

IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA

CORAM: HENRY KWOFIE JA (PRESIDING)

NOVISI ARYENE JA

ERIC BAAH JA

SUIT NO. H1/36/2022

DATE: 2ND JUNE 2022

- 1. DR. PAPA KWESI NDUOM**
- 2. COCONUT GROVE BEACH RESORT**
- 3. GROUP NDUOM LIMITED .. APPLICANTS/RESPONDENTS**

VS.

- 1. BANK OF GHANA 1ST RESPONDENT/APPELLANT**
- 2. THE ATTORNEY GENERAL**
- 3. GN SAVINGS & LOANS CO. LTD.**

J U D G M E N T

HENRY KWOFIE JA:

This appeal was launched by the 1st Respondent/Appellant against the ruling of the High Court (Human Rights Division 1) Accra delivered on 19th, December 2019. In that ruling, the court dismissed the preliminary legal objection which the 1st and 2nd Respondent/Appellants raised as to the competence of the Applicants/Respondents originating motion on notice filed against the Respondents/Appellants and the prayer of the 1st respondent/appellant that the action of the applicants/respondents be set aside or struck out.

The brief facts of the case culminating in this appeal are that the 1st Respondent/Appellant Bank of Ghana in exercise of its statutory powers under Section 123 of the Banks and Specialized Deposit Taking Institutions Act 2016 (Act 930) revoked the banking license of GN Savings and Loans Company Ltd. the 3rd respondent and appointed receivers to take over its assets and liabilities. The 1st, 2nd and 3rd Applicants/Respondents being shareholders of GN Savings & Loans Company and aggrieved by the decision of the 1st Respondent/Appellant filed an originating motion on notice under Article 33 of the Constitution, 1992, Order 67 of the High Court (Civil Procedure) Rules, 2004 (C.I. 47) and the inherent jurisdiction of the High Court on 30-08-2019 for the enforcement of the 1st, 2nd and 3rd Applicants/Respondents fundamental human rights to administrative justice, to property and to equality or non-discrimination against the respondents. The originating motion on notice was amended on 28-10-2019 pursuant to leave granted by the court on 24-10-2019 and claimed against the Respondent/Appellants the following reliefs:

- i. *Adjudge and declare that by failing to take into account the indebtedness of the Government of Ghana, its Ministries Departments or Agencies to the 3rd applicant group, Gold Coast Advisors Limited or 3rd respondent company before concluding that 3rd respondent was insolvent and consequently revoking its specialised deposit taking*

- license the 1st respondent has violated, is violating or is likely to violate the rights of 1st, 2nd and 3rd applicants and 3rd respondent to administrative justice, to property and to equality or non-discrimination.*
- ii. *Adjudge and declare that by relating to the 1st respondent that the total indebtedness of the Government of Ghana, its Ministries, Departments or Agencies to the 3rd applicant group Gold Coast Advisors Ltd or the 3rd respondent company was thirty Million and three hundred and twenty nine thousand four hundred and eighty three Ghana cedis and eighty four pesewas (GH¢30,329,483.84) when the Ministry of Finance knew or ought to have known that that amount was woefully inaccurate and 1st respondent subsequently relying on such communication in arriving at its decision to revoke the specialized deposit taking license of the 3rd respondent, the 1st respondent has violated, is violating or likely to violate the rights of the 1st, 2nd and 3rd applicants and the 3rd respondent to administrative justice, to property and to equality or non-discrimination*
- iii. *Make an order of certiorari quashing the decision in the notice issued by the 1st respondent dated August 16, 2019 which declared the 3rd respondent insolvent and consequently revoked its license to operate as a specialized deposit taking institution.*
- iv. *Make an order of mandamus to issue compelling*
- a) *The 1st respondent to restore to the 3rd respondent company its licence to enable it to continue operating as a specialized deposit taking institution.*
- b) *Messrs. Eric Nana Nipah as receiver of the 3rd respondent to submit the possession, management or control of such assets, operations and activities*
- v. *Make an order of injunction restraining the other respondents their assigns, agents, privies and workmen howsoever called or described from interfering with the possession, management or control of the assets, operations and other activities of the 3rd respondent*

- vi. *Provide any other remedies that the honourable court may deem fit under the circumstances*

The 1st respondent/appellant upon service of the originating motion on notice entered a conditional appearance and on 18-09-2019 filed a motion on notice to strike out and/or set aside the 1st, 2nd and 3rd applicants/respondents originating motion on notice for various orders for the enforcement of the applicants fundamental human rights to administrative justice, to property and to equality or non-discrimination.

On 25-09-2019 the 1st, 2nd and 3rd applicants/respondents filed an affidavit in opposition to 1st respondent/appellants motion on notice to strike out and/or set aside the applicants/respondents originating motion on notice. On 19-12-2019 the trial judge delivered her ruling and dismissed the 1st respondent's motion to set aside or strike out the 1st, 2nd and 3rd applicant/respondent's originating motion on notice. Dissatisfied with the ruling of the trial court, the 1st respondent/appellant launched the instant appeal on the 09-01-2020 on the following grounds:

- a) *The ruling is against the weight of affidavit evidence.*
- b) *Further grounds to be filed upon receipt of the record of appeal.*

It should be noted for the record that no further grounds of appeal were filed by the appellant. The notice of appeal filed on 09-01-2020 is at pages 98 to 99 of the Record of Appeal (vol.2) and the reliefs sought from the Court of Appeal is that the ruling of the High Court made on 19-12-2019 dismissing 1st respondent/appellant's motion on notice to strike out and/or set aside 1st, 2nd and 3rd applicants/respondents originating motion on notice for various orders for the enforcement of the applicant's fundamental human rights to administrative justice, to property and to equality or non-discrimination and also motion on notice for an order of interlocutory injunction be set aside.

In this judgment, the 1st respondent/appellant would be referred to simply as appellant whilst the 1st, 2nd and 3rd applicants/respondents would be referred to simply as 1st, 2nd and 3rd applicants. The 3rd respondent will be referred to simply as 3rd respondent.

Ground 1

The basis of the 1st respondent/appellant's motion to set aside or strike out the 1st, 2nd and 3rd applicants/respondents originating motion on notice for the enforcement of the fundamental human rights to administrative justice, to property and to equality or non-discrimination against the respondents is that Section 141 of the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930) makes it mandatory and obligatory for any person aggrieved by the decision of the Bank of Ghana on Official administration liquidation and receivership and who seeks redress of such grievance to resort to arbitration.

Arguing the sole ground of appeal, counsel for the appellant submitted that the burden was on the appellant to show on the basis of the affidavit evidence that the jurisdiction of the High Court was wrongly invoked by the 1st, 2nd and 3rd applicants/respondents.

Counsel referred to paragraph 3 to 10 of the affidavit in support of the appellants affidavit in support of the motion on notice to strike out or set aside 1st, 2nd and 3rd applicants originating motion on notice for various orders for the enforcement of the applicants fundamental human rights to administrative justice etc. and submitted that, the applicants' plaint emanates from the revocation of the license of the 3rd respondent GN Savings and Loans Company Ltd. by the 1st respondent and placing same under receivership. He submitted that this revocation was undertaken and/or effected pursuant

to Sections 123⁽¹⁾ of the Banks and Specialised Deposit-Taking Institutions Act 2016 (Act 930) and added that the said Act prescribes the mode for resolving any grievance by any person aggrieved by the actions of the Bank of Ghana in accordance with section 123(1) of Act 930. Counsel further referred to paragraphs 26 to 29 of the amended affidavit in support (at page 23 to 33 of the Record of Appeal vol.2) and submitted that the 1st, 2nd and 3rd applicants' assertion that their fundamental human rights to administrative justice, to property and to equality or non-discrimination had been breached or is likely to be breached, is grossly misconceived and the trial judge erred when she held that the action was a fundamental human rights action.

Counsel finally submitted that the ruling of the court below be reversed as the applicants' plaint in the court below is not one of human rights violation but only a grievance against the revocation of 3rd respondent's license by the 1st respondent and Act 930 specifies the mode to be employed in resolving same.

Responding to the submissions of counsel for the appellant, counsel for the applicants/respondents submitted that the preliminary legal objection has no merit. He submitted firstly that Section 141 of Act 930 does not bar an aggrieved person from enforcing his or her fundamental human rights and freedoms under Article 33(1) of the Constitution 1992. He submitted that the applicant's originating motion was brought under Article 33⁽¹⁾ of the Constitution and asserted that the true position of the law is that the availability of other lawful remedies does not prevent an alleged victim of a human rights violation from pursuing an Article 33⁽¹⁾ remedy. He added that the applicants are entitled to ignore the local remedy under Section 141⁽¹⁾ of Act 930 and to rather pursue the remedy under Article 33⁽¹⁾ of the constitution. Counsel further asserted that a respondent to an article 33⁽¹⁾ claim is not allowed to plead simply that a different forum is available or even more appropriate

for the claim, but must file an affidavit in opposition to the originating motion and forcefully contest the claim on the merit.

Counsel finally submitted that the Alternative Dispute Resolution (ADR) Act does not admit of Human Rights enforcement claims and added that this court is the most appropriate forum for addressing the plaint of the applicants and that arbitration has no role to play in the determination of this plaint.

It is necessary to state at the outset that no viva voce evidence was led in this case and the preliminary legal point on the Motion to set aside or strike out the originating notice of motion for the enforcement of the applicants' fundamental human rights to administrative justice, to property and to equality or non-discrimination was decided entirely based on the affidavit evidence and it is therefore incumbent on the appellant to demonstrate on the affidavit evidence the lapses in the ruling appealed against. See **Djin vs. Musah Baako (2007-2008) 1 SCGLR 686**.

In her ruling the trial judge stated as follows:

"The above referred to reliefs being sought by the applicants/respondents are anchored on what the applicants/respondents deem to be their rights to property, administrative justice and to equality or non-discrimination. Without attempting to go into the merits of the substantive application before me, I am satisfied, from a reading of the affidavit in support of the substantive application before me, that the plaint of the applicants/respondents is recognized under several articles of the Constitution, 1992, principal among which are Articles 17, 18, 23 and 296. Further without any doubts Article 17, 18, and 23 are

contained in chapter Five of the 1992 Constitution which relate to Fundamental Human Rights and Freedoms

*What the applicants/respondents at the hearing of the substantive matter, need to satisfy this honourable court is whether indeed those Articles, among others, have been violated by the respondents/applicants in relation to them. I thus find and hold, that the action before me, is a fundamental human rights action. I do not arrive at this finding without recognizing the abhorrence of the courts, particularly of the Supreme Court, of the conduct where a person seeks to circumvent laid down procedures to seeking a relief and thus masquerade a particular cause of action as another. For instance, in what was found by the court to be a clear human rights grievance, the Supreme Court declined jurisdiction in the case of **Edusei vs. Attorney General and Another (1996-97) SCGLR** when the plaintiff therein presented a human rights violation as a constitutional issue. I do not find from a reading of the entire affidavits before me, vis-a vis the reliefs being sought by the applicants/respondents, that the applicants/respondents have circumvented what is not a human rights action"*

What was the capacity in which the 1st, 2nd and 3rd applicant/respondents brought the originating notice of motion for the enforcement of their fundamental human rights?

In paragraphs 2, 6 and 7 of the amended affidavit in support of the originating notice, the 1st applicant Dr. Papa Kwesi Nduom deposed as follows:

"2) That I am a shareholder of the 2nd applicant and shareholder and chairman of the 3rd applicant by which capacity I have the consent

and authority of both the 2nd applicant and the 3rd applicant to depose to this affidavit jointly on my behalf and both the 2nd applicant and the 3rd applicant.

- 6) *That the 2nd applicant is a shareholder of the 3rd respondent company in which capacity the 2nd applicant brings this application*
- 7) *That the 3rd applicant is a privately held holding company registered under the laws of Ghana with member companies in the banking, financial services, hospitality, real estate, information technology, media and entertainment industries with over 3500 direct employees.*

Further on in the amended affidavit in support, the 1st applicant Dr. Papa Kwesi Nduom deposed in paragraphs 13, 14, 15 and 16 thereof the grounds on which the originating Notice of Motion was filed as follows:

- “13. That the 3rd respondent company (whose specialized deposit-taking licence is the subject matter of this suit) is a limited liability company registered and licenced under the laws of Ghana to carry on specialized deposit-taking business and other related business activities, and in respect of which the 1st Respondent did, on August 16, 2019, and pursuant to Section 123(2) of Banks and specialized Deposit-Taking Institutions Act 2016 (Act 930) appoint Messrs. Eric Nana Nipah, accountant, as receiver. (Emphasis mine)*

Revocation and Receivership

14. *That on August 16, 2019, the 1st Respondent through a public notice titled "Notice of Revocation of Licences of Insolvent Savings and Loans Companies and Finance Houses and Appointment of a Receiver "(hereinafter referred to as Revocation Notice") did on grounds of insolvency, revoke the specialized deposit-taking licence of the 3rd Respondent company alongside more than 20 other savings and loans and Finance house companies. Attached as Exhibit PKN 1 is a copy of the Revocation Notice.*
15. *That the 1st respondent in the said revocation Notice, did appoint Messrs. Eric Nana Nipah as the receiver who, effective August 16, 2019 became the sole legal representative of the shareholders, the directors and the key management personnel of the 3rd respondent and succeeded their rights and powers*
16. *That on the same day August 16, 2019, the 1st respondent and Messrs. Eric Nana Nipah or their agents, assigns or workmen, ostensibly in furtherance of the Revocation Notice but without notice whatsoever to the shareholders or management of the 3rd respondent, moved in and took possession and total control of the 3rd respondent's premises, assets and operations and have since remained in such possession and control.*

Again further in paragraphs 26 and 27 of the said amended affidavit in support of the originating Notice of Motion, the 1st applicant deposed as follows:

- "25. *That though very much aware of these facts and other relevant circumstances of the 3rd respondent in particular and the 3rd applicants as a whole, the 1st respondent, the Minister of Finance*

and the 2nd respondent, either by refusal or negligence, failed to factor the circumstances into determining the solvency of the 3rd respondent, the consequence of which is the 1st respondent's decision to revoke the 3rd respondents specialised deposit-taking licence.

27. *That I am advised by counsel and I verily believe same to be true that by refusal or negligence, to take into consideration all the relevant circumstances of the 3rd respondent in particular and the 3rd applicant in general in coming to the decision that the 3rd respondent was insolvent (and subsequently revoking its licence and appointing Messrs. Eric Nana Nipah as receiver thereof) the 1st respondent has been unreasonable and exceptionally unfair to us the applicants, the 3rd respondent company and the shareholders thereof".*

Clearly, from the depositions in the amended affidavit in support of the Motion set out in extenso, it is obvious that the 3 applicants as shareholders of the 3rd respondent, a specialized deposit-taking institution, were dissatisfied or aggrieved by the decision of the 1st respondent, the Bank of Ghana to revoke the licence of the 3rd respondent and appoint a receiver pursuant to its powers under Section 123⁽¹⁾ of the Banks and specialized Deposit-Taking Institutions Act 2016 (Act 930). The said section 123 of Act 930 provides as follows in sub-section 1, 2 and 3:

Mandatory revocation of licence and initiation of receivership

"123 (1) *Where the Bank of Ghana determines that the bank or specialized deposit-taking institution is insolvent or is likely to become*

*insolvent within the next sixty days, the Bank of Ghana **shall** revoke the licence of that bank or specialized deposit-taking institution.*

(2) *The Bank of Ghana **shall** appoint a receiver at the effective time of revocation of the licence under sub-section (1)*

(3) *The receiver appointed under sub-section (2) **shall** take possession and control of the assets and liabilities of the bank or specialised deposit-taking institution”*

As the applicants themselves show, it was their dissatisfaction with the decision of the Bank of Ghana to revoke the licence of the 3rd respondent, a licenced deposit-taking institution by its Notice of Revocation dated August 16, 2019 and the appointment of Mr. Eric Nana Nipah, a chartered accountant as receiver that provoked the originating notice of Motion for the enforcement of the fundamental human rights etc. in the first place. The affidavit evidence clearly shows that the relief the applicants are seeking is not a human rights issue.

The Bank of Ghana is the regulator of banks, specialized deposit-taking institutions, financial holding companies and affiliates of banks, specialized deposit-taking institutions and financial holding companies. See Sections 1 and 3 of Act 930.

The thrust of the appellants application before the High Court to strike out or set aside the originating notice of Motion of the applicants was grounded on section 141 of Act 930 which makes it obligatory and mandatory for a person dissatisfied or aggrieved by the decision of the Bank of Ghana to revoke the licence of any of the institutions under the Act and appointment of a receiver, to go through arbitration.

Section 141 of Act 930 provides as follows:

Review of decision of Bank of Ghana in official administration, liquidation and receivership by arbitration

“141 (1) where a person is aggrieved with a decision of the Bank of Ghana in respect of

a) Matters under sections 107 to 122 Or sections 123 to 139

b) Withdrawal of the Registration of a financial holding Company

c) Matters which involve the revocation of a licence of a bank or a specialized deposit-taking institution; or

d) An action under Sections 102 to 106 and where the Bank of Ghana determines that there is a serious risk to the financial stability or of material loss to that bank or specialized deposit-taking institution or financial holding company.

*and that person desires redress od such grievances, that person **shall** resort to arbitration under the rules of the Alternative Dispute Resolution Center established under the Alternative Dispute Resolution Act, 2010 (Act 789).”*

Thus, any person dissatisfied or aggrieved by a decision of the Bank of Ghana under specific Sections of Act 930 including Section 123, that person is obliged to resort to arbitration under the rules of the Alternative Dispute Resolution Center established under the Alternative Dispute Resolution Act 2010 (Act 789) if he desires redress of the grievance.

Those Sections deal with the following actions of Bank of Ghana under the Act:

- i. *Appointment of an official administrator - Section 107*
- ii. *General powers of the official administrator - Section 108*
- iii. *Oversight of official administrator by the Bank of Ghana –section 109*
- iv. *Suspension of payment of dividend by the official administrator - Section 110*
- v. *Moratorium and effective of official administration on proceedings including suspension of some or all payments by a bank or specialized deposit-taking institution - Section 111*
- vi. *Suspension of rights of termination of obligation of the third party under any contract to which the bank or specialized deposit-taking institution is a party - Section 112*
- vii. *Control of the bank or specialized deposit-taking institution or the bank including its properties assets by official administrator - Section 113*
- viii. *Taking of inventory and plan of action to resolve the bank or specialized deposit –taking institution- Section 114*
- ix. *Increase of the capital of the bank or specialized deposit-taking institution –section 115*
- x. *Recapitalization of the bank or specialized deposit-taking institution by new shareholder – Section 116*
- xi. *Mergers, sales and other restructuring of the bank or specialized deposit-taking institution by official administrator-Section 117*
- xii. *Mandatory restructuring liabilities –Section 118*
- xiii. *Removal of management personnel –Section 119*
- xiv. *Misconduct by significant shareholders, directors, key management personnel and others –Section 120*
- xv. *Expenses of official administrator – Section 121*
- xvi. *Termination of official administration – Section 122*

I have earlier in this judgment set out Section 123 of the Act dealing with the mandatory revocation of licence and initiation of receivership, the section under which the Bank of Ghana acted to revoke the licence of the 3rd respondent.

That section 123 and Sections 124 to 139 of the Act dealing with the qualification and compensation of the receiver; notice and registration of receivership; oversight of Bank of Ghana over receiver; general powers of receiver; effects of receivership; control of the bank or specialised deposit-taking institution by receiver and other actions by the receiver, are all matters which by Section 141 of the Act, have to go to arbitration if any person is aggrieved by such action of the receiver and that person seeks redress. The applicants in the face of the mandatory provisions of section 141 of Act 930 brought their action under the Human Rights provision of the 1992 constitution, claiming that by the revocation of the licence of the 3rd respondent, GN savings and Loans Company Ltd, a licenced specialized deposit-taking institution by the Bank of Ghana under Act 930, their fundamental human rights to administrative justice, to property and to equality or non-discrimination have been violated by the said Bank of Ghana.

The provision in section 141(1) of Act 930 that where a person is aggrieved with a decision of the Bank of Ghana **“and that person desires redress of such grievances, that person shall resort to arbitration”** is mandatory and the applicants/respondents from their depositions in their affidavit in support, being persons aggrieved by the decision of the Bank of Ghana in revoking the licence of the 3rd respondent and appointing a receiver under Section 123 of Act 930, fall within the purview of Section 141 of the Act which is a statutory ouster clause.

Dealing with ouster clauses in the case of **Osei Bonsu Joseph Vs. Ghana Commercial Bank and 1 other Civil Appeal No. H1/76/2010** unreported judgment of the Court of

Appeal delivered on 27th May 2021 my respected brother Justice Sir Dennis Adjei stated as follows at page 23 thereof:

“The law is settled that ouster clauses exist in deeds and documents, statutes and national constitutions. Ouster clauses in deeds and documents entitle parties to oust the jurisdiction of the courts but cannot oust the entire jurisdictions of the courts. The parties may postpone original jurisdiction of the courts but cannot completely oust the original and supervisory jurisdictions of the appropriate courts. Where an ouster clause in deeds and documents including those with arbitration clauses and the arbitration clause is side stepped, the defendant may enter appearance and apply to the court timeously to refer the action in accordance with the arbitration agreement or may waive it. Section 6 of the Alternative Dispute Resolution Act, (Act 798) provides that where an application is made to the court to refer the matter to an arbitration in accordance with an arbitration agreement and it is granted, it automatically operates as a stay of proceedings A statutory ouster clause is where a statute provides for a resolution of dispute by a tribunal, administrative body or through Alternative Dispute Resolution methods. A statutory ouster clause does not however completely oust the jurisdiction of the court but it either postpones or defers some of the jurisdiction exercised by the courts”

It is worth noting that section 141 of Act 930 is such a statutory ouster clause. In the case of **Boyefio vs. NTHC Properties Limited (1996-97) SCGLR 531**, the Supreme Court relying on the case of **Tularley vs. Abaidoo (1962)1 GLR 411** stated the legal position thereof in holding 5 as follows:

“(5) The law was clear that where an enactment had prescribed a special procedure by which something was to be done, it was that procedure alone that was

to be followed. Thus Section 12(1) of PNDC Law 152 was in consonance with the modern practice of setting up an internal tribunal in an institution to have a first bite at disputes arising within that institution before recourse was made to the courts if the matter did not end at the internal tribunal. Where a person has ignored the internal tribunal by resorting to the courts in respect of any such internal dispute, the court would invariably order him to go back to the internal tribunal, if that person had no substantial reason for ignoring the internal tribunal”

Clearly Section 141 of Act 930 is a statutory ouster clause meant to resolve grievances arising from the actions of the Bank of Ghana as the regulator of banks, deposit-taking institutions and financial holding companies on the one hand and persons aggrieved or dissatisfied by the actions of the Bank of Ghana. That provision in Section 141 of Act 930 requiring persons aggrieved with a decision of the Bank of Ghana under the sections referred to including Section 123 to seek redress of such grievance through resort to arbitration cannot be side-stepped by the applicants who have sought to masquerade their cause of action as a human rights action for the sole purpose of avoiding recourse to arbitration as required under section 141 of Act 930. The applicants/respondents contention that the revocation of the licence of the 3rd respondent by the Bank of Ghana violated their fundamental human rights to administrative justice to property and to equality and non-discrimination is a red-herring! We are of the view that the trial judge erred in overruling the objection of the appellants to the court to entertain the applicants/respondents action. The appeal is hereby allowed. Accordingly, the ruling of the High Court (Human Rights Division) Accra dated 19th December 2019 is hereby set aside. The applicants/respondents action pending before the trial court is hereby stayed and referred by necessity to arbitration under the rules of the Ghana Arbitration Centre.

SGD

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JUSTICE HENRY KWOFIE
(JUSTICE OF THE COURT OF APPEAL)

SGD

I AGREE

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JUSTICE NOVISI ARYENE
(JUSTICE OF THE COURT OF APPEAL)

SGD

I ALSO AGREE

.....

JUSTICE ERIC BAAH
(JUSTICE OF THE COURT OF APPEAL)

COUNSEL:

FRANK DAVIES FOR 1ST RESPONDENT/APPELLANT

JUSTICE SREM SAI FOR APPLICANTS/RESPONDENTS

JUSTICE OTENG FOR 3RD RESPONDENT/RESPONDENT