IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: YEBOAH CJ (PRESIDING)
BAFFOE-BONNIE JSC
PWAMANG JSC
OWUSU (MS.) JSC
AMADU JSC

CIVIL MOTION
NO. J8/87/2022

19TH MAY, 2022

DANIEL OFORI ..... PLAINTIFF/APPELLANT/APPELLANT/ RESPONDENT/APPLICANT

VRS

ECOBANK GHANA LIMITED ..... 1ST DEFENDANT/RESPONDENT/ RESPONDENT/APPLICANT/RESPONDENT

SECURITIES AND EXCHANGE COMMISSION ..... 4TH DEFENDANT

GHANA STOCK EXCHANGE ..... 5TH DEFENDANT

RULING

YEBOAH CJ:-

Before us, my Lords, is an application for review of our decision in this case dated 13th July, 2021. The review application was filed by the Defendant/Applicant/Respondent, to be referred to as "the Defendant" pursuant to time extended by the Court. Upon service

on the Plaintiff/Respondent/Applicant, to be referred to as "the Plaintiff" he filed an affidavit in opposition. When the review application was listed for hearing, the Plaintiff raised an objection to the inclusion of our respected sister, Torkornoo JSC, as a member of the panel to hear the application, on the grounds that she dealt with an aspect of the case when she was a High Court Judge. The objection could not be summarily resolved and an order was made for the Plaintiff to file a formal application in that regard. The application was filed on 7th February 2022, setting out the grounds for the objection, key among which is that;

"The constitutional hierarchy of courts in Ghana, as elsewhere, does not allow a judge who sat as a judge of first instance in a case where she adjudicated on certain facts, to adjudicate again on the same set of facts when later sitting as a judge in a court higher in the hierarchy. Her ladyship Justice Gertrude Torkornoo, while a High Court Judge, sat on a case: Databank Brokerage Limited Vs. 1.Danotel Limited 2. Mr. Daniel Ofori, Suit No. BFS/411/11 and made a determination of some of the issues which would be coming up for consideration in the current review application."

The pending review application stemmed from High Court Suit No. BFS; 545/08 in respect of company shares that the Plaintiff sold to one William Oppong-Bio through the Defendant herein. A dispute arose concerning the transaction hence the suit, which was finally decided by the Supreme Court on 25th July, 2018 in favour of the Plaintiff. In the review application, the Defendant is praying us to reopen the case and receive evidence alleging the Plaintiff did not disclose certain facts to the Supreme Court when the

appeal came on for hearing. Databank Brokerage Ltd acted as the brokers of the Plaintiff in the shares transaction and they also had some differences with the Plaintiff that arose out of the transaction leading to the Suit No. BFS/411/11 that was heard and determined by our sister.

The Defendant upon service of this application seeking to disqualify Torkornoo, JSC, filed an affidavit in opposition asserting that the cases are different and no prejudice could arise.

The settled practice in our jurisdiction is, that, if a judge was involved in proceedings concerning a matter at a lower level of the Judiciary and the matter comes up subsequently when the judge has moved up the hierarchy of courts, he would recuse himself from the subsequent case on grounds that the earlier association with the case may lead to prejudice. The issue is simple where a judge conducted hearing of a substantive cause or matter and the same cause or matter goes up on appeal or for review. However, where the judge's association with the case at the lower level was collateral or concerned interlocutory matters only, then it is not a straight forward issue and the nature and extent of the association of the judge to the matter needs to be examined. The instant application is premised on an earlier association that was collateral, in that the judge being sought to be disqualified, did not hear the substantive case or give a substantive judgment in Suit No. BFS; 545/08.

Nevertheless, the apprehension of the Plaintiff is that in the proceedings in the High Court before our sister in which the matters in the case came up, she delved into the facts and the law involved in the shares transaction and that those same matters arise for consideration in the instant application. The Plaintiff's case is that, the degree of her association was such that she formed opinions at that at lower level that she is likely to defend on this occasion and not afford her an impartial hearing. But the Defendant contents that the review application is not to reopen the substantive decision that was given in the case so there can be no prejudice on the part of the judge.

We have read the decision by the judge in the case in the High Court that involved some aspects of the shares transaction alluded to in the instant application and we take note of the following significant specific statements by our sister that were made at a time the case was pending determination in the Supreme Court;

At Page 20 of her judgment, Her Ladyship said as follows:

"When the details of Suit No. BFS 545/08 are placed alongside the defence and 2nd Defendant's (the Plaintiff herein) counterclaims in the current dispute before me, it is clear that the 2nd Defendant has always been aware that the Plaintiff herein never received value on the bank draft, hence his claims indorsed on his writ. The holdings of the High Court that no liabilities existed on the share sale transaction because no value passed from buyer to seller put the question of validity of that bank draft to rest. ***My***

evaluation is that the continued submission of this argument defies logic, good faith, and can only be the work of mischief."

At Page 21, the following statement Her Ladyship continued thus;

"In the CAL share sale transaction in issue, the Bank of Ghana ordered the underlying transaction to be halted before payment for the shares were handed over to 2nd Defendant and the Plaintiff, as his broker. The honourable court held that this amounted to frustration of the underlying transaction. To my mind, with this frustration the need to be paid for the shares disappeared, the shares remained the property of 2nd Defendant, and **any claim thereafter to the value endorsed on the bank draft is a simple act of fraud.** It would seem that Defendant to date has failed to appreciate this situation. That defence is dismissed. I will now make final orders."

At Page 9, Her Ladyship stated as follows:

"Unfortunately, it was also an answer **which confirmed the 2nd Defendant (the Plaintiff) as a man who did not hesitate to present untruths to the Court"**

From the above statement, the Plaintiff states that, while being a judge in the High Court, our sister dealt with the details of the shares transaction and the role therein of the Plaintiff in particular. The present application for review concerns the personal conduct of the Plaintiff in the shares transaction and his dealings with the shares. In view of what the judge's evaluation was about the conduct of the Plaintiff, with use of words like; acts of fraud, a man who did not hesitate to present untruths and conduct

defies logic, good faith and is mischievous, all in relation to the Plaintiff, our respectful opinion is that there is a real likelihood that the judge may suffer prejudice when determining how the Plaintiff conducted himself in matters raised in this application.

In consideration of the above observations, we cannot with due respect, brush aside the apprehension of the Plaintiff that the judge may carry her earlier opinion about him concerning the shares transaction into this case and may prejudge him. We are not saying that the judge's earlier opinion about the credibility of the Plaintiff will necessarily follow her in this application but the principle is that, not only must justice be done, but it must be seen to be done. We have formed this opinion on the basis that our respected sister went a bit far in her assessment of the Plaintiff. We think a case of real likelihood of bias based on prejudice from the High Court case has been made out by the Plaintiff in this application. The panel for hearing this application for review shall be reconstituted.

ANIN YEBOAH
(CHIEF JUSTICE)

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

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

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

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