emphasis that being void, the writ could neither be perfected by a waiver under Order 81 nor by an amendment. And as long as the matter is still pending before court in proceedings which are valid according to law and rules of practice, the nullity could be raised at any stage of the proceedings.

The appeal therefore succeeds on this ground and is accordingly allowed. The writ of summons issued in this case on 4th March 2010 is declared a nullity. Consequently, we set aside all proceedings founded on the said writ of summons including the judgments of both the High Court and the Court of Appeal.

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

S. A. B. AKUFFO (MS)
(CHIEF JUSTICE)

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

S. O. A. ADINYIRA (MRS)
(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

COUNSEL

MR. TSATSU TSIKATA WITH HIM MR. DICK ANYADI FOR THE 1ST DEFENDANT/ APPELLANT/APPELLANT.
MR. DEY WITH HIM MRS VICTORIA BARTH FOR THE PLAINTIFF/RESPONDENT/ RESPONDENT.