IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA, 2012

CORAM: ATUGUBA AG. C J (PRESIDING)
AKUFFO [MS.], JSC
OWUSU [MS], JSC
DOTSE, JSC
GBADEGBE,JSC

CIVIL APPEAL.
No. J4/23/2008

19TH JULY,2012

AXEX COMPANY LIMITED ... PLAINTIFF/RESPONDENT/RESPONDENT

VRS

1. KWAME OPOKU ... DEFENDANTS/APPELLANTS/APPELLANTS
2. SYLOP COMPANY LIMITED
3. UNIQUE COMPANY LIMITED

J U D G M E N T

GBADEGBE JSC:

This is an appeal from the decision of the Court of Appeal dated 31 July 2008, that dismissed an appeal from the previous decision of the High Court, Accra entered on 14 March 2007. In outline, the respondent commenced the action herein in the court below seeking certain orders directed at specified bank accounts alleged to be operated by the 1st

appellant with proceeds that had been transferred from a business account held by the respondent company of which the 1st appellant herein was a 50% shareholder.

Following the issue of the writ of summons herein, certain interlocutory applications were made to the court below and granted including an order freezing the specified accounts and an order for the managers of Ecobank and Barclays Bank, Tema to furnish the court with statements of accounts relating to the said accounts from January 2003 to January 2007. On 14 March 2007, the respondent applied to the court below for summary judgment against the defendants in the sum of US$3, 042, 000.00. At the hearing of the application to sign summary judgment, learned counsel for the defendants made a statement that appears in the record of appeal at page 140 as follows:

> **"My Lord, we admit owing the plaintiff the sum of $1,475,330.00 (one million four hundred and seventy five thousand three hundred and thirty United States dollars) as contained in our affidavit in opposition."**

As a result, the learned trial judge of the court below made the following order that appears at pages 140- 141 of the record of appeal:

> **"Based on the processes before me as well as learned counsel's submissions, summary judgment is entered for the plaintiff for the recovery of the sum of one million four hundred and seventy five thousand three hundred and thirty United States dollars against the defendants……The outstanding balance of $1,467,000.00 (one million four hundred and sixty seven**

thousand United States dollars) is set down for hearing. Suit to take its normal course".

The appellants unsuccessfully appealed to the Court of Appeal from the summary judgment and have now appealed to this court. In the notice of appeal by which these proceedings were initiated, the following grounds were formulated:

(1) "The judgment is not warranted by law.

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

An aspect of the appeal herein has been the subject of a previous determination of a point of law touching the nature of the summary judgment that was delivered by the trial court and the time frame for appealing there from, which is reported in [2011] SCGLR 50 bearing the title herein - **Opoku & Others v Axes Co Ltd.** The parties having submitted their respective statements to us, in compliance with the rules of the Court, we adjourned the matter for our consideration on the merits of the appeal. At the heart of the appellants' submissions in this appeal is the question whether the action herein was improperly constituted. In connection with this issue, we have been strenuously urged by learned counsel for the appellants in both the original and supplementary statements of case to set aside the order of summary judgment and indeed the writ. The appellants in this regard contended that the writ as issued disclosed no cause of action and further that as it contained no substantive claim or remedy; the summary judgment was made and determined without jurisdiction. The appellants also took exception to the form of the application for summary judgment.

If these submissions are correct as the appellants contended, then there was no jurisdiction in the trial High Court to have proceeded with the action at all and consequently the decision on appeal to us must be set aside together with the writ on which it was founded. The respondent contended to the contrary and has urged us to affirm the decision of the Court of Appeal in the matter.

As the issue of jurisdiction when sustained brings an end to our determination of the proceedings herein, it is useful to open the consideration of the issues turning on the appeal herein with the competency of the writ. In such cases, 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 Order 11 rule 15(2) of CI 47, the High Court Rules, amplify or diminish the scope of the writ on which it is founded. The cause of action on which the claim was founded for this purpose must be determined by looking only at the writ and the accompanying statement of claim, without any other extrinsic document. When so considered, there appears to be a claim of accounts between the respondent company and the appellants in regard to moneys that are alleged to have been siphoned from the business operations of the respondent by its 50% shareholder, the 1st appellant into the accounts of the 2nd and 3rd defendants while the other shareholder was outside the jurisdiction having left the conduct and management of the business of the respondent company to the first appellant.

Since the objection of the appellants is not that the facts or claims contained in the statement of claim are different from those contained in the writ, we are enabled to have regard to the said pleadings in determining the question of the competency of the action. See: **Brickfield Properties Ltd v Newton** [1971] 3 All ER 328. I observe of this case that it was decided on RSC Order 18 rule 15 (2) of the rules then applicable in England, that is expressed in the same words as Order 11 rule 15 (2) of Cl 47. In order to appreciate the point being made here, I refer to page 333 of the judgment in the Brickfield case wherein reference is made to the then English equivalent of our current rules as follows:

> **"A statement of claim must not contain any allegation or claim in respect of a cause of action unless the cause of action is mentioned in the writ or arises from facts which are the same as, or include or form part of, facts giving rise to a cause of action so mentioned; but subject to that a plaintiff may in his statement of claim alter, modify or extend any claim made by him in the indorsement to the writ without amending the indorsement."**

Order 11 rule 15 (2) of Cl 47 provides thus:

> **"A statement of claim shall not contain any allegation or claim in respect of a cause of action unless that cause of action is mentioned in the writ or arises from the facts which are the same as or include or form part of, facts giving rise to a cause of action so mentioned; but, subject to that, a plaintiff may in the plaintiff's statement of claim alter, modify or extend any claim made by the**

plaintiff in the endorsement of the writ without amending the indorsement."

Reading the two provisions side by side, it is clear that although they are not expressed in the same words, the words by which the rules are formulated are substantially the same and it being so, there is authority for our courts to apply the same interpretation to the scope and extent of Order 11 rule 15 (2). In the case of **Hill v Luton** Corporation [1951] 1 All ER 1028 at 1031, Devlin J in considering the same objection as raised by the appellants to the writ herein observed as follows:

> **"There remains the fact that the writ was initially irregular. Ought it on that ground to be set aside? I gravely doubt that there is power to set aside a writ on the ground of a defective indorsement once that has been cured by the delivery of a proper statement of claim. If there is, it is hardly possible to conceive any ordinary case - that is where no time bar is involved - where there could be any justification for its exercise. Especially when the two documents are delivered together, it would be the height of technicality to pick holes in the one in order to fill them from material in the other."**

The above pronouncement is consistent with the requirements of Order 1 rule 2 of the Rules of the High Court, Cl 47, which provides as follows:

> **"These Rules shall be interpreted and applied so as to achieve speedy and effective justice, avoid delays and unnecessary expense and ensure that as far as possible,**

all matters in dispute between parties may be completely and effectively and finally determined and multiplicity of proceedings concerning any of such matters avoided."

In my thinking, the statement of claim that was delivered together with the writ raised a claim for the determination of the High Court. Reference is made to paragraph 14 of the statement of claim by which it was averred as follows:

"The bank statement of the plaintiff company revealed the various monies that had been lodged into the plaintiff's company's account, and the 1st defendant without the consent of the other directors had withdrawn over 20 billion cedis from the plaintiff's company's account and transferred same into the accounts of the defendant company and his own self."

The plaintiff followed this averment with paragraphs 15 and 16 which alleged that the 1st appellant herein was unable to explain the transfers to the company resulting in his removal as a director. In my thinking, these averments raised serious charges against the defendants. These charges raised facts on which the respondent's action was based that the court below in the interest of justice was obliged to inquire into. As said earlier, as the issue of the competency of the action is one of an objection in limine to the writ and the statement of claim, in determining it we must look only at the writ and the accompanying statement of claim. Although, I confess that the indorsement to the writ was expressed in an unusual form, I am of the view that a careful consideration of the writ

together with the accompanying statement of claim disclosed a cause of action before the trial court. The learned justices of the Court of Appeal were therefore right in reaching the same conclusion. In the circumstances, contrary to the contention of the appellants there was before the court a substantive claim. In my opinion, the circumstances of the action herein are distinguishable from the situation that confronted the learned justices of this court in the case entitled **Ex parte Essco Spirit** [2003-2004] 2 SCGLR 689. Although, I have great difficulty in accepting the scope and extent of the said decision, I desire not to proceed with any further consideration of it in this delivery as that would be dealt with in some detail by my worthy brother, Atuguba JSC in his supporting opinion. Having determined the primary question raised in the submissions of the appellants, I now turn my attention to the ruling of the trial High Court on the summary judgment that has provoked the appeal herein.

After giving much consideration to the proceedings at pages 140 – 141 of the record of proceedings, I have arrived at the conclusion that it was based both on the affidavit sworn on behalf of the respondent and the oral submission of learned counsel for the appellant. As they were both unequivocal admissions of liability, the learned trial judge of the court below was right in accepting them and basing his decision thereon. The decision of the court is one commonly referred to as “judgment on admissions”, that our courts are authorised to enter in appropriate cases, under the rules of court. Indeed, Order 23 rule 6 of the High Court (Civil Procedure) Rules, CI 47 explicitly provides for the exercise of this jurisdiction. The rule is expressed thus:

"**Where an admission of the truth of a fact or the authenticity of a document is made**

(a) In an affidavit filed by a party,

(b) In the examination for discovery of a party or a person examined for discovery on behalf of a party; or

(c) by a party on any other examination under oath or affirmation in or out of court

any party may apply to the court or judge in the same or another cause or matter for such order as the party may be entitled to on the admission without waiting for the determination of any other question between the parties, and the court or judge may make such order as is just."

The admission made in the affidavit that was sworn to by the law clerk, as well as the oral submissions made by counsel in open court, in my thinking were in their nature clear admissions of part of the claim contained in the application for summary judgment, and as they were made in the course of proceedings before a judge seized with jurisdiction to determine the cause in which they were made, there can be no legitimate complaint against the learned trial judge acting on them within the intendment of the rules. See: (1) **Ellis** v **Allen** [1914] 1 Ch. 904 at 909; (2) **Adjavon v Ghana Industrial Holding Corporation** [1980] GLR 135 at 140; (3) **Technistudy Ltd v Kelland** [1976] 3 All ER 632 at 634.

The judge before whom an application for summary judgment is made is entitled under rule 5(1) of Order 14 to give such judgment to a plaintiff on the claim partly or wholly as may be just having regard to the remedy or relief sought except the defendant shows that there is an issue to be tried or for some other reason there ought to be a trial. From the record of proceedings before us regarding the hearing of the application for summary judgment, there does not appear to be any reason why the learned trial judge can be faulted for his ruling on the application. This is a jurisdiction that our courts have exercised on several occasions and is intended to bring matters in respect of which the defendant does not appear to have any answer to a speedy end. Once there has been such an unequivocal admission before a court in respect of a claim or part thereof as was done in the case before us and not withdrawn there cannot in principle be any objection to a decision based thereon. In the instant case since the said admission was the foundation of the judgment, it subsists until it is discharged by an order of the court. See: (1**) Order 23 rule 5 of Cl 47**; (2**) Hollis v Burton** [1892] 3 Ch. 226; **Satoshi Kojima** v **HSBC Bank PLC** [2011] 3 All ER 359 ;(3) **H. Clark (Doncaster) Ltd v Wilkinson** [1965] 1 All ER 934.

From the processes before us in the appeal herein, there appears to be no merit in the urgings that have been made to us attacking the ruling of the court on the summary judgment. One matter of significance that ought to be mentioned is that the decision in the matter herein was one by which the learned trial judge gave effect to the admission of a party regarding part of the subject matter of an application for summary judgment. In such a situation, I think, it lies

foul in the mouth of the appellants to invite us to avoid the effects of their unequivocal admission. Such a conduct sounds sour having regard to the requirements of justice particularly when even before us in this appeal there has not been the slightest indication that the admission on which the judgment was entered by the trial court was made in error or mistakenly.

Closely linked with the appellants complaint, submitted in these proceedings to us on the summary judgment is the obvious fact that the claim does not reveal any demand for a specific sum of money in respect of which the application for summary judgment could lawfully have been made. But a careful reading of the writ and the statement of claim particularly paragraph 14 compels me to a different opinion. In my view, the provisions of Order 81 also render the arguments touching the absence of a monetary claim in the writ and the form of the application for summary judgment devoid of much substance as the appellants participated in the proceedings and, admitted liability to the respondent in respect of a specific amount; indeed, they subsequently made payments under the judgment. There is also a personal undertaking by the first appellant to pay up the entire judgment debt by instalments commencing from 31 May 2007, which is contained at page 263 of the record of appeal.

Lastly, there is the point made that the claim was based on fraud and therefore the court erred in entering summary judgment in the matter. Unfortunately for the appellant, a careful reading and consideration of the writ and statement of claim is not supportive of this assertion. I

think the appellants must have misapprehended the difference between an allegation that a party has acted fraudulently in the sense of dishonourably or without conscience which sounds in equity and fraud at common law. The latter, which is a term of art that refers to certain types of conduct which by their cumulative effect, are such as to constitute facts on which a party to an action may rely either to sustain an action or defend it. Regarding this latter category, the requirements of practice and procedure demand particulars of the alleged fraud to be provided by the party who relies on it as provided for in Order 11 rule 8 of CI 47. There is no such pleading before us and accordingly the point sought to be made on it is unmeritorious and like the others before it crumbles.

The point made by the appellant touching the non-payment of filing fees for the monetary award is unanswerable. It is hereby ordered that the respondent-judgment creditor makes the appropriate payment in respect of the amount of US $3,042,000.00 claimed in the application for summary judgment was filed on 2007. The said fees should be levied at the prevailing rate at the date of the filing of the application for summary judgment in the court below. It is further ordered that the payment of the filing fees herein ordered be a condition precedent to enforcement or execution the summary judgment entered by the trial High Court on 14 March 2007.

For the above reasons, the appeal herein fails and must be dismissed.

[SGD] N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

ATUGUBA J.S.C.

I have had the advantage of reading the well reasoned judgment of my brother Gbadegbe J.S.C. However, much anxiety has been felt on this panel over the decision of this court in *Republic v. High Court, Tema, Ex parte Owners of MV Esso Spirit* [2003-2004] SCGLR 689 to the effect that a writ which does not disclose any cause of action is a nullity upon which no trial can ensue. This decision was followed by this court in *Rockson v. Ilios Shipping Co. S.A. & Wiltex Ltd* [2010] SCGLR 341. This position has been endorsed by Mr. S. Kwami Tetteh in his record-shattering and ultra monumental work Civil *Procedure: A Practical Approach*, otherwise known as the Black Book at 183-188. It is however to be noticed that the aforementioned decisions turned on the old High Court (Civil Procedure) Rules, 1954, LN 140A, the judicial construction of Order 70 of which drew a sharp distinction between mere non compliance which earned an irregularity as opposed to a fundamental error which earned nullity. Even under this old regime of civil procedure in the High Court there were some, at least, persuasive decisions that a writ which did not disclose a cause of action could be cured by amendment.

The present writ was however issued in December 2006 when the new High Court (Civil Procedure) Rules 2004, C.I. 47 had long come into force. The provisions concerning the indorsement of a cause of action on the issue of a writ, are, as far as relevant:

"ORDER 2

2. Commencement of proceedings

Subject to any existing enactment to the contrary civil proceedings shall be commenced by the filing of a writ of summons.

3. Contents of writ

(1) Every writ shall be as in Form 1 in the Schedule and shall be indorsed with a statement of *the nature of the claim, relief or remedy* sought in the action."

This question of indorsement of a cause of action under the new High Court Civil Procedure Rules has been dealt with by Lord Denning M.R. (Salmon and Cross L.JJ concurring) with his characteristic contempt for procedural niceties in *Sterman v. E. W. and W.J. Moore (A Firm)* 1970 2 WLR 386 C.A. at 390 thus:

> "The first question is whether the *indorsement on the writ* was defective or not. Order 6, r 2 (1) says that the writ must be endorsed
>
> > "with a concise *statement of the nature of the claim* made *or the relief* or *remedy* required in the action begun thereby." (e.s.)
>
> The old rule was in the same terms. But the old rules contained forms which showed that the indorsement had to state the cause of action, for example, damages for negligence or breach of duty. The new rules do not contain forms; but I am inclined to think that it is still necessary to state the cause of action. The indorsement should state the nature of the claim made *and* the relief or remedy required. The word "*or"* should be read as "and." At any rate, even if it is not necessary to state the cause of action, it is very desirable to do so. I am prepared, therefore, to approach this case on the footing that *the writ did not comply with the rule*. It was defective in that it said simply: "damages and for loss of earnings" *without stating the cause of action*, viz., negligence and

breach of statutory duty. That *defect did not render the writ a nullity.* It was at most an irregularity, and the irregularity was waived when the defendants entered an unconditional appearance to that writ." (e.s.)

I agree with this reasoning and the appellants here are caught by it since they have also entered unconditional appearance to the writ herein and since the relevant Rules under C.I. 47 are substantially the same as those dealt with by Lord Denning M.R. in that case.

For the avoidance of doubt however I would emphasise that Order 81 of C.I. 47 is truly a comprehensive insurance policy covering all procedural defects arising from the provisions of C.I. 47 except where the same also have a constitutional pedestal. This Rule with all its explicitness states as follows:

"ORDER 81

Effect of Non-Compliance with Rules

1. Non-compliance with rules not to render proceedings void

(1)Where , *in beginning or purporting to begin* any proceedings or *at any stage* in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a *failure to comply* with the requirements of these Rules, *whether in respect of time, place, manner, form or content or in any other respect*, the failure *shall be treated as an irregularity* and *shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order in it*." (e.s.)

I believe that the effect of this rule is not different from Rule 97(3) of the Magistrates' Courts Rules 1981 which fell to be construed in *R v. Oldham Justices and another, Ex parte Cawley* (1996) 1 All ER 464 or the indemnity provisions in *Kwakye v. Attorney-General* (1981) GLR 944, except that Order 81 gives the court a discretionary power to set aside flawed proceedings as

irregular. The facts and decision of the Oldham Justices case, *supra*, as far as relevant are as follows:

> "The cases of the three applicants were selected as test cases to represent several young offenders who had been committed to custody by justices for wilful refusal or culpable neglect in their non-payment of fines. *In each case the warrant of commitment under which the applicant was detained did not comply with the provisions of s 88(5) of the Magistrates Courts Act 1980* which required that where a person under 21 was committed to detention *the warrant should state the grounds* on which the court was satisfied that it was undesirable or impracticable to place the defaulter under supervision. *The justices had also failed to comply with the requirements of s 1(5A) of the Criminal Justice Act 1982 that the justices should specify both in the warrant and the register their reasons* for concluding that detention was the only appropriate method of dealing with the defaulter. The applicants sought habeas corpus to secure their release on the grounds (i) *that by reason of the patent defects in the warrants they were invalid* and *the prison governors consequently lacked the proper authority to detain the applicants*, alternatively (ii) if the defects in the warrants were not sufficient to invalidate the detentions they nevertheless raised a prima facie case of unlawful commitment such as to justify challenging the process by way of proceedings for habeas corpus rather than by judicial review.
>
> Held – (1) *Where justices failed to discharge their statutory obligations to state the reasons for detention in a warrant of commitment the legality of the detention was not thereby vitiated, since r 97(3)* of the Magistrates' Courts Rules 1981 provided that *any defect in the warrant would not render it void*. …" (e.s.)

This is also the effect of this court's decisions such as *Boakye v. Tutuyehene* [2007-2008] SCGLR 970 at 980 per Dr. Twum JSC that " … the new

Order 81 has made it clear that *perhaps apart from lack of jurisdiction in its true and strict sense*, any other wrong step taken in any legal suit *should not have the effect of nullifying the judgment or the proceedings.* This means that the principle stated in *Mosi v. Bagyina* (1963) 1 GLR 337, SC has been rendered otiose", *Halle & Sons SA v. Bank of Ghana* (2011) 2 SCGLR 378, *Republic v. Court of Appeal & Thomford; Ex parte Ghana Chartered Institute of Bankers* [2011] 2 SCGLR 941 and *Republic v. High Court, Accra; Ex parte Osafo* (2011) SCGLR 966.

Even, as is well known, substantive statutory provisions have, in the interest of substantive justice, been categorised as mandatory or directory.

In any case as rightly held by my brother Gbadegbe J.S.C. any irregularity in the writ of summons has been cured by the statement of claim delivered by the plaintiff in the action. The appellants have also fully, with admissions, participated in the trial of the action.

For all these reasons, I agree that the appeal be dismissed.

[SGD] W. A. ATUGUBA

ACTING CHIEF JUSTICE

[SGD] S. A. B. AKUFFO [MS.]

JUSTICE OF THE SUPREME COURT

[SGD] R. C. OWUSU [MS.]

JUSTICE OF THE SUPREME COURT

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