IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA

CORAM: YAW APPAU, JSC. SITTING AS A SINGLE JUSTICE OF THE SUPREME COURT

CIVIL MOTION

NO. J8/68/2016

19TH MAY 2016

MINING AND BUILDING CONTRACTORS LIMITED

VRS.

ANGLOGOLD ASHANTI GHANA LIMITED

RULING

APPAU, JSC.

On 28th April 2016, I refused an application filed in this Court by the plaintiff/respondent/applicant (hereinafter referred to simply as applicant), for special leave to appeal to this Court against the judgment of the Court of Appeal dated 17th Decmber, 2015. The application, which was filed on 21st March, 2016, was brought under article 131(2) of the Constitution, 1992. I exercised that jurisdiction as a single justice of the Supreme Court, vide article 134 of the Constitution, 1992. The article in question provides:

"A single justice of the Supreme Court may exercise power vested in the Supreme Court not involving the decision of the cause or matter before the Supreme Court, except that –

(a) in criminal matters, where that justice refuses or grants an application in the exercise of any such power, a person affected by it is entitled to have the application determined by the Supreme Court constituted by three justices of the Supreme Court; and

(b) in civil matters, any order, direction or decision made or given under this article may be varied, discharged or reversed by the Supreme Court, constituted by three justices of the Supreme Court."

I reserved the reasons that informed my decision and I now proceed to advance same.

The appellate jurisdiction of the Supreme Court is provided under article **131 (1)** and **(2)** of the Constitution, 1992. The article in question reads:

"131(1) An appeal shall lie from a judgment of the Court of Appeal to the Supreme Court –

(a) as of right in a civil or criminal cause or matter in respect of which an appeal has been brought to the Court of Appeal from a judgment of the High Court or a Regional Tribunal in the exercise of its original jurisdiction; or

(b) with the leave of the Court of Appeal, in any other cause or matter, where the case was commenced in a court lower than the High Court or a Regional Tribunal and where the Court of Appeal is satisfied that the case involves a substantial question of law or is in the public interest."

(2) Notwithstanding clause (1) of this article, the Supreme Court may entertain an application for special leave to appeal to the Supreme Court in any cause or matter, civil or criminal, and may grant leave accordingly."

The right of appeal to this Court under article 131(1)(a) is as of right but that under 131(1)(b) requires leave from the Court of Appeal. Where the

Court of Appeal refuses leave, the application could be brought under article 131 (2) for special leave to appeal.

The interpretation placed by this Court on the intendment of article 131 (2) creates three (3) types of applicants who can invoke the special leave jurisdiction of this Court. They are:

a. The applicant who was refused leave by the Court of Appeal under article 131(1)(b) of the Constitution and has complied with rule 7(2)(b) of C.I. 16 by filing the application within fourteen (14) days of the refusal by the Court of Appeal to grant leave;
b. The applicant who was refused leave by the Court of Appeal under article 131(1)(b) of the Constitution but, for stated reasons, did not comply with rule 7(2)(b) of C.I. 16, which required that the application be filed with the registrar of the Court within fourteen (14) days; and
c. The applicant who has a right of appeal without leave as provided under article 131(1)(a) but, for stated reasons, has failed to comply with rule 8(1) and (2) of C.I. 16 on time within which to file appeal against both interlocutory and final decisions.

The application for special leave where leave has been refused by the Court of Appeal under article 131(1)(b), is governed by rule 7(2) of the Supreme Court Rules, 1996 [C.I. 16]. This rule provides:

"7 *(2) An application for special leave to appeal under clause (2) of article 131 of the Constitution,*

(a) shall be by motion on notice in the Form 3 set out in Part 1 of the Schedule; and

(b) shall be filed with the Registrar of the Court within fourteen days of the refusal of the Court below to grant leave to appeal."

The applicant herein is not coming under rule 7 (2) of C.I. 16 so that rule does not apply in this case.

Rule 7(4) of C.I. 16, governs an application for special leave made straight to the Supreme Court as permitted under article 131(2) of the Constitution.

This rule applies to applicants who fall under categories **(b)** and **(c)** above and the applicant in the instant case falls under category **(c)**.

Rule 7(4) of the Supreme Court Rules [C.I. 16] of 1996 provides:

"Despite subrules (1) to (3) of this rule, an application for special leave to appeal under clause (2) of article 131 of the Constitution shall be entertained by the Court and the Court may grant leave on the term specified by the Court having regard to the circumstances of the case."

Section 4(2) of the Courts Act, 1993 [Act 459] also provides**:** *"Notwithstanding subsection (1), the Supreme Court may entertain an application for special leave to appeal to the Supreme Court in a cause or matter, <u>including an</u> <u>interlocutory matter</u>, civil or criminal, and may grant leave accordingly."* {Emphasis mine}

Section 4(1) of Act 459/1993 referred to above and which is a replication of article 131(1) of the Constitution with the exception of subsection (c), also reads:

"In accordance with article 131 of the Constitution, an appeal lies from a judgment of the Court of Appeal to the Supreme Court –

(a) as of right, in a civil or criminal cause or matter in respect of which an appeal has been brought to the Court of Appeal from a judgment of the High Court or a Regional Tribunal in the exercise of its original jurisdiction;

(b) with the leave of the Court of Appeal, in a cause or matter, where the case was commenced in a court lower than the High Court or a Regional Tribunal and where the Court of Appeal is satisfied that the case involves a substantial question of law or it is in the public interest to grant leave of appeal;

(c) as of right, in a cause or matter relating to the issue or refusal of writ or order of habeas corpus, certiorari, mandamus, prohibition or quo warranto."

The facts of the case that gave birth to this application are briefly that; on the 20th day of February 2014, the applicant filed a writ of summons against the respondent in the High Court, Accra, claiming as many as sixteen (16) reliefs. The reliefs are myriad, including debt claims, but the

major one, of course, was a declaration seeking to invalidate an agreement termed "SEPARATION AGREEMENT", which both parties executed on 8th November 2012, to govern their business relations.

On 28th February 2014, the respondent entered conditional appearance to the writ. Subsequently, it filed an application for stay of proceedings and sought for an order referring the matter to arbitration pursuant to an arbitration clause contained in the Separation Agreement entered into by the parties, which agreement applicant is seeking to nullify in his substantive action. The applicant herein opposed the application for stay of proceedings and the referral of the matter to arbitration as provided in their own agreement (i.e. the Separation Agreement).

On the 2nd day of April 2014, the High Court heard and dismissed respondent's application and gave the respondent fourteen (14) days from the date of its ruling, to file its statement of defence to the action. The respondent appealed against the ruling of the High Court to the Court of Appeal with a prayer to the Court of Appeal to reverse the said ruling, stay the proceedings in the High Court and refer the matter to arbitration as provided in the Separation Agreement.

On the 17th day of December 2015, the Court of Appeal unanimously allowed respondent's appeal and referred the matter or parties to arbitration. Applicant, who told this Court it was present in the appellate court with its counsel on the day the judgment reversing the decision of the High Court was delivered, said it applied for a copy of the judgment and obtained same on the 21st day of January 2016; i.e. five (5) weeks after the said decision.

Having obtained a copy of the judgment of the Court of Appeal, applicant took steps to comply with the judgment, by writing to the Ghana Arbitration Centre, which is the arbitral body agreed on by the parties in their agreement, to initiate the arbitration proceedings. The respondent, however, rejected the procedure adopted by the applicant in invoking the jurisdiction of the arbitral tribunal as being improper.

Instead of taking the necessary steps to properly invoke the jurisdiction of the arbitral body, the applicant, on the 21st day of March 2016; (i.e. three months, four days after the interlocutory decision of the Court of Appeal),

filed the instant application in this Court, praying for special leave to appeal against the decision of the Court of Appeal.

Applicant's contention was that, after a careful review of the judgment of the Court of Appeal that reversed the earlier ruling of the High Court, it came to realise that the Court of Appeal fell into grave error when it reversed the ruling of the High Court. In its view, the judgment of the Court of Appeal was given *per incuriam*, as it was contrary to the clear provisions of Sections 6(1), 6(2) and 24 of the Alternative Dispute Resolution (ADR) Act, 2010 [Act 798].

Applicant explained that the Court of Appeal did not inquire into the scope of the arbitration agreement embodied in the main agreement executed by the parties, contrary to the provisions of section 6(2) of Act 798. By this failure, the decision of the Court of Appeal seeks to create a novel principle of law which threatens to undermine the stability of the concept of arbitration as a consensual agreement between the parties, for which the pronouncement of the highest court of the land; i.e. this Court, would be most advantageous to the public.

Applicant contended further that when the matter went on appeal before the Court of Appeal, it filed an amended written submission to bring the full force of its argument before the appellate court, having realised that its original written submission was inadequate. However, the Court of Appeal, in exercising its discretion, rejected same thereby disabling itself from a proper determination of the issues between the parties.

Applicant concluded that exceptional circumstances exist in this case for this Honourable Court to exercise its discretion in its favour by granting it special leave to appeal to the Supreme Court to prevent a failure of justice as there is a prima facie error on the face of the record. It referred to the decision of this Court in the case of **DOLPHYNE (NO. 2) v SPEEDLINE STEVEDORING CO. LTD [1996-97] SCGLR 373**; particularly holding (3) on principles governing grant of special leave under article 131 (2) of the Constitution.

As an interlocutory matter that commenced in the High Court, applicant did not need leave to appeal against the decision of the Court of Appeal to this Court. Applicant could have appealed as of right within twenty-one days

from the date the Court of Appeal gave its decision if it was of the view that the decision was wrong as provided under Rule 8 (1)(a) of the rules of this Court, 1996 **[C.I.16]**. Applicant did not do so but had to wait for more than three months to bring this application. Applicant, however, did not advance any reason in its affidavit in support of this motion, to explain why it refused or failed to comply with the rules of court governing appeals.

What I gathered from applicant's case as canvassed by its counsel was that, after it had taken steps to comply with the ruling or decision of the Court of Appeal by writing to the Ghana Arbitration Centre to initiate the arbitral proceedings, it noticed that the judgment in question was given *per incuriam*. The twenty-one days permitted under the rules; i.e. rule 8 (1) (a) of [C.I. 16] for appeals against interlocutory decisions had lapsed by then and the applicable rule does not admit of time extensions. So there was no way the applicant could have appealed against the decision complained of. It therefore resorted to Article 131 (2) of the Constitution and rule 7 (4) of C.I. 16 to seek the special leave of this Court to appeal. But the big question is; has the applicant satisfied the requirements for invoking this special jurisdiction of the Court?

The respondent vehemently opposed the application in a vigorous response and prayed the Court not to grant same. Respondent relied on the depositions in its affidavit in opposition filed on 11/04/2016. The first two grounds of opposition, which I do not agree to, were that; (i) the application did not conform to Form 3, Part One of C.I. 16 since the grounds of the application were not stated on the motion paper to put the Court and the parties on notice of the issues at stake and (ii) the applicant did not seek leave first in the court below (i.e. the Court of Appeal), before coming to the Supreme Court.

With regard to the first ground of objection, the rules of court and particularly rule 7 (4) of C.I. 16, did not provide for any form in which applications made under that rule should be brought. Form 3 Part 1 of C.I. 16 is for applicants coming under article 131 (1)(b). Though the applicant could have adopted the same form, failure to do so is inconsequential since it is the substance of the application that matters but not the form.

The authorities have made it clear that the discretion of the Court in entertaining such applications under article 131 (2) and rule 7 (4) is a perfectly free one, uninhibited by any rules of procedure. The only question that confronts the Court for an answer when considering such applications is; **'Whether upon the facts of the particular case or the case in question, the discretion should be exercised in applicant's favour?'**

On the second ground that the applicant should have sought leave first in the court below, I wish to state that that procedure does not apply in applications for special leave brought under article 131 (2); Section 4 (5) of the Courts' Act, 1993 [Act 459]; and rule 7 (4) of C.I. 16 of 1996.

As Bamford Addo, JSC stated in the case of **KOTEY v KOLETEY [2000] SCGLR 417 @ 422-423**; *"…The special leave referred to by article 131 (2) and rule 7 (4) of C.I. 16, is very special indeed and it is also unfettered by any rules of law since the grant of leave was left entirely at the discretion of the Supreme Court. This leave is under section 4 (5) of the Courts' Act, 1993 [Act 549], not subject to any condition of appeal under the Rules of Court, i.e. C.I. 16. It is a special favour which is given to litigants who have good and valid appeals, to enable them to appeal even though they are under the Rules of Court out of time within which to appeal so as to prevent a failure of justice."* The rationale behind the grant of such applications is basically; ***'To prevent the denial or the failure of justice.'***

Respondent's first two grounds of objection are therefore untenable and I dismiss same.

The other grounds of objection that the respondent canvassed were that; the applicant failed to attach a proposed notice of appeal to its application to convince this Court that it has genuine grounds of appeal that needs determination by this Court. According to the respondent, applicant should have gone beyond showing that he has grounds of appeal by filing the supposed grounds of appeal, which it failed to do. Applicant referred to the decision of this Court in Khoury v Mitchual [1989-90] 2 GLR 256 in support of this contention.

It contended further that there was no prima facie error on the face of the record for the applicant to resort to article 131 (2) instead of 131 (1) (a) of the Constitution. According to respondent, it was in the parties own

agreement that such a dispute that was initiated by the applicant in the High Court must first be determined by arbitration so the Court of Appeal was right in staying proceedings in the High Court for the matter to be determined on arbitration. It submitted that when parties agree on something, it is that agreement that must be complied with.

The respondent referred to the cases of; *Kotey v Koletey case* cited supra; Ansah v Atsem [2001-2002] SCGLR 906; BCM v Ashanti Goldfields Ltd [2005-2006] SCGLR 602; Westchester Resources Ltd v Ashanti Goldfields Co Ltd & Africore (Gh) Ltd v Ashanti Goldfields Co. Ltd, (Civil Appeal No. J4/63/2013, dated 11th November, 2015-unreported judgment of this Court); Dell Computer Corp. v Union des Consommateurs [2007] SCC 34; Naviera Amazonica Peruana v Compania Internacional de Seguros del Peru [1998] 1 Lloyd's Rep. 116, to support its submissions.

On the point made by the applicant that the Court of Appeal erred in refusing to admit its amended written submissions, respondent said the applicant did not appeal against the ruling of the Court of Appeal on that issue so it was not appropriate for the applicant to raise it in this application. I agree with the respondent on this point and I do not think that argument is worthy of consideration at this material time.

Acquah, JSC in the *Kotey case* (supra), outlined the prerequisites for the grant of special leave to appeal under article 131(2) as follows: *"An applicant who applies to the Supreme Court for special leave under article 131(2) must satisfy the Court* ***(i)*** *why he did not avail himself/herself of the usual rights of appeal i.e., as of right and by leave) provided, and* ***(ii)*** *why he should be granted such special indulgence. In this connection, applicant must pass the test set out in the Dolphyne (No.2) case."*

Atuguba, JSC also in the same case, expressed himself thus; *"Even though failure to make prior application for leave to appeal from the Court of Appeal under rule 7 (1) or to make application for special leave within 14 days under rule 7(2) of C.I. 16 after a refusal of an application for leave by the Court of Appeal, is no bar to an application to this Court for special leave, it is still* ***pars judicis*** *to take those matters into consideration in determining an application for special leave to appeal to this Court under rule 7(4) of C.I. 16."*

As the distinguished jurists quoted above have opined, it is the duty of an applicant who comes under article 131(2) and rule 7(4) of C.I. 16 for special leave to appeal, to satisfy the Court as to why he did not avail himself of the usual rights of appeal and the Court is required to take such matters into consideration.

The test or principles set out in the Dolphyne (No.2) case, which every applicant for special leave under article 131 (2) and rule 7(4) must pass, as stated by Acquah, JSC in the *Kotey case* (supra) are:

*"**(a)** that there was a prima facie error on the face of the record; or*

***(b)** that a general principle of law had arisen for the first time; or*

***(c)** that a decision by the Supreme Court on the point sought to be appealed against would be advantageous to the public."*

In the words of Acquah, JSC (as he then was); ***"The discretion granted or conferred on the Supreme Court under article 131 (2) is a very potent power given to the highest court of the land to exercise it in the supreme interest of justice in a fit and proper manner."*** {Emphasis mine}

In a recent case of **OSEI v ANOKYE [2007-2008] SCGLR 463**, this Court per Georgina Wood, C.J., affirmed the points canvassed in the *Kotey and Ansah cases* (supra) on the factors that the Court takes into consideration in granting special leave per article 131(2), which include the need to avoid inordinate disrespect for the rules of court.

This means that the avenue created under article 131(2) and rule 7(4) for special leave to appeal, is not meant for losers who failed to comply with the rules of court procedure for instituting appeals unaffected by any insurmountable inhibitions. The guiding principle governing grants of special leave to appeal is not that the applicant has a good case that needs the attention of the highest court of the land. The first probe that the Court must undertake and which the applicant must pass is; ***why did he/she/it not comply with the rules of court in properly invoking the appellate jurisdiction of the Court?***

For an applicant to win the sympathy of this Court in the grant of special leave under article 131(2) of the Constitution and rule 7(4) of C.I. 16, he

must first give good and convincing reasons explaining why he/she/it could not strictly comply with the rules of court on time for filing appeals. If he/she/it is able to clear the first hurdle, then comes the second. He/she/it must then satisfy the Court that the end of justice would be defeated if the application is refused. Anything short of that would be tantamount to undermining the decision of this Court in **Doku v Presbyterian Church of Ghana [2005-2006] SCGLR 700 @ 701 (holding 2),** where the Court, speaking with one voice through Sophia Akuffo, JSC stated: ***"It is not for nothing that the rules of court procedure stipulate time limits. Because it is in the public interest that there shall be an end to litigation, the Rules of the Supreme Court have set limits to guide litigants with a view to achieving certainty and procedural integrity. Otherwise, in the case of appeals, any litigant may conveniently take his or her time to decide when to resurrect the litigation of suits in which decisions have been given. Thus, time limits are too important for this Court to ignore; even if it had any discretion in the matter…There is no principle of equity that permits the court to ignore the time limits set out by the rules so as to favour the appellant with an undue advantage"***

The above decision of this Court was an affirmation of the sanctity the Court holds with regard to the application of the rules of court as emphasized by Wuaku, JSC in the case of **Darkwa v Kwabi IV [1993-94] GBR 380 @ page 382-383** in the following words;

"The rules must prima facie be obeyed otherwise, as it was held by the Privy Council in Ratnan v Cumarasamy [1965] 1 WLR 8, PC a party would have unqualified right to extension which would defeat the purpose of the rules which was to provide a time-table for litigation. See also the case of Revici v Prentice Hall Incorporated [1969] 1 WLR 157, CA."

The applicant, in the instant application, did not advance any reason why it failed to resort to the normal appeal procedure by filing a notice of appeal within 21 days after the delivery of the decision of the Court of Appeal on 17th December 2015. In fact, it could not have given any as it never occurred to it to appeal against the said decision, having taken steps to comply with the said judgment by writing to the Ghana Arbitration Centre to invoke its jurisdiction.

As was decided by this Court in the cases cited supra, rules are not made in a vacuum. They are made to be obeyed but not to be flouted with impunity. This Court should therefore be purposeful in applying article 131(2) and rule 7(4) of C.I. 16. In both the *Kotey* and *Ansah cases* (supra), the applicants gave reasons why they could not appeal within time and the Court found out that the fault for not appealing within time was not that of the applicants but their lawyers. On the principle that the sins of a lawyer must not be visited on his/her client, the Court granted the application in the *Kotey case* but refused that of the applicant in the Ansah case because the applicant could not demonstrate that there was something special which entitled him to the grant.

From the authorities, this Court, as the court of last resort, would give a blind eye to the rules only in situations where the ends of justice would be defeated. Article 131(2) and rule 7(4) of C.I. 16 must therefore be applied in such a way that it does not defeat the purpose of rule 8 of C.I. 16 on time limits within which to file appeals to this Court.

In the instant case, the applicant did not attach any proposed grounds of appeal to its application for the Court to know whether in fact, it has any genuine grounds of appeal. The only contention applicant made was that the interlocutory judgment of the Court of Appeal was given *per incuriam* contrary to sections 6(1); 6(2) and 24 of the ADR Act, 2010 [Act 798].

The sections in question provide:

6(1). *"Where there is an arbitration agreement and a party commences an action in court, the other party may, on entering appearance, and on notice to the party who commenced the action in court, apply to the court to refer the action or a part of the action to which the arbitration agreement relates, to arbitration."*

6(2). *"The court on hearing an application made under subsection (1) shall, if satisfied that the matter in respect of which the application has been made is a matter in respect of which there is an arbitration agreement, refer the matter to arbitration."*

24. *"Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own jurisdiction particularly in respect of*

(a) The existence, scope or validity of the arbitration agreement;
(b) The existence or validity of the agreement to which the arbitration agreement relates;
(c) Whether the matters submitted to arbitration are in accordance with the arbitration agreement."

In fact, I do not find tenable applicant's argument that the decision of the Court of Appeal under impeachment did not comply with section 6(1) of Act 798. Section 6(1) only makes provision for the procedure a party who wants to give meaning to an arbitration agreement signed with another, must adopt when the other party decides to initiate a court action contrary to their own agreement to resort to arbitration first. That was exactly what the respondent in this application did. It complied with section 6(1) of the ADR Act, by applying to the trial High Court to stay its proceedings and to refer the matter to arbitration as provided under section 20.2 of the Separation Agreement that was the subject of the action. The trial High Court refused the application but the Court of Appeal, on appeal, thought otherwise and granted respondent's prayer. The Court of Appeal did not therefore breach section 6(1) of Act 798.

On section 6(2) of the same Act, applicant's contention was that the Court of Appeal did not satisfy itself on the scope of the arbitration agreement embodied in the main Separation Agreement before referring the parties to arbitration. By doing that, the Court of Appeal was compelling the parties to go on arbitration contrary to the principle that arbitration must be consensual.

To be fair to the Court of Appeal, it did, in fact, consider the issue as to whether or not the matter must be referred to arbitration before it did so. The Court of Appeal, per L. L. Mensah, J. A., evaluated the two positions presented by the parties in line with the Separation Agreement that embodied the arbitration agreement and concluded as follows: *"I think the defendant's counsel is right to say that the trial court's ruling is an invasion of the domain of the arbitral tribunal which has been permitted by statute, i.e. section 24 of the ADR Act to determine the existence, scope and validity of any arbitration agreement. The authorities – both decided cases and statute as aforementioned, are clear that once there is an arbitration agreement in a contract duly executed by the parties, the court must give effect to the*

agreement. Unfortunately the learned trial judge failed to advert his mind to section 24 of the ADR Act and gave, with respect, per incuriam view of the Separation Agreement of the parties. The courts have consistently held the view that if a statute recommends that a particular act or procedure should be followed, that avenue is the only procedure which should be followed. Any breach of the statutory provision may either not clothe the court with jurisdiction or in extreme breach of the statute, incur the wrath of certiorari."

The arbitration agreement embodied in the parties' Separation Agreement is provided under section 20.2 of the main agreement. It reads:

"Any dispute arising out of or in connection with this Agreement other than a dispute relating to Claim, including any question regarding its existence, validity or termination, shall be referred to and finally resolved through arbitration under the auspices of the Ghana Arbitration Centre and adopting the Rules of Arbitration of the United Nations Commission on International Trade Law, (the UNCITRAL Rules), which UNCITRAL Rules are deemed to be incorporated by reference into this clause."

The word **'Claim'** as used above was defined in the 'Separation Agreement'. While the trial High Court gave it a meaning that purports to place the suit of the applicant outside the arbitration clause, the Court of Appeal defined it differently and thought the action was a matter that could be properly referred to arbitration as provided in the agreement. The substantive action initiated by the applicant is seeking, inter alia, to challenge the validity of the Separation Agreement that embodies the arbitration clause referred to above. Section 20.2 is emphatic that any dispute arising out of or in connection with the agreement, including any question regarding its existence, validity or termination, shall be referred to and resolved by arbitration.

Section 24 of Act 798 says, the arbitral tribunal has power to rule on its own jurisdiction in respect of the existence, scope or validity of the arbitration agreement except where the parties decide otherwise. The parties have not decided otherwise aside of disputes they described as 'Claim', the definition of which both courts below find nebulous or vague. The existence or validity of the Separation Agreement to which the

arbitration agreement relates is not one of the reliefs defined under 'Claim'. It is a matter that falls under those to be submitted to arbitration as stated under section 20.2 of the Agreement.

The order of the Court of Appeal that the parties should give meaning to their own agreement (i.e. the Separation Agreement) by resorting to arbitration where a dispute has arisen with regard to the validity of the said agreement, which both parties have appended their signatures to, does not, in my view, occasion injustice or the crucifixion of justice in any way.

In the case of **BMC v ASHANTI GOLDFIELDS LTD [2005-2006] SCGLR 602 @ page 611**, which the respondent referred to in its submissions, this Court per Adinyira, JSC stated; ***"the cardinal presumption in the interpretation of a document is that the parties are presumed to have intended what they have in fact said or written."*** She went on to admonish the courts to strive to uphold dispute resolution clauses in agreements which constitute sound business practice. The Court held further that there is no general principle of law that whenever a question of legal construction arises from the terms of a contract containing an arbitration clause, the same must be reserved for a court.

The Separation Agreement provides categorically that any dispute that relates to the validity of the agreement itself or the arbitration agreement embodied therein must be determined by arbitration. The decision to refer certain disputes to arbitration as indicated under section 20.2 of the Separation Agreement arose from the consent of the parties the moment they appended their signatures to the agreement. It does not matter that the drafting of the agreement was the act of only one of the parties. So long as both parties have appended their signatures to it, they are bound by its provisions. The reference by the parties to arbitration in the Separation Agreement, which the Court of Appeal complied with, was therefore consensual.

The applicant has failed to convince the Court that the refusal to grant it special leave to appeal would defeat the end of justice or would constitute a failure of justice. I say so because, the Court of Appeal, by its judgment of 17th December 2015, did not create any novel principle that threatens to challenge the age old principle that arbitration is consensual. No error

patent on the record was therefore committed by the Court of Appeal in its judgment to merit the grant of special leave to the applicant to appeal against the said judgment.

Section 58 of the ADR Act, 2010 [Act 798], makes provision for the applicant to challenge any award made by the arbitrator if at the end of the day, it feels the award deals with a dispute not within the scope of the arbitration agreement. As Atugubah, JSC opined in the Koletey case (supra); ***"although an application for normal leave must show some merits in the intended appeal, an application for special leave must do more than that; it must also give good and convincing reasons why the application is special."*** The applicant has failed to satisfy the above criteria, making its application unmeritorious.

(SGD) YAW APPAU

JUSTICE OF THE SUPREME COURT

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