IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: PWAMANG JSC (PRESIDING)

DORDZIE (MRS.) JSC

OWUSU (MS.) JSC

TORKORNOO (MRS.) JSC

HONYENUGA JSC

CIVIL MOTION

NO. J5/12/2022

9TH MARCH, 2022

THE REPUBLIC

VRS

HIGH COURT, ACCRA

GENERAL JURICDICTION "6" ……. RESPONDENT

EX PARTE: INDEPTH NETWORK ……. APPLICANT

DANIEL KOFI BAKU & 8 OTHERS ……. INTERESTED PARTY

RULING

MAJORITY OPINION

PWAMANG, JSC:-

The background to this application invoking our supervisory jurisdiction is that the individual persons involved in the case come from various countries and worked together under the umbrella of Indepth Network Limited, a not for profit organization incorporated in 1998 under the company laws of Ghana as a company limited by guarantee. Except for two or so other professionals, the rest are scientists and their focus appeared to have been on advancing the scientific objectives of the organization which are related to public health. Though in operating as an organization the parties were required by law to comply strictly with the provisions of the Companies Act, 1963 (Act 179),they over the years failed to observe some important provisions of the law. Some years back, differences arose among them which could not be resolved and it resulted in a contest for control of the organization by two main factions ending up in the High Court, Accra in May, 2018. There were cross allegations as to who are and who are not legally recognized subscribers, directors, secretary and officers of the organization. After a full blown trial, the High Court gave judgment on 4th November, 2021. In concluding the judgment the trial judge made the following findings and orders at pages 52-53;

"There is no evidence before me that any AGM has been held since the last one in 2017. Based on the Regulations and Professor Binka's testimony which is to the effect that board members are about nine (9) and hold tenure for two years, it is clear that the last executive council members or the Board of Trustees' tenure has expired. Consequently, in order for the company to operate smoothly, it is hereby ordered that

an AGM should be held within 90 days from today so that a new board of trustees and or Executive Council members can be appointed forthwith. Until then those who have been operating the company in the course of the litigation shall continue on an interim basis to help organize the AGM.

…All officers who were appointed and whose contracts have expired will have no role in the operation of the company on an interim basis. For instance, the evidence is that Prof. Alimanay Sankoh is no longer the Executive Director, to that extent he has no further role to play in that capacity. Also, Dr Baku testified that Mr Apaliyah's employment expired on 30th April, 2018, and I note that the testimony was not challenged. To that extent, I hold that Sixtus Apaliyah is also not an officer of the company and therefore has no role to play in the company now unless he is re-hired. I make no order as to costs."

The Plaintiff/Applicant in its motion paper has complained that the trial judge acted without jurisdiction when he ordered as follows;

"it is hereby ordered that an AGM should be held within 90 days from today so that a new board of trustees and or Executive Council members can be appointed forthwith. Until then those who have been operating the company in the course of the litigation shall continue on an interim basis…."

The applicant's reason for stating so is that it is only under section 162 (1) of the **Companies Act, 2019 (Act 992)** that a court may draw authority to make the above kind of order but then the court can only do so on an application by a director of the company, a member of the company or the Registrar of Companies. The court cannot make such an order on its own motion. Counsel contends that in this case, no such application was made to the court so it had no jurisdiction to make the order it made.

Counsel for the applicant cited the case of **Republic v Court of Appeal; Ex parte Tsatsu Tsikata [2005-2006] SCGLR 612** among other cases.

Furthermore, it is submitted on behalf of the applicant that the above order was premised on the court saying that, by the regulations of the company, the tenure of all directors is two years so all directors' tenure has lapsed since the last appointments in 2017. That the tenure of all directors lapses after every two years was part of the case of the defendants based on their claim that the regulations of the company had been amended and that the subsisting regulations were Exhibit "34" and not Exhibit "A3" as asserted by the plaintiff. Counsel submits that, in his judgment the judge made a finding that the valid subsisting regulations of the company are Exhibit "A3" and not Exhibit "34". As Exhibit "A3" contained no provision for the tenure of all directors to lapse after two years, the judge's order which implied that the company had no directors at all is inconsistent with the findings the same judge made in his judgment. The judge indeed made that finding at paragraph 41 of his judgment which has been exhibited in this application. Counsel maintains that the judge's order is therefore inconsistent with the valid regulations of the company and wrongful.

It is also submitted that the consequential order for the company to be operated on interim basis is not lawful since some of the persons the judge directed to operate on the interim basis are persons in respect of whom the judge held that their tenure as officials of the company had expired.

The defendants/interested parties have opposed the application and Dr Kofi Baku has deposed to an affidavit in opposition on their behalf and their lawyer has also filed a statement of case in answer. At paragraphs 19 and 20 of the affidavit in opposition, it is stated that in the High Court the applicant endorsed its writ of summons with a relief for the court to make such orders as in the circumstances of the case the court deemed fit. As such, the jurisdiction of the trial judge to make orders including orders under

section 162 (1) of Act 992 was invoked. The affidavit also states that the case involved donor funds which are substantial so during the litigation the judge restrained both parties from operating the company and refused an application by the applicant which had sought to restrain only they the defendants. It is stated that the consequential orders for the interim management of the company were required in order to protect the donor funds which otherwise would be mismanaged. It is further stated in the affidavit that the applicant being aggrieved by the judgment of the High Court has lodged an appeal against it in the Court of Appeal and the Notice of Appeal has been exhibited.

In the statement of case, Counsel for the interested parties argues that the trial judge had jurisdiction and acted within that jurisdiction in making the impugned orders. Consequently, by the decided authorities including **Republic v. High Court, Kumasi, Ex-parte Bank of Ghana and Others, (Sefa and Asiedu-Interested Parties) (No. 1) Republic v High Court, Kumasi, Ex-parte Bank of Ghana and Others (Gyamfi and Others Interested Parties No. 1) Consolidated [2013-2014] 1 SCGLR 477,** the applicant has failed to make out his alleged ground of want and excess of jurisdiction for the writ of certiorari to be issued. He submits that since the applicant has filed an appeal against the judgment, the proper course is for him to pursue his appeal and not to apply for certiorari under the supervisory jurisdiction of the court.

Section 162 of Act 992 is as follows;

Power of Court to order meeting

162. (1) If for a good reason it is impracticable to call a meeting of a company in a manner in which meetings of that company may be called, or to conduct the meeting of the company in the manner prescribed by the constitution of the company, the Court may on the application of a director, a member of the company or the Registrar

order a meeting of the company to be called, held and conducted in the manner that the Court considers fit.

(2) Where that order is made, the Court may give any ancillary or consequential directions that the court considers expedient.

(3) A meeting called, held and conducted in accordance with the order is, for the purpose of this Act, a meeting of the company duly called, held and conducted.

We have examined all the processes filed and considered thoroughly the arguments of the parties and we do not agree with the applicant that the trial judge's jurisdiction under section 162 (1) of Act 992 was not invoked. We wonder what the applicant understands by "on the application" in section 162 (1) of Act 992. Counsel appears to confine himself to a formal application by motion on notice by a member or director but we do not understand the provision to be intended to be so narrowly interpreted. As the interested parties pointed out, the writ of summons which the applicant caused to be issued in the High Court was endorsed with a general relief in the following terms;

"Any other order(s) which this honourable Court, in the circumstances, may deem fit".

Though that relief was prayed for by the company which was plaintiff, the record of the court shows that Professor Binka who testified on behalf of the company said he is a subscriber and director of the company. That would qualify him to apply to the court to make orders under section 162(1) of the Act. Therefore, that relief that a person who said he is a member and director of the company associated himself with at the trial, in our understanding, competently invoked the jurisdiction of the High Court under section 162 (1) of the Act. Accordingly, we are of the opinion that the trial judge had jurisdiction to make an order for an AGM to be held.

However, an AGM (Annual General Meeting) is a statutory meeting that is mandated to be held by every company at stated intervals for the company to transact specified business of which appointment of directors is only one. Section 2(b) of the Eight Schedule of Act 992 provides as follows;

(b) In the case of notice of an annual general meeting, a statement that the purpose is to transact the ordinary business of an annual general meeting is a sufficient specification that the business is,

(i) to declare a dividend;

(ii) consideration of the financial statements and reports of the directors and auditors;

(iii) the election of directors in the place of those retiring;

(iv) the fixing of the remuneration of the auditors; and

(v) for the removal and election of auditors and directors;

From the evidence narrated by the judge in his judgment, the documents required for an AGM may not be available for the meeting he intended which was simply to appoint directors. By the provisions of the law an AGM is to be chaired by the chairman of the board of directors and in his absence, by someone chosen by the directors or members. In this case, the judge made the order on the basis that there are no lawful directors. If that were correct, which is disputed by the applicant, then the court needed to direct who should chair this special meeting, who should be responsible for summoning it and the specific issues to be decided. Since section 162(1) mentions the Registrar of Companies as one person who may apply for a meeting to be held, a court can consider appointing her to convene and chair such a meeting, and on the facts here the court ought to have limited the meeting to appointment of directors only. Therefore, to be

consistent with the general provisions of Act 992, the trial judge ought to have worded his order differently.

The applicant complains that by the orders of the judge, the persons who are to have interim management of the company do not have capacity but, we wish to point out that, contrary to the notion being carried by the parties, the judge, in our understanding, did not make an order for the **general** management of the company in the interim. His order was specific as to what the interim officials were to do, for he said;

"Consequently, in order for the company to operate smoothly, it is hereby ordered that an AGM should be held within 90 days from today ***so that a new board of trustees and or Executive Council members can be appointed forthwith.*** **Until then those who have been operating the company in the course of the litigation** ***shall continue on an interim basis to help organize the AGM*****".**(Emphasis supplied).

The counsel for the applicant in reproducing the order of the court left out the vital part of the order which stated the mandate of the interim officials to be **"to help organize the AGM".** The interested parties also appear to treat the order as being for the interim **general** operation of the company but that is not what the trial judge said. An order for general operation of the company for 90 days by interim officials would have put the funds of the company at risk since the interim officials may deplete the funds before the proper directors assume control after their appointment at the AGM ordered by the court. Additionally, unless such interim officials were members or directors of the company validly appointed in accordance with the regulations of the company and the provisions of the Companies Act, the order would be unlawful and amenable to be quashed as was done in the case of **In re Speedline Stevedoring Co Ltd; Republic v High Court, Accra; Ex parte Brenya [2001-2002] SCGLR 775,** referred to by counsel for the interested parties.

Moreover, in the affidavit of the interested parties, it is stated that in the course of the litigation both parties were restrained and the company was not operating. In those circumstances, who is it that is to help in the organization of the AGM and indeed, who is **responsible** for holding the AGM since the interim officials were only to help? We think that as the affairs of the company are at a standstill, it was imperative that there should be absolute clarity about who was responsible for the holding of the intended meeting, who is to take part in it, how it was to be conducted, who chairs, how the decisions to be taken were to be filed in the Companies Registry and at what point the new directors were to take control over the management of the company. That, in our view, is the import of the powers given to a judge under section 162 (1) and (2) of the Act.

All the above matters were left hanging in the order of the judge for an AGM to be held but in our considered opinion, where a judge decides to make orders for any meeting of any structure of a company pursuant to section 162 of the Act, the orders must take into account the provisions of the constitution of the company and the applicable provisions of the Companies Act. Furthermore, such orders must be carefully drawn so as to restore the company to operating properly within the law with minimum disruption. Unfortunately, the orders made in this case fall short of that, particularly when the orders are viewed against the background that, in the conclusion part of his judgment the trial judge failed to specifically state which of the nine reliefs, if any, endorsed by the plaintiff on the writ of summons, and the three by the defendants in their counterclaim, he granted and which, if any, were dismissed. We have had occasion in this court to advise judges to render their decisions with clarity and if they make orders or grant reliefs prayed for, the terms of the order or the grant should be stated in precise and unambiguous language. This way, courts would prevent parties placing different

interpretations on court decisions as it suit them, which causes chaos in the administration of justice.

Accordingly, whereas the applicant legitimately challenges the correctness of the order of the trial judge on the basis of the findings of the judge himself, and has also made it a ground of its appeal at grounds (f) and (i) of its notice of appeal, we for our part consider that an attempt to implement the orders of the High Court as they stand now will lead to more confusion in the affairs of the company and defeat the ends of justice in this case.

In **Inre Appenteng (Decd); R v High Court, Accra, Ex parte Appenteng [2005-2006] SCGLR 18 at 23-24,**Prof Ocran, delivering the unanimous ruling of the Supreme Court said as follows:

"…we as the Supreme Court do retain our supervisory jurisdiction over all and over any other adjudicatory authority, even when we decide that a particular order such as prohibition is not quite appropriate in a particular context. And we need to reiterate that under section 5 of the Courts Act, 1993 (Act 459), the Supreme Court may issue such directions as may be required for the purpose of enforcing or securing the enforcement of this supervisory power. ***Such directions may relate to such future course of action in a suit as appear best to secure a just and expeditious disposal of a case, including all matters which may not already have been dealt with.***(Emphasis supplied)

Also, in **Republic v High Court (Commercial Court), Accra; Ex parte Attorney-General (Balkan Energy Ghana Ltd-Interested Party) [2011] 2 SCGLR 1183**, Sophia Akuffo, JSC (as she then was) at page 1191 of the Report observed as follows;

"Now, as was made patently clear in the abovementioned case of Ex Parte Electoral Commission (Mettle-Nunoo & Others Interested Parties) [2005-2006] SCGLR 514, the remedies available to the Supreme Court, when exercising its supervisory jurisdiction under Article 132, are not

limited to the issuing of the conventional writs of certiorari, mandamus, prohibition, etc. ***We also have the power to issue orders and directions as shall be necessary to prevent illegalities, failure of justice and needless delays in the administration of justice,*** *'for the purpose of enforcing or securing the enforcement' of our supervisory power. Additionally, under Article 129(4):-*

'For the purposes of hearing and determining a matter within its jurisdiction and the amendment, execution or the enforcement of a judgement or order made on any matter, and for the purposes of any other authority, expressly or by necessary implication given to the Supreme Court by this Constitution or any other law, the Supreme Court shall have all the powers, authority and Jurisdiction vested in any court established by this Constitution or any other law.'"(Emphasis supplied).

On the strength of this wider supervisory powers of the Supreme Court, in the case of **Republic v. High Court, Kumasi, Ex-parte Bank of Ghana and Others, (Sefa and Asiedu-Interested Parties) (No. 1) Republic v High Court, Kumasi, Ex-parte Bank of Ghana and Others (Gyamfi and Others Interested Parties No. 1) Consolidated (supra)** referred to us by counsel for the interested parties, despite dismissing an application for certiorari because the grounds for the application were not made out, the court nevertheless made orders to ensure that justice, equity and fairness prevailed in the case which was on appeal. At page 511 the court speaking through Dotse, JSC said as follows;

"…despite the fact that these applications are dismissed as untenable, this court on the principle of ensuring fairness and justice hereby grants a stay of execution of all processes aimed at executing the default judgments of the High Court, Kumasi…until the final determination of the appeal currently pending before the Court of Appeal."

In this case, we have held that the trial judge had jurisdiction under section 162(1) to make an order for a meeting of members of the company to be held for the purpose of constituting a board of directors for the company. The argument by the applicant that the order is inconsistent with the findings on the evidence by the same judge is a valid complaint of a wrong decision based on the evidence and the applicable law. Such an error would not however destroy the jurisdiction of the judge but is one that appropriately ought to be resolved by an appeal where the appellate court would review the totality of the evidence to determine if the order was wrongful. See the case of **Republic v High Court, Kumasi; Ex parte Fosuhene [1989-90] 2 GLR 315**. Therefore, though we have expressed our reservations about the contents of the order, we have no doubt that the trial judge had jurisdiction to make the orders he made so we shall dismiss the prayer for certiorari.

Nonetheless, in order to prevent a failure of justice in this case and avoid illegalities, we shall fall on our wider supervisory powers under article 132 of the Constitution, 1992, and order a stay of execution of the judgment of the High Court dated 4th November, 2021pending determination of the appeal in the Court of Appeal. Pending the determination of the appeal, both parties are restrained from operating the company. If there is need for certain essential services to be paid for on behalf of the company an application may be made to the High Court until such time that the appeal is entered in the Court of Appeal in which case an application may be made to that court. In order to minimize the effect of the litigation on the company, which has noble objectives, we direct the appellant to ensure that the record of the appeal is made ready and transmitted to the Court of Appeal not later than six months from the date of this ruling, being 9th March, 2022.Failing this the interested parties may apply to this court for directions.

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

A. M. A. DORDZIE (MRS.)

(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

C. J. HONYENUGA

(JUSTICE OF THE SUPREME COURT)

DISSENTING OPINION REGARDING ORDERS OTHER THAN REFUSAL OF CERTIORARI APPLICATION

TORKORNOO (MRS.) JSC:-

The plaintiff/appellant/applicant hereinafter referred to as applicant in this ruling sued the nine interested parties in the high court. At the tail end of the rendering of his decisions in his judgment, the learned trial judge added the following order which had not been specifically sought in any of the indorsed reliefs. He said that '*it is hereby ordered that an AGM should be held within 90 days from today so that a new board of trustees and or executive council members can be appointed forthwith. Until then those who have been operating the Company in the course of the litigation shall continue on an interim basis…'*

It is this order that has drawn the ire of applicant. The applicant has applied to the supervisory jurisdiction of this court pursuant to Article 132 of the 1992 Constitution to quash this order on the following grounds:

i. That the High Court committed an error of law apparent on the face of the record which error goes to jurisdiction
ii. That the High court acted in excess of its jurisdiction.

The argument of applicant with regard to the first ground is that *'the court's jurisdiction for that purpose had not been validly invoked as required or sanctioned by Section 162 of the Companies Act, 2019'*.

Section 162 of Act 992 reads:

Power of court to order meeting

162 (1) *If for a good reason it is impracticable to call a meeting of a company in a manner in which meetings of that company may be called, or to conduct the meeting of the company in the manner prescribed by the constitution of the company, the Court may* ***on the application of a director****, a member of the company or the Registrar order a meeting of the company to be called, held and conducted in the manner that the Court considers fit*. (emphasis mine)

It is the submission of Counsel for Applicant that without an application by a member of the applicant company, a director or the Registrar General pursuant to Section 162 of Act 992, which application could have invoked the court's jurisdiction for an order for an AGM to be held, the court had no jurisdiction to make the aforementioned order for the holding of an AGM.

On the second leg of the application, he urges that even if the court had jurisdiction to make orders regarding the reliefs indorsed in the suit, he exceeded the utilization of that jurisdiction by granting the part of the order that directed that '*those operating the*

company in the course of the litigation shall continue on an interim basis'. This is because, the court should have restricted himself to the directions of the Regulations of the Company if he decided to issue orders regarding who was to operate the company prior to the appointment of new officers of the company at the AGM.

I have gratefully read the opinion of the President and I agree wholly with the decision that the application for certiorari should be refused because there is no error arising from a wrong assumption of jurisdiction or an exceeding of jurisdiction in the impugned order.

But my reason for arriving at this position is manifestly unrelated to any operation of Section 162 of Act 992, which applicant appointment points to as the only basis for an order of an interventionist order of a court to a company to call an AGM. My reason is also unrelated to the Regulations of the company, which applicant points to as the only legal basis for persons who may manage a company.

In resisting this application, counsel for the 1st to 7thInterested parties has pointed out that the jurisdiction of a court to make orders regarding a dispute is determined by claims before it. Citing **Izenkwe v Nnadozie 1953 14 WACA 361** on this point, he urges that the circumstances in this matter warranted that the High Court make consequential or incidental orders to protect the assets of the company from mismanagement.

I have no views on whether the circumstances of the company warranted the order that has been brought to us to quash, because as has been established over and over, the essential character of the certiorari application is the need to avoid examining the merits of the alleged reason for the application, and focus on whether the decision is void by reason of a fundamental error that is patent on the face of the record, or an absence of jurisdiction. Reference is made to the articulation of these principles in the decisions of this court in **Republic v High Court, Accra: Ex Parte Commission on Human Rights**

and Administrative Justice (Addo Interested Party) 2003 – 2004 1 SC GLR 312, **Mansah & Others v Adutwumwaa & Others (2013 – 2014) 1 SCGLR 38**and **Republic v. High Court, Kumasi, Ex-parte Bank of Ghana and Others, (Sefa and Asiedu-Interested Parties) (No. 1) Republic v High Court, Kumasi, Ex-parte Bank of Ghana and Others (Gyamfi and Others Interested Parties No. 1) Consolidated Suit 2013 – 2014 1 SCGLR 477**

The submissions of Applicant counsel suggest that without a Section 162 application before a court, the court had no jurisdiction to make an order on what to do to ensure that the proper governance of a company is reinstated after making findings regarding the company's subscribers and executive council members. If that is the case, then the actual import of that position is that the order brought to us to quash was made in error of the requirements of law. Such a submission requires a purposeful examination of the role of Section 162 in the body of Act 992 and whether Section 162 forms the only basis for a court ordering certain persons to ensure the convening of an AGM.

Such an exercise is not properly conducted when determining an application for certiorari, because in considering whether or not to exercise supervisory jurisdiction in the form of certiorari against the decision of a superior court judge, this court cannot look beyond the face of the record and cannot examine the legal imports inherent in that decision.

Again, a careful look at the impugned order will show the passive language in which it is crafted. The court said: *'it is hereby ordered that an AGM should be held within 90 days from today so that a new board of trustees and or executive council members can be appointed forthwith*

One will have to read the entire judgment to discern who is qualified to convene this AGM, an exercise that can only be appropriately conducted by the court of appeal in considering the ground (i) of appeal that reads:

i. *The learned trial Judge erred in law when he made an Order for an Annual General Meeting (AGM) to be held within 90 days from the date of the judgment, as same in contravention of the Companies Act, 2019*

Consequential Orders

On the record before us, the Applicant sought consequential orders as a last relief when it commenced this suit in these words

i. Any other order(s) which this honourable court, in the circumstances, may deem fit.

What is clear to me is that to the extent that the plaintiff sought a relief for any further order or order, which the court could grant, the impugned orders could be made as consequential relief, because they flowed directly from the matters in issue before the court.

Indeed, as to who the persons who were operating the company in the course of litigation were, one also needs the full record of the case to appreciate who the Judge was referring to, because of the passive language of the orders. Because of these circumstances, I do not think that the Applicant should invite us to stretch our consideration of this application to decipher whether these people are qualified to do so in the interim by an examination of the Regulations of the company, as he seeks to do in his submissions.

My view therefore is that the impugned order is well grounded as a consequential order, no less and no more. It had no relation to Section 162 of Act 992. I am also settled

in my mind that to the extent that the learned trial judge did not premise his impugned order on Section 162 of Act 992, this court should not allow the Applicant to draw us into grounding a decision not to quash the said order on account of the operation of section 162 within Act 992. To this end, I would specifically elide any reference to Section 162 as the basis in law for refusing the application for a certiorari order to issue against the impugned orders. The propriety or otherwise of this order to conduct an AGM is one for appeal. The propriety of the order that those who managed the company during the course of litigation should continue on an interim basis does not feed into a fundamental error in the decision.

Stay of Execution

Should this court grant an order of stay of execution of this impugned order, on account of any confusion it may cause? My humble view is that we ought not to do so, because the Applicant made no such application to us. Indeed, the record in the Respondent's exhibit DDB5 reveals that the Applicant has already sought this order of stay of execution from the court of appeal, and the application was scheduled to be heard on 12th January 2022. Another application for Stay of Execution pending the hearing of this application for Certiorari was filed in this court and scheduled to be heard on 22nd February 2022. I would therefore refuse the application for certiorari and nothing more beyond that.

G. TORKORNOO (MRS.)

(JUSTICE OF THE SUPREME COURT)

COUNSEL

NANA AGYEI BAFFOUR AWUAH ESQ. FOR THE APPLICANT.

JUSTIN AMENUVOR ESQ. FOR THE INTERESTED PARTIES.