IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: YEBOAH, CJ (PRESIDING)
PWAMANG, JSC
MARFUL-SAU, JSC
AMEGATCHER, JSC
TORKORNOO, JSC

CIVIL MOTION
NO. J5/35/2020

24TH JUNE, 2020

THE REPUBLIC

VRS

HIGH COURT, ACCRA	.....	RESPONDENT
EXPARTE: SECURITY AND EXCHANGE COMMISSION	.....	APPLICANT
FIRSTBANC FINANCIAL SERVICE	.....	INTERESTED PARTY

RULING

TORKORNOO (MRS), JSC:-

Background of the Application for Judicial Review in the High Court

Section 1(1) of the **Securities Industry Act 2016 Act 929** provides for the establishment of the Securities and Exchange Commission (SEC). Section 2 provides for its object as follows:

2. *The object of the Commission is to regulate and promote the growth and development of an efficient, fair, and transparent securities market in which investors and the integrity of the market are protected.*

In the course of its regulatory functions, the SEC revoked the licence of FirstBanc Financial Services (FirstBanc) by letter dated 8th November 2019 for reasons stated in the letter. On 11th November 2019, FirstBanc filed an application for Judicial Review in the High Court for the following reliefs:

A. **A declaration that the revocation of Applicant's licence by Respondent is null, void and of no effect for want of compliance with due process and breach of Applicant's right to administrative justice.**
B. **An order of certiorari for the purpose of bringing up for purposes of quashing and accordingly quashing Respondent's decision of the 8th November 2019 revoking Applicant's fund management licence.**
C. **An order of injunction directed at Respondent and all its officers, consultants, advisers, workmen, assigns or privies restraining them from interfering with Applicant's business.**

The SEC filed an application to set aside the Judicial Review application on 9th December 2019 on the basis that '*the application is premature since the Applicant failed to exhaust the statutory provisions of the Securities Industries Act, 2016 (Act 929) prior to filing its application*'.

SEC also contended that Firstbanc had written to it for a reversal of the revocation of the license a day after it filed the application for judicial review. It was their case that that communication falls within the ambit of section 19 of Act 929, therefore the application for judicial review ought to be set aside for the procedures stipulated in Act 929 to be completed. And even if that communication was not a complaint (as argued by Firstbanc), it still would amount to a dispute of the decision of SEC to revoke their licence. As such the court still ought to set aside the Application for Judicial Review and allow the parties to follow the procedures determined in Act 929 for resolution of disputes.

High Court Ruling

On 17th January 2020, the high court ruled dismissing the application (first application) to set aside the Judicial Review Application (substantive application) on the grounds that

a. Act 929 also provided in Section 19 (5) that `*the hearings committee shall not determine a complaint or matter which is the subject matter of an action before a court*
b. Act 929 had no provisions allowing stay of proceedings when proceedings had been commenced in court
c. Therefore once an action has actually commenced in court, there will be no legal justification for referring the matter to the hearings Committee as provided for under Section 19 of act 929.

The Application before this court

SEC, as Respondent/Applicant/Appellant/Applicant in this court (hereinafter referred to as SEC simply) has applied to invoke the supervisory jurisdiction of this court through an order of certiorari quashing this decision of 17th January 2020 on the premise that

a. Applicant/Respondent/Respondent/Interested Party (hereinafter referred to as FirstBanc) failed to comply with the statutory provisions stipulated in Act 929 when it filed the application for Judicial Review of the SEC's order.
b. The High court's decision permitting FirstBanc to invoke its jurisdiction without first complying with the procedures stipulated in Act 929, amounts to a fundamental error of law on the face of the record.

In their supporting Statement of Case, SEC's counsel submits that **Section 122 (2)** of Act 929 empowers the SEC to revoke or suspend the licence of a company. **Section 122 (4)** provides that a licence should only be revoked or suspended after the licence holder has been given the opportunity to be heard. Thus even if SEC failed to hear FirstBanc

before the revocation of the license, that failure would constitute a violation of the Act, and bring it under the ambit of an administrative hearing under Section 19 (1)

Section 19 (1) uses mandatory language in directing that

> '19 (1) *A complaint, dispute or a violation arising under this Act shall, before any redress is sought in the courts, be submitted to the Commission for hearing and determination in accordance with this Act*. '

SEC urges that this provision does not constitute an ouster of the court's jurisdiction but a direction to resort to internal remedies before an action is instituted in court. They cited dicta from **Boyefio v NTHC Properties 1997-98 1 GLR 768; Republic v High Court, Koforidua, Ex Parte: Asare (Baba Jamal & Others Interest Parties) 2009 SCGLR 460;** and **Gaisie Zwennes Hughes & Co v Loders Crocklaan BV 2012 SCGLR 363.**

They submit that it is apparent on the face of the Substantive Application (for Judicial Review) before the high court that the high court had been invited to assume jurisdiction over alleged violations of the provisions of 929. Further, **Section 19 of Act 929** has provided internal mechanisms for resolving disputes prior to submission of the decisions to the courts on appeal and so the court's assumption of that jurisdiction is a fundamental error.

Counsel referred to the circumstances under which the supervisory jurisdiction of this court may be invoked namely where

a. there is want or excess of jurisdiction
b. there is an error of law on the face of the record
c. there is failure to comply with the rules of natural justice and
d. on the Wednesbury Principle on reasonableness

Opposition to the Application

FirstBanc opposed this application for certiorari on three grounds. First they described the present application as incompetent by reason of the heading of the application, which did not strictly conform to what is prescribed in Form 29 under rule 61(1) of CI 16.

Second, that for the supervisory jurisdiction of this court over the high court to be properly invoked, it is required that this court examine whether the High court in entering the impugned decision acted without jurisdiction or breached the rules of natural justice.

If the high court had jurisdiction to enter the decision, then the proper remedy against the rightness or wrongness of the decision is an appeal, and not a resort to certiorari to quash it. They said SEC had acted without candor by not placing before this court, the fact of the appeal they had filed against the decision.

Third, Firstbanc's counsel drew attention to the sacrosanct nature of the supervisory jurisdiction of the high court and the settled position that it cannot be ousted by Statute or private contract. It was their submission that FirstBanc had invoked the jurisdiction of the high court for their right to administrative justice under Article 23 of the 1992 Constitution to be protected, and this right may only be enforced in the high court.

Consideration of the Submissions

SEC is right in identifying that there are confines to the circumstances within which this court exercises the supervisory jurisdiction given it under Article 132 of the 1992 Constitution.

First the fundamental question is whether the impugned decision was rendered void by circumstances such as a want of jurisdiction in the court at the time it purported to render

the decision, or the court went in excess of its jurisdiction regarding the particular decision, or the court gave the decision in breach of the rules of natural justice. Such a failure of jurisdiction would make the decision a nullity and render it void.

If the answer to the jurisdictional question establishes jurisdiction to so enter that ruling, then the decision would not come within the purview of the power to be quashed by certiorari, unless the tertiary question of 'error of law patent on the face of the record' exists.

As stated by Bamford Addo JSC in **Republic v High Court, Accra Ex Parte Industrialization Fund for Developing Countries and Another 2003 – 2004 SC GLR 348 at 354** '*since the High Court had jurisdiction to hear the application* (for a variation of her earlier order,) *she was acting within the jurisdiction and her ruling or decision, even if the applicant disagreed with it, was a matter for appeal and not certiorari*'

She went on to say that '*It is to be noted that there is a clear distinction between certiorari and appeal, which is so often lost on litigants and their lawyers. When the High Court, a Superior Court is acting within its jurisdiction, its erroneous decision is normally corrected on appeal whether the error is one of fact or law. Certiorari, however, is a discretionary remedy, which would issue to correct a clear error of law on the face of the ruling of the court; or an error which amounts to a lack of jurisdiction in the court so as to make the decision a nullity. In the case of errors of law not apparent on the face of the ruling or those of fact the avenue for redress is by way of appeal*'

Where the court has jurisdiction, then the other context within which the Supreme Court would find reason to quash the decision is if it is premised on such a grevious, fundamental and patent error of law on the face of the record such as to make the impugned decision a complete nullity.

In **Republic v High Court, Accra Ex-Parte CHRAJ, 2003 – 2004 SCGLR 312 at page 345** the Supreme Court speaking through Date-Bah JSC in what the Court describes as a re-statement of the law governing the exercise of the Supreme Court's supervisory powers over the high court had this to say: '*The re-statement of the law may be summarized as follows: where the High Court (or for that matter the Court of Appeal) makes a non-jurisdictional error of law which is not patent on the face of the record (within the meaning already discussed), the avenue for redress open to an aggrieved party is an appeal, not judicial review. In this regard, an error of law made by the High Court or the Court of Appeal is not to be regarded as taking the judge outside the court's jurisdiction, unless the court had acted ultra vires the Constitution or an express statutory restriction validly imposed on it*'

In **Republic v Court of Appeal Ex-Parte Tsatsu Tsikata 2005 – 2006 SCGLR 612** at 619, the court had this to say to further settle the pillars of the landscape through Wood JSC, as she then was:

> '*The clear thinking of this court is that, our supervisory jurisdiction under article 132 of the 1992 Constitution, should be exercised only in those manifestly plain and obvious cases, where there are patent errors of law on the face of the record, which errors either go to jurisdiction or are so plain as to make the impugned decision a complete nullity. It stands to reason then, that the error(s) of law alleged must be fundamental, substantial, material, grave or so serious as to go to the root of the matter. The error of law must be one on which the decision depends. A minor, trifling, inconsequential or unimportant error, or for that matter an error which does not go to the core or root of the decision complained of; or stated differently, on which the decision does not turn, would not attract the court's supervisory intervention. Also where the proceedings are regular, the charge that the court has misread or misconceived a point of law or misdirected itself, does not per se constitute a sufficient ground for the grant of the order.*

Similarly, the complaint that there has been an improper exercise of the discretionary jurisdiction is clearly insufficient'

In the matter before us, the jurisdiction of the high court to entertain and rule on the first application is not faulted by SEC.

What SEC complains to us about is the effect of the decision regarding the first application – that the court will assume jurisdiction over the substantive application for supervisory jurisdiction when Act 992 stipulates other internal mechanisms to deal with disputes, complaints and violations of Act 992. This is what SEC complains constitute an error that is patent on the face of the record.

To use the words of Wood JSC (as she then was) on page 620 of **Ex Parte Tsatsu Tsikata** cited supra, '*It is plainly trite, but worth reiterating that, in cases alleging error of law apparent on the face of the record, the alleged matter complained of must be a mistake in law. Thus, if in the first place, it is not an error but, on the contrary, correct in law, then it does not in any way qualify for judicial review*'

Would the decision that the high court is seised with jurisdiction to determine whether FirstBanc is entitled to '**A declaration that the revocation of Applicant's licence by Respondent is null, void and of no effect for want of compliance with due process and breach of Applicant's right to administrative justice'** be a mistake in law?

We do not think so at all, because the high court is indeed clothed with jurisdiction under Article 140 (2) and 141 in these words:

Jurisdiction of the High Court

140 (2) *The High Court shall have jurisdiction to enforce the Fundamental Human Rights and Freedoms guaranteed by this Constitution*

Supervisory Jurisdiction of the High Court

> **141** *The High Court shall have supervisory jurisdiction over all lower courts and any lower adjudicating authority; and may, in the exercise of that jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its supervisory powers*

As part of the above cited jurisdictions, the high court is mandated to review the acts of administrative bodies to determine their conformity with the tenets of administrative justice required under Article 23 of the 1992 Constitution.

Article 23 reads

Administrative Justice

23. *Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal.*

Thus whether the reliefs sought within the context of the alleged facts, reflect a genuine case for the exercise of the supervisory jurisdiction of the court under Order 55 or not, this is a decision that the high court has jurisdiction to make under its supervisory jurisdiction. It stands to reason therefore that, the assumption of jurisdiction to consider the case placed before the court cannot make the impugned decision a nullity.

We are mindful of the learned high court judge's reasoning that by reason of Section 19 (5) of Act 992, the high court is not restrained from assuming jurisdiction over cases

emanating from the regulatory functions of SEC, even if the administrative mechanisms of SEC had commenced. Is that decision erroneous? If it is, then it is an error made within jurisdiction, and the proper response is an appeal, and not an order quashing the ruling.

Counsel for SEC has strongly pointed us in the direction of cases such as **Boyefio v NTHC Properties Ltd** 1997-98 1 GLR 768, **Gaisie Zwennes Hughes & Co v Loders Crocklaan 2012 SCGLR 363** and **R v High Court (Commercial Division), Accra; Ex Parte Republic (HFC Bank Limited & Securities and Exchange Commission, Interested Parties)** (Unreported: Civil Motion No: JS/45/2014, 17th December 2014.

He cites them as authorities for the position of the law, that where the exercise of the jurisdiction of the courts is made subject to the prior engagement of internal mechanisms set out in statutes, those mechanisms must be exhausted before the jurisdiction of the courts can be invoked. This position of the law is appreciated, though it must be pointed out that in the cited cases, and all relevant cases, the remit of those internal mechanisms were always defined and identifiable within the relevant laws, and the decisions centered around that remit. Second, the recognition of the specified remits before the court could assume jurisdiction was a function for the courts that had exercised jurisdiction to resolve the disputes brought to them, as part of the issues placed before them. Their ability to do so or failure to do so turned the determination to apply the supervisory power and review function of the Supreme Court.

In Boyefio v NTHC Properties Ltd 1997-98 1 GLR 768, the Supreme Court, on reference of a question from the high court pursuant to Article 130 (2) of the 1992 Constitution, identified that it was specified disputes relative to land or an interest in land under the Land Title Registration Law 1986 (PNDC Law 152), that were required under section 12(1) of the law to be settled by the internal mechanism of the adjudication committees under the law, prior to resorting to a court. The Supreme Court was clear that outside this limited jurisdiction of the adjudication committees, the adjudication

committees were not committees with general jurisdiction to handle any land suit in a registration district. In such general jurisdiction cases, a party could commerce their actions in court.

In Gaisie Zwennes Hughes & Co v Loders Crocklaan 2012 SCGLR 363, the non-compliance with a mandatory provision of the Legal Profession Act, Act 32 prior to commencement of the court action was identified as the defect to the jurisdiction of the courts below**.**

In **R v High Court (Commercial Division), Accra; Ex Parte Republic (HFC Bank Limited & Securities and Exchange Commission, Interested Parties),** the action was one that commenced by Writ for the substantive resolution of a complaint and dispute relative to the role of the Security Exchange Commission. The Supreme Court identified that by reason of the internal mechanisms for resolving the complaint and dispute that was brought before the court, the high court's entertainment of the suit and applications thereon was an error of law.

We are satisfied that these cases cited above have distinctly different circumstances from the case before us. In the present proceedings, Firstbanc makes the case to us that it run to the high court to seek the use of its supervisory power to protect FirstBanc's constitutional rights to administrative justice under Article 23 of the 1992 Constitution, and to declare the decision of SEC void because of the lack of a hearing given to FirstBanc before the revocation of the licence. In this wise, it was not bringing a complaint, dispute or violation under Act 929 to the court for resolution.

This position cannot be faulted and barred in limine because the application is indeed couched as being grounded on the right to administrative justice, and the court's constitutionally mandated duty to provide supervisory review over administrative justice

matters, rather than an invitation to the high court to resolve the dispute and complaint between the parties.

As to whether the case made by FirstBanc, within the facts they recount, the remedies sought, the tenets of Act 992, and the relevant constitutional provisions, is a genuine case for the grant of the orders sought under the judicial review jurisdiction of the high court, is the decision that the high court that has assumed jurisdiction has to make. That decision to assume jurisdiction as required by either Article 140(2) and Article 141 is not a mistake in law.

Our view is that the invitation in the application before us is pre-emptory in nature. Indeed, when the complaint before us is examined, what is gleaned is that learned counsel for SEC is inviting this court to pre-empt the decision of the high court regarding what it will utilize the assumption of its supervisory jurisdiction to do – that is, uphold the application or any of its reliefs for stated reasons, or dismiss them for stated reasons.

CONCLUSION

To the extent that the high court has jurisdiction to decide one way or the other regarding the application for judicial review placed before it, and that assumption of jurisdiction to consider the merits of the particular application is not a mistake in law, this application is misconceived and so is dismissed.

We will end by commenting on FirstBanc's objections to the form applied in this application. It is recognizable that SEC has duplicated the form employed by Firstbanc to commence its own application in the high court. Since the application before us has been dismissed, we will reserve a determination on this "procedural misstep".

G. TORKORNOO (MRS.)
(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH
(CHIEF JUSTICE)

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

S. K. MARFUL-SAU
(JUSTICE OF THE SUPREME COURT)

N. A. AMEGATCHER
(JUSTICE OF THE SUPREME COURT)

COUNSEL

Thaddeus Sory with Abu Juan Jagiara for the Applicant.

Gloria Koufie with Sherley Otu for the Interested party.