IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA, A.D.2017

CORAM: DOTSE, JSC (PRESIDING)

BAFFOE-BONNIE, JSC

BENIN, JSC

CIVIL MOTION
NO. J8/212/2017

16TH NOVEMBER, 2017

SKYLIMIT STRUCTURE
BUILDERS LIMITED …… PLAINTIFF/RESPONDENT/RESPONDENT

VRS

TULLOW GHANA LIMITED ……. DEFENDANT/APPELLANT/APPLICANT

RULING

DOTSE, JSC:-

This is a Ruling arising from an application for special leave to appeal to the Supreme Court pursuant to Article 131 (2) and 134 (b) of the Constitution 1992, filed by the Defendant/Appellant/Applicant hereafter referred to as Applicants.

The application has been opposed by the Plaintiff/Respondent/Respondent, hereafter referred to as Respondents.

In view of the somewhat complicated and complex facts of this case, we deem it appropriate to set out the facts in some detail as follows:-

FACTS OF THE CASE

The Applicants by an advertisement, invited bids for the provision of crane and forklift services in Takoradi in April 2011. The Respondents answered the advert and put in their offer for tender, in accordance with the Applicant's tender instructions. The Applicants, after a meeting on 1st November, 2011, sent an email to the Respondents with a Letter of Intent (LOI) attached to allay the Respondent's fears over the delay in executing a formal contract between the parties.

This LOI, according to the Applicants was a sign of their intention to execute a formal contract between the parties, subject only to formal approval from the Applicants management and partners. After the close of the tender period, the applicants, on 20th July, 2011 represented to the respondent in both words and conduct that the respondent's bid to provide crane and forklift services had been accepted by the applicants and that a formal contract was to follow soon.

The respondents, based on these assurances, moved operation from Mali and Togo to Ghana and acquired equipment and an operational base in Takoradi for the provision of the crane and forklift services required by the applicants. However, before the respondents could commence operations, the LOI was terminated by the applicants, leading to a suit in court.

At the trial High Court, compensatory damages of GHS10 million and USD$113,000.00 and costs of GHS80,000.00 were awarded against the applicants. Dissatisfied with the ruling of the trial Court, the applicants then appealed the decision to the Court of Appeal on 5th January 2017.

A Motion for Stay of Execution pending Appeal was filed by the Applicants and moved on 25th January, 2017. The High Court, on 9th February, 2017 however, refused this application. A repeat application was then applied for in the court of Appeal. On the 27th of March, 2017, a partial stay of execution of the High Court judge's judgment was allowed by the Court of Appeal constituted by a single Judge.

The Applicant then applied under article 138 (b) of the Constitution and section 12 of the Courts Act (ACT 459), to have the application determined by the Court of Appeal duly constituted by way of reversal, variation or discharge of the decision of the single justice. The Applicant's application for stay of execution to the Court of Appeal duly constituted was also dismissed, confirming the decision of the single Judge on 24th May 2017

An application pursuant to articles 131 (2) and 134 of the Constitution to a single Judge of the Supreme court for a variation of the orders of the Court of Appeal duly constituted was also dismissed per a considered ruling by our respectful brother Pwamang JSC. The dismissal of the Applicant's application for Variation is the basis of the current application for Special Leave before three Justices of the Supreme Court in accordance with the provisions of Article 134(b) of the Constitution, 1992.

It will therefore appear that the application by the applicants before us in this court is for the determination of an application for special leave to appeal to the Supreme Court the decision of the Court of Appeal, duly constituted dated 24th May 2017.

Initially, it appeared that the applicants had appealed or were intending to appeal against the decisions of both the single Judge of the Court of Apeal given

on 27th March 2017 and that rendered by the duly constituted panel on 24th May 2017.

However, per the supplementary affidavit in support of the application sworn to by one Felix Antwi and filed on 20th October 2017, the deponent therein deposed to in paragraph 42 thereof as follows:-

> ***"That the Respondents makes no denial of paragraphs 23-38 save to say that this motion for special leave to appeal seeks to target the ruling of the Court of Appeal duly constituted instead of the decision of the single Justice of this Honourable Court." Emphasis***

Per the above deposition, the applicants made it quite clear that it was the decision of the Court of Appeal duly constituted that they were seeking special leave to appeal against.

As has been indicated in the narration of the facts supra, the learned single Judge of this court, refused to grant special leave to the applicants when the jurisdiction of this court was duly invoked. It must be emphasized at this stage that, during the delivery of the ruling by our distinguished brother, he reviewed the grounds upon which this court's jurisdiction for special leave are normally granted as per the relevant case laws and constitutional and statutory provisions i.e. articles 131 (2) of the Constitution which provisions are in pari materia to the provisions in section 4 of the Courts Act, Act 459, the same provisions under which the application had been brought.

The grounds upon which this courts jurisdiction may be invoked for special leave summed up by the single Judge of this court are the following:-

1. Where there was a prima facie error on the face of the record,

2. A general principle of law had arisen for the first time

3. That a decision of the Supreme Court on the point sought would be advantageous to the public

See the unreported judgment of the Supreme court dated 30th July 2015 in the case of **Kwasi Owusu & Anr. V John Nmai Addo & Anr. C. A. No J4/50/2014,** per Wood C.J and **Dolphyne (No. 23) v Speedline Stevedoring Co. Ltd. [1996-97] SCGLR 373.** It should be noted however that, the said grounds are not exclusive and could be expanded depending on the circumstances of each case.

PRELIMINARY OBJECTION

We observe that arising from a deposition in paragraph 8 of the affidavit in opposition sworn to by one Theodora Tawiah Amarh and filed on the 18th October 2017, wherein the applicants application herein was described as **incompetent**, learned counsel for the applicants Minkah-Premo devoted a substantial portion of his submissions before us to this preliminary issue. Out of abundance of caution, it is considered worthwhile to state in full the said depositions.

> *"That a comparison of Defendant's instant application and the grounds urged on this court in respect of it will confirm that* ***the application is incompetent as it does not invoke the jurisdiction of the court to vary, discharge or reverse the decision of the single justice of the court*** *are for the bald prayer to determine the same application already ruled upon by the single Justice of this Court. Emphasis*

We have considered the submissions of learned counsel for the applicants on the

1. Pre- 22nd September 2016 procedural regime which according to him was driven by Rule 73 of the Supreme Court Rules, C. I. 16 and

2. Post 22nd September 2016 procedural regime, regulated now by the Supreme Court (Amendment) Rules 2016, C. I. 98.

Under Rule 73 of C. I. 16, the Rule provided as follows:-

> *"An application pursuant to article 134 of the Constitution in respect of a cause or matter, civil or criminal, shall be made by motion on notice and shall be served on a party who has an interest in the cause or matter".*

This according to learned counsel for applicants only meant that an application pursuant to article 134 of the Constitution has to be by motion on notice and served on a party who has an interest in the cause or matter unlike the provisions in the post 22nd September 2016.

The provisions in Rule 73 of C. I. 98 provides as follows:-

> ***"Review of decision of single Justice***
>
> ***73 (1) A person dissatisfied with the decision of a single Justice of the Supreme Court in respect of an application determined under article 134 of the Constitution, may apply to the Supreme Court to have the application determined by three Justices of the Court.***
>
> ***(2) The application to have the cause or matter determined by the three Justices shall be by motion on notice and shall be served on any other party who has an interest in the cause or matter."***

According to learned counsel for the Applicants, under C. I. 98, an application pursuant therein was to vary, discharge and or reverse the order made by a single justice of the Supreme Court.

In this respect, Counsel argued that, an application therein can be based on variation, reversal or discharge either standing alone or combined with any of the other grounds.

In this particular instance, learned counsel argued that because of the above provisions in C. I. 98 which is in pari materia to the provisions in article 134 (b) of the Constitution, the present application is not incompetent as contended by learned counsel for the Respondents, Thaddeus Sory, in paragraph 8 of the affidavit in opposition.

BY COUNSEL FOR RESPONDENTS

Learned counsel for the respondents however submitted that the application is incompetent as it has been brought in violation of article 134 of the Constitution and section 7 of the Courts Act, Act 459.

Whilst conceding that under article 134 (b) of the Constitution, the applicants are entitled to have the application re-heard on any of the three grounds of variation, discharge or reversal and not to repeat it, learned counsel for respondents nevertheless argued that it was incompetent. According to learned counsel, C. I. 98 has not regulated procedure, but rather substance as contained in article 134 (b) and Section 7 (b) of the Courts Act, Act 549. In that respect, because the applicants have failed to indicate on what grounds the application has been invoked, i.e. variation, reversal or discharge learned counsel for respondents urged that the application is incompetent and should be dismissed.

We have taken into consideration the submissions of learned counsel on this issue of incompetence of the application before us. We have considered all the constitutional, statutory and procedural rules referred to us i.e. articles 131 (2), 134 (b) and 138 (b) all of the constitution as well as sections 7 (b) and 12 of the Courts Act 1993, Act 459 as well as section 73 of the Supreme Court (Amendment) Rules 2016, C. I. 98 and to some extent the Court of Appeal (Amendment) Rules, 2016 C. I. 100, and are satisfied that the application herein is a legitimate application flowing directly from article 134 (b) of the Constitution. The Sections of the Courts Act, Act 459 and the Rules of Procedure referred to all empower the applicants herein to apply for a variation of the orders contained in the Ruling of the single Judge of this court.

We therefore consider the preliminary objection on the incompetency of the instant application as a red-herring and accordingly dismiss it.

Now to the substance of the arguments.

On the substance of the application before this court, learned counsel for the applicants urged the court to consider an application made to it pursuant to article 134 (b) as a stand alone application for either variation, reversal or discharge of the orders of the single Judge. According to learned Counsel, depending upon the grounds and circumstances of each case, the court may consider only one of the applicable grounds and grant the application. Thus, it is wrong for such an application to be bundled up in all cases as coming under the three grounds of variation, reversal and or discharge.

This according to learned Counsel is because, arguments for variation as in the instant case would be different from arguments on the other grounds, e.g. reversal or discharge. In support of the said arguments, learned counsel referred the court to the case of Ex-parte Ghana Cable [2005-2006] 107 at 118 and

contended that the requirements in considering the application for variation would require different considerations from the others, and referred us to the grounds of appeal they intend to rely on when leave is granted especially grounds (a) (b) (e) (f) and (g).

Flowing from the above, learned counsel then prayed this court for grant of special leave to be granted them to appeal against the decision of the Court of Appeal duly constituted, dated 24th May 2017.

BY COUNSEL FOR RESPONDENTS IN ANSWER TO THE POINTS OF SUBSTANCE

Secondly, learned Counsel for the respondents articulated on the grounds upon which special leave can be granted by this court, which grounds have been dealt with by the single Judge of this court and found not to be applicable under the circumstances of this case. According to learned counsel for the respondents, the absence of any of the applicable grounds for grant of the special leave is such that the application ought to be dismissed.

He also referred to the fact that, the Court of Appeal duly considered the application under article 138 (b) of the Constitution and this is in pari materia with article 134 (b) of the Constitution. In that respect, when a party comes before a panel of three for variation, what is to be done is for the same application to be repeated just as was urged before the single Judge.

He finally concluded his arguments that, there being no real genuine basis for invoking this court's jurisdiction for special leave to appeal, same must be dismissed.

ANALYSIS AND DECISIONS

We have taken into consideration all the processes filed by both parties, the constitutional and legal provisions as well as Rules of Procedure referred to supra. We have also taken into consideration the submissions of both learned counsel before this court.

On the substance and merits of the case, we have considered the many grounds of appeal urged on us by the Applicants as the grounds upon which they intend to mount the appeal if special leave is granted.

We take note of grounds (a)(b) (e) (f) and (g) as those meeting the criteria that has been established as the standard criteria for grant of special leave to appeal to this court. In our opinion, there is a public interest issue involved in the resolution of these grounds of appeal and to our mind, it is imperative that the application should be granted to afford the applicants the need to articulate this public interest issues.

The application therefore succeeds.

Secondly, we observe that the amendment of both the Supreme Court and Court of Appeal Rules in C. I. 98 and 100 respectively does not go far. What has been enacted in the above Amendment Rules is only a restatement of the substantive laws in the Constitution articles 134 (b) and 138 (b) respectively, and the Courts Act, Sections 7 and 12 thereof. In this respect, we recommend to the Rules of Court Committee to as a matter of urgency make detailed Rules of procedure to regulate the following:-

i. Time within which application to the three member panels of both the Court of Appeal and Supreme Court are to be made from decisions of a single Judge.

ii. Rules to regulate and control the scope of the powers of the single Judge i.e. the nature of the applications that can be put before single Judges.

iii. Whether applicants for review of the decision of a single Judge must file statements of case or not.

iv. Any other relevant rules of procedure that can improve upon and expedite Rules of procedure under the single Justice jurisdiction which has proved very useful and convenient.

For the above stated reasons, we allow the application and grant special leave to the applicants herein to appeal the decision of the Court of Appeal duly constituted, dated 24th May 2017.

V. J. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

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

A. A. BENIN
(JUSTICE OF THE SUPREME COURT)

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JUSTICE MINKAH-PREMO FOR THE DEFENDANT/APPELLANT/APPLICANT.
THADDEUS SORY FOR THE PLAINTIFF/RESPONDENT/RESPONDENT.