IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: DOTSE, JSC (PRESIDING)

AKOTO-BAMFO (MRS), JSC

BENIN, JSC

APPAU, JSC

PWAMANG, JSC

CIVIL MOTION
NO. J5/66A/2017

7TH NOVEMBER, 2018

THE REPUBLIC

VRS

HIGH COURT, GENERAL JURISDICTION, ACCRA ……. RESPONDENT

EXPARTE: MAGNA INTERNATIONAL TRANSPORT LTD. …… APPLICANT

GHANA TELECOMMUNICATIONS CO. LTD. ……. INTERESTED PARTY

RULING

BENIN, JSC:-

The issue for our consideration is whether by virtue of rule 27A of the Court of Appeal Rules, 1997, C. I. 19 as amended by C. I. 21 the Court of Appeal has exclusive jurisdiction to hear applications for stay of proceedings from the moment an interlocutory appeal is filed.

The Applicant commenced an action at the High Court upon filing a Writ of Summons and a Statement of Claim for reliefs endorsed thereon. The interested party entered

conditional appearance and subsequently applied for the Writ and Statement of Claim to be set aside for lack of Jurisdiction. The High Court dismissed the interested party's application to set aside the Writ. The interested party lodged an appeal against the said ruling to the Court of Appeal and filed an application for stay of proceedings in the High Court which was granted. It is from this grant of stay of proceedings by the High Court that the present application is grounded.

The Applicant's case is that the Court of Appeal is the right court to hear applications for Stay of Proceedings pending the determination of interlocutory appeals. The High Court has no jurisdiction to hear and grant same and as such acted in excess of its jurisdiction. Consequently, the applicant seeks an order of certiorari directed at the ruling of the High Court, General Jurisdiction Division, Accra, presided over by Her Ladyship Justice Afua Novisi Ayine dated the 11th day of July 2017, which said ruling stayed proceedings pending the determination of the interlocutory appeal at the Court of Appeal. The ground for the relief is excess of jurisdiction on the part of the High Court which error of law is apparent on the face of the record.

The interested party contended that the High Court has jurisdiction under the rules of court as well as under the court's inherent jurisdiction to stay its own proceedings. Counsel dwelt extensively on the court's inherent jurisdiction which he said was available to the court, the rules of court notwithstanding. He therefore urged the court to depart from the ex parte Abodakpi decision.

The issue raised in this application is quite simple but procedurally significant. It revolves around Rules 21, 27, 27A and 28 of the Court of Appeal Rules C.I 19, as amended. This issue ought not to have engaged our attention but for the fact that following the introduction of Rule 27A by C. I. 21 and this court's decision in ex parte Abodakpi in 2005, infra, the view has been held that the High Court has no jurisdiction to entertain an application to stay proceedings when an interlocutory appeal has been filed. Others hold the view that rule 27A does not oust the High Court's inherent jurisdiction to stay its own proceedings. We shall examine some decisions which have dealt with one or more of these rules directly as well as other principles of law in

coming out with a decision which we believe will bring this controversy to rest. The relevant Rules under C. I. 19 as amended by C. I. 21 for our consideration provide:

21. Control of proceedings during pendency of appeal

After the record of appeal has been transmitted from the court below to the Court, the Court shall be seised of the whole of the proceedings as between the parties and every application shall be made to the Court and not to the court below, but any application may be filed in the court below for transmission to the Court.

27. Effect of Appeal

(1) An appeal shall not operate as a stay of execution or of proceedings under the judgment or decision appealed against except where the court below or the Court otherwise orders-

(a) in the case of the court below, upon application made orally or by motion on notice to it; and

(b) in the case of the Court, upon application made to it by motion on notice, and except as provided in this rule no intermediate act or proceeding shall be invalidated.

(2) When an application is pending for determination under sub-rule (1) of this rule any proceedings for execution of the judgment or decision to which the application relates shall be stayed.

(3) There shall, in any case, be a stay of execution of the judgment or decision, or of proceedings under the judgment or decision appealed from-

(a) for a period of seven days immediately following the giving of the judgment or decision; and

(b) for a period of seven days immediately following the determination by the court below or any application under sub-rule (1)(a) of this rule where the application is refused by the court below.

27A. Interlocutory appeals-

The Court may in any interlocutory Appeal, civil or criminal before it, grant stay of proceedings pending the determination of that interlocutory appeal subject to such terms as the Court considers fit.

28. Court to which application should be made

Subject to these Rules and to any other enactment, where under any enactment an application may be made either to the court below or to the Court, it shall be made in the first instance to the court below, but if the court below refuses to grant the application, the applicant shall be entitled to have the application determined by the Court.

Rule 21 of C. I. 19 was construed by this court in the case of Republic v. High Court (Human Rights Division) Accra; ex parte Akita (Mancell-Egala & Attorney-General. Interested Parties) (2010) SCGLR 374, delivered on 17 February 2010. The court held that once Form 6 was served on the High Court, its jurisdiction to entertain applications in respect of the appeal was truncated, even if the application was pending before the said court at the time Form 6 was served. But until it was served with the Form 6 the High Court was empowered by rule 21 of C. I. 19 to entertain applications. And even in that case it was an interlocutory appeal, in respect of an application for interim injunction. The court made no distinction as to the subject-matter of the application. The court cited with approval two cases decided under the old rule 21 of L. I. 218, which is 'in pari materia' with the present provisions. Those cases are Shardey v. Adamtey and Shardey v. Martey and Another (Consolidated) (1972) G. L. R 380 and Republic v. High Court, Ho; ex parte Evangelical Presbyterian Church of Ghana and Another (1991) 1 GLR 323, SC. We take note that this decision did not specifically consider rule 27A, so one is minded to restrict it to rule 21. But the reasoning is that not until Form 6 has been issued and served, the High Court is at liberty to entertain all applications in respect of the case, and that will include applications to stay proceedings.

It is a well settled principle that every court has an inherent jurisdiction to stay proceedings for stated reasons which include, but not limited to, abuse of process. Indeed in matters on appeal, especially interlocutory, the courts have always exercised an inherent jurisdiction to stay proceedings pending appeal, lest all their efforts should become fruitless, a waste of time and resources. The inherent jurisdiction of the Courts is derived from the common law, which is part of the laws of Ghana by virtue of article 11(1)(e) of the Constitution, 1992.

The court's inherent power to stay proceedings has become so entrenched in the law as to assume the status of indispensability unless clearly ousted by statute. The editors of Halsbury's Laws put it this way in the 4th edition, Reissue, page 422, para. 533: "The court's general jurisdiction to stay proceedings in proper cases is not limited by the Civil Procedure Rules, and indeed is distinct from the jurisdiction conferred by the rules, since the two sources of the court's power continue to exist side by side and may be invoked cumulatively or alternatively." The same reference work at para. 529 page 420 re-states the principle thus: "The Court's power to stay proceedings may be exercised under particular statutory provisions, or under the Civil Procedure Rules or under the court's inherent jurisdiction, or under one or all of these powers, since they are cumulative, not exclusive, in their operation" This passage was quoted with approval by this court in the case of Republic v. High Court (Commercial Division) Tamale; ex parte Dakpem Zoboguna Henry Kareem & ors; (Dakpema Naa Alhassan Mohammed Dawuni..Interested Party); Civil Motion J5/6/2015, dated 4 June 2015, unreported.

A similar view was expressed by the renowned writer Sir I. H. Jacob in an article titled 'The Inherent Jurisdiction of the Court, 1970 Current Legal Problems', at page 25, which was quoted with approval by this court in the case of Footprint Solutions Co. Ltd. v. Leo & Lee Company Ltd. Civil Appeal No. J4/52/2011, dated 24 May 2013, unreported.

But we are mindful that where there is clear statutory provision which is in conflict with an aspect of the court's inherent jurisdiction, the statute law will prevail.

Therefore, the court's inherent jurisdiction to stay proceedings is subject to any restriction or limitation imposed by legislation.

Thus Rules 21 and 28 of C. I. 19 which enable the trial court to have the first opportunity to stay proceedings before the appellate court becomes seised of the whole appeal, was just a crystallization of the well-known and time tested principle and practice. Indeed, in such situation, it is our considered view that any legislation that seeks to alter the settled principle and practice must be express in language, on the ground that there is a presumption against implied repeal. In the absence of an express repeal, the burden is on the party asserting an implied repeal; see the case of Lybbe v. Hart (1883) 29 Ch D 8 at 15. However, the presumption may be rebutted and repeal by implication may apply where the provisions of the later legislation are inconsistent with or repugnant to the provisions of the earlier legislation, in other words, as stated in the Indian case of Municipal Council, Palau v. T. J. Joseph, AIR 1963 SC 1561 at 1562 "that the two cannot stand together." Black's Law Dictionary 9th edition at page 1413 states that implied repeal applies where there exists "irreconcilable conflict" between the old and new legislation. In the result we agree with Brett L. J. in A.G. v. Moore, (1878) 3 Ex D 276 at 281, that if the two may be read together and some application may be made of the words in the earlier legislation, a repeal will not be implied.

What is the effect of rule 27A of C. I. 19? Does it impliedly repeal rules 21 and 28 in relation to applications for stay of proceedings in interlocutory appeals? If it does not, can these provisions be reconciled and made to co-exist? What was the void, if any, that it came to fill? Did it give exclusive jurisdiction to the Court of Appeal in applications to stay proceedings during an interlocutory appeal? These are legitimate questions to be addressed in view of the submission in reference to this court's decision in Republic v. Fast Track High Court, Accra, Ex parte Daniel Kwasi Abodakpi, Civil Motion No. J5/15/2005 dated 25th October 2005 unreported. This is the full decision of the court: "Paragraph 27A of the Court of Appeal Rules, 1997 (C. I. 19) as amended by C. I. 21, make it quite clear that in interlocutory appeals, it is the Court of Appeal, rather than the High Court which has the jurisdiction to grant an order of

stay of proceedings. The application is and the same is hereby dismissed as without merit"

In addressing the questions posed above, it is necessary to understand what the situation was prior to the introduction of rule 27A by C. I. 21. That will help us to unravel for what purpose or objective this rule was introduced. Before the new rule was introduced, the Court of Appeal was restricted to applications for stay of execution or stay of proceedings in respect of only the judgment or decision appealed from, it could not stay the entire case that was before the court below. That is the clear import of rule 27.

This court had the opportunity to address the provisions contained in rule 27 of C.I. 19 in the case of Takyi v. Ghassoub (1987-88) 2 GLR 452. In that case the High Court entered judgment for the plaintiff by finding the defendant liable on part of plaintiff's claim against him. The defendant appealed against the judgment. Meanwhile the High Court adjourned the hearing of the question of damages which was outstanding. The defendant applied to the High Court to stay proceedings to determine the issue of damages. The application was dismissed by the High Court. The defendant filed a fresh application before the Court of Appeal which allowed it. The plaintiff appealed to the Supreme Court on ground that the Court of Appeal did not have supervisory jurisdiction over the High Court and so too it did not have original jurisdiction in any matter, so whatever comes to that court must be by way of an appeal. In allowing the appeal, this court held the view that the Court of Appeal did not have jurisdiction under rule 27 to order a stay of the entire proceedings before the High Court, and that rule 27 permitted it to stay matters related to the judgment or decision appealed from. In this case it opined that the question of damages had not been determined by the High Court so the Court of Appeal had no jurisdiction to stay those proceedings.

Indeed the decision in Takyi v. Ghassoub, supra, is an affirmation of another principle of law that application for stay of proceedings must be made to the court in which the proceedings are pending. See these cases: Wright v. Redgrave (1879) 11 Ch D 24 at 35 CA; Re Artistic Colour Printing Co (1880) 14 Ch D 502. The rules have been fashioned in a way as to give effect to this principle, hence where the record is still

with the court below it hears and determines all applications, but after transmission of the record the appellate court takes responsibility. Even in repeat applications the appellate court is entitled to call for all such processes as will enable it to effectively and effectually determine the interlocutory application.

Thus by the amendment to rule 27 the Court of Appeal has been given an enhanced jurisdiction over the entire proceedings before the lower court when it is seised with an interlocutory appeal, and no longer is it confined to matters arising from the decision or judgment appealed from. That is the extent of rule 27A. This is so because applications to invoke the court's expanded jurisdiction are still regulated by rules 21, 27 and 28. Moreover, by virtue of rules 21 and 28, the Court below still retains the right to have a first shot at all applications, except where the record of appeal has been transmitted to the Court of Appeal, in which case the appellate court becomes seised of the appeal, thereby truncating the trial court's jurisdiction, inherent or otherwise. By rule 27A, the Court of Appeal was empowered to entertain application under rules 21 and 27 to stay, not only the judgment or decision appealed from, but the entire proceedings in the case before the trial court if there was the need for it. That is additional power given to the Court of Appeal, and this did not alter the jurisdiction of the trial court to entertain application for stay of proceedings, whether in relation to the decision appealed from or the entire proceedings in the case, from a combined reading of rules 21, 27 and 28. This expanded procedural jurisdiction became necessary in order to forestall the situation whereby a decision given by the Court of Appeal would be rendered otiose and fruitless as happened in the case of Footprint Solutions v. Lee & Leo, supra. In that case whilst the interlocutory appeal was pending before the Court of Appeal the High Court heard the case and delivered final judgment. So when the Court of Appeal allowed the interlocutory appeal it was virtually a Pyrrhic victory. Rule 27A enables the Court of Appeal to entertain application and stay the entire proceedings before the trial court whilst it hears the interlocutory appeal.

The makers of these rules must be credited with knowledge of the existing principle of law that the court has an inherent jurisdiction to stay its own proceedings for stated reasons, which is independent of the same jurisdiction conferred on it by law or rules

of procedure. That principle is as stated in Halsbury's Laws quoted above, endorsed by the author I. H. Jacob.

Thus the settled practice which followed this principle of law was that the trial court retained jurisdiction to stay its own proceedings as long as the record of appeal had not been transmitted to the Court of Appeal. Consequently, any legislation that seeks to upset this principle of law and settled practice which gives the court a very useful and purposeful jurisdiction must be express in its language. For, as earlier explained, there is a presumption against implied repeal.

We have not had the benefit of the facts and issues leading up to the decision in the ex parte Abodakpi case. But the decision is clear that it pronounced exclusive jurisdiction in the Court of Appeal in stay of proceedings in interlocutory appeal. Unfortunately no reason was given for the decision. No reference was made to rules 21, 27 and 28 of C. I. 19 and the court said nothing about whether rule 27A had impliedly repealed these rules in as far as applications for stay of proceedings in interlocutory appeals were concerned. Indeed the court's decision under consideration does not say, on the face of it, that the trial court has no jurisdiction even where the record of appeal has not been transmitted to the Court of Appeal.

It is observed that the only part of a court's decision that creates binding precedent is the 'ratio decidendi'. Other principles stated in a court's decision which do not flow from the issues to be determined, whether they are the main issues or ancillary ones, are classified as 'obiter dicta' and do not have the force of law. That is why the issues must be known as well as the reasons for the court's determination, especially so, as it seeks to depart from existing legislation, principles of law as well as practice.

We hold the view that rule 27A did not give exclusive jurisdiction to the Court of Appeal in application for stay of proceedings in interlocutory appeal. As already stated, Rule 27A does not amend, either expressly or even by implication the provisions of rules 21 and 28. Indeed conditions do not exist for implied repeal to be applied in the instant in so far as the principle of harmonious construction may be applied to allow all these

provisions to co-exist. Thus reading rules 21, 27, 27A and 28 together, this is the correct construction:

1. Before the transmission of the record of appeal, a party may apply first to the High Court, failing which he may repeat the application before the Court of Appeal, invoking rules 21 and 28;

2. When the interlocutory appeal is before it, the Court of Appeal may grant stay of the entire proceedings before the court below upon application of a party under rules 21 and 27A.

3. Upon receipt of an application under rule 21, the Court of Appeal may order a stay of the entire proceedings before the court below by virtue of the power conferred upon it by rule 27A.

For these reasons we decide that the decision in ex parte Abodakpi was given per incuriam and we depart from it accordingly in line with article 129(3) of the Constitution, 1992.

In the instant case the High Court cannot be faulted because at the material time that it granted a stay of proceedings the Court of Appeal was not seised with the interlocutory appeal; so it was at liberty to deal with the application to stay proceedings under rule 21 of C. I. 19. The application fails and is accordingly dismissed.

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

DOTSE, JSC: -

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

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

AKOTO-BAMFO (MRS), JSC:-

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

V. AKOTO- BAMFO (MRS)

(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-

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

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

PWAMANG, JSC:-

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

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

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ACE ANKOMAH WITH GOLDA DENYO FOR THE INTERESTED PARTY.