IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: ANSAH, JSC (PRESIDING)

ADINYIRA (MRS), JSC

BAFFOE-BONNIE, JSC

AKOTO-BAMFO (MRS), JSC

APPAU, JSC

CVIL MOTION
NO. J8/96/2018

18TH JULY, 2018

RIASAND VENTURES LIMITED ……. PETITIONER/RESPONDENT/RESPONDENT/ RESPONDENT

VRS

1. REGISTRAR OF COMPANIES …….. RESPONDENT
2. NOBLE GOLD BIBIANI LIMITED …….. RESPONDENT/APPELLANT/APPELLANT/ APPLICANT

RULING

APPAU, JSC:-

Before us is a motion for stay of execution of the decision/order of the Court of Appeal dated 7th December 2017 pending an appeal against that decision/order. Though it is a repeat application after a similar one had been refused by the Court of Appeal, it is not regarded as an appeal against the decision of the Court of Appeal as held by this Court in **JOSEPH v JEBEILE & Another [1963] 1 GLR 387**. It is, in fact, a fresh application altogether and we are supposed to exercise our discretion unmindful of the reasons grounding the refusal by the Court of Appeal. Our paramount consideration is

whether there are exceptional circumstances to warrant the grant. In so doing, however, we must avoid the temptation of prejudicing the appeal by going into the merits of the substantive matter, which is yet to be gone into and for which the application has been made.

As we have consistently held in several cases dating back to the *Joseph v Jebeile case* (supra), it is the paramount duty of every court to which an application for stay of execution pending appeal is made to ensure or see to it that the appeal, if successful, is not rendered nugatory - **MENSAH v GHANA FOOTBALL ASSOCIATION [1989] 1 GLR 1 @ p. 2**. This consideration is given premium particularly, where the judgment appealed against is one involving the payment of money by the appellant/applicant. Before we determine the merits of the application, a brief narration of the facts would be essential for a better appreciation of the reasons behind the exercise of our discretion.

Somewhere in September 2013, the respondent in this application instituted an action in the High Court against the applicant for the recovery of the sum of US$1, 105,902.30. The applicant could not defend the action so the trial court entered summary judgment against it in the said sum on the application of the respondent. Subsequently, the respondent, realizing that the applicant could not pay the judgment-debt within the time it expected, petitioned the High Court under the Bodies Corporate (Official Liquidation) Act, 1963 [Act 189] for the official winding-up of the applicant. The High Court granted the order but stayed its execution for a period. The applicant applied to the trial High Court to stay execution and to set aside its winding-up orders. The major reason advanced in support of applicant's motion for stay was that the Commercial Court, which is a court of co-ordinate jurisdiction, had earlier on confirmed a scheme of arrangement approved by a majority of the creditors of the Applicant, which scheme, as provided under section 231 of the Companies Act, 1963 [Act 179], was binding on all the creditors of the applicant including the respondent. It would therefore be unfair to order for the winding-up of the applicant company when the approved scheme of arrangement took precedence over the winding-up order. The trial

High Court dismissed the application but ordered that the winding-up order be extended to take effect on 31st December 2014 instead of 30th June 2014 as earlier ordered.

Dissatisfied with the order of the trial High Court, the applicant appealed against it to the Court of Appeal and subsequently repeated or applied for a stay of execution of the order pending appeal. The Court of Appeal granted the application for stay unconditionally. This prompted the respondent to file an interlocutory appeal against the unconditional grant of the application by the Court of Appeal to this Court on the sole ground that the Court of Appeal wrongly exercised its discretion when it failed to grant the stay of execution on terms. This Court dismissed the interlocutory appeal on the ground that the respondent (then appellant) could not demonstrate that the Court of Appeal did not exercise its discretion judicially. This was on 13th April 2016. On the 7th day of December 2017, the Court of Appeal finally determined the substantive appeal in favour of the respondent herein. The Court of Appeal then ordered the applicant herein to pay the judgment-debt to the respondent within three months from the date of its judgment or be wound up. The applicant filed an appeal against the decision of the Court of Appeal to this Court, which appeal is still pending. After filing the appeal, the applicant prayed the Court of Appeal to stay its order pending the determination of its appeal before this Court. The Court of Appeal refused the application. The applicant has come on a repeat application, praying us to exercise our discretion in its favour by granting the application pending our determination of the substantive appeal before us.

The main contention of the applicant is that if the application is not granted, the appeal before us would be rendered nugatory in the event of any success on its part. The applicant argues that the matters raised in the appeal border on two main issues. The first is; whether or not the scheme of arrangement approved by the Commercial Court was binding on all the creditors of the applicant including the respondent, and secondly, whether or not the scheme of arrangement takes precedence over the winding-up order. According to applicant, with these legal issues yet to be determined by this

Court, it would be appropriate for the Court to grant the application as a refusal would yield repercussions that would render any success chalked in the appeal nugatory. Applicant explained the repercussions as follows:

1. *Upon the commencement of a winding-up proceedings, the powers of the directors shall cease, which would make it impossible for the directors to instruct its lawyers to apply to the High Court for leave to proceed with the appeal pending in this Court. The appeal to this Court would therefore technically terminate.*
2. *Even if the directors could obtain leave, in the event that the appeal is successful, it would be rendered nugatory as the dismissal of the application would translate into the winding-up of the applicant company, which would trigger forfeiture provisions in its mining lease with the Government of Ghana. This would mean that ownership of all immovable assets of the applicant would devolve unto the Government of Ghana.*

The respondent, on the other hand contends that the application is a deliberate ploy by the applicant to frustrate and deny the respondent from enjoying the fruits of its judgment. It argued further that the directors of applicant, by law, could seek leave of the High Court upon the commencement of the winding-up to vindicate its rights in court and as such, the applicant's appeal would not terminate as alleged. The respondent contends further that the scheme of arrangement would still be operational despite the winding-up of the applicant; as such the appeal would not be rendered nugatory.

By section 231 (4) of the Companies Act, 1963 [Act 179], upon confirmation of the scheme of arrangement by the court, such scheme became binding on all creditors. However, a cursory reading of section 231 as a whole does not indicate that a winding-up order has to be set aside upon the confirmation of a scheme of arrangement. Meanwhile, the purpose of a winding-up process is to bring the company to an end. In that light, the company, upon commencement of winding-up proceedings, ceases to

carry on business as has been expressly stated under section 246 (2) of Act 179. If the winding up order is therefore carried out the possibility that that action could terminate the applicant's lease with the Government in accordance with section 28(iii) of the lease document cannot not be completely ruled out. The crucial question, therefore, which this Court has been called upon to determine in the substantive appeal is; whether or not the two orders, i.e. an order confirming or approving a scheme of arrangement for the payment of a judgment/debtor's creditors and an order for the winding up of the judgment/debtor company, could be enforced at the same time. Is it practicable or feasible to enforce the two orders *pari passu* by virtue of the implications of each?

We are of the view that the appeal is neither frivolous nor vexatious and that there are serious questions to be answered or resolved by this Court in the appeal. Since the dismissal of the application could trigger a series of events which might render the appeal nugatory should the applicant be successful, it would not be appropriate for us to refuse the application. We are guided by our own decision in the *Jebeile case* (supra), where this Court held that; **"where an application for stay of execution pending appeal is considered in a case involving, *inter alia*, payment of money, the main consideration should be not so much that the victorious party is being deprived of the fruits of his victory as what the position of a defeated party would be who had had to pay up or surrender some legal right only to find himself successful on appeal."**

What the respondent would suffer by the grant of this application is delay in carrying out the liquidation process but not that the judgment-debt would not be paid at all. It is worrisome anyway, but our duty is to balance the equation between the parties. With regard to the respondent, the law provides a remedy for delayed payment as interest is taken into consideration anytime the final amount is to be paid. The applicant, on the other hand, has everything to lose when the application is refused, as any success on its part in the appeal would be rendered nugatory, as by then it would have become extinct. We are therefore compelled to exercise our discretion in applicant's favour, which we hereby do. Accordingly, the winding-up order made by the High Court as

affirmed by the Court of Appeal, is stayed pending the determination of the appeal by this Court.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

ANSAH, JSC:-

I agree with the conclusion and reasoning of my brother Appau, JSC.

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

ADINYIRA (MRS), JSC:-

I agree with the conclusion and reasoning of my brother Appau, JSC.

S. O. A. ADINYIRA (MRS)
(JUSTICE OF THE SUPREME COURT)

BAFFOE-BONNIE, JSC:-

I agree with the conclusion and reasoning of my brother Appau, JSC.

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

AKOTO-BAMFO (MRS), JSC:-

I agree with the conclusion and reasoning of my brother Appau, JSC.

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

COUNSEL

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COSMAS AMPENGYOU FOR THE RESPONDENT/APPELLANT/APPELLANT/APPLICANT.