IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2019

CORAM: YEBOAH, JSC (PRESIDING)

BAFFOE-BONNIE, JSC

GBADEGBE, JSC

APPAU, JSC

DORDZIE (MRS.), JSC

CIVIL MOTION
NO. J5/08/2019

10TH APRIL, 2019

THE REPUBLIC

VRS

THE HIGH COURT (COMMERCIAL DIVISION) ACCRA ..... RESPONDENT

EX PARTE: ATTORNEY-GENERAL ..... APPLICANT

ZENITH BANK ..... INTERESTED PARTY/RESPONDENT

DORDZIE (MRS.), JSC:-

FACTS

In a suit numbered BFS/217/13, between Zenith Bank Ghana Limited (the interested party herein) and Balkan Energy Ghana Limited and Reality Advisors Incorporated in the High Court, Zenith Bank, on the 12th of March 2014 obtained judgment in the sum of USD44, 155,258.39 against Balkan Energy Ghana Ltd.

Balkan Energy on the other hand was given an arbitral award of about USD 13.3 million against the Republic of Ghana. This came about as a result of breach of a power purchase agreement between Balkan Energy Ltd and the Republic of Ghana. In accordance with an arbitration clause in the said agreement, Balkan Energy Ghana Ltd commenced arbitration against the Republic of Ghana at the Permanent Court of Arbitration in The Hague, Netherland. On the 1st of April 2014 the arbitration awarded a total of about USD13.3million in favour of Balkan Energy Ghana Ltd.

Zenith Bank in enforcing the judgment against Balkan Energy Ghana Ltd. obtained garnishee order absolute against the Attorney General for the arbitral award to be assigned to it (Zenith Bank). The Garnishee order absolute was granted on the 13th of October 2017. Consequently by a letter dated 16th February 2018 the Attorney - General instructed the Minister of Finance to pay Zenith Bank.

In the meantime Balkan Energy Ghana Ltd. petitioned the United States District Court for the District of Columbia to confirm, recognize and enforce the arbitral award. On the 22nd of March 2018 the District Court for the District of Columbia confirmed the arbitral award and assigned same to Balkan Energy UK.

In view of the above development the Attorney General on the 19th of July 2018 wrote to the Minister of Finance withdrawing its earlier instruction dated 19th February 2018 thereby stopping payment to Zenith Bank; payment to Zenith bank would mean paying the debt twice. The solicitors of the interested party were notified of this development per a letter dated 31st July 2018.

Following the judgment of the District Court for the District of Columbia, Balkan Energy UK took steps to enforce the arbitral award and attached assets of the Government of Ghana in France. The Government of Ghana promptly payed Balkan UK a total of USD 13,678,263.30 being the settlement of the arbitral award. This payment was done on the 2nd of October 2018.

Zenith Bank the interested party herein instituted another execution process and commenced garnishee proceedings in the High Court consequent to which it obtained a

Garnishee Order Nisi ordering the Garnishee bank, Bank of Ghana High Street Accra to appear before it on the 10th of October 2018 to show cause why funds held by it in the following accounts: a) Ghana Revenue Authority -1018631462014 and b) National Petroleum Authority -1018631520208 for and on behalf of the Government of Ghana should not be released in payment and satisfaction of the debt Government of Ghana owed to the applicant. This order is dated 25th of September 2018 and exhibited in this application as exhibit AGS13.

On the 10th of October 2018 the Attorney-General filed a motion to set aside the Garnishee Order Nisi granted on the 25th of September 2018. In a ruling dated 6th November 2018 the High Court dismissed the application to set aside its order.

The applicant herein the Attorney-General brought this application under article 132 of the 1992 Constitution of Ghana evoking the supervisory jurisdiction of this court for the following reliefs:

i. An Order of Certiorari to bring up to this Court for purposes of being quashed the Garnishee Order Nisi made on 25th September, 2018 by the High Court (Commercial Division), Accra; Coram Asiedu J; in the suit entitled *Zenith Bank Ghana Ltd vrs. Balkan Energy Ghana Limited and Anor, Suit No: BFS.217/2013*

ii. An Order of Certiorari to bring up to this Court for purposes of being quashed the Ruling delivered on 6th November, 2013 refusing the Application of the Applicant herein to set aside the Garnishee Order Nisi of the High Court (Commercial Division) Accra Coram Nkrumah J; in the suit entitled *Zenith Bank Ghana Ltd. vrs. Balkan Energy Ghana Limited and Another, Suit No. BFS. 217/2013*

iii. An Order of Prohibition barring all lower Courts from entertaining any previous or further actions or proceedings in the suit in respect of which the Orders sought to be quashed were made.

The grounds upon which the application is brought are as follows:

1. The High Court wrongly assumed jurisdiction when it granted the Garnishee Order Nisi in respect of an arbitral award that had not been recognized and confirmed in courts of Ghana.

2. The High Court committed an error of law apparent on the face of the record affecting the High Court's jurisdiction when it failed to take evidence and legal arguments in respect of an assignment between Balkan and Balkan Energy, UK when it purported to declare same invalid.

Submissions:

In arguing these grounds the applicant made the following submissions:
That the award is not enforceable because it had not complied with section 59 of the Alternative Dispute Resolution Act, 2010 Act 798; and the New York Convention which regulates the recognition and enforcement of foreign arbitral awards. The New York Convention was ratified by the Republic of Ghana and incorporated In the Alternative Resolution Act. (See the first schedule of the Act). The argument of the applicant is that in so far as the award had not been recognized by the High Court in Ghana in accordance with the provisions of the Alternative Dispute Resolution Act and article IV of the New York Convention, the arbitral award had not accrued or become due. The conditions precedent for the High Court's jurisdiction to be triggered under Order 47 of C. I. 47 had not been fulfilled. As at the time the High Court granted the Garnishee Order Nisi, it had no jurisdiction to do so, the said order ought to be brought to this court to be quashed.

On the second ground the applicant argued that the High Court in making its decision dated 6th November 2018 breached the rules of natural justice, particularly it breached the audi alteram partem rule when it pronounced the assignment of the arbitral award to Balkan UK as not valid. Balkan UK was not a party before it, the court did not give the parties a hearing on the validity or otherwise of the assignment when it declared that the assignment was not valid.

In reply to these arguments counsel for the interested party took the position that the question of recognition and enforcement of the arbitral award do not arise in the instant case. According to him, by article III of the New York Convention an arbitral award can be enforced in any of the contracting states therefore Balkan Energy Ghana Ltd need not come to Ghana to either confirm the award or enforce same. Indeed, counsel further submitted, Balkan Energy Ghana Ltd had filed applications in South Africa and the United States of America to confirm and enforce the arbitral award and had attached asserts of the Republic of Ghana in South Africa and France. There was therefore a debt due to Balkan Energy which the interested party could obtain in Garnishee proceedings.

On the second ground learned counsel for the interested party argued that the ground is misconceived, the High Court giving the ruling complained of relied on affidavit evidence before it, moreover Balkan Energy UK is not different from Balkan Energy Ghana Ltd. Counsel concluded the applicant has failed to make a case to properly evoke the supervisory jurisdiction of this court and therefore the application ought to be dismissed.

Issues:

The issue that needs to be considered first and foremost in our opinion is whether this court's supervisory jurisdiction had been properly evoked.
The procedure for Garnishee proceedings is guided by Order 47 of the High Court (Civil Procedure) Rules, 2004 C. I 47. Order 47 Rules 1 &2 read:

1. "(1) Where a person in this Order referred to as "the judgment creditor" has obtained a judgment or order for the payment of money by some other person referred to as "the judgment debtor" and the judgment order is not for the payment of money into court, and another person within the jurisdiction, referred to as "the garnishee" is indebted to the judgment debtor, the Court may, subject to the provisions of this Order and of any enactment, order the garnishee to pay the judgment creditor the amount of any debt due or accruing to the judgment debtor from the garnishee, or as much of it as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings.

(2) An order under this rule shall in the first instance be an order to show cause, and shall specify the time and place for further consideration of the matter, and in the meantime attach such debt as is mentioned in sub rule (1), or as much of it as may be specified in the order, to satisfy the judgment or order mentioned in that sub rule and the costs of the proceedings.

2. An application for an order under rule 1 shall be made ex-parte supported by an affidavit that

> *(a) identifies the judgment or order to be enforced and states the amount remaining unpaid under it at the time of the application; and*
>
> *(b) states that to the best of the information or belief of the deponent, the garnishee is within the jurisdiction and is indebted to the judgment debtor and states the sources of the deponent's information or the grounds for the deponent's belief."*

Order 47 rule 5 provides the procedure to follow in a situation where a garnishee disputes liability to pay the debt claimed. ***Order 47 rule 5 of C.I 47 provides:***

5***. "Where on the further consideration of the matter the garnishee disputes liability to pay the debt due or claimed to be due from the garnishee to the judgment debtor, the Court may summarily determine the question in issue or order that any question necessary for determining the liability of the garnishee be tried in any manner in which any question or issue in an action may be tried."***

This provision safely puts to rest the question of correctness or otherwise of the summary hearing of the Garnishee nisi application by the trial court. This rule gives the court the discretion to hear the application summarily.

In a similar vein order 47 rule 6 makes provision for cases in which third parties other than the judgment debtor (such as the interested party in this case) claims to be entitled to the debt sought to be attached.

Order 47 Rule 6 reads:

"Claims of third persons

6. (1) If in garnishee proceedings it is brought to the notice of the Court that some person other than the judgment debtor is or claims to be entitled to the debt sought to be attached or has or claims to have a charge or lien on it, the Court may order that other person to attend before the Court and state the nature of the claim with particulars of it,

(2) After hearing any person who attends before the Court in compliance with an order under sub rule (1), the Court may summarily determine the questions in issue between the claimants or make such other order as it considers just, including an order that any question or issue necessary for determining the validity of the claim of the other person as is mentioned in sub rule (1) be tried in any manner in which any question or issue in an action may be tried,

In accordance with the rules as quoted above it is when the Garnishee appears before the court in answer to an Order Nisi that the question of the validity of the claim and questions as to whether the debt was due or had accrued would be determined. The argument by the applicant that the debt was not due or had not accrued is an issue affecting the validity of the claim which must be determined at the stage when the garnishee appears before the court to show cause. Apart from that Order 47 Rule 3 (1) mandatorily requests that the Order nisi is served on the garnishee as well as the judgment debtor before further consideration of the matter***.*** The said rule reads ***3. (1) An order under rule 1 to show cause shall, at least seven days before the time appointed for the further consideration of the matter, be served on the (a)***

garnishee personally; and (b) judgment debtor unless the Court otherwise directs.

This gives the judgment debtor the opportunity to provide the court with information he may have on the debt by affidavit before further consideration of the matter. See the case of ***Lovely v White (1983)12 LR Ir 381***. The power to make the order absolute is a discretionary power, as such the court is obliged to take into account any matters raised by the judgment debtor before making the order absolute. In this case therefore it had been demonstrated from our reasoning above that the rules of court have made ample provision for remedy to the concerns the applicant had raised in this application on the validity of the claim; provisions which the applicant failed to take advantage of.

The High Court in making the order acted within jurisdiction. If it is the position of the applicant that the Order Nisi was not regularly obtained, then it is our view that the appropriate remedy is to apply to set it aside; a step which the applicant indeed took. At the refusal of the application to set aside the order, an appeal is the next forum for remedy and not praying this court for an order of certiorari. Certiorari is a discretionary remedy and the courts have always followed the principle that it is a residual remedy held in reserve therefore where there is an equally effective remedy, resort to certiorari would be refused.

The Court of Appeal per Jiagge JA held in respect of the discretionary nature of the prerogative orders in the case of ***Republic v Anlo Traditional Council; Ex parte Hor II [1979] GLR 234 at 243 as follows: "As a matter of practice, great caution accompanies the exercise of discretionary powers under prerogative orders. The prerogative has been defined as "The residue of discretionary or arbitrary authority which at any given time, is legally left in the hands of the Crown (i.e. State).***

In the case of ***Republic v High Court (Financial Division), Accra Ex Parte Odonkor (Executive Director of Economic And Organised Crime Office (EOCO), Bank of Ghana & Ecobank Ghana Ltd. Interested Parties [2015-2016]1SCGLR 312 at***

314 This court, per Atuguba JSC reemphasized this principle following the Ex parte Hor decision ***and held as follows: "It should be stressed that certiorari is a special and residual remedy which is held in reserve; hence the rule that where there is an equally effective remedy resort to certiorari would be refused."***

Ground one of this application we consider to have no merit and must fail.

The second ground attacks the High Court for summarily deciding the issue of validity of the assignment between Balkan Energy Ghana and Balkan Energy UK. The applicant maintains that the court should have taken evidence from the beneficiary, Balkan Energy UK before arriving at a decision, failure to do so amounts to a breach of the rules of natural justice, particularly the audi alteram partem rule; therefore the decision or ruling of the court dated the 6th November 2018 must be brought to this court to be quashed.

In the first place the application that resulted in the 6th of November ruling was a motion, taking evidence at the hearing of motions does not support the settled practice in our jurisdiction, as such, the court would not have given a hearing in the form of taking evidence from Balkan Energy UK. The court in hearing the application summarily, acted within its jurisdiction.

Secondly the application was a garnishee proceeding where the garnishee bank was called upon to show cause why it should not pay monies it was holding to the claimant. The question of validity of the assignment was a legal issue that arose and could be determined summarily by recourse to the instrument that created it therefore summary hearing of the application was in place. Above all Order 47 rule 5 quoted supra places a statutory demand on the trial judge to hear the application summarily.

The trial judge's summary determination of the application is within the rules. He has the discretion to make an order that the legal question of the validity of the assignment be tried in any manner in which any question or issue in an action may be tried.

Other jurisdictions in the sub region have rules of procedure similar to our Order 47 rules 5 and 6(2) The Sheriffs and Civil Procedure Act of Nigeria for example, Section 87, has a

similar provision as our Order 47 Rules 5 & 6 (2). A decision of the Nigerian Court of Appeal (Lagos Judicial Division) in the case of ***Fidelity Bank PLC v Francis Okwuowolu & another (Unreported) dated 26th April 2012*** explained the application of these rules. I will quote Section 87 of the Sheriffs and Civil Procedure Act of Nigeria to bring home its similarity in wording to our Order 47 Rule 5 and rule 6 (2) it reads:

"Trial of liability of garnishee

If a garnishee appears and disputes his liability the court instead of making an order that execution shall issue, may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in any proceedings may be tried or determined, or may refer the matter to a referee" The Nigerian Court of Appeal in the case cited supra explained this procedure in the following words: ***"The fact that the garnishee disputed liability implies that section 87 of Sheriff and Civil Procedure Act be applied as stipulated by law……The garnishee may become the plaintiff while the judgment creditor may become the defendant. The issue of liability of the garnishee must then be tried separately."***

In the garnishee proceedings resulting in the ruling of 6th November 2018, the trial judge decided the matter summarily and determined the issue of validity of the assignment without taking the other option of making orders for a separate trial. The judge acted within jurisdiction when he decided that the assignment was improper. Any dissatisfaction the applicant may have with the ruling of 6th November 2018 is appealable, certiorari would therefore not lie.

The applicant did not make any submissions on the 3rd prayer for an order of prohibition baring all lower court from entertaining any previous or further actions or proceeding in the suit in respect of which the orders sought to be quashed were made. It is presumed the said ground has been abandoned. In any event there is no justifiable reason why we

should grant such an order which would have a wide and far reaching restriction on the jurisdiction of the lower courts.

For the reasons stated above we hold the view that the applicant is not entitled to any of the judicial review orders prayed for in this application. An appeal is the appropriate remedy available to the applicant in the circumstances of this case.

The application is therefore dismissed.

A. M. A. DORDZIE (MRS.)
(JUSTICE OF THE SUPREME COURT)

GBADEGBE JSC:

Ordinarily, I should have been content to express my agreement with the judgment that has just been delivered by worthy sister Dordzie JSC but as there are certain procedural issues arising from the application that need to be attended to, I will state my own views briefly commencing with the reliefs sought by the applicant before us. In the application which was taken out on November 08, 2018 two reliefs were sought in respect of two different rulings and or orders of the High Court which were made by two different judges. These orders are the Order Nisi made on September 25, 2018 by Asiedu J and the ruling of Noble- Nkrumah J dated November 06, 2018.

In my respectful view, applications for judicial review in the nature of certiorari are intended from a careful consideration of the Rules authorizing their making to be made in respect of an order and not orders contrary to what the applicant demands from us in these proceedings. A careful reading of Rule 61 sub-rule (1) (b) bears this out. The said rule provides:

(b) in the case of an application for certiorari or prohibition, be filed with a copy of the decision, determination or other proceeding against which the application is sought."

Similarly, by way of comparative reference to what prevails in the High Court, reference is made to Order 55 rules 1, 2 and 3. Rule 3 (2) of the Rules of the High Court.For comparative effect, reference is made to Order 55 rule 3(2) of the High Court (Civil Procedure) Rules, CI 47. That rule provides:

> *"Where an order of certiorari is sought in respect of any judgment, order, conviction or other proceeding, the date of the occurrence of the event giving grounds for the making of the application shall be taken to be the date of that judgement, order, conviction or proceeding."*

Further, applications for judicial review unlike actions began by writ do not have rules authorizing joinder of causes of action. Whiles joinder of causes of action in cases begun by writ is sanctioned by Order 4 of the High Court Rules, CI 47, there is no such provision regarding judicial review applications. In this court as well, there is no provision authorizing joinder of causes of action. It seems to me that the Rules contemplate that in a case, such as has unfolded from these proceedings, the applicant would have determined which of the separate orders in respect of which he seeks the relief of certiorari is the foundation of the other and seek an order quashing it. An order that quashes such an order dissolves without any further order all proceedings and or orders founded thereupon. As the ground relating to the order nisi made by Asiedu J was the first in point of time before the ruling on the application to set it aside, the latter order was founded on it and a successful collateral attack on it would have the effect of wiping out all subsequent proceedings including the ruling as the learning is that one cannot put something on nothing. Accordingly, had the applicant adverted its mind to the nature of the two orders, it is probable that an order would only have been sought in respect of the order nisi. That would have avoided the procedural objections turning on the duality of the reliefs sought in the matter and saved the Court's time. Regarding the ruling by Noble- Nkrumah J, as the order was essentially a refusal, it is doubtful if merely quashing it plication directed at the order nisi succeeding would yield any benefit to the applicants. It is hoped that in future applicants would direct their minds to the utility of the reliefs sought by them in judicial review applications.

Regarding the grounds for the application related to the order nisi, it was formulated thus:

> *"The High Court wrongly assumed jurisdiction when it granted the Garnishee Order nisi in respect of an arbitral award that had not been recognised and confirmed in courts of Ghana."*

As expressed, the above ground is not an allegation of lack of jurisdiction and so its import, in so far as it uses the words ''wrongly assumed jurisdiction" is indicative of a jurisdictional error within jurisdiction. So stated, the applicant must demonstrate that the order nisi granted by Asiedu J was in respect of a subject matter unrelated or unconnected with its jurisdiction. To allege against a court that it wrongly assumed jurisdiction implies that it exercised jurisdiction in a matter outside its competence. The error arising therefrom must be apparent on the face of the record without any effort being made to scrutinize the record in order to discover it. But a careful consideration of the only process or proceeding before us relating to the order nisi, exhibit AGS13 does not reveal any error that will qualify as a jurisdictional error. The order in my view having not been attacked on the ground that it does not satisfy the enabling rule, Order 47 r 2 of CI 47 attracts the presumption of regularity by virtue of section 37 of the Evidence Act, NRCD 323. Since the order nisi is regular and there is no error of law apparent on the face of its making, that should be the end of the statement that the learned trial judge wrongly assumed jurisdiction in the matter.

As there was no apparent error proved to bring the matter within certiorari, the applicant should have waited for the holding of further proceedings envisaged under Order 47 rule 5 to raise the issue of disputed liability and or the like. At the said hearing, the obligation firstly is on the judgment creditor to show that there is in fact 'any debt due or accruing from the garnishee to the judgment debtor' and it is only when this burden is satisfied that the garnishee's dispute of liability will be considered.See:Bagley v Winsome National Provincial Bank Ltd [1952]1 All ER 637, The mere grant of the order nisi does not relieve the judgment creditor of his primary obligation to prove the existence of a debt due or accruing to the judgment debtor from the garnishee. At the proceedings preceding the

making of the order nisi, the court is only interested in the matters specified in Order 47 rule 2 namely the identification of the judgment debt and the amount remaining unpaid as at date of the application and also an indication that to the best of his information and belief the garnishee who must be within the jurisdiction is indebted to the judgment debtor. AS a matter of practice, on the hearing of the order nisi, it is sufficient if the affidavit of the applicant states that the deponent is informed and believes that the garnishee is indebted to the judgment debtor. See: (1) Coren v Barne (1889) 22 QBD 249; (2) Vinall De pass [1892] AC 90.. Therefore, as the applicants have not demonstrated that the application resulting in the garnishee order nisi under the hand of Asiedu J dated September 25, 2018 exhibited to the application as AGS 13 did not contain any of the conditions specified for the making of the order, the ground by which it is said that the court wrongly assumed jurisdiction in the making of the order nisi crumbles.

The allusion to the non-recognition of the foreign arbitral award is not one of the matters specified in Order 47 rule 2; to be sworn to before the order nisi is granted. From the order nisi, it seems that the debt contemplated by Order 47 rule 1 is not the debt owing from Ghana to Balkan under the foreign arbitral award but that alleged by the judgment creditor to be owing from the garnishee to the judgment debtor. Unfortunately, the applicants have proceeded on the basis that it is the debt owing to Balkan that should have been due or accruing from the garnishee to the judgment debtor but the authorities speak to the contrary. It is observed of the applicable rule and the practice that has developed thereunder all the world over is that at the nisi stage, the concern of the court is limited only to being satisfied with the matters specified in Order 47 rule 2. Indeed, rule 2 of Order 47 does not require the Court on the hearing of the application for the order nisi is not required to inquire into the truth of the debt alleged to be due and accruing from the garnishee to the judgment debtor; that is a matter to be determined when the garnishee turns up to show cause against the order as provided in rule 1(2) of Order 47.

As garnishee proceedings are in two stages, as has rightly been stated by my respected sister Dordzie JSC, in her judgment it is at the stage that the garnishee is required to

show cause against the order nisi -the stage preceding the making of the garnishee order absolute- what Order 47 rules 1(2), 4(1) and 5 refer to as" further consideration" that issues such as have informed the applicant's challenge to the order nisi are considered. For emphasis reference is made to Order 47 rule 5 in the following words:

> *"Where on the further consideration of the matter the garnishee disputes liability to pay the debt due or claimed to be due from the garnishee to the judgment debtor, the Court may summarily determine the question in issue or order that the question in issue or order that any question necessary for determining the liability of the garnishee to be tried in any manner in which any question or issue in an action may be tried."*

These are very wide and extensive powers conferred on the court and I have no doubt that the question of non-recognition of the foreign arbitral debt and or its payment are matters that come within the scope of the rule although the fact that the debt has been paid seems to be inconsistent with such a plea. It is as the lead judgment has amply stated without any equivocation that issues such as these are as a rule and practice determined. In the course of the "further consideration of the matter' , a judgment debtor is entitled to be heard before the order absolute is made. See: Dawson v Preston Law Society [1953] 3 All ER 314. Speaking on the right of the judgment debtor to be heard before the making of the order absolute, Goddard CJ in the Dawson case (supra) observed at page 315 as follows:

"Where garnishee proceedings are taken, the garnishee order nisi under R.S. C Ord. 45, r1 to be served on the judgment debtor, and it would be a mere farce if he were not entitled to appear on the hearing to make the order absolute and to submit any arguments he might have. It might be that the judgment debtor would desire to say ; " I do not mind what the garnishee is saying in this case; I want to show that there is no attachable debt here Ordinarily, the garnishee would probably take the point, but one can well imagine a case in which the garnishee would not take the point and then the

judgment debtor would be entitled to take it because he could succeed in defeating the order absolute, he might be able to recover the debt"

From the above exposition of the practice before the making of the order absolute, the Rules have provided a clear remedy and so resort to certiorari in the absence of any allegation of absence of jurisdiction in the High Court is inappropriate.

I desire that these views are not misconstrued to be supportive of a claim made outside the scope of Order 47 rule 1. On the contrary, as we are in these proceedings concerned with the grant of certiorari, our primary focus is to satisfy ourselves whether the grounds for the exercise of our jurisdiction have been satisfied. Certiorari concerns itself not with the merits but requirements of due process, a feature which distinguishes it from appeals. It is for this reason that in applications for certiorari, there is the insistence on what constitutes the record in order to ensure that matters that do not belong thereto are excluded from the processes filed in applications for certiorari. Accordingly, to attempt to introduce by way of error of law matters that were not before the High Court before the making of the order nisi is to move the exercise of the supervisory jurisdiction into another realm.

. Pausing here, reference is made to the following speech of Singleton LJ in R v Northumberland Appeal Tribunal ex parte Shaw [1952] 1 All ER 122, 126 wherein he quoted with approval Sumner LJ's observation in R v Nat Bell Liquors, Ltd [1922] AC 128 at 154 as follows:

> *"……but there is no suggestion that apart from questions of jurisdiction, a party may state further matters to the court either by new affidavits or by producing anything that is not part of the record. So strictly has this been acted on, that documents returned by the inferior court along with its record, for example, the information, have been excluded by the superior court from its consideration. That the superior court should be bound by the record is inherent in the nature of the case. Its jurisdiction is to see that that the Dawson case (supra) said inferior court has not exceeded its own,*

and for that reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would itself, in form, transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualification and the conditions of its exercise; the other is the observance of the law in the course of its exercise."

The above approach has developed into imperatives to be followed by any court exercising supervisory jurisdiction and our courts have applied them consistently without conflict of opinion. Recently, in case number J5/63/2018 entitled: The Republic v The High Court Accra Ex -parte Mirielli Hitti and Others, an unreported judgment of the Supreme Court dated January 17, 2018 the above principles were applied in the determination of an application for certiorari.

Applying the principles set out in the preceding paragraphs, certain processes which were exhibited to the application such as the Order of Noble- Nkrumah J in the garnishee proceedings dating far back as November, 2017 have no relevance to the issues before the Court for determination. It is important to say that section 51 of the Evidence Act, NRCD 323 on relevance as the sole criteria for the admissibility of evidence applies with equal force to applications. Those proceedings which were extensively commented upon tended to prejudice and or confuse the issues before us within the contemplation of section 52 of the Evidence Act. For example, while the garnishee order dated July 26, 2017 by Noble- Nkrumah J exhibited to the proceedings herein as AGS1 has the Government of Ghana as the garnishee, in respect of the order nisi of Asiedu J, which was made on September 25, 2018 and exhibited as AGS13, the Bank of Ghana, High street Branch, Accra is the garnishee. Had the applicant limited the application only to matters which properly speaking belong to the record, we would perhaps have been faced with a less bulky application than we have had to contend with.

Furthermore, turning to the applicable rules, the choice of the singular noun in reference to decisions in the nature of an order, conviction, ruling or proceeding is deliberate and imposes on applicants a procedural requirement that any application seeking certiorari to

be good must be in relation to an order or like proceeding. It seems to me, however that notwithstanding the clear intendment of the relevant provisions, we have been exercising our supervisory jurisdiction in a relaxed manner, so to say, that leaves applicants with the unhappy impression that the requirements of the Rules are not intended to be strictly applied. Such a situation undermines the purpose for the making of rules pf procedure and detract from the rule of law, the observance of which is a pre-requisite of any legal system founded upon laws.

The making of the application related to two separate orders of the High Court that are directed at different judges also brings in its wake problems such as the computation of the time frame allowed under the Rules in respect of each order for the initiation of the application. The requirement of the Rules limiting the application to be directed at an order instead of orders arises from the fact that every order made by a court has separate consequences regarding the right to appeal or initiate as in this case, collateral proceedings in respect of it. This explains why in regard to notice of appeals; the objection is filed in relation to a judgment or order and not judgments or orders. See: Rule 6 of CI 16. It is only a court properly constituted that may after either several appeals or collateral proceedings have been filed in the exercise of its discretion direct that they be heard together. Concomitantly is the requirement of rule 61 sub-rule 1 (b) of the Supreme Court rules, CI 16 regarding the filing of a copy of the order against which the application is made, the effect of which is that properly speaking the application need be made only in respect of an order and not orders. And perhaps more concerning is the fact that the remedies sought are directed at two different judges of the High Court and if the application were to succeed have resulted in this Court making two separate orders, each being directed at a different judge of the High Court.

My respected colleagues, I have raised these matters in order that parties may be alert to the requirements of the Rules for future guidance only and I do not desire thereby to diminish in the slightest degree the careful and well thought out judgment just delivered by my sister Dordzie JSC to which I have hereinbefore expressed my agreement. Since

no issue was raised at the hearing in regard to these points, they are of no moment to the merit determination of the application.

N. S GBADEGBE
(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-

My sister, Dordzie JSC has correctly stated my views and l have nothing useful to add. I therefore support the conclusion that the application be refused.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

BAFFOE-BONNIE, JSC:-

FACTS

On the12th of March 2014, in a suit numbered BFS/217/13, Zenith Bank Ghana Limited (the interested party herein obtained judgment in the sum of USD44, 155,258.39 against Balkan Energy Ghana Ltd.) obtained judgment in the sum of USD44, 155,258.39 against Balkan Energy Ghana Limited and Reality Advisors Incorporated. This was in the suit numbered BFS/217/13.

In another transaction Balkan Energy obtained an arbitral award of about USD 13.3 million against the Republic of Ghana. There was a power purchase agreement between Balkan Energy Ltd and the Republic of Ghana which The Ghana Government breached. In accordance with an arbitration clause in the said agreement, Balkan Energy Ghana Ltd commenced arbitration against the Republic of Ghana at the Permanent Court of

Arbitration in The Hague, Netherland. The result of this arbitration was the award of a total of USD 13.3 million in favour of Balkan Energy against The Ghana Government. That was on the 1st of April 2014

In seeking to enforce their judgment against Balkan Energy Ghana Ltd, Zenith Bank applied for and obtained a garnishee order absolute against the Attorney General for the arbitral award standing to the credit of Balkan Energy against the Ghana Government to be assigned to it (Zenith Bank). The Garnishee order absolute was granted on the 13th of October 2017. Consequently by a letter dated 16th February 2018 the Attorney - General instructed the Minister of Finance to pay Zenith Bank.

Subsequent to these events, Balkan Energy Ghana Ltd. petitioned the United States District Court for the District of Columbia to confirm, recognize and enforce the arbitral award. On the 22nd of March 2018 the District Court for the District of Columbia confirmed the arbitral award and assigned same to Balkan Energy UK. When this was brought to the attention of the Attorney General, she wrote to the Minister of Finance on 19th July 2018, withdrawing her earlier instruction dated 19th February 2018, thereby stopping payment to Zenith Bank; payment to Zenith bank would mean paying the debt twice. The solicitors of the interested party were notified of this development per a letter dated 31st July 2018.

Following the judgment of the District Court for the District of Columbia, Balkan Energy UK took steps to enforce the arbitral award and attached assets of the Government of Ghana in France forcing The Government of Ghana to pay Balkan UK a total of USD 13,678,263.30 being the settlement of the arbitral award. This payment was done on the 20th September, 2018.

Zenith Bank the interested party herein instituted another execution process and commenced garnishee proceedings in the High Court consequent to which it obtained a Garnishee Order Nisi on 25th September, 2018, ordering the Garnishee bank, Bank of Ghana High Street Accra to appear before it on the 10th of October 2018 to show cause why funds held by it in the following accounts: a) Ghana Revenue Authority -

1018631462014 and b) National Petroleum Authority -1018631520208 for and on behalf of the Government of Ghana should not be released in payment and satisfaction of the debt Government of Ghana owed to the applicant. This order is dated 25th of September 2018 and exhibited in this application as exhibit AGS13.

On the 10th of October 2018 the A-G filed a motion to set aside the Garnishee Order Nisi granted on the 25th of September 2018. In a ruling dated 6th November 2018 the High Court dismissed the application to set aside its order.

The applicant herein the A-G has brought this application under article 132 of the 1992 Constitution of Ghana evoking the supervisory jurisdiction of this court for the following reliefs:

iv. An Order of Certiorari to bring up to this Court for purposes of being quashed the Garnishee Order Nisi made on 25th September, 2018 by the High Court (Commercial Division), Accra; Coram Asiedu J; in the suit entitled *Zenith Bank Ghana Ltd vrs. Balkan Energy Ghana Limited and Anor, Suit No: BFS.217/2013*

v. An Order of Certiorari to bring up to this Court for purposes of being quashed the Ruling delivered on 6th November, 2013 refusing the Application of the Applicant herein to set aside the Garnishee Order Nisi of the High Court (Commercial Division) Accra Coram Nkrumah J; in the suit entitled *Zenith Bank Ghana Ltd. vrs. Balkan Energy Ghana Limited and Another, Suit No. BFS. 217/2013*

vi. An Order of Prohibition barring all lower Courts from entertaining any previous or further actions or proceedings in the suit in respect of which the Orders sought to be quashed were made.

The grounds upon which the application is brought are as follows:

3. The High Court wrongly assumed jurisdiction when it granted the Garnishee Order Nisi in respect of an arbitral award that had not been recognized and confirmed in courts of Ghana.

4. The High Court committed an error of law apparent on the face of the record affecting the High Court's jurisdiction when it failed to take evidence and legal arguments in respect of an assignment between Balkan and Balkan Energy, UK when it purported to declare same invalid.

Submissions:

In arguing these grounds the applicant made the following submissions:
That the award is not enforceable because it had not complied with section 59 of the Alternative Dispute Resolution Act, 2010 Act 798; and the New York Convention which regulates the recognition and enforcement of foreign arbitral awards. The New York Convention was ratified by the Republic of Ghana and incorporated In the Alternative Resolution Act. (See the first schedule of the Act). The argument of the applicant is that in so far as the award had not been recognized by the High Court in Ghana in accordance with the provisions of the Alternative Dispute Resolution Act and article IV of the New York Convention, the arbitral award had not accrued or become due. The conditions precedent for the High Court's jurisdiction to be triggered under Order 47 of C. I. 47 had not been fulfilled. As at the time the High Court granted the Garnishee Order Nisi, it had no jurisdiction to do so, the said order ought to be brought to this court to be quashed.

On the second ground the applicant argued that the High Court in making its decision dated 6th November 2018 breached the rules of natural justice, particularly it breached the *audi alteram partem* rule when it pronounced the assignment of the arbitral award to Balkan UK as not valid. Balkan UK was not a party before it, the court did not give the parties a hearing on the validity or otherwise of the assignment when it declared that the assignment was not valid.

In reply to these arguments counsel for the interested party took the position that the question of recognition and enforcement of the arbitral award do not arise in the instant case. According to him, by article III of the New York Convention an arbitral award can be enforced in any of the contracting states therefore Balkan Energy Ghana Ltd need not come to Ghana to either confirm the award or enforce same. Indeed, counsel further submitted, Balkan Energy Ghana Ltd had filed applications in South Africa and the United States of America to confirm and enforce the arbitral award and had attached asserts of the Republic of Ghana in South Africa and France. There was therefore a debt due to Balkan Energy which the interested party could obtain in Garnishee proceedings.

On the second ground learned counsel for the interested party argued that the ground is misconceived, the High Court giving the ruling complained of relied on affidavit evidence before it, moreover Balkan Energy Uk is not different from Balkan Energy Ghana Ltd. Counsel concluded the applicant has failed to make a case to properly evoke the supervisory jurisdiction of this court and therefore the application ought to be dismissed.

Issues:

The issue that needs to be considered first and foremost in our opinion is whether this court's supervisory jurisdiction had been properly evoked.

I have had the benefit of reading beforehand the Lucid opinion written by my worthy sister, Dordzie JSC, and concurred in by my able brothers Gbadegbe and Appau JJSC. My sister concludes that the applicant does not properly invoke our jurisdiction, that the order nisi was properly made, and that if the applicant has any cause to show why he does not have to pay monies to the Zenith Bank, he only has to appear before the court and oppose the issuance of the decree absolute. The application for certiorari is misconceived and so same should not be granted. My sister has cited the case of

Republic v High Court (Financial Division), Accra Ex Parte Odonkor (Executive Director of Economic and Organised Crime Office (EOCO), Bank of Ghana & Ecobank Ghana Ltd. Interested Parties [2015-2015]1SCGLR 312 at 314 where this court, per Atuguba JSC *held as follows:*

"It should be stressed that certiorari is a special and residual remedy which is held in reserve; hence the rule that where there is an equally effective remedy resort to certiorari would be refused."

With respect to my Sister, I am unable to agree with her that the applicant has not made a case for certiorari to issue. Yes, it is true that the applicant has the choice of appearing before the High Court to show cause why he should not be made to pay the judgement debt to the interested party herein, but that does not his right to apply for certiorari if the order to appear before the court was procured without jurisdiction. Coming by certiorari to quash an order procured without jurisdiction is not mutually exclusive to the choice to appear before the court to show cause. So, if the applicant feels that the garnishee order nisi was procured without jurisdiction, nothing prevents him from seeking to quash the wrongful order without having to come and show cause why he should not pay.

Garnishee proceedings is one of the methods of execution and it is regulated by Order 47 of CI 47. Rule 1 of Order 47 provides as follows:

> "1 (1) Where a person in this Order referred to as "the judgment creditor" has obtained a judgement or order for the payment of money by some other person referred to as the judgment debtor and the judgment or order is not for the payment of money into court, **and another person within the jurisdiction, referred to as "the garnishee" is indebted to the judgment debtor,** the court may, subject to the provisions of this Order and of any enactment, order the garnishee to pay the judgment creditor the amount of any debt due or accruing to other judgment debtor from the garnishee, or as much of it as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings.
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> (2) An order under this rule shall in the first instance be an order to show cause, and shall specify the time and place for further consideration of the matter, and in the meantime attach such debt

as is mentioned in sub rule (1), or as much of it as may be specified in the order, to satisfy the judgment or order mentioned in that sub rule and the costs of the proceedings"

The essential condition for the institution of garnishee proceedings under C.I. 47 is the indebtedness of a third party (the garnishee) to the judgment debtor. This is a condition precedent for the exercise of the court's jurisdiction in the garnishee proceedings.

The Government of Ghana (GoG), as shown by the Minister for Finance's letter attached, paid Balkan Energy the full amount owed, almost $14 million, on **20th September, 2018.** At the time, the garnishee order nisi was issued, there was no debt which could have been the subject matter of garnishee proceedings. The High Court had no jurisdiction to entertain the garnishee proceedings.

The refusal of the High Court to set aside the order nisi in the face of the evidence adduced by the A-G, was another error patent on the face of the records.

1. Assuming for argument purposes that GoG owed Balkan as of the date of the institution of the garnishee proceedings, same was not a debt recognizable within the jurisdiction of Ghana, since it emanated from an arbitral award which had not been registered or enforced in Ghana.

Section 59 of the Alternative Dispute Resolution Act, 2006 (**Act 796)** enjoins specific steps to be taken to register an arbitral award in the High Court of Ghana, before an arbitral award may be recognized or enforced in Ghana. This is in accordance with the provisions of the New York Convention, specifically incorporated into Ghana's domestic law by Act 796. To the extent that there had not been any enforcement proceedings regarding the arbitral ward on the strength

of which Zenith Bank instituted the garnishee proceedings, there was no debt enforceable in Ghana. The garnishee proceedings were null, void and of no effect.

Another issue that I think brings out the illegality in the garnishee nisi proceedings is the issue of capacity of the interested party herein, (Zenith Bank). In the garnishee nisi proceedings, the Bank Of Ghana is the garnishee while the Ghana Government is the Judgment debtor. In garnishee proceedings, the applicant is the judgment debtor, while the garnishee is the person who in turn owes the judgment debtor or holds some money on behalf of the judgment debtor. This is the interpretation, one can put on Order 47 Rule 1(1) of C.I, 47. "1

(1) Where a person in this Order referred to as "the judgment creditor" has obtained a judgement or order for the payment of money by some other person referred to as the judgment debtor and the judgment or order is not for the payment of money into court, ***and another person within the jurisdiction, referred to as "the garnishee" is indebted to the judgment debtor,*** *the court may, subject to the provisions of this Order and of any enactment, order the garnishee to pay the judgment creditor the amount of any debt due or accruing to other judgment debtor from the garnishee, or as much of it as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings.*

If that is the case then Zenith Bank as a judgment creditor to Balkan Energy could only have brought garnishee proceedings against the Government of Ghana as a judgment debtor to Balkan Energy. Or the Balkan Energy as judgment creditors of The Ghana Government could have brought garnishee proceedings against the Bank of Ghana, as holding monies on behalf of the Ghana Government as judgment debtors of Balkan Energy.

As things stand now Zenith Bank not being a party to the arbitral proceedings had no capacity to enforce the arbitral award through any form of execution, be it by garnishee or a writ of Fi fa. The proper party to enforce the award was Balkan Energy. The Garnishee order nisi was issued without jurisdiction and therefore same is amenable to be quashed by certiorari. I will therefore order that same should be brought before us for the purpose of being quashed, and same is quashed accordingly.

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

YEBOAH, JSC:-

I agree with the conclusion and reasoning of my brother Baffoe-Bonnie, JSC.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

COUNSEL

AMARKAI AMARTEIFIO FOR THE INTERESTED PARTY/RESPONDENT.

GODFRED YEBOAH DAME, DEPUTY ATTORNEY-GENERAL FOR THE APPLICANT WITH HIM MRS. GRACE EWOAL. PRINCIPAL STATE ATTORNEY, NANA ABUA BRONYA OTCHERE, SENIOR STATE ATTORNEY, MISS YVONNE BANNERMAN, SENIOR STATE ATTORNEY AND AKANWARE ATENDAM, ASSISTANT STATE ATTORNEY.