IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT, ACCRA

AD 2016

CORAM: ANIN YEBOAH JSC (PRESIDING)
BAFFOE - BONNIE, JSC
AKOTO – BAMFO (MRS), JSC
BENIN, JSC
AKAMBA, JSC

CIVIL MOTION
NO.J5/46/2015

22ND MARCH 2016

THE REPUBLIC ...

VRS

HIGH COURT (FINANCIAL DIVISION) ACCRA
EX-PARTE : XENON INVESTMENT CO. LTD ... APPLICANT

FINANCIAL INTELLIGENCE CENTRE ... INTERESTED PARTY

RULING

ANIN YEBOAH JSC:-

The applicant herein has invoked our supervisory jurisdiction to quash a ruling of an Accra High Court, [Financial Division], dated the 1st of June 2015. The uncontroverted facts of this application appear to be very simple. The applicant is a limited liability company operating in this

country. It operated three accounts at the Tower branch of Fidelity Bank, Ghana Limited. On 27/02/2014, the interested party herein (The Financial Intelligence Centre), in a letter, directed the applicant's bank to freeze all the accounts of the applicant.

As the interested party is statutorily conferred with such authority, the bank complied to freeze all the three accounts of the applicant. According to the interested party, in an affidavit sworn to by one Mary Shireen Ofosu, an analyst of the Financial Intelligence Centre, the applicant on 20/02/2014 received an amount of US$43,569.45 from one Sue Batth-Tait in Canada. Prior to the 20/02/2014 the same Sue Batth-Tait had remitted the applicant US$33,999.00. The interested party's officials questioned two directors of the applicant's company; namely: DAVID OMARI and ISAAC BOATENG who according to the officials of the interested party could not provide credible information for the remittances and they therefore suspected the applicant company of money laundering. After the freezing order initiated by the interested party herein on 4/03/2014, it applied for and successfully obtained from the High Court, [Financial Division] Accra, a confirmation order freezing all the three accounts of the applicant in an ex parte application.

Not comfortable with the freezing of its accounts, the applicant company on 27/08/2014 filed a motion praying the court to set aside the freezing order granted against them. This application to defreeze the accounts was struck out for want of prosecution on 5/09/2014. Later, on 9/04/15, the applicant filed an application praying the same court to defreeze the accounts frozen by the same court on 5/03/2014, which was clearly over one year. The interested party herein opposed the application.

It did not file any comprehensive affidavit in answer to the motion but learned counsel made it clear to the learned judge that he would rely on the affidavit in answer filed earlier on in the motion which was struck out for want of prosecution on 5/09/2014. We shall consider this point later in this delivery.

In the course of hearing the application, the learned High Court Judge suo motu requested one Isaac Boateng, a director of the applicant company to appear in court to answer certain allegations apparent on the affidavit of the interested party filed in the motion which was struck out for want of prosecution. The said Isaac Boateng was not available to be examined on the affidavit.

The application to defreeze, however, was heard and the learned judge in a lengthy ruling on 1/06/2015, concluded as follows:

> "…I find that there are too many questions and pointers to what might be a fraudulent transaction which the court has notice of. Unfortunately, the applicant's directors are unwilling or unable to make
>
> themselves available to settle these queries.
>
> By granting this application, this court would, in my view, be condoning an illegality under some other technical guise. It would not be in the interest of justice to do so".

The applicant company does not complain in this application before us, that the initial procedure leading to the freezing of the accounts were not in order. However, it has raised a legal issue that under the Anti-money Laundering Amendment Act, 2014 (Act 874) the interested party cannot freeze the accounts of the company for more than one year and that the statute under reference does not even provide for extension of the one year and therefore the court had no jurisdiction to keep the freezing order beyond the one year.

The applicants have thus prayed us by this motion to quash the ruling of the learned High Court judge dated the 1/06/2015 on the following grounds:

a. The High Court exceeded its jurisdiction when it dismissed the application for a defreeze of accounts and release of funds filed on 9/04/2015 when the statutory period of 12 months had long lapsed.

b. The High Court exceeded its jurisdiction when it relied on an affidavit in opposition filed on 5/09/2014 in a previous application when same had been struck out for want of prosecution on 5/09/2015.

c. The freezing of all the accounts of the applicant was done in breach of the rules of natural justice.

On the first ground, learned counsel for the applicant argued, that, since the statute under which the jurisdiction to freeze accounts limits the courts jurisdiction to freeze the accounts for only one year, the High Court has no jurisdiction beyond one year to keep the freezing order in place. To fully appreciate this line of argument it would suffice to state the statute on which counsel anchored his argument. The said section

23A of the Anti-Money Laundering Amendment Act, 2014 (Act 874)) states thus:

> "An accountable institution shall preserve the funds, other assets and instrumentalities of crime for a period of one year to facilitate investigations"

Counsel for the interested party does not doubt the time period fixed by the law for the operation of the freezing order. In a rather lengthy affidavit in answer to this application, one Acheampong Opoku, a financial analyst of Financial Intelligence Centre had this to say in paragraphs 23, 24 and 25 thereof as follows:

> "23. That I have further been advised by lawyers for the Interested Party and I verily believe same to be true <u>that even though the statutory period of twelve (12) months, during which time an accountable institution could preserve frozen funds for the facilitation of investigation had elapsed</u>, the processes on the docket of the suit were unaffected, hence the reliance on same by the Applicant herein to file its motion dated 9th April, 2015.

24. That in specific response to paragraphs 5,6,7,8,9 and 10 of the Applicant's affidavit in support of the instant motion, the interested party will say that investigation of allegation of fraud, which is criminal in nature, is not affected by the effluxion of time.

25. that the directors of the Applicant herein were reluctant to make themselves available when the High Court [Financial Division] directed that they appeared in court to speak to the issue of the forged passport that was used to open the Applicant's account at the Fidelity Bank Ghana Limited"

We have quoted at length the factual basis of the interested party's position and the legitimate reasons for keeping the applicant's accounts frozen over one year.

It may be factually true that the allegations of fraud had basis but that is not the issue at stake in these proceedings. The statutory provision which was invoked against the Applicant was to prevent the applicant from dealing with the frozen accounts for that one year period; so as to enable the Financial Intelligence Centre (the interested party) herein to conduct any investigations into the transaction to ascertain whether the

transaction has any traces of criminality to warrant the freezing of the accounts.

One is compelled to assume that in this era of information technology and international co-operation among nations, one whole year should be enough for the Financial Intelligence Centre to unearth any wrongdoing in the transaction under consideration. The mere fact that fraud may connote criminality should not be used as an opportunity to indefinitely freeze the accounts of the applicant, when the law under which the interested party is relying on does not vest it with power to do so.

The question is this: is the High court vested with jurisdiction to freeze the account for over one year? We think that the statute does not vest that jurisdiction in the High Court to do so. It has jurisdiction to freeze and defreeze an account but the statute does not vest it with authority to keep the accounts frozen for more than one year.

Learned counsel for the applicant has referred us to the case of the REPUBLIC V DISTRICT MAGISTRATE, ACCRA; EX PARTE ADIO [1972] 2 GLR 125 to argue that even though the High court had jurisdiction to entertain the matter the order made to keep the accounts frozen beyond

one year destroyed its jurisdiction. In the said case Acher JA (as he then was) at page 132 said:

> "It is of vital importance to appreciate that when the term "excess of jurisdiction" is used, it may mean that from the inception of the case, the court has no jurisdiction whatsoever because the nature of the case or the value involved is beyond its jurisdiction. But it may also mean that although the Court has jurisdiction to hear the case, the orders which the court can pronounce are restricted by statute. If an order is therefore beyond the powers of the court, it is perfectly correct to say that it has exceeded its jurisdiction" (emphasis ours)

We think this proposition of law clearly settles the matter. The High court undoubtedly has jurisdiction to hear the matter but it is clear beyond doubt that it had no jurisdiction to order the continuous freezing of the accounts beyond one year.

The learned judge was therefore left with no discretion in the matter at the stage when the court's jurisdiction was invoked to defreeze the accounts beyond the one year. As the learned judge ordered otherwise to keep the freezing of the accounts beyond the one year she destroyed

the jurisdiction vested in the court. We accordingly hold that the High Court lacked the jurisdiction to order the continuous freezing of the accounts of the applicant.

We would have rested our decision at this stage of this delivery as this court in a cluster of cases like; REPUBLIC V FAST TRACK HIGH COURT, ACCRA; EX PARTE ELECTORAL COMMISSION [2005-2006] SCGLR 514, REPUBLIC V HIGH COURT KOFORIDUA EX PARTE ASARE [2008-2009] 2 GLR 750 has established the time-honoured principle of law that when there is an apparent want of jurisdiction, certiorari should issue by a supervising court. However, learned counsel for the applicant raised another procedural issue of whether the court erred in relying on an affidavit in support of an earlier motion which had been struck out for want of prosecution.

As it was pointed out earlier in this delivery, the first application to defreeze the accounts was struck out for want of prosecution. However, learned counsel for the interested party and the learned judge relied on the affidavit in the motion struck out in the repeated motion to refuse the application to defreeze.

According to counsel for the applicant as the motion was struck out it had ceased to be operative and the court could not rely on same. None

of the counsel in this case referred this court to any decided case on this issue. However, Order 20 rule 13 of the High Court [Civil Procedure] Rules CI 47 of 2004 offers some assistance. The rule states as follows:

> "13 (1) An original affidavit may be used in any proceedings if it bears a filing stamp.
>
> (2) Where an original affidavit is used it shall be filed with the Registrar.
>
> (3) Where an affidavit has been filed, an office copy of it may be tendered in any proceedings."

We think that order 20 rule 13 (1) resolves the issue under consideration. The nature of an affidavit is well captured in the authoritative works in Atkin's Encyclopedia of Court Forms in Civil Proceedings [2nd edition) volume 3 at page 343 as follows:-

> "An affidavit is a written statement of evidence, sworn by the person making it, who is called the deponent, before a person authorised to take affidavits, and where admissible, receivable in legal proceedings as evidence either in support of an application, or in answer or reply."

Affidavits are commonly used in interlocutory applications to provide factual basis in support or answer to depositions. In Barber v Mackrell [1879] 12 Ch D.534 the court formed the opinion that an affidavit which is used in proceedings can be used for purposes if relevant, since it is a form of evidence on oath. In this application under consideration, the deponent was available for cross-examination if requested by the court and there was also indication from counsel for the interested party that he was going to rely on it which to us constitutes fair and sufficient notice to the applicant, thereby avoiding any element of surprise.

We think that the learned trial Judge's reliance on the affidavit was supported by law and we accordingly reject this ground of the application as unmeritorious.

The last ground touches on the breach of the rules of natural justice. We understand learned counsel for the applicant in his simple submissions on this ground that, as some money which stood in the accounts before the alleged money laundering had nothing to do with the transfer from Canada, the learned Judge ought not to freeze the whole accounts without hearing the applicant. On record, learned counsel for the

interested party had little to say in answer to the submissions of counsel for the applicants on this point.

It is plain that the freezing order affected the whole accounts without limiting it to the alleged illegal transfers which culminated in the freezing order. We think that moneys which stood in the accounts of the applicants before any alleged illegal transfers into the accounts should not form part of the freezing order.

If a trial Judge is invited by the Financial Intelligence Centre to do so, it should provide the court with compelling evidence and notice of the application should be given to the victim of the freezing order. As applicant was denied the opportunity to be heard as regards the money not forming part of the alleged money laundering, but nevertheless had the entire accounts frozen, we hold that the court denied the applicant a fundamental requirement of the common law that is the audi alteram partem rule. This has always been a ground for certiorari and since this application has already been granted on the ground of jurisdictional error, it would be sheer pedantry to cite several cases to support this proposition of law. We will, however, sound a caution to the interested party in this Constitutional dispensation by referring to Article 23 of the 1992 Constitution and the case of AWUNI v WEST AFRICAN

EXAMINATIONS COUNCIL [2003-2004] SCGLR 471, 514 where Sophia Akuffo JSC said as follows:

> "In my view, the scope of Article 23 is such that there is no distinction made between acts done in exercise of ordinary administrative functions and quasi-judicial administrative functions. Where a body or officer has an administrative function to perform, the activity must be conducted with, and reflect the qualities of fairness, reasonableness and legal compliance"

In sum, we think the applicant has made a clear case on the merits to warrant our supervisory jurisdiction. We hereby quash the order of the learned High Court Judge dated the 1st June 2015 for the reasons canvassed above.

The application for certiorari is thus granted as prayed.

ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

P. BAFFOE-BONNIE
JUSTICE OF THE SUPREME COURT

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

A. A. BENIN
JUSTICE OF THE SUPREME COURT

J. B. AKAMBA
JUSTICE OF THE SUPREME COURT

ALEXANDER AFENYO MARKIN ESQ. WITH HIM KORKOR OKUTU FOR THE APPLICANT
ARTHUR CHAMBERS ESQ. FOR THE INTERESTED PARTY.