IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA

CORAM: J. ANSAH JSC (PRESIDING)
J. V. M. DOTSE JSC
ANIN-YEBOAH JSC

REVIEW MOTION
No. J7/5/2014
6TH FEBRUARY,2014

ZOOMLION GHANA LTD ---- APPLICANT/ RESPONDENT

VRS.

MERSKWORLD CO. LTD ---- RESPONDENT/ APPLICANT

R U L I N G

ANIN-YEBOAH JSC:

The applicant herein has invoked our jurisdiction under Article 134(b) of the 1992 Constitution to reverse the ruling of our brother Akamba JSC who exercised the jurisdiction of this court as a single justice by virtue of Article 134(a) of the same Constitution.

To appreciate the basis for this application, a brief summary of the facts culminating in this ruling would suffice.

FACTS

On the 1/08/2013, the respondent herein filed a motion before this court headed as follows:

> "MOTION ON NOTICE FOR AN INTERIM INJUNCTION OR SUSPENSION OF THE ENFORCEMENT OF JUDGMENT"

As expected in matters in execution of judgments, the application was opposed by the applicant herein. The basis for the application was that the applicant herein in a High Court [Land Division, Accra] suit intituled: SUIT NO. IRL/167/2010: ZOOMLION GHANA LIMITED v MERSKWORLD GHANA LIMITED, was on the 9/04/2013 adjudged by the said High Court to recover various sums of money from the respondent herein. The respondent lodged an appeal against the judgment at the Court of Appeal, Accra. It appeared that on 24/04/2013, the High Court was by a motion invited to stay execution of its judgment. The court dismissed the application and therefore paved way for execution to proceed. Not satisfied with the order of the High Court, the respondent herein repeated the application for stay of execution at the Court of Appeal, Accra. On 20/05/2013, the Court of Appeal granted the motion for stay of execution in the following terms:

> "**BY COURT**: This application for stay of execution of GH¢17,581,010 of damages is granted in the following terms:
>
> (1) The plaintiff/Appellant/Applicant shall vacate the land fill site at Sawbah forthwith if has not done so yet.
>
> (2) The Plaintiff/Appellant/Applicant shall pay into court 50% of the judgment debt pending the final determination of the appeal. This payment shall be made within 30 days from the date hereof.

(3) The sum paid shall be invested by the Registrar in a good interest yielding investment.

(4) Failing the payment into court, this order of stay will be deemed vacated."

The respondent herein felt aggrieved by the orders of the Court of Appeal as it considered the orders as onerous and therefore lodged an appeal to this court on several grounds to set aside the ruling of the Court of Appeal, especially the order for payment of 50% of the judgment debt of GH¢17,588,010 into court within thirty days.

It must be made abundantly clear that the appeal to this court filed on 6/06/2013 against the motion for stay of execution was not an appeal against the substantive judgment delivered by the High Court. It was solely an appeal against the motion for stay of execution which according to the respondent was granted by the Court of Appeal on onerous terms and therefore amounted to a refusal.

The respondent by virtue of the pending appeal before this court against the grant of stay of execution filed a motion for stay of execution at the Court of Appeal. For a more detailed record the Court of Appeal after hearing the application ruled as follows:

> **"BY COURT:** We have seen all the papers filed in this application. We have also heard counsel for and on behalf of the parties. This application is pursuant to an appeal filed above. We are keenly aware that this matter is effectively out of our hands. That notwithstanding, we are not being asked to review our earlier order. That being the case since our previous order is not executable we shall refuse this application. It is accordingly refused."

The respondent thereafter invoked this courts' jurisdiction not by way of repeating the application for stay of execution which the Court of Appeal refused, but by praying this court for the following reliefs:

"MOTION ON NOTICE FOR AN INTERIM INJUNCTION OR SUSPENSION OF THE ENFORCEMENT OF JUDGMENT."

In the affidavit in support of the motion, it appeared for the first time in the history of the case, that the respondent herein was raising the issue of non-service of hearing notice. The respondent had indeed conducted a comprehensive search at the High Court and annexed same to bolster its case that hearing notices which ought to have been served in compliance with section 263(1) of the Companies Act (Act 179) of 1963 was flouted.

The application was listed before our brother as the single justice to exercise this court's jurisdiction under Article 134(a). Upon hearing parties on the 7/11/2013, our esteemed brother said as follows:

> "The Applicant has raised sufficient grounds for due consideration for the grant of the present application in the light of a breach of the rules of natural justice. As to the Respondent's argument that this court lacks the competence to grant the application, I wish to refer to such cases as Merchant Bank Gh. Ltd v Similar Ways Ltd [2012] 1 SCGLR 440 and Standard Chartered Bank (Gh) Ltd v Western Hardwood Ltd [2009] SCGLR 196 to state that in appropriate cases, this court has the power to grant reliefs such as the Applicant seeks. I am satisfied that the present application is an appropriate case to warrant the grant of an order to suspend the enforcement of the judgment of the High Court delivered on 9th April, 2013 which I hereby do, pending the outcome of the appeal before this court."

The applicant herein, aggrieved by the order above has invoked our jurisdiction under Article 134(b) of the 1992 Constitution and Rule 54 of CI 16 for an ORDER TO REVERSE THE DECISION delivered on the 7/11/2013. In our respectful opinion this application was for review of the decision of the single justice.

PRELIMINARY OBJECTION

In his statement of case opposing this application, learned counsel for the respondent has raised a preliminary objection as to the jurisdiction of this court to entertain this application. In paragraph 34 of the statement of case, counsel stated as follows:

> "The present application cannot qualify as one for review properly so-called because although rule 54 of CI 16 states that the court can review any decision made or given by it (and the court is duly constituted by a single justice thereof), that provision contained in a subsidiary legislation, cannot override the clear Constitutional provisions of Article 133(2) as the composition of the court when hearing a review application properly so-called and also the clear provisions of Article 134(b), which spells out the composition of the court to hear an application brought under to it to vary, discharge or reverse a decision of a single justice of the court. It is therefore our submission that in so far as the present application seeks a review, relying on Rule 54 of CI 16, it is with respect, incompetent because rule 54 of CI 16, can only be referrable to review applications pursuant to Article 133 of the Constitution."

It was submitted that an applicant proceeding under Article 134(b) as in this instant application cannot at the same time apply for a review of the decision of a single justice delivered pursuant to Article 134(a). A review within the context of Article 133 therefore cannot be heard by three justices of the Supreme Court. The court can only hear an application filed pursuant to Article 134(b) and an applicant who invokes Article 134(b) is thus limited by the clear wording of that Article as to the specific type of application that it can initiate - to vary, discharge or reverse the decision of a single justice and nothing else, including a review.

Learned counsel for the applicant concedes that the wording of Article 134(b) of the 1992 Constitution is clear, the article however, fails to stipulate the procedure to be adopted. He is of the view that in applying for the reversal of the single justice, the applicant in effect is seeking this Honourable court's intervention by way of review of the

said ruling. He proceeded to cite the case of Edusei No. 2 v Attorney-General [1998-99] SCGLR 735 in which Acquah JSC (as he then was) said:

> "an aggrieved person is entitled to adopt the nearest reasonable procedure of utilizing the right accorded by law – a procedure which must be such as to give notice to the person or legally authorized authority against whom redress is sought and afford to him or it an opportunity of putting his side of the case".

Reference was also made to MARIAM AWUNI v WEST AFRICAN EXAMINATION COUNCIL [2003-2004] SCGLR 471 in which Date-Bah JSC pointed out the relaxation of the rules at the Supreme Court when it comes to procedural flaws which do not oust the jurisdiction of the court so that the court can deal with the case on the merits.

It was therefore submitted that the applicant was entitled to adopt a reasonable procedure which could enable the Supreme Court as well as the respondent herein to appreciate the nature of the applicant's case.

In answering the objection posed by the respondent, it must be made clear that this court's jurisdiction under Article 134(b) is sparingly invoked and therefore few cases have been decided on it to offer precedents to assist this court. The most recent decision which my illustrous brother Dotse JSC delivered was in the unreported case of MASS PROJECTS LIMITED v STANDARD CHARTERED BANK & OR (REVIEW MOTION NO. J7/4/2014) delivered on 18th of December 2013. The court had to decide whether failure on the part of an applicant to file a statement of case in applications for review under Article 134(b) of the 1992 Constitution, should not render the application a nullity. A similar objection was raised earlier in an unreported application for review in REVIEW MOTION No. J7/2/2014 intituled: ABED NORTEY v AFRICAN INSTITUTE OF JOURNALISM AND COMMUNICATION & 2 OTHERS, Coram Mrs. WOOD CJ, (presiding), Dotse and Baffoe-Bonnie JJSC dated 23/10/2013. In both cases, this court was firm and held that lack of statement of case in support of an application brought under Article 134(b) should not render the application null and void. The lack of rules

governing or regulating the jurisdiction exercised under Article 134(b) by CI 16 led my brother Dotse JSC to express his well-thought views in the MASS PROJECTS LIMITED case, supra, which I quote ad longum:

> "Whilst our Supreme Court Rules in Ghana are completely silent on what procedure is to be adopted and applied before a single judge, the Gambian Rules provide for, even if not adequate, it is better than not making any provision at all.
>
> We believe it is this lacuna in the Rules of Court that has led to a number of such issues being raised for non-filing of statement of case in support of an application to review decisions of the single justice of the court.
>
> Even though in essence an application under Article 134(b) of the constitution is a review application, it is to be considered as a special review application separate and distinct from the review application provided for in Article 133 of the constitution and in Rules 54 to 60 of CI 16."

Like our brother Dotse JSC, we are of the opinion that save the different number of justices that may constitute a Supreme Court for review, under Article 134(b) and Article 133 of the Constitution, the jurisdiction exercised under both articles are substantially the same. An application to vary, discharge or reverse an order, direction or decision if successful would certainly amount to review if the application is granted by the court. In my respectful opinion, like our illustrious brother Dotse JSC, it may be said that applications under Article 134(b) may be considered as a special review application as in substance it seeks to vary, discharge or reverse a ruling made by the court.

It is therefore constitutional that this court as constituted is competent to entertain this review application. The preliminary objection is thus overruled.

BASIS FOR REVIEW

On the substantive matter, this application has been argued well in paragraphs 23-42 of the statement of case. The applicant herein complains that section 263(1) of the

Companies Act, Act 179 of 1963 which was relied on by the learned judge to grant the application was inapplicable under the circumstances.

It was also argued that several hearing notices were indeed served on the lawyer on record to compel his attendance in court which were ignored therefore vesting the trial court with no option than striking out the suit for want of prosecution to enable the respondent to pursue its counterclaim against the applicant. It was pointed out that the lawyer for the respondent at the trial court was present when the judgment in respect of the counterclaim was read in court.

After the judgment on the counterclaim, the respondent as judgment-debtor after lodging an appeal filed a motion for stay of execution at the High Court and upon its dismissal repeated same at the Court of Appeal. Throughout, the respondent did not raise the issue of non-service or service contrary to section 263(1) of Act 179.

It is very clear that the respondent, whose case was struck out for want of prosecution at the High Court (where it was the plaintiff) never complained that it was unaware of any notice for hearing of its case or the counterclaim that was prosecuted by the applicant herein. Indeed, that appeal was not the subject-matter of the application which was heard by the single judge, whose ruling is before us for review. The evidence of non-service is being raised for the first time in these proceedings when the case was before the single judge. The complaint of the respondent is against the service of the hearing notice on its previous solicitor.

At this stage, care must be taken not to prejudice the substantive appeal at the Court of appeal by embarking on any pronouncements of the law that may pre-empt the appeal before it is even heard. To us, this issue of lack of service of hearing notice in compliance with the Companies Act, Act 179 of 1963 has never been part of the respondent's case but was urged on the single judge as the only ground for granting the application which our brother acceded to. The appeal against the Court of Appeal's ruling is limited, indeed, to only the refusal of the Court of Appeal to grant the stay on

favourable terms but rather on onerous terms. The case of TONY ADAMS v ANANG SOWAH [2009] SCGLR 111 offers enough guidance on the limits of this court in matters of such nature. Our brother Atuguba JSC in the case said as follows:

> "It should be emphasized that an appeal to this court is an appeal from the immediate lower court and its powers are designed and directed at the matters that arise from that court and not otherwise, except as to consequential matters"

We consider the above pronouncement of law by our brother as very sound proposition to guide us in deciding matters of this nature. Our jurisdiction is indeed very limited. We think that our learned brother as the single judge did not, with due respect to him, consider the limits of his jurisdiction in dealing with the application as he went beyond it to consider a very serious matter which the parties themselves never raised in the substantive appeal. The submission of counsel for the applicant on this point has not already being canvassed at the lower courts. He seeks to draw this courts attention to apparent error which if not corrected would lead to miscarriage of justice. See Re KWAO (DEC'D) NARTEY v ARMAH & OR [1989-90] 2 GLR 546 SC and DARBAH v AMPAH [1989-90] 2 GLR 103.

In our respectful opinion, the error on the part of the single judge is fundamental in nature to constitute exceptional circumstances to warrant our review jurisdiction. In the very recent decision of the court which is unreported, that is, REVIEW MOTION No. J7/3/2014 PATIENCE ARTHUR VRS. MOSES ARTHUR 4/02/2014, CORAM: WOOD CJ (MRS), OWUSU, DOTSE, YEBOAH, BAFFOE-BONNIE, BENIN and AKAMBA JJSC this court per Dotse JSC after referring to virtually all the authoritative pronouncements on review came out with a road map to review. We find that this case falls squarely into the circumstances in which our review jurisdiction could be properly invoked as the ruling under review clearly resulted into gross miscarriage of justice.

We accordingly allow the application and set aside the ruling of the single judge dated the 7th of November, 2013.

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COURT

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

COUNSEL

MRS. NANCY AMARTEIFIO LED BY MR. KOFI SOMUAH FOR THE RESPONDENT /APPLICANT .

MR. CHARLES HAYIBOR, RICHARD BOBISON FOR THE APPLICANT /RESPONDENT.