IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2022

CORAM: BAFFOE-BONNIE JSC (PRESIDING)
DORDZIE (MRS.) JSC
PROF. KOTEY JSC
OWUSU (MS.)
PROF. MENSA-BONSU (MRS), JSC

CIVIL APPEAL
NO. J4/36/2021

2ND MARCH, 2022

A.J. FANJ CONSTRUCTION AND INDUSTRIAL ENGINEERING LTD. ..... PLAINTIFF/RESPONDENT/APPELLANT

VRS

GHACEM LIMITED ..... DEFENDANT/APPELLANT/RESPONDENT

JUDGMENT

BAFFOE-BONNIE JSC:-

In this ruling the plaintiff, AJ FANJCONSTRUCTION AND INDUSTRIAL ENGINEERING LTD, shall be referred to as the appellant and GHACEM shall be referred to as the respondent.

This is an appeal from a ruling from the Court of Appeal, coram, V.D Ofoe, Bartels Kwodwo (Mrs.), Barnasko-Essah (Mrs.), JJA. Dated, 10th December 2020, The said ruling of the Court of Appeal, reversed an earlier ruling dated 16thApril 2019, delivered by the High Court presided over by Kyei Baafour J(as he then was).The High Court had refused an application by the respondent herein, to dismiss the suit filed by the appellant on the grounds of *res judicata* and abuse of court process. Being aggrieved by the decision of His Lordship Kyei Baafour J, (as he then was),the respondent appealed to the Court of Appeal which reversed the decision of the High Court and struck out the suit on the grounds of *res judicata* and abuse of court process. It is this decision by the Court of Appeal that the appellant is challenging before this court.

How did we get here?

BACKGROUND

For a fuller and better appreciation of this ruling it is necessary to set out in great detail the series of events that have culminated in the appeal before us.

On the 8th of July, 2009, West Africa Quarries Limited (WAQL) entered into a contract with AJ FANJ Construction and Engineering Limited, the appellant herein, for the operation of limestone mining, crushing and haulage, from its concessions at Yongwa in the Eastern Region. Subsequent to terms of settlement executed between WAQL and the appellant, the parties agreed that the appellant shall continue to mine and supply limestone from the Yongwa Concession as they had been doing previously, based on agreements, beyond December 2012, which was the expiry date of the then prevailing agreement. As part of the settlement, it was agreed to extend the duration of the 2009 Yongwa contract which was to end in December 2012 for an indefinite period.

In June 2016, the Yongwa Concession was attached in execution of a judgment obtained against WAQL and so the concession was shut down. Following the shutdown of the Yongwa Concession as a result of the attachment of same in execution of the judgment, the appellant herein, instituted arbitral proceedings against WAQL as stipulated in the contract. WAQL did not only dispute the claims of the appellant, it also proceeded to file its statement of defence, after which the appellant filed a reply.

The parties thereafter proceeded to appoint a sole arbitrator to conduct the arbitral proceedings. In the course of the arbitral proceedings, specifically on the 1st of March 2017, the appellant brought an application before the Tribunal of the Ghana Arbitration Centre seeking to join the respondent herein (GHACEM), a non-signatory party, to the ongoing arbitration between the appellant and WAQL In the said application, his grounds for seeking to join respondent were as follows,

1. **GHACEM Ltd negotiated and performed the contract in which the Arbitration Agreement was contained and merely used WAQL as the face for the contract.**
2. **GHACEM ltd, at all material times, was the alter ego of WAQL by virtue of the absolute control it exercises over WAQL which Company was bound hand and foot to the Respondent herein and never exercised any independent volition of its own.**

After being served with the application for joinder, the respondent herein raised a preliminary objection to the jurisdiction of the Tribunal to entertain the application for joinder on two grounds:-

1. ***That, the arbitral tribunal does not have jurisdiction to ENTERTAIN an application to join GHACEM (applicant herein), a non-signatory of an arbitration agreement to arbitration proceedings.***
2. ***That the Alternative Dispute Resolution Act, 2010 (Act 798) does not confer jurisdiction on an arbitrator to join a non-party to a written agreement to arbitration proceedings arising out of disputes in respect of the said written agreement.***

The arbitral tribunal dismissed the 1STpreliminary objection ie, the objection to the tribunal's jurisdiction to entertain the application for joinder, holding as follows;

'The tribunal finds that issues of joinder are procedural matters which may not necessarily engage the attention of the legislators when passing substantive laws such as the ADR Act, Act798. Accordingly, the failure on the part of the legislators to specifically make provisions for

joinder of parties will not take away the jurisdiction of the tribunal to hear and determine an application for joinder as in the current application before it

Section 31 of the ADR Act vests the parties and arbitrator with a wide scope to determine any matter of procedure. The tribunal finds that this power includes applications for joinder. The question whether at the end of the day the application will or will not succeed is beside the point. Accordingly, the tribunal disagrees with the submission by the non-signatory that it does not have jurisdiction to hear and determine the current application. The tribunal holds that it has jurisdiction to hear the current application. The preliminary objection to jurisdiction of the Tribunal fails and is accordingly dismissed."

With regard to the second leg of the objection however, after hearing both counsel and referencing various jurisdictions, the tribunal came to the conclusion that,

'The rules of the Ghana Arbitration Centre that has been adopted by the parties did not make any specific provision for adding non-signatories. In the absence of specific provisions in the agreement and provisions referred to above, the tribunal finds that since arbitration is a private procedure, it is an implied term of an arbitration agreement that strangers to the agreement are excluded from the hearing and conduct of an arbitration under the agreement".

The appellant's quest to join GHACEM **to the arbitral proceedings** thus suffered a jolt and same was thrown out. He felt down but not out.

Dissatisfied with the turn of events, the appellant filed in the High Court (Commercial Division), an originating motion on notice under section 40 of the Alternative Dispute Resolution Act 2010 (Act 798) and order 19 r 1 (2) of C. I. 4, praying the Court for a determination of a preliminary point of law. That is, **as to whether in arbitral proceedings conducted in Ghana with the Ghanaian law as the substantive law, the court will have power to join a non-signatory party to the arbitral proceedings in the proper circumstances.**

The High Court, presided over by Asiedu J,(as he then was)did not only determine the question in favour of the appellant, that is, to answer the question in the affirmative, but also went

ahead and made an order for joinder of the applicant herein as a party to the arbitral proceedings. In his ruling he said among other things,

''From the totality of the evidence on record the court is absolutely convinced that West Africa Quarry Limited was used as a cover by GHACEM and for that matter in circumstances of this case, it will be unjust to let the arbitration proceed without the participation of GHACEM, the main actor in the whole scenario.''

This decision of the High Court then became the subject of an application by GHACEM, invoking the supervisory jurisdiction of the Supreme Court by way of certiorari to quash same.

Before the Supreme Court, GHACEM argued two (2) main grounds:-

1. **That the High Court, (Commercial Division), Accra exceeded its jurisdiction when it made an order for the joinder of the applicant to ongoing Arbitration Proceedings when the motion before the Court was for determination of a preliminary point of law pursuant to section 40 of the Alternative Dispute Act, (Act 798).**

2. **That the decision of the High Court, (Commercial Division), Accra to join the Applicant to Arbitration Proceedings arising out of an Arbitration Agreement to which the applicant is not party and/or signatory, amounts to a patent error of law on the face of the record.**

The Supreme Court, coram, Dotse JSC, Anin Yeboah JSC (as he then was) Baffoe-Bonnie, Appau and Pwamang JJSC, agreed with the Sole Arbitrator that arbitration agreements are private treaties and that non signatories cannot be compelled to partake in them. The court thus concluded thatthe respondent not being a signatory to the agreement that had given rise to the arbitral proceedings hence, it was wrongful for the High Court to have joined the applicant to the arbitral proceedings. This joinder by the High Court was therefore an error on the face of the record and therefore same was quashed.

The plaintiff has thus become check-mated. As per the pronouncements of the sole administrator and confirmed by the Supreme Court, GHACEM (the respondent) not being a signatory to the agreement that contained the arbitration clause, it could not be compelled to take part in the arbitral proceedings, However, convinced that GHACEM was indeed the alter ego of WAQL that signed the agreement, and that WAQL was only used as a front for GHACEM the appellant, discontinued the arbitral proceedings, and this time brought an action against GHACEM. The appellant's 19 reliefs claimed in his writ included among others,

1. **A declaration that at all times material to the 2009 Yongwa Contract and its extension in April 2012, until the abrupt closure of the mine and termination of the contract, the Defendant was the real contracting party and merely used its subsidiary, WAQL, as the face for the contract.**

This writ was attached with a 68-paragraph statement of claim. Immediately after service of the writ on him, the respondent filed an application for the suit to be struck out on the grounds of *res judicata*. Respondents' argument before the high court was that the issue of who were the contracting parties in the Yongwa contract, had been determined by the sole arbitrator and confirmed by the Supreme Court. To this end therefore the appellant herein was estopped *perrem judicatem* from bringing an action that sought to indicate that the respondent was a party to the Yongwa contract.

This application was dismissed by Kyei Bafour J(as he then was). On appeal, the Court of Appeal reversed Kyei Baafour, granted the respondent's prayer, and struck out the appellant's suit on the grounds of *res judicata* and abuse of process.

It is this decision of the Court of Appeal that the appellant is challenging in this appeal. Before us the appellant has filed 7 grounds of appeal as follows;

GROUNDS OF APPEAL:

i. The Court of Appeal misdirected itself in law when after determining that the Arbitral Tribunal and the Supreme Court determined that the Arbitral Tribunal was not clothed with the power to join the Defendant/Appellant/Respondent to the ongoing

Arbitration proceedings yet ruled that Plaintiff/appellant/Applicant's suit is caught by the principle of *res judicata*.

ii. The Court of appeal misdirected itself when it held that the High Court erred when it held that the Arbitrator declined jurisdiction in the first instance to entertain the matter.

iii. The Court of Appeal misdirected itself when it determined that the Supreme Court as a matter of fact determined that the Respondent was not a party to Yongwa Contract.

iv. The learned judges of the Court of Appeal erred when they held that relief (1) of the Plaintiff/Respondent/Appellant's reliefs sought in its Writ of Summons and Statement of Claim upon which all the other reliefs are premised and/or emanate has been finally determined by the Supreme Court and Arbitral Tribunal.

v. The learned Justices of the Court of Appeal erred when they held that in the circumstances of the case the Plaintiff/Respondent/Appellant by discontinuing its Arbitration proceedings against WEST AFRICA QUARRIES LIMITED and commencing the instant suit against Defendant/Appellant/Respondent is an abuse of the court process.

vi. The learned judges of the Court of Appeal erred when they reversed the decision of the High Court coram; His Lordship Eric Kyei Baffour J dated 16th April, 2019 dismissing the Respondent's motion to strike out Applicant's Writ of Summons and Statement of Claim on the grounds of *res judicata* and abuse of court process.

vii. The judgment is against the weight of evidence.

Relief sought

The judgment of the Court of Appeal (Civil Division) Accra dated 10th December, 2020 be set aside and the ruling of the High Court (Commercial Division) dated 16th April, 2019 restored or affirmed.

However, reading through their grounds of appeal and their written submissions, it is our considered view that a discussion and resolution of the 6thgroundof appeal will dispose of the other grounds of appeal.

GROUND 6

The learned judges of the Court of Appeal erred when they reversed the decision of the High Court coram; His Lordship Eric Kyei Baffour J dated 16th April, 2019 dismissing the Respondent's motion to strike out Applicant's Writ of Summons and Statement of Claim on the grounds of *res judicata* and abuse of court process.

ESTOPPEL *PER REM JUDICATEM*

The principles of estoppel *per rem judicatem* or *res judicata* has been espoused in a plethora of cases which both counsel have copiously referred to in their written submissions. In simple terms the doctrine of *res judicata* is invoked in support of the public policy ideal that litigation must end*; rei interest republicaeut sit finis litium* (it is in the interest of the state that litigation must come to an end).

So that, even though the laws of the land permits any person to bring any action against any person to vindicate his or her right, be it to property or anything and to pursue same to any level, there comes a time when the judicial system could tell a litigating party that "**enough is enough, this matter or issue has been adjudicated upon by a court of competent jurisdiction to its finality and so cannot be re-opened".** This simply put is *res judicata.*

This is how the principle of *res judicata* has been described in various texts.

Black's Law Dictionary 8th Edition

"Res Judicata has been defined as a doctrine barring the same parties from litigating a second suit on the same transaction or any other claim arising from the same transaction or series of transactions or that could have been raised but was not raised in the first suit. For a proper invocation of the doctrine, these elements must exist

1. *There must be an earlier decision on the issue*

2. *A final judgment on the merits and*
3. *The involvement of the same parties or parties in privity of the original parties*"

Strouds Judicial Dictionary of Words and Phrases 6th ED. Vol3 pg 2289

"The phrase *res judicata* is used to include two separate states of things. One is where a judgment has been pronounced between parties and findings of fact are involved as a basis for that judgment. All the parties affected by the judgment are then precluded from disputing those facts as facts in any subsequent litigation between them. The other aspect of the term arises when a party seeks to set up facts which if they had been set up in the first suit, would or might have affected the decision"

In Re Asere Stool,(2005-2006), SCGLR 637.

"Estoppel *per rem judicatem* is a generic term which, in modern law, includes two species. The first specie is called cause of action estoppel, which prevents a party to an action from asserting or denying as against the other party, the existence of a particular cause of action, the non-existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties….The second is called issue estoppel which is an extension of the same rule of public policy. This will arise where apart from cases in which the same cause of action or the same plea of defence is raised, there may be cases in which a party may be held to be estopped from raising particular issues, if those issues are precisely the same as the issues which have been previously raised and have been the subject of adjudication".

" **KwadwoDankwa and ors. V. Anglogold Ashanti, 2019**

"This Court reiterated that for a judgment to operate as *res judicata* it must be valid and subsisting. It must be a final judgment delivered by a court of competent jurisdiction on the merits, i.e. the issue must have been raised and pronounced upon. Therefore a dismissal of a suitor an action by a competent court or tribunal on the grounds of lack of jurisdiction does not and cannot operate as *res judicata*"

See also the cases of,

John Atta Owusu V Fosuhene [2011] I SCGLR 273,

Speedline Stevedoring Co ltd; Rep V High Court Accra, Ex parte Brenya,(2001-2002)SCGLR 775.

It must also be emphasised that there are two kinds of estoppels *per res judicata* as mentioned in the ASERE STOOL CASE. These are cause of action estoppel or subject matter estoppel and issue estoppel. **Azu Crabbe CJ** states the two types of estoppel per*res judicata* in the case of **POKU v FRIMPONG [1972] 1GLR 230** that:

> *"an estoppel deriving from a judgment of two kinds, namely, cause of action estoppels and issue estoppels. Where a plea of estoppels per rem judicatam is pleaded it is necessary for a trial judge, in order to avoid confusion to decide first the nature of the estoppel raised"*

Cause of action estoppel has been said to be that type of estoppel which prevents a party to an action from asserting or denying as against the other party the existence of a particular cause of action already determined by a court of competent jurisdiction in a previous litigation between the same parties. See the judgment of **Amissah JA** in the case of **FOLI &ANOR v ATTA [1976] 1GLR 194-203.**

Issue estoppel on the other hand is based on the fact that in a cause of action, there may be several issues in that cause and once an issue had previously been raised and determined by a court of competent jurisdiction, the courts will not allow an issue that has been raised and determined to be raised again on the basis of same public policy, *rei interest republicaeut sit finis litium*.

Diplock LJ better describes this estoppel in **MILLS v COOPER (1967) 2QB 459, 463** that:

> *"The party in civil proceedings is not entitled to make, as against the other party, an assertion whether of fact or of the legal consequences of fact, the correctness of which is an essential element in his cause of action or his defence, if the same assertion was an essential element in his previous cause of action or defence, in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in*

such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion by the party in previous proceedings have since become available to him.

Where a cause of action has been determined by a competent adjudicating body or an issue in a cause has been raised and laid to rest, a court will not subsequently allow the same matters to be raised for determination".

Per Blacks Law Dictionary, and the various authorities referred to, for the doctrine to be successfully invoked, it must be established that there is this judgment and that the judgment was on the merits of the case. A judgment will not be on the merits of the case if for example, the case was dismissed for want of prosecution or in default of appearance or any procedural step. Furthermore, the judgment must be a final one in that it determined the disputed rights of the parties in the case and was not just an interlocutory matter, for example, a preliminary matter such as interim injunction.

With this background properly established and the parameters within which the principle can be successfully invoked properly laid down, let us apply the principles to the facts and issues raised in this appeal.

We have had the benefit of the full record of appeal which contains extensive written submissions in support of their respective stances as well as the various proceedings, submissions and rulings by the Sole Arbitrator, High Court and Supreme Court, and all the necessary attachments. We have also had the benefit of the applications brought before both the High Court and the Court of Appeal and the rulings delivered by both courts.

We must say from the very onset that we find it really difficult to appreciate why and how the Court of Appeal came to the conclusion that the issues raised in the writ was an abuse of process and that the issue of who the real parties to the contract agreement are had been determined by the Supreme Court and therefore *res judicata* can be invoked to throw out the appellants writ. At no point in time, whether before the sole arbitrator or the High Court or the Supreme Court was the issue of who were the real signatories to the contract agreement adjudicated upon. What the sole arbitrator, and for that matter the Supreme Court adjudicated

on was simply, **whether or not a person or entity not signatory to an arbitration agreement, can be joined to an arbitral proceedings.** This is because the appellant had sought to join the respondent to the ongoing arbitral proceedings with AJ FANJ on the grounds that the respondent was the alter ego of WAQL and the real face behind the agreement that had given rise to the arbitral proceedings. Further, there was an express collateral contract between GHACEM and AJ FANJ by virtue of the fact that GHACEMs actions amounted to promises and assurances to AJ FANJ that it was a party to the contract which AJ FANJ acted upon and entered into a contract which contained the arbitration clause. It was for these reasons that the appellant, even before the sole arbitrator, said the veil of incorporation should be lifted for us to see the real faces behind WAQL. And this could be done if GHACEM was joined to the ARBITRAL PROCEEDINGS.

So indeed before the various forums, ie Sole Arbitrator, Justice Asiedu (High Court), and The Supreme Court, the issue that was raised and adjudicated upon was whether GHACEM(respondent herein) not being a signatory to the arbitration agreement could be joined to an arbitral proceedings going on between the signatories. The respondents' opposition to the application to join the respondent to the arbitral proceedings which was accepted by the Sole arbitrator, and as it were, concurred in by the Supreme Court, was that, not being a signatory to the arbitration agreement they cannot be compelled to partake in the ARBITRAL PROCEEDINGS (e.s). Based on this submission, the Supreme Court made an authoritative statement that goes even beyond these parties.

In his ruling the Sole Arbitrator had said,

'The rules of the Ghana Arbitration Centre that has been adopted by the parties did not make any specific provision for adding non signatories. In the absence of specific provisions in the agreement and provisions referred to above, the tribunal finds that since arbitration is a private procedure, it is an implied term of an arbitration agreement that strangers to the agreement are excluded from the hearing and conduct of an arbitration under the agreement"

Concurring in this finding by the Sole Arbitrator, the Supreme Court said,

*"It must be noted that in the instant case the parties in their arbitration agreement chose Ghanaian law as the **lexarbitri,** that is, the law that should govern their arbitration. The arbitral Tribunal, rightly in our views came to the conclusion that it had no power to join the applicant herein to the **arbitral proceedings**"*

The only court that said something that bears some semblance to the issue which the respondent claims to be *res judicata*, is Justice Asiedu who said,

`**From the totality of the evidence on record the court is absolutely convinced that WAQL was used as a cover by GHACEM and for that matter in the circumstances of this case it will be unjust to let the arbitrator proceed without the participation of GHACEM, the main actor in the whole scenario. In the circumstances and considering all the evidence available to the court as stated in the affidavits in support as well as the affidavit in opposition, substantial justice will be done by joining GHACEM to the arbitration. The court therefore proceeds and thereby joins GHACEM as a 2nd defendant or 2nd respondent to the arbitration proceedings notwithstanding that it is a non-signatory party to the arbitration clause in the contract."**

This statement by Justice Asiedu is the only one that bears some semblance to the issue that is being raised as *res judicata* by the respondent. And even then this same respondent successfully invoked the jurisdiction of the Supreme Court to quash this statement on the grounds that it was made in excess of jurisdiction.

In quashing the said orders, the Supreme Court said:

"Even though, as has been pointed out, the Courts have been granted some control mechanisms over the conduct of arbitral proceedings under the Act, the scope and extent to which the High Court intervened in this instance has far exceeded its jurisdiction. It is in our resolve to limit the unbridled interference of the court into the workings of arbitral Tribunals under Act 798 that has culminated into this decision.

*The issues of **lifting the corporate veil** as espoused in the celebrated case of **Morkor v Kuma [1998-1999] SCGLR, 620** and the doctrine of "alter ego" which the learned High Court judge embarked upon and used to join the Applicants, a non-signatory to the arbitral proceedings in our respected view amount to the learned trial judge exceeding his jurisdiction. As a matter of fact, all the renditions by the learned trial judge on these two principles were irrelevant and need not have been taken into consideration by him. In the premises, we are of the considered view that the Applicants have made a strong case for the exercise of our jurisdiction in ground one of this application. Certiorari will therefore lie to quash the decision of the High Court (Commercial Division), Accra, dated 21st December, 2017".*

The question then is does this decision of the Supreme Court operate as *res judicata* precluding the appellants from coming to Court against the respondent as the Court of Appeal seems to be saying? We do not think so. Where in the arbitral forum or the Supreme Court were the reliefs that appellant has claimed in his writ of summons adjudicated upon? It beggars belief that a party who, resisted quite rightly, that he cannot be compelled to arbitrate a claim he has not contracted to arbitrate and succeeded in that, to turn round when he is sued, to claim that the matter is res judicata. That is a glaring attempt to approbate and reprobate.

To claim any semblance of *res judicata* here is to completely misconceive the whole principle of *res judicata.* The reliefs sought have not been determined by any person. The parties have not met to determine the claims and no court of law has pronounced on the claims being sought. What the Arbitrator, the High Court and the Supreme Court, all dealt with was the attempt by appellant to join respondent to the **arbitral proceedings**. That failed. And the respondent will be prevented from using the refusal of the Arbitrator and the Supreme Court to join him to the arbitral proceedings to escape answering to the substantive claims now being made by the appellant in this fresh writ, by invoking the plea of *res judicata*. The Court of Appeal wrongly fell for this and their decision is hereby reversed.

ABUSE OF PROCESS

The second ground on which the Court of Appeal reversed the High Court was the claim by the respondent that the issuance of a fresh writ by the appellant in respect of matters that were deemed to be *res judicata* constitute an abuse of judicial process.

The law on this principle too is very well settled.

Black's Law Dictionary, 8th edition defines 'abuse of process' as follows:

'There is said to be an abuse of process when an adversary through the malicious and unfounded use of some regular legal proceeding obtains some advantage over his opponent"

In **Henderson v Henderson**,(**1843) Hare 100**, this is what was said of abuse of process

'' where a given matter becomes the subject matter of litigation in, …….a court of competent jurisdiction, the court requires a party to the litigation to bring forward the whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest but which was not brought forward only because they have from negligence, inadvertence or even accident omitted part of their case"

In the case of **Naos Holdings Inc. v Ghana Commercial Bank Ltd,(2011)1 SCGLR492**, it was said in holding one,

> *"The doctrine of abuse of process, commonly known as the rule in Henderson V Henderson, would require the parties, when a matter had become the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it might be finally decided (subject to any appeal) once and for all. In the absence of special circumstances, the parties could not return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule was not based on the doctrine of res judicata in a narrow sense, or even on any strict doctrine of issue or cause of action estoppel. It was a rule of public policy based on the desirability, in the general interest as well as that of the*

parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do.

Per curiam. *The principle of abuse of process clearly then underscores the essence of preventing those who want to make the litigation arena, i.e. the law courts, a career, from embarking upon such process as it is contrary to public policy and leads to loss of valuable time and resources."*

Commenting on HENDERSON V HENDERSON (op cit) in the case of SASU V AMUA-SEKYI [2003-2004] SCGLR 742, DATE-BAH JSC said as follows:

> *"The rule is not based on the doctrine of res judicata in a narrow sense, or even on any strict doctrine of issue or cause of action estoppels. It is a rule of public policy based on the desirability, in the general interest as wells as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do"*

So here again it is worth asking, where is the evidence of abuse of process? The appellant had sought to meet the respondent at the Ghana Arbitration Centre and that request had been opposed and declined and so on what basis can it be argued that appellant should have brought the claims he is making now to the Arbitrator for adjudication?

The fact of having sought joinder of the respondent to an arbitral proceedings and same failing cannot be said to be an abuse of the judicial process simply because the appellant had filed a writ to seek the reliefs he wanted from respondent at arbitration. If the joinder application had succeeded and respondent had been joined and had participated in the arbitration proceedings to finality and later the appellant had come to court seeking the reliefs he now seeks, then the respondent could be right to claim *res judicata* and abuse of process, but not when he, respondent, successfully resisted to join and have the matter heard on its merit at arbitration. Now that a claim is being made for him via a new writ, it does not lie in his mouth to contend that the matter constitutes an abuse of the process. The allegation that the suit constitutes an abuse of the judicial process is wholly unfounded. The Court of Appeal was wrong on this too and so the appeal succeeds on this ground too.

CONCLUSION

On the whole the appeal succeeds, the Court of Appeal is reversed and the Ruling of the High Court is restored. For the avoidance of doubt the Respondents application to the effect that the appellant's writ seeking some reliefs against the GHACEM, (respondent herein),is caught by res judicata, is dismissed and the case will take its normal course.

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

A. M. A. DORDZIE (MRS)
(JUSTICE OF THE SUPREME COURT)

PROF. N. A. KOTEY
(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS)
(JUSTICE OF THE SUPREME COURT)

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