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

CORAM: WOOD (MRS), CJ (PRESIDING)
BROBBEY, JSC
DOTSE, JSC
YEBOAH, JSC
GBADEGBE, JSC

CIVIL APPEAL
NO. J4/31/2009
11TH AUGUST, 2010

FRABINA LIMITED
SHELL SERVICE STATION ..... PLAINTIFF/APPELLANT/ APPELLANT
LEGON ROAD
ACCRA

- VRS -

SHELL GHANA LIMITED ..... DEFENDANT/RESPONDENT/RESPONDENT
SHELL HOUSE
HIGH STREET
ACCRA

J U D G M E N T

BROBBEY, JSC:-

The plaintiff and the defendant at the trial court entered into a dealership agreement which was tendered as exhibit A. The purpose of the agreement was to enable the plaintiff to run the Legon Road Service Station as petrol outlet unit. For the implementation of the agreement, the plaintiff paid the defendant ten thousand Ghana Cedis (GHS 10,000.00) as "working capital." The agreement was terminated by the defendants at a time when the defendants claimed that the plaintiff owed it some moneys.

Following the termination of the agreement, the plaintiff sued the defendant in the High Court for recovery of the GHS 10,000.00, interest on that amount, recovery of GHS 49300.00 being overdraft facility taken by the plaintiff from its bankers, interest on that overdraft and damages for wrongful termination of the dealership agreement.

The High Court dismissed all but one of the claims: It awarded GHS 6000.00 as damages for the wrongful termination of the agreement and cost of GHS 1000.00 in favour of the plaintiff.

The plaintiff appealed to the Court of Appeal and argued inter alia that the damages awarded were on the low side. The appeal was dismissed. Against that judgment, the plaintiff appealed to this court on the following grounds:

1. That the judgment was against the weight of evidence.
2. That the Court of Appeal erred in not allowing the appeal.

In this judgment, the plaintiff shall be referred to as the appellant while the defendant will be referred to as the respondent.

In arguing the appeal in this court, the appellant contended that the GHS 10,000.00 that it paid was not working capital but was rather a refundable "security deposit" which was "mistakenly referred to as the working capital." That argument was simply untenable for the following reason: The appellant conducted the entire case in the High Court and the Court of Appeal on the basis that that amount was the working capital. The case started with the plaintiff's claim for

> "the recovery of its working capital of ¢100,000,000.00 paid to the defendant to enable the plaintiff operate the Legon Road Shell Service Station and the attached groceries shop."

In paragraph 14 of the statement of claim, the appellant referred to the amount as the working capital. In the evidence of the Managing Director of the plaintiff, he stated right from the beginning of his testimony that "the first condition (in exhibit A) was for the plaintiff to pay ¢100 million as deposit as a working capital."

In exhibit E, the letter acknowledging the plaintiff's indebtedness to the defendant which was tendered on behalf of the plaintiff, the plaintiff used the expression "working capital" six times at page 2.

The agreement on the dealership, exhibit A, referred to only the working capital in several places and goes on to define minimum working capital in paragraphs 8.4.

In the written address of counsel for the appellant in the High Court, he persistently referred to the amount as the "working capital."

It was on the basis that the plaintiff's claim was for the working capital that the High Court considered the case and gave its judgment.

When the appellant appealed to the Court of Appeal, it based its case on the fact that the amount was working capital. Ground 1 of the grounds of appeal stated that:

> "The learned trial judge erred in not ordering the defendant to pay to the plaintiff the working capital of the plaintiff inclusive of interest thereon."

Counsel for the appellant then proceeded to argue the case on the basis that the appeal was to claim the working capital.

The Court of Appeal considered the appeal on the basis of working capital and gave its judgment based on the working capital.

It was in this court that the appellant for the very first time raised the argument that the claim of the plaintiff was for a refundable deposit of GHS 10,000.00.

In case the appellant was not sure of the meaning of working capital, the term "working capital" was defined in paragraph 8.4 of exhibit A to cover the value of Shell products on location, value of Shell products in transit, all cash in hand at location and the balance on the dealers' account created with Shell. The appellant claimed that the GHS 10,000.00 given to the respondent was a deposit to be held in the dealer's account as minimum balance. However, paragraph 8.2 of exhibit A defines the dealer's account as a record of all the appellant's financial transactions with the respondent. Indeed, all products purchased from the respondent were to be procured through and reflected in the dealer's account.

The appellant also argued that if the GHS 10,000.00 was intended as working capital, then products would have been purchased from the said monies. However, in paragraph 3 of the appellant's own statement of claim, the appellant stated that when the GHS 10,000.00 was given, GHS 7000.00 was intended for fuel and GHS 3000.00 was intended for groceries. The business was operational from 1996 to 2000. The business comprised the purchase of fuel and groceries and therefore the intention of the GHS 10,000.00 was realized.

Another point which buttressed this view was this:

In paragraph 6 of the statement of defence, the respondent stated that

> "The defendants say that as the plaintiffs were in business for themselves this minimum capital was plaintiff's own capital used by her in the business."

To this the appellant reacted by its reply in paragraph 3 that:

> "Paragraph 6 of the statement of defence is admitted."

That clearly was an admission that the appellant had used the GHS 10,000.00 on its own business of purchasing petroleum products and groceries. So, what again was the appellant asking the court to refund to it? Even if the GHS 10,000.00 was considered as a deposit, it had been used by the appellant itself in its operations and therefore was no longer available to be given back to the appellant.

The appellant admitted in exhibit E that it was indebted to the respondent. That admission of indebtedness amply demonstrated that the initial working capital investment was exhausted. If the appellant had its money to the tune of GHS 10,000.00 with the respondent, one would naturally have expected the appellant to have pointed out to the respondent that it did not owe any GHS 5360.00 because the GHS 10,000.00 would have covered that indebtedness.

From the foregoing, it was apparent to the appellant throughout the proceedings prior to this court that the GHS 10,000.00 was working capital. The legal hurdle confronting the appellant after conducting the case that way was that the **Evidence Decree, NRCD 323**, s 26 provides that:

> "Except as otherwise provided by law, including a rule of equity, when a party has, by his own statement, act or omission intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon such belief, the truth of that thing shall be conclusively presumed against that party or his successors in interest of that party in proceedings between … the replying person or his successors in interest of that person."

Since the appellant had made the High Court, the Court of Appeal and the respondent to believe that the GHS 10,000.00 was working capital as explained in exhibit A, none of them can be faulted in holding the view that that amount was indeed working capital and for disposing of the case on that basis.. Section 26 provides a presumption. By the way it conducted its case throughout the proceedings, the appellant is estopped from asserting a different meaning to the GHS 10,000.00 in this court.

There is no reference in exhibit A to the fact that the working capital was refundable. The term "refundable" was so significant that if the amount was meant to be refunded or refundable, it would have been stated in exhibit A because it would substantially

affected the contractual relationship of parties. The evidence rather showed that the mount was used to purchase petroleum products and groceries. It was exhausted and that was why the appellant became indebted to the respondent as admitted in exhibit E. The respondent could not be made to refund what it had not contracted to refund. In any case, it could not be made to refund what had been exhausted as a result of the appellant's own business activities of purchasing petroleum products and groceries with the GHS 10,000.00.

The contention of the appellant that the amount was a refundable deposit was not only an afterthought. It was also a belated attempt to change its case from that of working capital to refundable deposit. That change flies in the face of the known principles of pleadings, especially as provided in the High court (Civil Procedure) Rules, 2004 (CI 47), Order 11, r 10(1).

The significance of pleadings to a party's case was underscored in **Hammond v Odoi** [1982-83] 2 GLR 1215 when Charles Crabbe JSC stated at p 1235 that:

> "Pleadings are the nucleus around which the case – the whole case- revolves. Their very nature and character thus demonstrate their importance in actions, as for the benefit of the court as well as for the parties. A trial judge can only consider the evidence of the parties in the light of their pleadings. The pleadings form the basis of the respective case of each of the contestants. The pleadings bind and circumscribe the parties and place fetters on the evidence that they would lead. Amendment is the course to free them from such fetters. The pleadings thus manifest the true and substantive merits of the case."

To this, we would add that the essence of pleadings is inter alia not only to inform the opposing party of the case it will meet but also to put the opposing put on notice so as to prepare its case in response to the facts pleaded against it.

Since the appellant based its case on working capital throughout the High court and in the Court of Appeal, the respondent also put up its defence on the basis of working capital. The respondent cannot now be bound by the view that the amount was a refundable deposit. If the appellant was minded to rely on the fact that the amount was a refundable deposit, it should have amended its pleadings or pleaded that specifically. This was because the respondent could in turn have pleaded facts in support of its defence that the amount was a working capital. By raising the case of the refundable deposit for the first time and so belatedly in this court, the respondent was not given the opportunity to adduce evidence or plead facts in defence of its stand. That a fortiori is another reason why the case of refundable deposit should not be upheld in this court.

By the manner it presented its case in the High Court and the Court of Appeal, the appellant led the two courts to make concurrent findings against it. The established rule of law is that where findings made by a trial court have been concurred in by an appellate court, a second appellate court should be slow in coming to a different conclusion unless there is clear evidence which indicates that the two courts were manifestly wrong in their conclusions. This principle has been applied in several cases including **Awuku Sao v Ghana Supply Commission** [2009] SCGLR 710; **Jass Co Ltd v Appau** [2009] SCGLR 265 and **Achoro v Akonfela** [1996-97] SCGLR 209. In the instant case, the findings of the two courts cannot be described as manifestly wrong. If the case had not progressed to this court, the appellant would have rested its case on the basis that the amount was working capital.

The most serious point that militates against the contention that the money should be regarded as refundable security was the fact that the appellant never raised that as the basis of his claim in the High Court or the Court of Appeal until the case reached this Supreme Court. The principle has been well established that where a point of law was not raised or relied upon in the trial court and in a first appellate court, it cannot be raised in the Supreme Court as the final court of the land: See **Attorney-General v Faroe Atlantic Co Ltd [**2005-2006] SCGLR 271. Exceptions to this rule were set out at page 279 of the report are (i) where a jurisdictional issue has been raised, (ii) where the act or conduct has been made illegal by a statute and (ii) where the legal issue raised is substantial and could be disposed of without the necessity for fresh evidence to be adduced, such as constitutional issues. This case does not involve a jurisdictional, illegal or constitutional issue. None of those exceptions is applicable to the instant case. Not having raised refundable security at the trial court and in the Court of Appeal, the appellant cannot raise it for the first time in this court.

The issue of refundable security cannot be disposed of without giving the defendant the opportunity to react by facts and evidence which will establish its side of the nature of the GHS 10,000.00. It is simply not enough to fight the case on one basis and at the very end of the litigation make a bare assertion that the basis of the claim should have been that the amount was a refundable deposit and hope to succeed by that *volte face*. A number of questions would arise to be examined if the case had been prosecuted at the inception as refundable deposit or refundable security.

Some of them are these: Since when did the amount become refundable security or refundable deposit? Was it from the inception of the agreement on the dealership or from the middle of it? What kind of security was envisaged? Was it security for non-payment of petroleum products supplied or security against non- payment of groceries? Was it security against running the business at a loss? Was it security against damage

to the station by fire, by accident or natural sources? Under what circumstances should the deposit or security be refunded? Was it refundable where the damage was attributable to the appellant or its agent? Was it refundable where the termination of the contract was as a result of the fault of the appellant? Was it refundable where the appellant was the one pulling out of the agreement or where the termination was brought about by the respondent? It was argued on behalf of the appellant that the amount was described "mistakenly" as working capital. Whose mistake was it? Since when did the mistake become apparent for it to be raised only at the very end of the litigation? These and many more questions will forever remain unanswered if the case is allowed to be disposed of by a bare assertion that the amount was a refundable deposit or refundable security without going into the merits and demerits of that assertion.

The claim of the appellant for the GHS 4, 930 overdraft facility taken by the appellant These and many more questions will forever remain unanswered if the case is allowed to be disposed of by a bare assertion that the amount was a refundable deposit or refundable security without going into the merits and demerits of that assertion.

was baseless; this was because there was no evidence that the respondent induced the appellant to take that overdraft. It was a facility which the appellant sourced to improve its own business. The amount went to the respondent in its reasonable attempt to retrieve debts owed to it from the appellant. There was no basis for the claim for the refund of that amount to the appellant.

Liability for the termination of the agreement was determined by paragraph 25 of exhibit A. The respondent was required by paragraph 25.1 of exhibit A to have given the appellant three months notice before terminating the contract. That it failed to do. The trial court was justified in ruling that the termination was unlawful and proceeding to award damages.

The appellant argued that the award of six thousand Ghana Cedis as damages was on the low side and should be reviewed. The principles on the review of award of damages are well known and need no expatiation. Such an award may be reviewed only if the correct law is wrongly applied, or incorrect law is applied or where the award is so excessively high or so excessively low as to be erroneous. Authorities abound on these principles, with Standard **Chartered Bank v Nelson** [1998-99] SCGLR 810 **and Zik's Press v Ikoku** (1951) 12WACA 188 standing out as virtual locus classicus. The trial

judge did not indicate the basis of the award. But it appeared to have been based on lost future earnings and unearned future commission. These could not be legitimate bases for damages at times when the trend of business was in the decline. At such times, it would have been impossible to convince a court that profits and corresponding profits were imminent without indulging in speculation.

Considering the circumstances of the case, this court finds no basis for interfering with the award of the trial court, notwithstanding that there could be some amount of speculation on the basis of the award. The award of the trial judge which was endorsed by the Court of Appeal is upheld.

In the end, the appeal fails in its entirety and should be dismissed.

S. A. BROBBEY
JUSTICE OF THE SUPREME COURT

G.T. WOOD (MRS)
CHIEF JUSTICE

ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

N.S. GBADEGBE
JUSTICE OF THE SUPREME COURT

DOTSE, JSC:-

The facts of this case admit of no complexities whatsoever. The Plaintiffs/Appellants/Appellants hereafter referred to simply as the plaintiffs, initiated action in the High Court against the Defendants/Respondents/Respondents, referred to hereafter as Defendants, claiming the following reliefs:-

The plaintiff's claim against the defendants is for:

1. Recovery of its working capital of GH¢10,000.00 paid to the defendant to enable the plaintiff operate the Legon Road Shell Service Station and the attached groceries shop.

2. Interest on the said sum of money from the 7th day of June, 1996 at the current bank rate till the day of payment.

3. Recovery of the sum of GH¢4,930.00 being an overdraft from its bankers to the defendant for the supply of fuel on the 26th day of April, 2000.

4. Interest on the said sum of money from the 26th day of April, 2000 at the current bank rate till the day of payment.

5. Damages for wrongful termination of the plaintiff's dealership agreement.

The plaintiff's averred that on the 7th day of June, 1996 they entered into a dealership agreement with the defendant to operate the defendants service station on the Legon Road in Accra. Pursuant to the said agreement, the plaintiffs paid an amount of GH¢7,000.00 to the defendants for the supply of fuel and GH¢3,000.00 was paid for the supply of goods for the shell shop at the station, making a total of GH¢10,000.00 According to the plaintiffs at the time they took over the management of the Service Station, business was very good as there was only an additional service station from the Tetteh Quarshie Circle to Madina. Business however started to decline with the opening up of more filling stations in the neighborhood, coupled with the spate of armed robberies that rocked the Service station leading to loss of revenue and customers as a result of negative press publicity.

The plaintiffs further averred that the defendants did not approve of armed guards at their service stations, and despite the spate of armed robberies at the station the plaintiffs were prevented from engaging armed security guards.

The plaintiffs discussed strategies aimed at revamping their dwindling fortunes at the Service Station with the defendants and this led to the plaintiffs successfully accessing an overdraft facility of GH¢4,930.00 from their Bankers which they paid to the defendants on 26th day of April, 2000 with the aim of strengthening their financial base with the defendants.

Unfortunately, as fate would have it, the defendants terminated the Dealership agreement with the plaintiffs on the 28th day of April, 2000, barely two days after receipt of the amount of GH¢4,930.00 from the plaintiff's.

The plaintiffs therefore contended that the termination of their dealership agreement was wrongful.

The plaintiffs further contended that as a result of the wrongful termination of the contract they lost their working capital of GH¢10,000.00 which they paid to the defendants at the inception of the dealership agreement and also lost the amount of GH¢4,930.00 (which was an overdraft) which they paid to the defendants with the aim of revamping their business transactions.

In view of the peculiar circumstances of this case, the defence filed by the defendants will have to be considered in some detail, because that is the only case that has been proffered by the defendants. This is because, after the settlement of the pleadings the defendants and their Counsel were unable to attend court after several adjournments as a result of which the learned trial Judge took evidence from the plaintiff's representative and concluded the case.

Whilst the defendants admitted the Dealership agreement with the plaintiffs they contend that it was a term of the said agreement that in consideration of commissions to be paid by the defendants to the plaintiffs, the plaintiff was to purchase from the defendants and resell petroleum and allied products. The plaintiff was also to sell in the shell shop only approved products by the defendants. It was in pursuit of meeting the above obligations imposed on the plaintiffs under the dealership agreement that the plaintiffs were required to have and maintain a minimum working capital determined from time to time, in order to effectively and efficiently operate the station.

The defendants averred that the working capital was the capital that the plaintiff's used in their business and are responsible for it.

The defendants also accused the plaintiffs of poor management as the cause for the low sales, since according to them "ever since a new dealer took over, sales have gone up considerably" and denied that these were due inter alia to the armed robberies.

The defendants admit the receipt of an amount of GH¢4,930.00 from the plaintiffs but contend that as at the material time, the plaintiff's were owing an amount of GH¢6,313.62.00 they therefore used the GH¢4,930.00 to set it off against the debt owed it by the plaintiff.

The defendants also deny that they wrongfully terminated the contract with the plaintiffs, and contended that the plaintiff's are not entitled to the relief they claim at all.

As was stated earlier in this judgment, it was only the plaintiff's representative who testified, and tendered the following exhibits into evidence.

1. **Exhibit A**

   Shell Dealership Agreement dated 1st January, 1998.

2. **Exhibit B**

Statement of Account showing the performance of Shell Service Stations in order of performance.

3. **Exhibit C**

Letter dated 17th November, 1999 from the defendants reminding Shell Service station Managers not to use armed guards at their stations.

4. **Exhibit D**

   Letter dated 20th April, 2000 from the defendant's to the plaintiff's updating them on their Trading Account Balance in which they threatened to terminate the dealership agreement if the debt owed them is not paid within a period of seven days.

5. **Exhibit E**

Letter dated 25th April, 2000 from the plaintiff's to the defendant's which contained proposals from plaintiffs to the defendants aimed at revamping their sales performance.

6. **Exhibit F**

This is the termination letter from the defendants to the plaintiffs dated 28th April, 2000

7. **Exhibit G**

   This is the Police report dated 21st May 2002 on the armed robbery attack at the plaintiff's station which occurred on 8th July, 1999 at 3.30am.

8. Exhibit H

This is a letter from Ecobank to the plaintiff's dated 16th October, 2000 on the repayment of an outstanding overdraft facility granted the plaintiffs to revamp their business with the defendants.

9. **Exhibit J**

This is a writ of summons issued by Ecobank against the plaintiff's in respect of the balance of an overdraft facility of ¢35,548,210.79 granted the plaintiffs.

The learned trial Judge, after considering the probative effect of the above exhibits as well as the evidence led by plaintiff's representative without any input from the defendants delivered judgment on 25th June, 2007 in the following terms:-

> *"I therefore enter judgment in favour of the plaintiff to recover the sum of ¢60 million as general damages for the wrongful termination of the Dealership Agreement between the parties in accordance with the principle stated in of* ***Majolagbe vrs Larbi [1959] GLR 190*** *and state that in respect (sic) relief (5) the Endorsement on the writ of summons the plaintiffs were able to discharge both the burden of proof and standard of proof on balance of probabilities. I thereby dismiss reliefs (1) to (4) of the endorsement on the writ of summons. I award cost of ¢10million in favour of the plaintiff."*

Aggrieved by the inadequacy of the awards, the plaintiff's appealed against the judgment to the Court of Appeal which also dismissed the appeal by a unanimous judgment dated 27th November, 2008.

It is this Court of Appeal judgment that is the subject of the instant appeal to this court.

GROUNDS OF APPEAL TO SUPREME COURT

1. That the judgment is against the weight of evidence.

2. That the Court of Appeal erred in not allowing the appeal.

Since no additional grounds of appeal have been filed, only the above two grounds have been argued by learned counsel for the plaintiffs.

STATEMENT OF CASE OF PLAINTIFF'S

The arguments of learned Counsel for the plaintiff's as I understand them is to the effect that based on the pleadings, the oral evidence as well as documentary evidence that had been put before the trial court, there was no basis for the court to have accepted the bare assertions of the defendants in their pleadings that an amount of GH¢6,313.60 was owed it by the plaintiffs.

Out of abundance of caution, let me quote exactly what was stated by the plaintiff's in their statement of case.

> *"It is interesting to note that no evidence was proferred by the defendants to substantiate it claim that the appellant owed it GH¢6,313.60. This figure was contradicted by appellant in exhibit E at page 77 of the record of appeal".*

The plaintiff's argued further that, since they denied this piece of averment in their reply, issues were joined as between them and the defendants. Having failed and or refused to lead any evidence, the plaintiff's contended that the learned trial judge ought to have held that the defendants were obliged to refund to the plaintiff's the sum of GH¢4,930.00 being the overdraft facility the defendants induced the plaintiff's to access in order to revamp their business transactions.

What must be noted is that, in evaluating evidence in a judicial proceedings, a court has several sources to draw material evidence from:

1. First are the pleadings. Where the pleadings are not in contention, it is safe for the trial judge to draw from it and make his conclusions. For example, where as in this case, the plaintiff's and defendant's are adidem on the payment of an amount of GH¢10,000.00 by plaintiffs to the defendants, there is no problem about the acceptance of this piece of evidence. The only difficulty that arises is whether to accept the plaintiff's version that it is now a refundable security deposit and no longer a working capital. I will revert to this issue as to whether the plaintiff's at this stage of the trial are entitled to change their arguments without having done so previously in the trial court and at the Court of Appeal.

2. The second is the oral evidence that has been led in court. The credibility of oral evidence is normally tested through cross-examination but in this case, since the defendant's did not participate during the trial of the case, that opportunity is lost, and the only credible evidence on record is that led by the plaintiff's representative.

3. The third is the documentary evidence. This normally takes the form of documents that are tendered during the course of trial and upon which questions are asked during examination in chief and cross-examination. It can also take the form of reports submitted by court appointed expert witnesses such as Surveyors, Accountants, Medical Doctors, etc who testify and tender in reports prepared by them to help the judge in determining the case one way or the other.

4. The fourth are judicial decisions and authorities touching and dealing with principles of law in the subject matter of the case on trial. This is normally done during the closing addresses by Counsel of the parties to the court.

Since the defendant's did not take part in the trial process, the only applicable method of assessing their case is for the court to consider the pleadings, and perhaps the applicable case law on the subject.

The plaintiffs have in their statement of case argued that the learned judges of the Court of Appeal were wrong in affirming the decision of the trial court that the GH¢10,000.00 was a working capital.

Referring to clause 8:5 of exhibit A, the Dealership Agreement, which states as follows:-

> *"The Dealer shall pay for all products purchased from Shell in such manner, and on such terms and at such times as shell shall advise from time to time and shell may cease making deliveries to the Dealer upon the failure of the Dealer so to pay".*

The plaintiff's submit that, the GH¢10,000.00 paid by them to the defendants was a security which was misleadingly referred to as "working capital", and therefore concluded that the said amount could therefore not have been referred to as working capital since it could not have been used to pay for products supplied by the defendants to the plaintiff's.

The plaintiff's refer also to clause 8:2 of Exhibit A to buttress their submissions on this point. Clause 8 : 2 of Exhibit A states as follows:-

> *"The Dealer shall maintain with Shell an account to be designed as the 'Dealer's Account' which account shall be a record of all the Dealers financial transactions with Shell. The Dealer shall not allow this account to reflect a debit balance unless so authorised in writing by Shell".*

The plaintiff's submit that, this Dealers account is different from the working capital and refer to exhibits D and E as relating to the Dealers Account and therefore a security which should be refunded.

The plaintiff's argued in support of their contention that the award of GH¢6,000.00 damages was woefully inadequate by referring to exhibit B which placed plaintiff's Service Station at the material time as the (5^{th}) fifth best performing station in terms of sales volume to buttress their point of anticipated loss of future business due to the wrongful termination of the dealership agreement.

The plaintiff's further submit in their statement of case that it was wrong for the Court of Appeal to have stated that reliance on Exhibit B to compute the quantum of damages would have been an exercise in speculation. It is the plaintiff's case therefore that Exhibit B presents the only credible and fair idea about the future course of their business if the agreement had not been wrongfully terminated by the defendants. The plaintiff's refer to the proposals contained in their Exhibit E, and submit therein that, the defendants, if they had considered the contents of Exhibit E, would not have terminated Exhibit A, but give an opportunity for the business to be revamped.

Based on the above, the plaintiff's submit that the award of GH ¢6,000.00 as damages is on the low side since the termination led to heavy loss of future earnings and pray that this be enhanced by the Supreme Court.

STATEMENT OF CASE OF DEFENDANTS

The learned Counsel for the defendant's invited this court not to consider the argument of the plaintiff's about the effect of GH¢10,000.00 as a refundable security because that was not the complaint before the Court of Appeal and therefore, the Court of Appeal cannot be faulted if it did not consider it.

Learned Counsel for the defendant submitted that, not having raised this issue of refundable security in the trial and appellate court, it is unacceptable for the plaintiff's to do so at this late stage.

The defendants contend that the description of the amount of GH¢10,000.00 as a minimum working capital is what the parties agreed upon in their respective pleadings. This therefore did not make the payment of the said amount an issue.

Even though learned Counsel for the defendants made capital of the Reply filed by the plaintiff's an issue, especially paragraph 3 thereof which admitted paragraph 6 of the defence, the plaintiff's however in paragraph 4 of the Reply made other averments in further reply which negate the blanket admission made in paragraph 3 of the reply.

Secondly, I am of the opinion that the reference to *Section 26 of the Evidence Act, 1975 NRCD 323* is misplaced and does not apply.

There is absolutely nothing in the conduct of the plaintiff's to call in aid the provisions of *Section 26 of NRCD 323.*

In response to the reliance by the plaintiff's on clauses 8 : 2 and 8 : 5 of Exhibit A, the defendants invite this court to refer to clauses 8 : 1, 8 :3 and 8 : 4 in order for a holistic understanding of the provisions therein to be captured.

After discussing the said clauses learned Counsel posed the question whether upon the material evidence that was before both the trial judge and the Court of Appeal the defendants had a duty to refund the working capital to the plaintiffs.

Based upon the definition of working capital in the Oxford Concise English Dictionary as the "capital of a business which is used in its day to day trading operations, calculated as the current assets minus the current liabilities," the defendants submit that they would only be under an obligation to refund the said working capital if it is established that the plaintiffs have not used and exhausted the said amount of GH¢ 10,000.00 in their day to day operations. My understanding of the said submissions is that, the plaintiffs must explain to the satisfaction of the court that in their day to day business transactions with the defendants during the period they were in business, payments of their supplies were effected otherwise than by reference to this GH¢10,000.00.

Under the circumstances, this court would have to ascertain whether there was oral or documentary evidence to suggest that the said amount of GH¢10,000.00 had been exhausted by the plaintiff's in their business dealings with the defendants.

2. The defendants then briefly dealt with the arguments on the issue of the damages of GH¢6,000.00 awarded the plaintiff's by the trial court and affirmed by the appeal court. It is the contention of the defendants that the reasons given by the Court of Appeal for dismissing the appeal on this ground be maintained. The Court of Appeal stated on this ground of appeal as follows:

> *"It is to be noted that the trial judge did not explain the basis for the award. What was in evidence was Exhibit B, the sales record book and although the court did not specifically refer to that Exhibit in assessing the quantum of damages, it is not doubted that the figures in Exhibit B influenced her decision in making the award."*

The Court of Appeal then relied on a long line of cases to wit:

1. Standard Chartered Bank vrs Nelson [1998-99] SCGLR 810

2. Flint vrs Lovell [1936] 1 KB 360 and

3. ZIK's Press Limited vrs I Koku [1951] 13 WACA 188

and by these cases held that the award of GH ¢6,000.00 as damages by the trial court was adequate.

Learned Counsel for the defendants whilst relying on the same cases, referred also to the following cases to support their contention that the plaintiffs failed to satisfy this court, that the court of Appeal and the trial Judge acted on wrong principles of law or that the amount was too low under the circumstances.

The cases are:

1. Societe Generale De Compensation vrs Moshic Ackerman [1972] 1 GLR 413, C.A.

2. Oduro vrs Davis 1952 14 WACA 46

3. ZACCA vrs CFAO [1969] C.C. 156

4. Owen vrs Sykes [1936] 1 KB 192 C.A per Slesser L. J at 199-200

Based on the above submissions, the learned Counsel for the defendants prayed this court to dismiss the appeal.

ISSUES FOR DETERMINATION

From the grounds of appeal that have been argued in the respective statements of case by learned Counsel for the parties, the following issues stand out boldly for determination.

1. Whether or not the Court of Appeal was right on the basis of evidence led before the trial court to conclude that the defendant's were not entitled to refund the GH¢10,000.00 "working capital" or "security deposit" to the plaintiffs upon the termination of the dealership agreement. In determining the above issue, the following subsidiary but related issue would have to be dealt with. This is:

a. Whether this court can consider the late introduction of the issue of "security deposit" raised by the plaintiff's of the amount of GH¢10,000.00.

2. Whether or not the award of GH¢6,000.00 by the learned trial judge and confirmed by the court of Appeal judge is inadequate and should be enhanced by this court.

CONCURRENT FINDINGS OF FACT BY TRIAL COURT AND APPELLATE COURT

It would appear that the plaintiff's have a daunting task in this second appeal in view of the concurring findings of fact made by the trial court and concurred in by the first appellate court, the Court of Appeal.

The authorities are fairly well settled that, where findings of fact have been made by a trial court, and those facts have been concurred in by the appellate court, a second appellate court such as this Supreme Court must tread cautiously in its attempt to come to different conclusions on the findings of fact.

The task is not an impossible one, but there are certain basic principles that the courts have developed over the years.

It is pertinent to refer to some of the important and landmark decisions illustrating this principle – and apply them where necessary.

I am aware of the principle of law which has been stated in times without number in a number of decided cases both local and foreign that where findings of fact have been made by a trial court and concurred in by the first appellate court, (that is the Court of Appeal) then the second appellate court, in this instant, the Supreme Court, should be slow in coming to different conclusions unless it is satisfied that there are strong pieces of evidence on record which are manifestly clear that the findings of the trial court and the first appellate court are perverse.

The above principle was laid down in the following cases:

1. Achoro vrs Akanfela [1996-97] SCGLR 209 holding 2
2. Watt (or Thomas vrs Thomas) [1947] AC 484: [1947] 1 A.E.R. 582: 176 L.T 49, H.L
3. Clarke vrs Edinburgh Tramways & District Tramways Co. [1919] SCH L 35, 56 S CLR 303
4. Powell vrs streatham Manor Nursing Home [1935] AC 243
5. Jass Co. Ltd vrs Appau [2009] SCGLR 265 holding 4

6. Awuku Sao vrs Ghana Supply Commission [2009] SCGLR 710 at 713, holding 4 and

7. Obeng & others vrs Assemblies of God Church, Ghana to be reported in [2010] SCGLR 1, at 5 holding 4

Where the Supreme Court speaking with one voice through me (Dotse JSC) stated thus:

> *"Where findings of fact had been made by the trial court and concurred in by the first appellate court, (as in the instant case) the second appellate court must be slow in coming to different conclusions unless it was satisfied that there were strong pieces of evidence on record which were manifestly clear that the findings of the trial court and the first appellate court were perverse.* ***It was only in such cases that the findings of fact could be altered thereby disregarding the advantages enjoyed by the trial court in assessing the credibility and demeanour of witnesses" emphasis supplied.***

It should therefore be clearly noted that in some circumstances, the Supreme Court will depart from the findings of fact made by the trial Court and concurred in by the first appellate court, such as the Court of Appeal in this instance.

There are again a lot of decided cases to illustrate instances where the Supreme Court did depart from such concurrent findings of fact.

In the recent unanimous unreported decision of the Supreme Court dated 12th May, 2010 suit No. J4/8/10 intituled ***Sylvia Gregory – Plaintiff/Appellant/Appellant vrs Nana Kwesi Tandoh IV and another – Defendants/Respondents/Respondents*** the Supreme Court took pains to state the criteria that the court used to depart from the concurrent findings of fact made by the trial and the first appellate court in that case as follows:-

> *"It is therefore clear that, a second appellate court, like this Supreme Court can and is entitled to depart from findings of fact made by the trial court and concurred in by the first appellate court under the following circumstances:*
>
> *1. Where from the record the findings of fact by the trial court are clearly not supported by evidence on record and the reasons in support of the findings are unsatisfactory.*
>
> *2. Where the findings of fact by the trial court can be seen from the record to be either perverse or inconsistent with the totality of evidence led by*

the witnesses and the surrounding circumstances of the entire evidence on record.

3. *Where the findings of fact made by the trial court are consistently inconsistent with important documentary evidence on record.*

4. *Where the first appellate court had wrongly applied the principle of law in Achoro vrs Akanfela (already referred to supra) and other decided cases on the principle, the second appellate court must feel free to interfere with the said findings of fact, in order to ensure that absolute justice is done in the case".*

The Supreme Court in a unanimous decision in the case of ***Fosua and Adu Poku vrs Dufie (deceased) and Adu Poku Mensah, [2009] SCGLR 310 at 313***, also differed from the findings of fact made by the trial court and the first appellate court.

By those decisions, the Supreme Court as it were followed principles of law laid down in cases like:

1. Bisi vrs Tabiri [1987-88] 1 GLR 360 at 368 and the locus classicus decision in

2. Koglex (No. 2) vrs Field [2000] SCGLR 175

This therefore means that, for example, as in the instant case, where much of the evidence has turned on documentary evidence, then there is very little advantage that the trial court has had over and above the appellate courts by virtue of the observing of the demeanour and credibility of witnesses. In such a case, the probative value or weight that will be attached to the mass of documentary evidence on record by this Supreme Court is the same as the learned trial judge had when she heard the case as the court of first instance or trial court.

From the evidence on record by which is meant the pleadings which have been admitted, the evidence led by the plaintiff's representative as well as the documentary evidence, it is clear that the learned trial judge made the wrong deductions from the evidence on record, and the Court of Appeal also fell into that same error by concurring in them.

WHAT ARE SOME OF THOSE INSTANCES?

1. By paragraph 2 of the defence, the defendants admitted paragraph 3 of the statement of claim by which the plaintiff's averred that they paid a total of GH¢10,000.00 to the defendants as minimum working capital.

2. By paragraph 10 of the defence, the defendants again admitted the occurrence of armed robbery attacks at the plaintiff's Legon Road Station, thereby giving proof to plaintiff's paragraph 8 of the statement of claim and by necessary implication the issue of force majeure i.e. act of God. Refer to clause 21 of exhibit A.

3. An admission by the defendants of the receipt of a further sum of GH¢4,930.00 from the plaintiff's but deny that they induced them to obtain this facility from their Bankers to improve their credit rating.

4. Since exhibit A, has been admitted by the defendants and accepted by the Court, the definition of minimum working capital in sections 8:3 and 8:4 ought to have been used by the learned trial Judge in her evaluation of the evidence.

5. It is also clear from clause 8:5 of exhibit A, that the Dealer, in this case the plaintiff shall pay for all products purchased from shell in such manner and in such terms as shall be determined by Shell, i.e. the defendants.

6. This therefore connotes an irresistible conclusion that the GH¢10,000.00 paid to the Defendant's by the plaintiff was not the amount from which the purchase of petroleum products was to be made. Instead, the impression is created that it is like a deposit paid and lodged with the defendants and held as a security deposit. Assuming without admitting that it is the amount from which purchases were made, then there was the need for the parties to have gone into accounts for the court to ascertain the veracity of who owed who and what balance was outstanding.

7. It is also clear that the defendant's failed to give the requisite three (3) months notice as required by clause 25:1 and this was rightly found by the trial Judge.

8. From the evidence on record, it is clear the plaintiff's representative was emphatic in his testimony that as a result of the wrongful termination of the contract, he lost the GH¢10,000.00 as well as the additional overdraft of GH¢4,930.00. All these were not addressed by the learned trial Judge and there is no evidence to the contrary.

9. From the nature of exhibits D and E, it is clear that there was the need for the parties to have gone into accounts in view of the different figures and minimum working capital they all stated in their letters exhibits D and E.

10. From the assessment that was done by the learned trial Judge, it is clear that exhibit B was not factored into the computation. Otherwise, the figure would have shown some upward adjustment.

On the whole, it is my considered opinion that the evaluation of the entire evidence on record by the learned trial Judge did not meet the standard required of her. She was required to evaluate the evidence on a balance of probabilities but this she failed to do, even though she correctly stated the principle in ***Majolagbe vrs Larbi [1959] GLR 190***. It is for the above reasons that I am of the opinion that the concurrent findings of fact by the trial court and the Court of Appeal being inconsistent with the evidence on record same must be departed from.

This then brings me to the consideration of the issues set down supra.

ISSUE 1 and 1 (a)

1. Whether or not the Court of Appeal was right on the basis of evidence led before the trial court to conclude that the defendant's were not entitled to refund the GH¢10,000.00 "working capital" or "security deposit" to the plaintiffs upon the termination of the dealership agreement. In determining the above issue, the following subsidiary but related issues would have to be dealt with. These are:

    a. Whether this court can consider the late introduction of the issue of "security deposit" raised by the plaintiff's of the amount of GH¢10,000.000.

One issue that has been hotly contested in this appeal is whether the plaintiff's are entitled in law to raise for the first time before this court the issue of payment of GH¢10,000.00 as a security deposit and no longer as a "working capital".

This principle featured prominently in the Supreme Court decision in the case of ***Attorney-General vrs Faroe Atlantic Co. Limited [2005-2006] SCGLR 271, at 279 holding 8***, particularly at 309 per Georgina Wood JSC, as she then was.

In the above case, the Supreme Court stated the following general principles of law which I think should be applied in this case. The court held as follows:

> *"Generally, where a point of law had not been raised in the trial court and the intermediate Court of Appeal it might not be raised in the Supreme Court as the final appellate court. However, there were exceptions to the general rule, first namely (i) a jurisdictional issue could be taken or raised at any time, even for the time, (ii) where an act or conduct has been made illegal by statute or where an action*

has been brought on a contract which was ex facie illegal, it was the duty of the Court to take the point even though it might not have been raised by the defendant, (iii) ***and where the legal question sought to be raised for the first time was substantial and could be disposed of without the need for further evidence such as the constitutional issue raised by the defendant in the instant appeal.*** *Consequently, the office of the Attorney-General, as the defendant appellant, was obliged to raise in the instant appeal the point of law founded on article 181 of the Constitution even if belatedly, in discharge of its obligation to uphold the Constitution. And the court was equally obliged not to refuse to consider a point of law directly relating, as on the facts of the instant case, to real issues relating to the interpretation and enforcement of the Constitution."*

Explaining the reasons for her opinion in the above cited case Georgina Wood JSC as she then was on page 309 of the report stated thus:-

> *"The salutary and well known general rule of law is that where a point of law is relied on in an appeal, it must be one which was canvassed at the trial. But there are exceptions to this rule, the question of jurisdiction being one of them. Another exception is that where an act or contract is made illegal by statute …*
>
> ***Again, the well established general rule is that where the legal question sought to be raised for the first time is substantial and can be disposed of without the need for further evidence, it should be allowed. Substantial constitutional issues, such as the one raised before us, falls neatly into this category". Emphasis supplied***

I have had to quote in extenso from the ***Attorney-General vrs Faroe Atlantic Co. Ltd.*** case referred to supra to establish the fact that, even though the task of raising for the first time an issue not raised in the trial and first appellate court, but raised in the final appellate court such as this Supreme Court, is a rare phenomenon, the task nevertheless is not unsurmountable in view of the clearly established legal principles on the point.

Relating the well formulated principles in the ***Attorney-General vrs Faroe*** case to the circumstances of the instant appeal, the impression is clear that the plaintiff's rely purely on contract contained in the Dealership Agreement, exhibit A, to shift their grounds that the GH¢10,000.00 was in real terms a "security deposit" and not a "working capital" as mistakenly referred to in the trial and appeal courts.

The argument for this change in their submissions has been founded on clause 8:5 of exhibit A which has already been referred to but for purposes of emphasis states as follows:

"*The Dealer shall pay for all products purchased from Shell in such manner, and on such terms and at such times as shell shall advise from time to time and Shell may cease making deliveries to the Dealer upon the failure of the Dealer so to pay".*

Construing the above provisions strictly, I am of the view that, unless there is evidence to the contrary, it is to be understood that, the plaintiffs were made to pay for all products purchased from the defendant's directly and this was not a credit sale transaction which was to be debited against their account of GH¢10,000.00.

Furthermore, once the details of exhibit A, the dealership agreement are already in evidence, no further evidence or submissions ought to be made to enable this court come to a conclusion one way or the other on the subject matter. Thirdly, it should be noted that the issue of whether the amount of GH¢10,000.00 is a working capital or security deposit is a substantial issue of law, whose determination will definitely enhance or diminish the fortunes of the parties involved in this contest.

On the basis of the formulation in the ***Attorney General vrs Faroe*** case already referred to supra, I am of the considered view that it is perfectly legitimate for the said issue to be raised for the first time in this court and considered.

From the definition of what constitutes minimum working capital in clauses 8 : 3 and 8 : 4 of Exhibit A, it is clear that what is envisaged as a working capital is distinct and separate from the GH¢10,000.00 paid by the plaintiff's to the defendants.

In the first place, it has to be noted that, this minimum working capital by clause 8:3 is not fixed, but shall be prescribed by the defendants from time to time.

Secondly, by the definition in clause 8:4 of exhibit A, it is also apparent that this working capital includes the following:

a. The value of all products of the defendants at the Station at a given time.

b. The value of products in transit, these include products paid for and receipts issued which are yet to be received at the station.

c. Cash at hand at the station, which includes the previous days sales on a working day, at weekends comprises the sales of two previous days sales commencing Friday up to point of recording. These shall however never include credit sales made to the dealer, in this case the plaintiffs.

d. The balance on the Dealers (plaintiff's) account with shell.

Considering the above definitions and the evidence led by the plaintiff's representative to the effect that

> *"The first condition was for the plaintiff to pay GH¢10,000.00 as deposit as a working capital".*

and the totality of the above pieces of evidence, I am of the firm conviction that, on a balance of probabilities, the amount of GH¢10,000.00 paid by the plaintiff's to the defendants, in real terms was a security deposit and not a working capital as erroneously described in the lower courts.

Ordinarily any balance that has been adjudged as due and owing the defendants by the plaintiff's has to be deducted from this security deposit and the balance paid over to the plaintiff's.

However, considering the unsatisfactory nature of the way the learned trial Judge handled this question and the conduct of the defendants in unilaterally using the extra amount of GH¢4,930.00 paid by plaintiff's to defendants to set off their debts, I am of the view that, the plaintiff's are therefore entitled to a full refund of this amount of GH¢10,000.00 from the defendants.

This therefore leaves me with the resolution of the last issue 2.

ISSUE 2

Whether or not the award of GH¢6,000.00 by the learned trial Judge and confirmed by the Court of Appeal is inadequate and should be enhanced by this Court.

If as was duly recognized by the learned trial Judge, the plaintiff's were able to discharge both the burden of proof and standard of proof on balance of probabilities, in respect of relief (5) claimed by the plaintiffs then it appears the award of GH¢6,000.00 as general damages is on the low side.

In this case the learned trial judge referred to the case of ***Majolagbe vrs Larbi and others***, already referred to supra. In that case, Ollenu J, as he then was reiterated an earlier principle stated in ***Khoury and another vrs Richter*** (unreported) which stated thus:

> *"Proof in law is the establishment of facts by proper legal means where a party makes an averment capable of proof in some positive way, e.g. by producing documents, description of things, reference to other facts, instances, or circumstances and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on oath, or having it repeated*

on oath by his witness. He proves it by producing either evidence of facts and circumstances, from which the Court can be satisfied that what he avers is true."

In this case, apart from the evidence of the plaintiff's representative, the exhibits already referred to supra were also tendered into evidence. In my estimation, the learned trial Judge should have considered the effect of some of the exhibits in relation to the damages she awarded to the plaintiffs.

I have also considered the authorities referred to by the plaintiffs and defendants on the issue of the assessment of damages.

In sum, I am of the view that an appellate court, such as this court must consider the following principles whenever the issue of inadequacy or excessive nature of an award has arisen. These are:-

a. That the Judge acted on some wrong principles of law.

b. That the amount awarded was so extremely high or so very small as to make it, in the judgment of this (Court) an entirely erroneous estimate of the damage to which the plaintiff is entitled."

In this appeal, exhibit B, which was tendered by the Plaintiffs, constitutes the sales volume of Shell Service Stations in Ghana in order of performance for 1998.

From the exhibit B, the plaintiff's station at the time was the 5th best performing station with total sales for the period of January – June (6 -month period) recording ¢3,245,915 in today's currency GH¢324.59.

If one considers the price of fuel or petroleum products at the time and the volume of sales as was captured in that exhibit, and considering also the fact that the 1st best performing service station clocked ¢4,468,500 in Ghana cedis GH¢446.85, it means that the plaintiffs must have been in good business.

Exhibit B, should not be considered in isolation. Other factors like the amount of GH¢10,000.00 which the plaintiff's are admitted to have invested into the business with the additional investment of GH¢4,930.00, then it meant that not only was the business one that involved huge movements of funds, but also was a fast moving commodity as the monthly returns in exhibit B have indicated.

It is again apparent from exhibit G, the police report on the armed robbery attack at the plaintiff's station on 8/7/1999 at 3.30am that an amount of ¢22,645 and ¢339.00 in Ghana cedis GH¢2.67 and GH¢0.04 were stolen on that particular day.

This is just to indicate the volume of sales and monies that the plaintiff's were making before the termination of the contract.

From the above analysis, it is quite clear that the Judge did not consider any of the above factors before the grant of the award.

Secondly, considering the analysis that has been made in respect of the business fortunes of the plaintiff's at the material time before the termination, the award of GH¢6,000.00 should be considered as woefully inadequate and not consistent with what they have lost as a business entity.

However, it must also be stated that, the plaintiff's could have done better by giving further and better particulars indicating details of their margins by way of commission from the defendants. If that had been done the court would have been placed in a better position to assess the loss that the unlawful termination has caused the plaintiffs.

Considering all these issues, I will enhance the general damages awarded the plaintiffs from GH¢6,000.00 to GH¢10,000.00 as the adequate compensation due plaintiffs in terms of damages. This is because by the unilateral action of the defendants in terminating them, plaintiff's have completely lost on their investment and future earnings.

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

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