IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT OF GHANA

ACCRA, GHANA – A.D. 2014

CORAM: ATUGUBA, J.S.C(PRESIDING)
ANSAH, J.S.C.
ANIN YEBOAH, J.S.C.
BAFFOE BONNIE, J.S.C.
AKOTO BAMFO (MRS), J.S.C.

CIVIL APPEAL
NO. J4/4/2014

13TH NOVEMBER, 2014

SEBASTIAN D.N.K. GAVOR
H/NO. B/NG613
NEW GBAWE
ACCRA ----- PLAINTIFF/RESPONDENT/APPELLANT

VRS.

BANK OF GHANA
HIGH STREET
ACCRA ----- DEFENDANT/APPELLANT/RESPONDENT

JUDGMENT

ANIN YEBOAH JSC.

On the 13/11/2014, we dismissed the appeal in this matter and affirmed the judgment of the Court of Appeal, Accra. We now proceed to offer our reasons for the dismissal of the appeal.

The appellant herein was at the time material to this action a senior officer at the Bank of Ghana as the Director of Budget and Accounts. The facts giving rise to this action appear not to be in any serious controversy. On the 5th of May, 2000, the appellant was dismissed from the services of the respondent for his alleged involvement in a fraudulent withdrawal of US$1,500,000.00 from the respondent bank.

Upon his dismissal the appellant was handed over to the Bureau of National Investigations for investigations into the role the appellant played in the withdrawal of the said amount. After completion of the investigations, the Bureau of National Investigations presented its findings to the Attorney-General's office and the appellant was arraigned before the Greater Accra Regional Tribunal, and with three others were charged with the offences of: conspiracy to commit crime; namely causing financial loss to the state contrary to sections 23(i) and 179 A (3) (a) of the Criminal Code Act 29 of 1960 and causing Financial loss to the State, contrary to section 179 A (3)(a) of the Criminal Code Act 29 of 1960. On the 13th of August 2002, the appellant was acquitted and discharged after a lengthy trial.

Soon after his acquittal the appellant's solicitors wrote to the respondent informing them of his acquittal and made a demand for the payment of all his salaries and other entitlements that had been withheld when the criminal case

was pending at the Greater Accra Regional Tribunal. This demand from the appellant was met with a refusal by the respondent and on 23/09/2002 the appellant commenced this action against the respondent for the reliefs endorsed on the writ of summons as follows:

I. "A declaration that his dismissal from the employment of the defendant was wrongful and in contravention of the provisions of Article 191(b) of the Constitution 1992.

II. An order for the payment to plaintiff of all his salaries from 5th May 2000, to the date of final judgment.

III. An order for the payment of three month's salary in lieu of notice.

IV. An order for the payment of plaintiff's entire end of service benefits calculated up to the date of final judgment.

V. Damages for prospective loss of promotion and loss of employment.

VI. General damages for wrongful dismissal.

VII. Interest on (ii) and (iii) calculated at the prevailing bank rate from 5th May 2000 to date of final judgment.

VIII. Any other order or orders as this honourable Court may deem fit.

The respondent in its statement of defence in answer to the averments in the statement of claim denied all the material facts supporting the reliefs sought. The respondent contended that the appellant was dismissed due to the fact that he and others were responsible for the serious financial loss which was the subject matter of the prosecution. Further, it was contended that the acquittal of

the appellant did not exonerate him from liability for the loss of the amount of US$1,500,000.00. According to the respondent, it constituted a Disciplinary Committee to conduct investigations into the loss of the amount and there was evidence before the committee to support the finding that there was, indeed, gross negligence of duty and misconduct on the part of the appellant which led to the loss of the amount of US$1,500,000 and his ultimate dismissal.

From these rival averments the issues set down in the application for directions were as follows:

1. Whether or not the plaintiff's dismissal was unlawful
2. Whether or not the plaintiff is entitled to the reliefs sought
3. Whether or not the plaintiff was negligent
4. Whether or not plaintiff acted or performed or purported to carry out functions that did not fall within his purview
5. Whether or not plaintiff and his colleagues caused financial loss to the defendant
6. Whether or not the defendant can hold the plaintiff and others liable for the loss incurred by the defendant
7. Whether or not the defendant can invoke Article 13(b) of the defendant's Officials Rules and Conditions of Service.

We have taken the usual step as a second appellate court to state the issues set down at the application for directions for obvious reasons. It must be pointed out that in the judgment of the trial court, the learned trial judge, with due respect, took a step contrary to the basic principles of settled practice in civil jurisprudence by totally ignoring the issues set down by the parties and resorted

to setting down his own issues on which he based his judgment. This was what His Lordship said in the judgment at the High Court:

> "In the view of the court, therefore, the real issues that arise from the pleadings and which this court has adopted for determination are the following;
>
> 1. Whether or not the plaintiff was a co-beneficiary of the dishonoured cheque that occasioned the withdrawal of the $1.5 million.
> 2. Whether or not the plaintiff was notified of the constitution of a Disciplinary Committee to investigate the circumstances leading to the withdrawal of the $1.5 million, and if yes, whether or not he was given a fair hearing before the said committee.
> 3. Whether or not the letter written by the plaintiff to the Head of Banking Division of the defendant bank dated 25th April 2000 admitting errors of judgment on his part operates as estoppels against him from challenging the basis of his dismissal.
> 4. Whether or not plaintiff's dismissal under Article 13(b) of the defendant's Official Rules and Conditions of Service was wrongful and therefore unlawful under the circumstances.
> 5. Whether or not plaintiff is entitled to his claim or any of the reliefs claimed under it.

It should be noted that all the above issues set down by His Lordship were clearly different from what the parties themselves had put forward from their

pleadings and which the learned judge had himself adopted as issues for determination.

This procedure is clearly contrary to settled practice in our adversarial system of Justice. In the case of BLAY v POLLARD & MORRIS [1930] I KB 628, 634 Scrutton L.J condemned such practice and said;

> "Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case, the issue on which the judge decided was raised by himself without amending the pleading, and in my opinion he was not entitled to take such a course"

Apaloo JA (as he then was) in the case of BENNEH v THE REPUBLIC [1974] 2 GLR 47 CA [Full Bench] said at page 94 as follows:

> "For the court itself to raise this issue and found a conclusion on it, even in part, would hardly conform to our conception of the role of a judge in our adversary system of administering justice as an umpire in a dispute. Such appellate decisions as OLOTO v WILLIAMS [1944] 10 WACA 23, DAM v ADDO [1962] 2 GLR 200 SC, ODOI v HAMMOND [1971] GLR 132 CA and the English decision of ESSO PETROLEUM CO LTD v SOUTHPORT CORPORATION [1956] AC 218 HL, counsel a court against founding a conclusion on an issue not raised or canvassed by the parties or pronouncing for a party on a case inconsistent with the one he put up"

This irregular step taken by the learned judge was righted on appeal when the respondent herein complained bitterly against the conduct of the learned trial

judge in adopting such a course. This was what the Court of Appeal per Justice Richard Apaloo said:

> "In my view the learned trial judge went astray by the rulings on those issues. The effect of those rulings or decisions on the two key issues by the trial judge is that he completely failed to deal or adequately deal with the case of the defendant"

The Court of Appeal, however, proceeded to evaluate the evidence on record and eventually reversed the judgment of the High Court and entered judgment for the defendant, who is the respondent herein. The appellant herein appealed to this court after the Court of Appeal had allowed the appeal and dismissed his cross-appeal. Before this court, the appellant has filed several grounds of appeal to seek the reversal of the judgment of the Court of Appeal and allow his cross-appeal, which was dismissed by the Court of Appeal.

The grounds of appeal on record are as follows:

a) The judgment is against the weight of evidence.
b) The Court of Appeal erred when it failed to consider the Appellant's case on appeal
c) The Court of Appeal erred when it substituted its findings of fact and evidence for those of the trial judge.
d) The Court of Appeal erred in its interpretation of the import and effect of exhibit 8 relied on by the respondent.
e) The Court of Appeal erred when it dismissed the appellant's cross-appeal.

Learned counsel for the appellant who on record put a lot of industry into the preparation of the statement of case for the appellant argued grounds (a) (b)

and (c) together. Whilst appreciating that the law was settled that an appellant who appeals on the grounds that the judgment is against the weight of evidence assumes the burden of showing from the evidence that it was in fact so, he sought to urge on this court on the authority of BONNEY v BONNEY [1992-93] GBR 779 SC to submit that the Court of Appeal ought not under any circumstances interfere with the findings of fact made by the trial judge save when it could be clearly established that the trial judge was wrong. Further reliance was placed on NTIRI v ESSIEN [2001-2002] SCGLR 451 and IN RE YENDI SKIN AFFAIRS II YAKUBU II v ABDULAI [1984-86] 2 GLR 239.

It appears that learned counsel for the appellant has over-simplified the principles enunciated in the cases cited above if the principle is applied to this case. This case was not based on the demeanour of witnesses before the trial court. The case before the trial court was documentary in nature. The mass of documentary evidence on record out of which the Court of Appeal drew its own inferences and set aside the findings of the trial judge was not against the principle of law that appeals are by way of re-hearing.

Indeed the Court of Appeal rules, Rule 8 of CI 19 of 1997 has given statutory backing to this principle. See AFRICAN AUTOMOBILE LTD v TEMA OIL REFINERY [2011] 2 SCGLR 907 and AMOAH v LOKKO & ALFRED QUARTEY [substituted by) GLORIA QUARTEY [2011] ISCGLR 505.

Another serious attack on the judgment of the Court of Appeal was that it set aside the findings of the trial court when it concluded that the trial judge had erred in holding or finding that the appellant was not giving any hearing and therefore the committee set up to investigate the matter against the appellant

flouted the audi alteram partem rule. Counsel's argument in support of this ground was that primary findings of facts had been made by the learned trial judge and as the facts were amply supported by the evidence the Court of Appeal fell into serious error by setting aside these findings. He proceed to cite several authorities to support his contention that basic findings of facts made by a trial court ought not to be disturbed by the appellate court.

As pointed out earlier in this delivery, the case turned on documentary evidence which offered the Court of Appeal to draw its own inferences from the facts on record. However, this point can be disposed of by resort to the several exhibits on record. Exhibit "G" is the comprehensive Report of the The Committee Appointed by Management to Investigate The Fraudulent Encashment of Us$1,500.00 from Bank of Ghana which catalogued the events leading to the fraud perpetuated against the respondent herein.

Another exhibit worthy of consideration is Exhibit 8 which the appellant himself voluntarily wrote to the Head of the Banking Department of Bank of Ghana. In Exhibit 8 the appellant confessed his guilt and rendered an apology for the "serious lapse of good judgment" when he failed to protect the respondent from huge financial loss. This letter was dated the 25th of April 2000. The committee which turned out Exhibit "G" was purely an internal administrative one which was set up to investigate the allegations of the fraudulent conduct of the appellant and the presenter of the cheque. It was to investigate and make recommendations to the Board of Directors to unearth the circumstances leading to the fraud. The appellant was, however, contacted by the committee. His assertion that under Article 13 (b) of Exhibit "10" which is the Officers' Rules and

Conditions of Service (Bank of Ghana) he was denied hearing cannot be true. Article 13 (b) states thus:

> "The Bank may without notice or with salary in lieu of notice dismiss an officer on any of the following grounds;
>
> 1. Dishonesty
> 2. Fraud
> 3. Willful refusal to obey legitimate and reasonable instructions
> 4. Gross misconduct
> 5. Gross negligence of duty"

If Exhibits "A", "B" and "C" are read together, it would become clear that the conduct of the appellant fell squarely within Article 13(b) of Exhibit "10" which empowers the respondent to dismiss any employee whose conduct runs counter to the provisions of the said article. The contention that the audi alteram partem rule was flouted is clearly not supported by the evidence on record.

It must also be made plain that the common law reserves the right to dismiss an employee for proven misconduct. This court in BANI v MAERSK GHANA LTD [2011] 2 SCGLR per Date-Bah JSC said at page 813 as follows:

> "In ABOAGYE v GHANA COMMERCIAL BANK [2001-02] SCGLR 797 at 828-831, Adzoe JSC correctly expounds the common law position on summary dismissals. He said at 828-829;
>
> But it has been argued that the conduct of the plaintiff, viewed in the context of the nature of the business of banking, constitutes such a grave misconduct that it was lawful to dismiss him even without a hearing.

The case of LEVER BROS GHANA LTD v ANNAN [1989-90] 2GLR 385, PRESBYTERIAN CHURCH AGOGO v BOATENG [1985-86] 2 GLR 523; EDWARD NASSER & CO LTD v ABU JAWDI [1965] GLR 532; HALSBURY'S LAWS OF ENGLAND (3rd ed) at page 485, paragraph 938 were cited in support. The principle relied on is this;

> "A servant whose conduct is incompatible with the faithful discharge of his duty to his master may be dismissed ….Dismissal is also justified in the case of a servant ….If his conduct has been such that it would be injurious to the master's business to retain him"

It therefore follows that an employee like the appellant herein, (a senior officer of the nation's central bank) to have grossly misconducted himself resulting in huge financial loss of US$1,500,000.00 cannot complain of lack of fair hearing it he was found clearly culpable by an investigative committee set up to investigate the circumstances leading to such loss. This has been so held in several cases in this court and this court has always upheld this basic common law principle. Nothing has been urged on us to depart from this time-honoured principle which we find as sound proposition of law.

The appellant's own confession that there was "serious lapse of good judgment" leading to the loss of such a huge amount of money is clearly condemnable. In the case of AWUKU-SAO v. GHANA SUPPLY COMPANY LTD [2009] SCGLR 710 this court in dealing with what fair hearing means in disciplinary proceedings involving summary dismissals settled the law beyond doubt when it held as follows:

"The court would affirm the decision of both the High Court and the Court of Appeal that in the absence of any requirement in the service contract between the plaintiff and the governing board of the defendant company for the setting up of a disciplinary proceedings, what was essential for determination was whether the plaintiff had been given an opportunity to react to the charges laid against him. The court would therefore hold that if the plaintiff had been given a chance to answer to the charges even if not directly to the governing board or a body set up by it, that should satisfy the requirements of natural justice"

As it is not in dispute that the appellant was offered an opportunity to explain his involvement in the huge financial loss to the respondent, the Court of Appeal felt that this requirement of fair hearing was satisfied. Another case worthy of consideration is LAGUDAH v GHANA COMMERCIAL BANK LTD [2005-06] SCGLR 388 which seeks to lay down the same principle of fair hearing in matters of misconduct resulting in dismissal of an employee by an employer.

We were of the view that the appeal had no merits and we accordingly proceeded to dismiss same on 13/11/2014 and reserved our reasons.

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

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

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE BONNIE
JUSTICE OF THE SUPREME COURT

(SGD) V. AKOTO BAMFO (MRS)
JUSTICE OF THE SUPREME COURT

COUNSEL

CHARLES HAYIBOR ESQ. FOR THE PLAINTIFF/RESPONDENT/APPELLANT.

NUTIFAFA NUTSUKPUI ESQ. **(WITH MISS YVONNE AKUFO-ADDO AND JOEL ANNOR AFARI)** FOR THE DEFENDANT /APPELLANT/RESPONDENT.