**IN THE SUPERIOR COURT OF JUDICATURE**
**IN THE SUPREME COURT OF GHANA**
**ACCRA, GHANA – A.D. 2016**

**CORAM: ATUGUBA JSC (PRESIDING)**
**ADINYIRA (MRS) JSC**
**YEBOAH JSC**
**BENIN JSC**
**AKAMBA JSC**

**CIVIL APPEAL**

**№ J4/16/2016**

13TH APRIL 2016

**RIASAND VENTURES LTD :: PETITIONER/RESPONDENT**
**/RESPONDENT/APPELLANT**

**VRS**

**NOBLE GOLD BIBIANI LTD :: RESPONDENT/APPELLANT**
**/APPELLANT/RESPONDENT**

## JUDGMENT

**ANIN YEBOAH JSC:-**

My Lords, this interlocutory is from the ruling of the Court of Appeal, Accra dated the 28/1/2015. The legal point to be determined by us appears to be simple but to appreciate the reasons for our decision I will proceed to briefly state the facts in this interlocutory appeal.

The appellant commenced an action at the Fast Track Division of the High Court, Accra, in 2013 in a suit titled: RIASAND VENTURES LTD v NOBLE GOLD BIBIANI LTD for recovery of certain sums of money from the respondent, a company incorporated in Australia as Noble Minerals Resources wholly owned NOBLE MINING GHANA LTD AND DRILLING

AND MINING SERVICES LTD which are registered in Ghana as Ghanaian companies. Noble Mining Ghana Ltd is the sole shareholder of the respondent in this appeal. The three subsidiary companies which for purpose of brevity and convenience was referred to by counsel for the respondent as "Scheme Companies". As the "scheme companies" continued to experience financial challenges, the sole shareholder proposed a scheme of arrangement to prevent the ultimate winding up of the financially crippled companies, pursuant to section 231 of the Companies Act of 1963, Act 179 to prevent their ultimate winding up.

It was thus clear that the sole purpose for establishing the scheme was to restructure the debts of the companies to creditors which of course included the appellant. It was as a result of the said arrangements that on 27/02/2014, NOBLE MINRALS applied to the High Court, Commercial

Division (Accra) and successfully obtained an order to convene a meeting of creditors of the "scheme companies" so as to approve the scheme to salvage the distressed companies. The meeting was duly convened with notices actually served on all the creditors of the "scheme companies", which of course included the appellant herein.

The meeting was held on 24/03/2013 and the creditors, save the appellant, who was absent endorsed the proposals of the scheme. However, on 20/09/2013 the Fast Track High Court, Accra had entered summary judgment at the instance of the appellant against the respondent herein in suit Nº AC 737 for part of the amount due and owing to the appellant. On 27/06/2014 the same court entered judgment for the outstanding claim which was for damages for breach of contract.

Pursuant to the said judgment, the appellant filed a petition under the Bodies Corporate (Official Liquidation) Act of 1963 (Act 180) to liquidate the respondent as it was unable to pay off its debts. The court granted the application for the winding up on 5/02/2014 and made a consequential order that it by 30/06/2014 the entire judgment debt had

not been fully paid the respondent be wound up under Act 180. Before the winding up order could take effect, the respondent herein applied to the High court (Fast Track Division) Accra to stay execution of and to set aside the winding up order on 15/05/2014. The basis for the application was that as the "scheme" had taken effect all creditors of the

respondent herein were bound by the High Court's order, which of course included the appellant herein.

The appellant insisted that as the winding up order made by the High Court was subsisting it was entitled by virtue of the order to wind-up the respondent regardless of the pending order of the High Court sanctioning the scheme as the appellant was not bound by the order.

The High Court entertained an application at the instance of the respondent to stay and set aside the order for winding up. The learned High court judge refused to set aside the order and therefore allowed the order for winding up to stand. The respondent was ordered to pay the judgment debt by monthly installments from 31/08/2014 to 31/12/2014/ the learned High Court judge further ordered that the

effective date for the winding up was to take effect after the 31/12/2014 if the respondent failed to pay the judgment debt in full.

Aggrieved by the High Court's order, the respondent lodged an interlocutory appeal to the Court of Appeal. It applied to the High court to stay execution of the order for the winding up. The application was refused. On 1/10/2014 the respondent repeated the application for stay

of execution at the Court of appeal. Before the Court of Appeal could hear the application the respondent had paid GH905,921.10 into court for the appellant's benefit. The Court of appeal was of the view that the appeal would be rendered nugatory if the appellant proceeded to wind-up the respondent only for the respondent to succeed on appeal. The Court of Appeal therefore granted the application for stay of execution on several grounds. The appellant decided to appeal.

This appeal was lodged by the appellant herein against the grant of the stay of execution by the Court of Appeal. On record the appellant has argued only one ground of appeal which is set down as follows:

(i) That the Court of Appeal wrongly exercised its discretion when it unconditionally granted

respondent/appellant/applicant/respondent's application for stay of execution.

In the statement of case, the appellant has virtually referred to all the known or reported authorities on the exercise of discretion by a court of law. The appellant, however concedes that a stay of execution was discretionary. He relied on cases like APPIAH v PASTOR LARYEA-ADJEI [2007-8] SCGLR 863, DJOKOTO & AMISSAH v BBC INDUSTRIAL CO

(GHANA) LTD & CITY EXPRESS BUS SERVICES LTD [2011] 2 SCGLR 825, OFOSU-ADDO v GRAPHIC COMMUNICATIONS GROUP LTD [2011] 1 SCGLR 355 to buttress his submissions that the discretion was unjudicially exercised against the appellant. It must be made clear that when the Court of Appeal was seized with the appeal, it was invited to exercise its discretion whether to grant or refuse the stay of execution. It is a time-honoured discretion exercised on well-known principles. As it is a judicial discretion vested in the court below, it behoves the appellant herein to demonstrate to this appellate court that the discretion was not fairly exercised. The appellant can do so by demonstrating that the learned judges at the Court of Appeal misapplied the law governing the determination of the application for stay of

execution as clearly spelt out in the several authoritative decisions referred to above in this delivery above.

The appellant may also succeed if he is able to demonstrate to us that the Court of Appeal failed to take into account relevant matters or relied on irrelevant matters in arriving at a decision. We cannot state the law better than to refer to the case of OWUSU v OWUSU ANSAH [2007-2008] SCGLR 870 at 871 where it was held by this court thus:

> …"an appeal against the exercise of the court's discretion may succeed on the ground that the discretion was exercised on wrong or inadequate materials if it can be shown that the court acted under misapprehension of fact in that it either gave weight to irrelevant or unproven matters or omitted to take relevant matters into account. In the instance case, the trial High court acted on a misapprehension of the pleadings and affidavit evidence before it and thereby exercised its discretion wrongly in favour of the co-defendant-appellant"

See the cases of SAPPOR v WIGATAP [2007-2008] SCGLR 676, and BALLMOOS v MENSAH [1984-86] 1GLR 724.

In such matters the onus was squarely on the appellant to demonstrate in this appeal which is against the Court of Appeal's discretion where the Court of Appeal failed to take relevant matters into consideration or relied on irrelevant matters or misapplied the law regulating applications for stay of execution. As he failed to demonstrate where the Court of Appeal unjudicially exercised its discretion against him, this appellate court is not to disturb their discretion by allowing this appeal. It has never been the duty of an appellate court to substitute is discretion for a

lower court when an appellant has failed to demonstrate that there was unjudicial exercise of discretion on the part of the lower court. It is for the above reason that we dismissed the appeal and reserved our reasons.

We could have limited the reasons for the dismissal of this appeal on the only ground we have discussed above in this delivery but counsel for the respondent raised one legal point which we think we must consider as the highest court of the land. Counsel for the respondent contended that when on 15/05/2014, the Commercial Court confirmed the "Scheme" it became operational and that the appellant herein was bound by the order. He contended further that as it was wrong for the

appellant to contend that even though it was a creditor of the respondent the scheme was not binding on them.

The available evidence shows that the appellant had already obtained judgment and had, indeed, exercised the rights conferred on it under the Bodies Corporate (official Liquidation) Act 1963 (Act 180) to wind up the respondent company for unable to pay its debts to the appellant. We must say that, that was clearly in order as no inhibitions were placed on the appellant to cause the winding up of the respondent company.

The order of the court which was to make the "scheme" operational was not made in this case which is on appeal and to us it could not be considered as binding on the appellant. We agree that as a court of law its decisions must be respected by parties and non-parties alike, we nevertheless observe that this case was separate from the other cases in the absence of any formal consolidation on record, more so, at a time when a valid subsisting judgment had already been entered in favour of the appellant.

In sum, these are our reasons for dismissing the interlocutory appeal as clearly unmeritorious.

**(SGD) ANIN YEBOAH**

**JUSTICE OF THE SUPREME COURT**

**(SGD) W. A. ATUGUBA**

**JUSTICE OF THE SUPREME COURT**

**(SGD) S. O. A. ADINYIRA (MRS)**

**JUSTICE OF THE SUPREME COURT**

**(SGD) A. A. BENIN**

**JUSTICE OF THE SUPREME COURT**

**(SGD) J. B. AKAMBA**

**JUSTICE OF THE SUPREME COURT**

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