IN THE SUPERIOR COURT OF JUDICATURE
IN THE HIGH COURT OF JUSTICE (COURT '1') HO THIS MONDAY 14 NOVEMBER 2022 BEFORE JUSTICE GEORGE BUADI, J.

CASE NO. F22/37/2022

REPUBLIC	}	…….	RESPONDENT
Versus			
REV. DR. PRINCE DUGAH	}	…….	ACCUSED/APPELLANT

CRIMINAL APPEAL

1 Background

The appellant herein, the Executive Director of a corporate entity - Fish Farmer Brigade Ltd is facing a criminal trial at the Circuit Court, Ho on charges of having issued a dud cheque. After the close of the prosecution's case, the trial court directed the appellant to open his defence to the action. Dissatisfied with the decision of the court dated 16 July 2020 that directed him to open his defence, the accused filed this appeal against the decision. The decision was not a final order of the court on the matter; it is thus an interlocutory order. I find that the appeal was filed within time pursuant to the Criminal & Other Offences (Procedure) Act, 1960 (Act 30) s. 326.

The complainant in the case PW1 is a retired nurse, whilst the accused-appellant is a clergyman and managing director of Fish Farmer Brigade Ltd, a tilapia farming Investment Company at Juapong. During the year 2010, the complainant became aware of the tilapia venture through radio and television adverts. She developed an interest in the venture and so attended seminars organized by the company in

Accra, after which she became convinced and therefore invested various sums of money totalling GH¢40,000 for 100% returns. When the investment matured, the complainant upon demand was, on 15 May 2012, issued with an ADB Cheque No. NAT FISH FARMERS BRI 100039274019 by the company with the face value of GH¢40,000. The cheque was endorsed and co-signed by the appellant. Barely three weeks after receipt of the check, the complainant on 4 June 2012 went to the ADB Independent Avenue Branch, Accra with the intent to cash the cheque only to be told by the bank that the account holder did not have funds in the account.

Seven years later – that is on 4 June 2019 - the accused/appellant was arraigned before the Circuit Court Ho on charges of having issued a dud cheque contrary to the Criminal Offences Act, 1960 (Act 29) s. 313. Particulars of the charge sheet at the trial Circuit Court reads, thus:

> REV. DR. PRINCE DUGAH (55 years): For that, you on [the] 15th day of May 2012 at Juapong in the Volta Circuit and within the jurisdiction of this court did issue [ADB] Cheque No. MAT FISH FARMERS BRI 100039274101 for … GHc40,000 to be drawn at the said Juapong [ADB] when you have no ground to believe that you have adequate f[u]nds in your account to pay the amount specified in the cheque within [the] normal course of banking business.

The prosecution called two witnesses and closed its case. The learned trial judge in his ruling on 16 July 2020 under the Criminal and Other Offences (Procedure) Act, 1960, s. 173 called upon the appellant to open his defence. It is this decision of the court that the appellant is dissatisfied with for which reason on 6 August 2020, under s. 326 of Act 30 id, he filed this appeal. Subsequently, the court upon an

application stayed proceedings in the suit awaiting the outcome of the appeal before this Court.

As contained in paragraph 4 of the notice of petition, the two grounds of the appeal are:

a. The learned trial judge erred when he ordered the Appellant to open his defence
b. The ruling/order of the learned trial judge is not supported by the evidence on record.

By paragraph 5 of the petition, the appellant seeks therefore an order of the court setting aside the ruling/order of the trial Circuit Court and to acquit and discharge the appellant. From the two grounds of appeal, the accused is raising an issue of law, and also what I consider to be an omnibus ground of appeal; 'omnibus ground', because the appellant failed to isolate and identify a particular area of concern. All the same, counsel for the appellant had commendably in my view, distinguished the so-called omnibus ground from the one of misdirection or error of law and had dealt separately with each ground.

It is trite that when a judgment, decision or an order of the court is being prayed to be set aside, whether on an application or appeal, as in this instant case, the assumption is that the judgment or decision cannot be supported by law or rule of procedure or evidence on record and that same is inherently unjust. It might also be that there are pieces of evidence available on the record of proceedings that the trial court failed to advert its mind to, which makes the decision of the court unjust. *Abbey & Ors v. Antwi* [2010] SCGLR 17, at 20; *Tuakwa v. Bossom* [2001-2002] SCGLR 61, 65; *Dzin v. Musah Baako* [2007] 686.

In all these, the one who makes those claims, whether as an applicant or appellant assumes the burden to produce evidence where the court went wrong in terms of the law, procedure, or both. The High Court is not a trier of facts in the case of an appeal on a submission of no case. However, the Court for its limited purpose would have to consider the evidence at the trial court to the extent necessary to determine whether the requisite level of proof was present in respect of all the essential ingredients of the offence charged. *Tsatsu Tsikata v The Republic* [2003-2004] SCGLR 1068 at page 1074 (Holding 5).

Though the two grounds of appeal are connected; indeed, the ground on a point of law provides the fertile basis for analysis of evidence for consideration of the omnibus ground on facts, I shall deal with each separately.

The offence of issuing a false cheque under s. 313A 1(b) of Act 29 provides that:

> Any person who "**issues a cheque** in respect of **an account with a bank** when that person does not have **a reasonable ground, the proof** of which lies on that person, to believe **that there are funds or adequate funds in the account** to pay the amount specified on the cheque within the normal course of banking business, commits a criminal offence. (Emphasis added)

Arguing this legal ground, which I deem to be the crux of the appeal, learned counsel submitted that the learned trial judge appeared confused about the "personality [that was] brought up for prosecution", contending that the accused who signed the cheque acted in his official capacity as the executive director of the company - Fish Farm Brigade Ltd - a corporate entity. Being so, learned counsel

argued that the appellant cannot be held personally liable when the cheque was dishonoured citing the celebrated case of *Salmon v Salmon* [1897] AC 22 HL.

The implicit ingredients of proof of the offence in s. 313A 1(b) of Act 29, are:

a That the accused person issued a cheque

b That the cheque was issued in respect of a bank account.

c That a specified amount is stated on the cheque

d The cheque was dishonoured upon presentation at the bank on account of no funds or insufficient funds in the account

e That the cheque was presented at the bank for payment not later than three months after the date specified on the cheque.

Learned counsel reminded the court of the trite cardinal burden of the prosecution to establish proof of each of the elements of the offence beyond a reasonable doubt, failure which the burden cannot shift unto the accused who is only required to raise doubt in the prosecution's case. Counsel argued that the prosecution failed to discharge proof, particularly, 'element "d", contending that the element was not "**capable of proof as an act of the accused**", reliant steeply on the corporate personality principle in *Salmon v Salmon id*, and the Companies Act, 1963 (Act 179) s.139 and 140.[1] According to learned counsel, having endorsed and co-signed the cheque in his official capacity, the appellant cannot be personally held criminally liable and the trial court was wrong in holding so and directing the appellant to open his defence.

[1] The operating law at all the material time of the arrest, investigation and prosecution of the appellant.

The issue explicit in this appeal is principally a point of law. I deem it my core duty to look at the statute - the Companies Act, 139 and 140 id, and the *Salmon v Salmon* id case to assess the legitimacy of the appellant's claim. But since the correct application of the law is, or must be premised on correct identification of the facts in issue, I shall proceed to find what I deem as the primary facts as borne by the appeal record – a 64-page smartly-bound document. It is a fact that the cheque – Exhibit C was not a personal cheque but a corporate one that bore the name of the company - 'Nat Fish Farmers Brigade Ghana', a corporate entity, registered as such by the Registrar of Companies. The cheque was issued on 15 May 2012. The appellant was one of the only two directors; in fact, he is the sole shareholder and managing director of the company - Farmers Brigade Ghana Limited. The Appellant is a co-signatory of the company's cheques, and he co-signed and endorsed Exhibit C. PW1 presented the cheque for payment on 4 June 2012. It was unpaid on grounds of lack of funds, indeed declared a dud.

PW1 did not sit back but went to the company's office on the cheque. She received no assistance at the office, neither from the appellant despite persistent calls on him. PW1's visitation to the appellant's house was once repelled; she was declared unwelcome by the appellant's wife on grounds that the house was not an extension or part of the appellant's office. The evidence of PW1, the complainant under cross-examination of learned defence counsel sums up the facts and also triggers the law to be considered in the suit:

> Qn I suggest to you that … if the cheque failed to clear, it is the personality of the company i.e. the Fish Farmers Brigade which is liable.

Ans **The Company belongs to somebody and that somebody should be held responsible.**

Qn On the face of the cheque, can you indicate the reason … that the cheque was not honoured

Ans After the teller signed it, they put some figures there and after that, I was told that there was no money [in the account]. (Emphasis added)

I reiterate that the appellant's case at the trial, amply evident on the face of cross-examination of PW1, part of which I have just captured above, mainly is one under the shield of corporate immunity under the Companies Act, s.139 and 140 which provides mainly that a company was to be criminally liable for acts of the members in a general meeting, or the board of directors or the managing director **while carrying on in the usual way the business of the company**. Per the relevant law – s. 139 and 140 – that the appellant perceives as his refuge, I shall show later on whether the provision of the law, indeed, is his safe refuge or rather his grave.

From the time the House of Lords clarified the cardinal principle of corporate identity close to a century and a half ago in *Salomon v Salomon id*, the principle has, subject to certain exceptions, remained the same in common law jurisdictions. Indeed, our Company Act (past and current) had been grounded on this concept. That is, a company, after its registration becomes a legal entity with a capacity separate, independent and distinct from the persons constituting it or employed by it with all powers of a natural person of full capacity to pursue its **lawful** authorised business. Within the lawful bounds of the Companies Act, a company may do everything that a natural person might **lawfully** do in its registered name, including the power to sue and be sued and to owe and be owed legal liabilities.

It stands to reason from sections 139 and 140 of the Companies Act therefore that it is not every act or omission of the company per its members or shareholders, directors or agents or officers that the law clothes with the corporate immunity seal. Indeed, per s.139 and 140 that the appellant seems to be seeking refuge, yes, it is the company, not its members, directors and officials that are to be criminally liable for acts of the members in a general meeting, or the board of directors or the managing director, the proceeding portions of the same provision restrict the immunity to situations only where the members, owners, directors and officers and agents are **"carrying on in the usual way the business of the company.**

The meaning I ascribe to this provision – s. 139 and 140 - is that when members or shareholders, owners or directors carry on the business of a company or do any acts that are **not in the usual way the business of the company,** they cannot be shielded under the immunity veil of corporate identity and personality in *Salmon v Salmon*. It is trite law that legal or corporate bodies work and perform their functions through natural bodies. See s. 137 of Act 179. It is not the business of a company; neither can its directors or officers and agents claim to be conducting the business of the company **in the usual way** when its cheques are dishonoured, indeed declared dud. Neither can the business of the company be said to be carried on in the usual way by the directors when the directors appear to be refusing to assume duty and responsibility upon notification that the company's cheques or one of the cheques the directors issued to a customer had not been honoured by the bank for lack of funds.

As it was held in the case *Morkor v Kuma* (No.1) [1999-2000] 1 GLR 721 SC at page 723, this time-honoured corporate personality and immunity is not iron cast, but

"could be lifted … in circumstances where in the light of the evidence, the dictates of justice, public policy, or [relevant provisions of the] Companies [Act], 1963 (Act 179) so required". Finding it impossible to formulate an exhaustive list of circumstances that would justify the 'lifting of the corporate veil' to attach personal liability, the Court thought it fair and just to include situations where it could be shown that the company, among others, is "avoid[ing] contractual liability". I find per the evidence established in this suit that the company by its directors, including the appellant, is simply avoiding a contractual liability under the guise of the veil of corporate immunity.

It has also been held in *Akoto v Akoto* [2011] 1 SCGLR 533, at 535 (Holding 3) that "when the notion of legal entity had been used to defeat public convenience, justify wrong, protect fraud, or defend crime", and indeed to avoid contractual liability, "the law would regard the company as an association of persons" to enable them to be personally held liable for any loss or liability occasioned by any such act. *Akoto v Akoto id.* Indeed, issuing a cheque that is dishonoured on presentment to the bank, per s. 313 of Act 29 is a criminal act; an act that is not done or permissible in the usual way of doing business.

Companies do business not by themselves but by or through human beings, who cannot or must not be allowed to avoid responsibility for acts and omissions I find as not being carried on or done in the usual way of business of a company. Such a person, in my view, cannot seek refuge under the corporate immunity principle under *Salomon v Salomon*. I reiterate that issuing a cheque by the appellant in the name of the company that ends up being declared a dud, and most importantly, in my view, for the appellant to refuse to show responsibility to sanitize the situation in the circumstances of this case cannot be an act done or performed in

the usual way of business of a company that could warrant protection under the law in general or in particular under the shield of corporate identity and protection in *Salomon v Salomon.* Id. The appellant was avoiding contractual responsibility.
In conclusion, I reiterate that corporate bodies work conduct business and perform their functions through natural bodies who centrally happen to be the owners, owners *cum* directors, or employed officers. Surely, the law shields them from personal liability for acts done for the company **"… <u>in the usual way</u> of business of the company"** See <u>s.139 (1) Companies Act, 1963, (Act 179).</u> It is not impermissible under the Companies Act nor under *Salomon v Salomon* for an owner, a member or a director of a corporate body to be held by the police and criminally prosecuted for acts done **not in the usual way of doing business** including avoiding contractual liability as held in *Morkor v Kuma* id, at page 723. See also *Amartey v Social Security Bank Ltd; Social Security Bank Ltd; Robertson (Consolidated*) [1987-88] 1 GLR 497, CA (Holding 2). Indeed, as it was held quite recently in the case of *Abu Ramadan & Anor v Electoral Commission & Anor; In Re-Owners of Muntie FM Station*, popularly referred to as "*Muntie FM's Case"*[2] the Supreme Court, per the leading judgment of Sophia Akuffo JSC presiding, was emphatic that where a company is held in criminal contempt, it is the directors and officers who must answer for the charge, since they constitute the human face, indeed the controlling minds of the company.

A trial judge has discretion under s. 173 of Act 30 to decide whether, at the close of the prosecution's case, a *prima facie* case has been laid to warrant the accused to open his defence. *Tsatsu Tsikata v The Republic* id. (Holding 5). I have perused the evidence on record, my view is that the decision of the trial judge that directed the

[2] Civil Motion No. J8/108/2016 decided on 27 July 2016

appellant to open his defence is based on sound law, indeed, a discretion that was exercised judicially. In any event, the decision is supported by the evidence on record. The appeal is therefore dismissed in its entirety. The court reiterates the order the trial judge gave and directs the appellant to open his defence at the trial Circuit Court, Ho.

Ordered accordingly.

(Sgd.) George Buadi, J

High Court (1)

Ho.

Lawyers:

1 Kwame Senanu Afagbe, Esq. for the appellant

2 Anthony Ghattie, Esq. (Assistant State Attorney) of the Attorney-General's Office, Ho for Republic/Respondent.