IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA – AD 2012

CORAM: W. ATUGUBA, J.S.C. (PRESIDING)
S. DATE-BAH, J.S.C.
S. ADINYIRA (MRS), J.S.C.
J. DOTSE, J.S.C.
S. GBADEGBE, J.S.C.

CIVIL APPEAL,
No. J4/18/2012

15TH MARCH 2013

JUSTICE ESSUMAN
H/NO. H7A, ATOMIC HILLS
ESTATE ASHONGMAN
ACCRA … PLAINTIFF/APPELLANT/RESPONDENT

VRS

AUTO PARTS LIMITED
ACCRA … DEFENDANT/RESPONDENT/APPELLANT

JUDGMENT

SOPHIA ADINYIRA (MRS.) JSC:

On 5th March 2013, this Court dismissed the appeal by the Defendant/Respondent/ Appellant and reserved its reasons to be filed later. These are the reasons.

FACTS

The Plaintiff/Appellant/Respondent (hereafter the Plaintiff) was a former employee of the Defendant/Respondent/Appellant (hereafter Defendant). Plaintiff claims the Defendant has neglected to pay him agreed commission on contracts he won for the Defendant. He therefore brought an action against the Defendant in the High Court, Accra seeking the following reliefs:

1. (a) payment of 2,544,847 Japanese Yen

   (b) US $16, 043.85

   (c) 394,322.00 Cedis

Being commission due and owing to Plaintiff by the Defendants.

2. Interest at the prevailing bank rate

3. Damages for breach of contract and

4. Costs

Plaintiff claims he was employed as a sales manager in August 1995 by the Defendant. A month after his employment with the Defendant, he was asked by the company, through its Executive Director to actively canvass for and win contracts for the Defendant. This agreement was made orally. Initially the remuneration was 1% of the contract sum but it was subsequently renegotiated and reduced to 0.8%.

Plaintiff claims that this additional duty involved, among others, searching for tenders, preparing and submitting bid documents, following up on bidding applications to ensure their success, and ensuring prompt payments for contracts won for the Defendant.

It is the case of the Plaintiff that he was able to win 34 contracts for the Defendant and relied particularly on Exhibit D in support of his claim. He claims that between 1995 and 2001 the commission due to him on these contract awards had accumulated to 2,564,350.48 Japanese Yen, US $ 19,948.46 and 21,594,321.88 Cedis.

Plaintiff claims after repeated demands and following his resignation from the company, the Defendant made seventeen part payments totaling 51 million Cedis for which he issued receipts. Plaintiff contends that the last payment of 3,000,000 Cedis was made on 12th November, 2002.

The Defendant denied the Plaintiff's claim and contends that though the Plaintiff was a sales manager in the company, they never entered into any such special agreement with him and that the Plaintiff was never on commission and was at all times a salaried worker. It is their case that as part of his schedule, he was given tender documents to be presented on behalf of the company and was remunerated by way of a monthly salary.

The Defendant contends further that the extra monies that were given to the Plaintiff were only tokens given to many other hardworking employees to encourage them. Even though the Defendant agrees that the Plaintiff upon leaving the company made persistent demands on them, they deny paying any sums of money pursuant to those demands and also deny being indebted to him.

The findings by the trial judge were that apart from being a sales manager the Plaintiff was given additional duties to bid for contracts and to be paid commission on the bids won.; and that the Plaintiff who was on a salary of less than 1 million Cedis per month was paid an amount of 27 million Cedis in installments of 3 million each, on nine separate occasions while he was in the Defendant's employment; and these extra payments were not tokens but represented commissions or part payment for commissions due to the Plaintiff. The High Court also held Exhibits D and E reflected the tenders and payments respectively.

The High Court however held that looking at Exhibit D; 20 of the tenders were made on behalf of the Defendant by other companies namely Nichimen, Nissan Trading and Sumitomo.

Judgment was therefore given to the Plaintiff for 14 out of the 34 contracts claimed. The Plaintiff brought an application to the High Court for a review of its judgment but the application was refused.

An appeal to the Court of Appeal by the Plaintiff however proved successful. The Court of Appeal held unanimously that the Plaintiff had proved its claim on all 34 contracts and that the High Court erred in its evaluation of the evidence contained in Exhibit D. The Court of Appeal held that:

> 'The error of the trial Court appears to be that it read supplier on Exhibit D as indicating the person who worked on the tender and since the Appellant was working for the

> Respondent company, Auto Parts, the Appellant was credited with tenders listed as having been supplied by Auto Parts, while he was denied credit for tenders listed as having been supplied by Nichimen, Nissan Trading and Sumitomo."

The Court of Appeal was of the view that:" [T]he roles those companies are shown on Exhibit D to have performed in the transaction in issue are those of suppliers of products that had been tendered for; not those of winners of tenders for the Respondent;" and it was erroneous for the Court to deny the Plaintiff credit for tenders listed in Exhibit D as having been supplied by Nichimen, Sumitomo and Nissan Trading.

The Defendant being dissatisfied appealed to this Court on the grounds that:

a. That the judgment is against the weight of evidence
b. That the learned justices of the Court of Appeal erred when they held that the Appellant operated as an agent in Ghana for Nichimen Corporation and Sumitomo Corporation when same was not the case of the Respondent by the pleadings and evidence on record.
c. That the learned justices of the Court of Appeal erred in their evaluation of Exhibit. D when they held that the Respondent has successfully worked on and won 34 tenders for the Appellant when in fact the said Exhibit. D did not mention the Respondent as having won the tenders for the Appellant.
d. That the learned Justices of the Court of Appeal erred in their evaluation of Exhibit D when they treated the supplier column on Exhibit. D as the tenders won by the Respondent when in fact only 14 products were supplied by the Appellant on Exhibit D.

The Defendant argued ground b first to wit:

That the learned justices of the Court of Appeal erred when they held that the Appellant operated as an agent in Ghana for Nichimen Corporation and Sumitomo Corporation when same was not the case of the Respondent by the pleadings and evidence on record

The Defendant submits that the judgment of the Court of Appeal sins against the principle of law established by the Supreme Court in *Dam v Addo* [1962] GLR 200, SC that:

> "A court must not substitute a case *propio motu*, nor accept a case contrary to or inconsistent with that which the party himself puts forward whether he be plaintiff or defendant."

The Defendant contends the Court of Appeal *propio motu* introduced and made findings that the Plaintiff was an agent for Nichimen and Sumitomo Corporations when same has not been pleaded by the Plaintiff and the Defendant had not had the opportunity to adduce evidence to meet. The Defendant contends the Court of Appeal erred in that regard.

The Defendant submits that they were principals for whom Nichimen and Sumitomo worked and not the other way round. The Defendant concludes that it was not possible for the Plaintiff to claim on work done by other agents, especially when he had not established any contract between himself and those agents.

Plaintiff submits that the issue of the relationship between Auto Parts (Defendant) on the one hand, and the Japanese companies Nichimen and Sumitomo on the other, as agent and principal respectively, was raised by Defendant's counsel in support of the Defendant's case. The Plaintiff illustrated this point by references to the record.

Cross-examination of Plaintiff by Defendant at pages 74 to 75 of the record of appeal:

Q. And that before you were employed by Auto Parts, Auto Parts was in the business of tendering jobs.

A. My Lord, Auto Parts was in the business of tendering. In my previous employment, I was doing it for them. Nichimen Corporation was the only principal for them in doing tenders. So all the communication to and from the principals abroad were channeled through Nichimen Corporation. So at that time, I handled it and when I came and later on they called me to continue for them

Evidence in Chief of Defendant's representative at page 100:

Q. So this job of submitting tenders has Essuman being (sic!) the only one involved?

A. No my Lord

Q. Can you tell us who else?

A. Before him [Plaintiff], there were companies like Nichimen and later on Sumitomo also did this job on behalf of Auto Parts.

Q, Can you explain why these companies, Nichimen for example was doing a job like that for Auto Parts?

A. Yes my Lord, Nichimen at that time we held the franchise for Japanese products in Ghana and represented all the products that comes in from Japan to Ghana. So any time there was a tender, this company went in submitted the tender documents on behalf of the various agencies and organizations that dealt in Japanese products and if they won the tender, in this particular case Auto Parts, Auto Parts will supply the vehicles.

From the above illustration it is clear that the evidence complained of was drawn from the Plaintiff in cross-examination, and also given by the Defendant in his evidence in chief. It is now trite learning that evidence of unpleaded facts which had been let in without objection are part of the evidence to be considered in the overall assessment of the case in the light of the effect of section 6 (1) of the *Evidence Act*, 1975, NRCD 323 that provides:

"Section 6

Objection to evidence

1) In an action and at every stage of the action, an objection to the admissibility of evidence by a party affected by that evidence shall be made at the time the evidence is offered."

The Supreme Court in *Nasser v. McVroom* [1996-97] SCGLR 468 in considering the same issue unanimously held per Acquah JSC (as he then was) in holding (1) that:

> "If a party failed (as required by the Evidence Act, 1975, NRCD 323, section 6 (1) to object to the admission of evidence which in his view ought not be led, he would be precluded by section 5 (1) of the Decree to complain on appeal or review about the admission of that evidence unless the admission has occasioned a substantial miscarriage of justice. Factors helping to determine whether or not a substantial miscarriage of justice had occurred have been set out in section 5 (2). Consequently, where evidence in respect of an unpleaded fact had been led without objection, the trial court was bound to consider that evidence in the overall assessment of the merits of the case, unless the evidence was inadmissible per se. An appeal or a review against the judgment might succeed only

where it was established that the admission had occasioned a substantial miscarriage of justice."

See also *Atta v. Adu* [1987-88] 233 at 238, *Quashie v. Boahema* [1987-88]727 at 733 and *In Re Okine (Decd); Dodoov and Another v.Okine* and Others [2003-2004] SCGLR 582, pages 611 to 613.

Even in this case before us there is no question of 'evidence in respect of an unpleaded fact that had been led without objection' or a breach of the principle in Dam v. Addo, as the evidence was led by the Defendant himself. It is an unfortunate commentary on the conduct of Counsel for the Defendant to raise a ground of appeal in this form. In our view the Court of Appeal was duty bound to consider that evidence in the overall assessment of the case and make the necessary inference which may as in this instance differ from that of the trial judge. And that a Court seized with an appeal had the duty of evaluating the entire evidence adduced at the trial to ascertain whether a particular finding of fact made by the trail judge was supported by the evidence adduced at the trial. The evaluation of the evidence on record done by the Court of Appeal cannot be faulted.

The court of Appeal in the evaluation of the evidence that there was an agency relationship between the Defendant and Nichimen and Sumitomo Corporations, held that, up to the middle of 1995, the business relationship was for the tendering of bidding documents for the supply of Japanese vehicles whereby Nichimen and Sumitomo Companies acted as the agents of the Defendant to do the bidding on its behalf. At that time, the Plaintiff who was then in the employment of Nichimen did the bidding on behalf of Nichimen and Sumitomo Corporations and was paid on commission for it. It was when Nichimen left Ghana that the Defendant employed the Plaintiff to carry on with the tendering of bidding documents for it. With the departure of the two companies from Ghana their roles changed. The business relationship between the parties was for the supply of cars; the Defendant distributing Japanese vehicles and products in Ghana as agents of Nichimen and Sumitomo Corporations who supplied them. The Court of Appeal came to this conclusion on the basis that:

"And as the Plaintiff stated during his examination in chief, Exhibit D contains among other things, details as to the products tendered for, the purchasers of the products, the

quantity purchased, and the suppliers of the products . As observed above, in the tendering transactions, the subject matter of this appeal, the roles played by the various participants were distinct, and on Exhibit D, where Nichimen Corporation, Nissan Trading and Sumitomo Corporation appear, they appear in the supplier column. To my mind, their appearance in the supplier column simply means that when the Respondent won the tenders concerned, it was the said companies that supplied the products involved and this should not come as a surprise-the Respondent was the agent of Nichimen and Sumitomo, and Sumitomo had a business relationship with Nissan." [Emphasis mine]

From the foregoing we hold that the Court of Appeal did not introduce the issue of agency but rather based its findings on evidence produced by the Defendant in the cross-examination of the Plaintiff and by the Defendant in his own examination in chief. The Court of Appeal was under a duty to evaluate the entire evidence adduced at the trial and to make the appropriate findings. We find no reason to overturn these findings as they are adequately supported by the evidence on record. This ground of appeal is dismissed.

The Defendant argued grounds a, c and d together.

a. **That the judgment is against the weight of evidence**
c. **That the learned justices of the Court of Appeal erred in their evaluation of Exhibit D when they held that the Respondent has successfully worked on and won 34 tenders for the Appellant when in fact the said Exhibit. D did not mention the Respondent as having won the tenders for the Appellant.**
d. **That the learned Justices of the Court of Appeal erred in their evaluation of Exhibit D when they treated the supplier column on Exhibit D as the tenders won by the Defendant submits that Exhibits D, E and F were self-serving and after thoughts prepared to mislead.**

Under these grounds of appeal the Defendant submits that the erroneous finding by the Court of Appeal that the Defendant was the agent for Nichimen and Sumitomo in Ghana when there was no such evidence to that effect led the Court of Appeal to erroneously treat the suppliers column on Exhibit D as tenders won by the Plaintiff.

The Defendant reiterates his submission that the relationship between the Appellant and Nichimen and Sumitomo was one for tendering of bidding documents (as noted by the trial judge) and not one for the supply of vehicles (as noted by the Court of Appeal).

The Defendant submits further that the Plaintiff did not lead evidence at the trial to show that all 34 contracts on Exhibit D were actually supplied by The Defendant. It is their case that Exhibits D, E and F were self-serving and after thoughts prepared to mislead.

Plaintiff submits that the case initially presented by the Defendant was that the Plaintiff was not entitled to any commission. However, defendant changed position after the judgment of the trial court to the stance that that the Plaintiff was entitled to claim on only 14 of the contracts. Plaintiff submits that the Defendant led no evidence to the effect that Nichimen and Sumitomo companies continued to do the tender business for the Defendant after they left Ghana. Plaintiff submits further that Exhibit D was not challenged by Defendant's counsel under cross examination, which amounts to admission of the facts therein.

We do not find any merit in these submissions by the defendant in support of these grounds of appeal, as we have found that there was sufficient evidence on record to support the conclusion made by the Court of Appeal that Defendant was the agent for Nichimen and Sumitomo after they left Ghana. Even though he submits that Exhibit D and E were self –serving the only objection the Defendant raised to the tendering of Exhibit D was that it was unsigned. We also note that the Defendant did not seriously challenge the entries made in Exhibit D and did not demand explanations on the contents. Both the trial and appellate courts considered their contents to be credible and made findings in favour of the Plaintiff.

It is appropriate to comment here that we find it strange that, the Executive Director of the Defendant, Mr. Accad, whom the Plaintiff claimed entered into an oral contract with him on behalf of the Defendant, was not called as a witness even though he was available and was originally made 2nd defendant in the action but was removed. The Defendant rather relied on Mr. Minka-Premo; the Human Resource Manager of Auto Parts, to give evidence on matters which took place before he was employed in the company and after the Plaintiff has left the company.

Furthermore we find that the Court of Appeal fully appreciated the distinct roles played by the various persons or entities indicated on Exhibit D. We note that the word "Supplier" as it appears on Exhibit D is not a term of art which should lend itself to other interpretations. "Supplier" simply and unambiguously means that the entity or company that supplied the goods described in column 2 of Exhibit D; and not the person or entity that worked on the tenders and won the contracts for Defendant.

In the circumstances, the Court of Appeal correctly held that:

> "It is reasonable to expect that when contracts or tenders are won by or for the Respondent, the Respondent as local distributor, will supply the products from its stock and that if it is out of stock it will look up to its principals or other entities for the supply of the products. I do not therefore see how the appearance of Nichimen and Sumitomo or Nissan as suppliers calls for an explanation regarding tendering. The claim Exhibit D seems to me to be making is that between December, 1995 and April 2001, the Appellant successfully worked on 34 tenders for the Respondent; that the tender were for the supply of the products specified in the description column; that the purchasers were the ministries or organizations or companies specified in the purchaser column; that the products purchased were supplied by the companies specified in the supplier column; that the contract prices were as specified in the contract price column and that by winning the tenders contained in the exhibit, a right accrued to the Appellant to be paid the commissions specified in the 0.8% commission column."

The Defendant submit further that the Court of Appeal erred in their evaluation of Exhibit D when they treated the supplier column on Exhibit D as the tenders won by the Defendant when in fact only 14 products were supplied by them on Exhibit D

We reject this submission as according to the evidence the Plaintiff put in bids in respect of over 100 contracts on behalf of the Defendant out of which 34 were successful. These bids included uncompleted ones he came to meet at the time he was employed by the Defendant. As the Plaintiff submitted, the Defendant led no evidence to the effect that those two Japanese companies continued to do the tender business for them after they left Ghana. It is in the supply of the products that the Defendant supplied 14 of them. The rest were supplied by Nichimen and Sumitomo and Nissan companies.

We recall that under the commission agreement with the Defendant, the Plaintiff was only obliged to canvass and win contracts for the Defendant. We agree with the Court of Appeal that the:

> "[T]he Appellant's claim is based on his successful canvassing for tenders for the Respondent and if, for any reason, the Respondent turned over the supply of the products

or any of them to other companies, that was entirely the choice of the Respondent and it did not and should not affect the Appellant's right to be paid his commission".

From the foregoing we hold that the Defendant is an agent of Nichimen Corporation and Sumitomo Corporation in the supply of Japanese cars in Ghana; the supply column in Exhibit D represents tenders won by the Plaintiff on behalf of the Defendant. The Plaintiff is therefore entitled to the commission on the 34 successful tenders.

Accordingly the appeal is without merit and is hereby dismissed. The judgment of the Court of Appeal is hereby affirmed.

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

(SGD) W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

(SGD) DR. S. K. DATE BAH
JUSTICE OF THE SUPREME COURT

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

(SGD) N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

COUNSEL

ERIC MICHAEL NARH (WITH HIM ISAAC OBENG) FOR THE DEFENDANT/ RESPONDENT/ APPELLANT.

KWAKU GYAWU BARFOUR FOR THE PLAINTIFF/APPELLANT/RESPONDENT