IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, A.D.2012

CORAM: AKUFFO (MS) JSC (PRESIDING)
DATE-BAH JSC
ANSAH JSC
BONNIE JSC
AKOTO-BAMFO (MRS) JSC

CIVILMOTION
No. J8/23/2012

7TH MARCH, 2012

GOLDEN BEACH HOTELS (GH) LTD . . . DEFENDANTS/APPELLANTS/

APPELLANTS/APPLICANTS

VRS

PACKPLUS INTERNATIONAL LTD . . . PLAINTIFFS/RESPONDENTS/

RESPONDENTS/RESPONDENTS

R U L I N G

DR DATE-BAH JSC:

This is an application for an order from this Court suspending an order of the Court of Appeal made on 14th December 2011 or, in the alternative, an order staying execution of the proceedings consequent upon that order which refused the Applicant's application for stay of execution. The application is patently made in order to circumvent the received learning that this and other courts will not grant a stay of execution of orders that are not executable. The application relies principally on two authorities: *Merchant Bank Ghana Ltd. V Similar Ways Ltd.*, an unreported decision of this court dated 29th March 2011 (Civil Motion J8/38/2011} and *Standard Chartered Bank (Ghana) Ltd. V Western Hardwood Ltd. & Another* [2009] SCGLR 196.

In the *Merchant Bank* case, the High Court had delivered a judgment when one party had not been served with any hearing notice for the day of judgment. That party had applied to set aside the delivery of the judgment. That application was dismissed. It appealed against this dismissal and in the meantime applied unsuccessfully to the High Court and the Court of Appeal for an interim injunction to restrain the execution of the judgment. It next applied to the Supreme Court for this relief of an interim injunction. In response to that application, our brother Atuguba JSC said:

> "All along, it is obvious that its applications and appeals do not relate to any executable order. That however does not mean that it has no interest in holding off the enforcement of the substantive judgment to which its processes relate.

> If a stay of execution cannot lie other remedies may lie. One of such remedies can be the suspension of the entry of judgment. In that event the effect of the judgment itself is temporarily frozen and incidental processes such as execution can't fly not because execution thereof is stayed but that the life of the judgment itself is in coma. This measure will prevent the eventual success of the applicant's appeal being rendered nugatory.
>
> This measure will protect the applicant from being injured by the prima facie default of the trial court having delivered its judgment without notice to the applicant, pending the determination of its appeals."

In the *Standard Chartered* case, Atuguba JSC, delivering the ruling of the Court, considered the effect of Rule 20 of the Supreme Court Rules, 1996, CI 16.He stated (at p. 200) that:

> "…this court can, in an appropriate case, grant a "*stay of proceedings under the judgment or decision appealed against,"* under rule 20(1) of the Supreme Court Rules, 1996 (CI 16), and not only in respect of execution process. … In this regard we would, in this modern era of functional or purposive justice liberally interpret the word *"proceedings"* in rule 20(1) as referring to any steps that are required or are necessitated, and not merely occasioned, by the judgment appealed from."

The rule 20(1) referred to by Atuguba JSC reads as follows:

> "A civil appeal shall not operate as a stay of execution or of proceedings under the judgment or decision appealed against except in so far as the Court or the Court below may otherwise order."

In the wake of these two authorities, we think that this court needs to spell out the boundaries between orders for stay of execution and orders for suspension of the orders of courts below or for stay of proceedings (which have been construed by Atuguba JSC as including steps required to be taken pursuant to orders of the court below). There is a risk of this court descending into a morass of sophistry, with applications for orders for stay of execution formulated as applications for suspensions of the orders of the court below or as applications for stay of proceedings. Thus, the preconditions for a successful application for an order for suspension of the order of a court below or for the stay of proceedings (including execution processes) need to be spelt out clearly and authoritatively, otherwise the received learning on executable and non-executable orders would be rendered irrelevant. Logically, the preconditions for trigerring orders for suspension of orders of lower courts and stay of proceedings under rule 20 of CI 16 have to be stricter and narrower than those for an ordinary stay of execution. Otherwise, this court is likely to wallow in a semantic morass.

On the facts of the present case, we are not inclined to grant an order for suspension of the order of the Court of Appeal nor to stay any proceedings consequent on that order. The applicant has not demonstrated such exceptional circumstances as to justify, in our view, the exercise of the extraordinary discretion to suspend the orders of courts below or to stay proceedings, liberally construed, on the lines established in the two cases cited above, namely: *Merchant Bank Ghana Ltd. V Similar Ways Ltd (supra)* and *Standard Chartered Bank (Ghana) Ltd. V Western Hardwood Ltd. & Another* (*supra)*. We would like to re-iterate that the range of such exceptional circumstances will have to be kept

narrow in order not to overthrow the rule that there can be no stay of execution of non-executable orders.

The facts of the present case are that the applicant company participated in arbitration proceedings which resulted in an arbitral award against it in favour of the respondent company in January 2011. The respondent applied to the High Court for leave to enforce the arbitral award and the applicant in parallel prayed the High Court to set aside the award. The High Court dismissed the application to set aside the arbitral award and rather adopted the award as a judgment of the Court. The applicant then appealed from this ruling to the Court of Appeal and also applied to the Court of Appeal for a stay of execution of the High Court order. However, the applicant's Notice of Appeal was filed more than 21 days after the ruling of the High Court. Accordingly, at the hearing of the applicant's application for stay of execution, the respondent argued that the applicant's appeal, on which the application for stay of execution was predicated, was filed out of time, because the High Court's ruling was an interlocutory one. In spite of the applicant's arguments to the contrary, the Court of Appeal held that the High Court's ruling was an interlocutory one and therefore refused the applicant's application for a stay of execution.

The applicant has appealed to this Court against this ruling of the Court of Appeal and, recognising that the Court of Appeal's ruling is not an executable order, has made the imaginative application described at the beginning of this ruling for this Court's consideration.

In our view, the applicant has not established a sufficiently compelling case for the remedies it seeks. In paragraph 20 of the affidavit in support of the applicant's motion, deposed to by Mr. Carl Adongo, one of its solicitors, he states:

> "That if the present application is not granted the result will be that Defendant will find its appeal which has a high chance of success to be nugatory since the Defendant has no way of recovering the sum of $54,649.10 which Plaintiff has commenced execution proceedings to recover. (Annexed hereto and marked exhibit "K" is a process filed by Plaintiff pursuant to garnishee proceedings initiated by Plaintiff in the High Court.)"

This bare affirmation that the applicant cannot recover the judgment debt from the Plaintiff/respondent, should the applicant win the appeal, is unproven on the balance of probabilities and therefore cannot be the basis for founding the imaginative orders sought by the applicant from this Court. The applicant has therefore failed to establish that its appeal, if successful, would be rendered nugatory by this Court's refusal to suspend the order of the court below. This criterion is what is used to determine applications for stay of execution. Thus, in *Joseph v Jebeile & Anor* [1963] 1 GLR 387, Akufo-Addo JSC (as he then was) explained that (at p.390):

> "While we do not wish to say anything that may be interpreted as a fetter on the exercise of the discretion of a trial judge when he considers an application for stay of execution pending appeal we think it necessary in the interest of justice to say generally that when such an application is considered in a case involving, inter alia, the payment of money, the main

consideration should be not so much that the victorious party is being deprived of the fruits of his victory, as what the position of a defeated party would be who had had to pay up or surrender some legal right only to find himself successful on appeal. In this respect it is wholly immaterial what view a trial judge takes of the correctness of his own judgment or of the would-be appellant's chances on appeal, if the position (it is not of course suggested that that is the position in the case before us) is that the victorious party is unlikely to be able to refund the amount paid to him, or the defeated party to be restored to the status quo ante, in the event of a successful appeal (and it should not be difficult to determine the likelihood of such an event), then it would be palpably unjust to refuse stay of execution, or, when stay of execution is refused, not to order the judgment creditor to give good, substantial and realisable security for the refund of the money involved."

It should be noted that this court has relatively recently approved of the criterion set out in *Joseph v Jebeille* in *N.D.K. Financial Services Ltd. V Yiadom* [2007-2008] SCGLR 93.

According to the argument we earlier advanced in this Ruling, the criterion for suspending an order of a court below should not be identical with the criterion summarised by Akufo Addo JSC in relation to applications for stay of execution, but should embody an additional element or requirement. The precise nature of this additional element or requirement we would leave to subsequent cases to develop. However, subject to fine-tuning in the light of the facts of subsequent cases, We would propose that a possible test could be the nugatory effect,

referred to in *Joseph v Jebeille (supra),* combined with the need for exceptional circumstances. If this test of a "nugatory effect plus more" is not insisted upon, there would be no point to maintaining the distinction between the two kinds of orders, namely stays of execution and suspensions of orders of the court below. The facts of this case do not satisfy the test articulated in *Joseph v Jebeille (supra),* let alone the exceptional circumstances requirement. Accordingly, this application deserves to be dismissed.

In sum, we would dismiss this application.

(SGD) DR. S. K. DATE BAH
JUSTICE OF THE SUPREME COURT

(SGD) S.A.B AKUFFO (MS)
JUSTICE OF THE SUPREME COURT

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COURT

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

(SGD) V. AKOTO BAMFO (MRS)
JUSTICE OF THE SUPREME COURT

COUNSELS:

THADEUS SORY APPEARS FOR THE APPLICANTS
SAMMY ADDO APPEARS FOR THE RESPONDENT