IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT OF GHANA

ACCRA

CORAM: WOOD (MRS) CJ PRESIDING
ANSAH JSC
OWUSU(MS) JSC
DOTSE JSC
YEBOAH JSC
BONNIE JSC
GBADEGBE JSC

REVIEW MOTION

NO.J7/8/2014

29TH MAY 2014

SAMUEL BONNEY& 4,174 OTHERS PLAINTIFFS
/RESPONDENTS
/APPELLANTS
/APPLICANTS

VRS

GHANA PORTS AND HARBOURS DEFENDANT
AUTHORITY /APPELLANT
/RESPONDENT
/RESPONDENT

R U L I N G

BAFFOE-BONNIE JSC.

Rule 54 of the Supreme Court Rules, 1996 (CI 16) provides as follows;

54**. Grounds for review**

The court may review a decision made or given by it on the ground of

(a) Exceptional circumstances which have resulted in a miscarriage of justice or

(b) The discovery of new important matter of evidence which after the exercise of due diligence, was not within the applicants knowledge or could not be produced by the applicant at the time when the decision was given.

The remit of this rule has been expounded in a number of cases.

In the case of **Afranie II vrs Quarcoo [1992]GLR561, at 591-592,**Wuaku JSC said:

"There is only one Supreme Court. A review court is not an appellate court to sit in judgment over the Supreme Court".

Then in the case of **Mechanical Lloyd Assembly Plant Ltd v Nartey [1987-88]2 GLR598** the Supreme Court said,

"*The review jurisdiction is not intended as a try on by a party losing an appeal neither is it meant to be resorted to as an emotional re-actionto an unfavourable judgment"*

In the case **of Quartey v Central Services Co Ltd [1996-97]SCGLR 398;** this court restated the remit of the review jurisdiction as follows

" A review jurisdiction is a special jurisdiction, conferred on the court, and the court would exercise that special jurisdiction in favour of an

applicant only in exceptional circumstances. This implies that such an application should satisfy the court that there has been some fundamental or basic error which the court inadvertently committed in the course of considering its judgment and which fundamental error has resulted in gross miscarriage of justice."

These and a long line of cases are often cited as authorities that speak against the use of the review process to overturn decisions given by the Supreme Court except for exceptional circumstances that have occasioned a miscarriage of justice. They actually show the daunting task an applicant faces in trying to get a decision given by the Ordinary bench reviewed.

However, it must be said that difficult as it is to get the Supreme Court to overturn its own decision, it is not an impossibility, and that whenever the Supreme Court has found exceptional circumstances, it has readily conceded and reviewed its decision. In the recent case of **Glencore AG v Volta Aluminum Company Ltd, review Motion No J7/10/2014 dated 15th April 2014,** the Supreme Court graciously accepted an error it had made that had occasioned a miscarriage of justice and readily reviewed its decision while commending counsel for the industry he put in his application for review. In that case, the ordinary bench had struck out the appeal as withdrawn when the court, relying on the repealed Interpretation Act, had come to the conclusion that the appeal was filed out of time, albeit by one day. In his application for review, the courts attention was drawn to the fact that under the current interpretation act, computation of days was to start from a day after the decision being appealed against and not from the day of the decision.

Calculated that way, the applicant was within time. The Court therefore held;

"We are satisfied that the ordinary bench of this court made an inadvertent fundamental error which if not reviewed would result in the grave if not total miscarriage of justice. Consequently we allow the application and set aside any decision of the 19th February, 2014. We order a relisting of the appeal numbered ***No J4/40/2013 entitled Glencore AG v. Volta Aluminum Company*** *for the same to be heard and disposed of by this court on the merits."*

Having established this legal background let me return to the application before us.

This is an application for review brought pursuant to Article 133(1) of the 1992 Constitution and rule 54 of the Supreme Court Rules, 1996 (CI16) on the ground that having regard to the exceptional circumstances which have resulted in a substantial miscarriage of justice occasioned by the judgment of the Ordinary panel of the Supreme court dated 29th January, 2014 same should be reviewed. The exceptional circumstances warranting a review of the decision of the full bench of this court have been given as follows.

"1. The ground on which the present application for review is premised is that there are exceptional circumstances warranting a review of the judgment of the ordinary panel of the Supreme Court dated 29th January 2014. That judgment, it is very humbly and respectfully submitted, was given per incuriam articles 17(1), 37(1) and 190 the 1992 Constitution and also section 2 of the State Proceedings Act, 1998 (Act 555).

2.It is very humbly submitted that the judgment of the ordinary panel which held that the defendant/appellant/respondent/respondent

(hereinafter referred to as the "respondent"), an agent of the Government or the Republic, could be treated differently in respect of its liability in contract, separate and distinct from any private citizen of this country, (a treatment which is not available even to the Government or the Republic itself by virtue of the constitutional and statutory provisions in articles 17(1), 37(1) and 190 of the 1992 Constitution and also section 2 of the State Proceedings Act, 1998 (Act 555)) was with respect given in error.

3 The ordinary panel of this court, it is very humbly submitted, committed a fundamental error of law apparent on the face of the record and the judgment was given inadvertently and is fundamentally wrong and occasioned a substantial miscarriage of justice to the applicants and same ought to be reviewed.

4.By the judgment, the State or Government or Republic is permitted to make a law truncating or abating its liability in contract or the liability in contract of its agents within a shorter period (in this case, one year or twelve months) not available to all persons or private citizens for acts committed in breach of contract; insulating the Government or its agent the respondent, from liability in contract after one year from the date of accrual of the cause of action in flagrant violation of articles 17(1), 37(1) and 190 of the 1992 Constitution.

5.Section 92(1) of the Ghana Ports and Harbours Authority Act, 1986 (PNDCL 160) is in contravention of and inconsistent with Articles 17(1), 37(1) and 190 of the 1992 constitution.

6. It is very humbly and respectfully submitted that it was the failure or omission of the ordinary panel of this court to consider and determine the issue of the unconstitutionality of section 92 of PNDCL 160, an issue which was raised in the Court of Appeal and also before the ordinary panel of this court that occasioned the judgment for which the review is presently sought.

7.Section 92(1) of the Ghana Ports and Harbours Authority Act, 1986 (PNDCL 160) is inconsistent with the letter and spirit of articles 17(1), 37(1) and 190 of the 1992 Constitution and must be struck down as void to the extent of its inconsistency with these constitutional provisions pursuant to article 1(2) of the 1992 Constitutions."

Reading through the 10 paragraph affidavit in support of the application and the 28 page statement of case, the case for the applicant is simple; that the respondent being at best a body corporate must be equated to any individual or for that matter any other body corporate as far as contractual relations are concerned. So since the limitation period for bringing any action in contract against individuals or other body corporates or even the government is 6 years, any law like the GPHA law that seeks to limit the contractual obligations of the GPHA to actions brought within 12 months, is unconstitutional and so the reliance on same by the ordinary bench was an error of law that had occasioned a miscarriage of justice.

BACKGROUND OF THE CASE

The facts in this case are really very simple. The applicants numbering about 4169 together with some others were all former workers of the respondent company. Describing them as casual workers, the respondent laid the applicants off without giving them benefits normally

given to regular workers who were being laid off. Feeling aggrieved by this action by the respondent which they deemed discriminatory, they brought an action before the High court. That suit had the names of Clement Agbesi and 4 other persons and then 'Ors', as plaintiffs with the respondents as defendants. The writ was accompanied by an addendum filed on the same day which stated that a full and comprehensive detailed list will be supplied to the court subsequently. The plaintiffs later filed a list of persons numbering about 3839. In the course of the proceedings, an application was filed to amend the writ to add 356 more people as plaintiffs. The application was granted with an order that the title of the suit be amended to include the names of the 365 employees. Strangely this order was not carried out. The trial proceeded to its conclusion and the High Court entered judgment for the plaintiffs and the others who were listed in the addendum.

At the Appeal Court the court found that the list of 3839 not having been filed together with the writ, and the suit of the title not having been amended to include the 359 names for which leave had been granted, it was only Clement Agbesi and the 4 other persons named in the writ who were entitled to judgment.

The Court of Appeal however purported to grant the 3839 and 356 liberty to bring a fresh action. The court said

"In the interest of justice, the 3839 and 356 must be returned to the positions they held or occupied prior to the commencement of the action with liberty to institute fresh action against the other for whatever reliefs they may deem proper".

The plaintiffs issued a fresh which had culminated in this application.

When this action was instituted at the high court the trial judge overruled the submissions of the respondents herein that the action was statute barred and ruled that the action was not statute barred because under section 2 of the limitation Decree NRCD 54 the period of limitation is 12 years. At the appellate court, the decision was overturned in the following terms;

"Counsel for the plaintiffs/respondents however argues that as this action is based on Judgment in the Agbesi case, the period of limitation starts running from the date when the judgment became enforceable and the period of limitation is as provided for by section 5(2) of the Limitation Decree 54 of 1972 which is 12 years……..

This wrongful exposition of the law unfortunately informed the trial judge in his judgment. The period of limitation is not set by judgments but by statute. The plaintiffs herein were held not to be parties in the Agbesi case. How could that case give any relief or time limit to the plaintiffs to commence their case?"

Their Lordships were fully convinced that the action of the applicants herein was not subject to the limitations imposed by the Limitation Act of 1972 but rather the limitations imposed by section 92 of PNDC Law 160 which provides as follows

"A civil action against the authority or an employee for an act done in pursuance or execution or purported pursuance or execution of an enactment, duty or authority shall abate unless it is commenced within 12 months after the act, neglect or default complained of, or where the injury or damage continues, within twelve months after it ceases"

The court came to the conclusion that the action was statute barred and therefore not maintainable.

Feeling aggrieved by this decision of the Court of Appeal the applicants appealed to the Supreme Court on the grounds, which for purposes of emphasis I will reproduce in full.

"1.The learned justices of the Court of Appeal erred when they held that the plaintiffs' action was statute barred"

"2.The learned justices of the Court of Appeal erred when they held that the plaintiffs' action was statute barred upon the application of section 92(1) of the Ghana Ports and Harbours Authority Law,1986 (PNDCL 160)."

"3.The learned Justices of Court of Appeal erred in not making a reference to the Supreme Court under article 130(2) of the 1992 Republican Constitution of Ghana on the question of the constitutionality or otherwise of section 92(1) of the Ghana Ports and Harbours Authority Law, 1986 (PNDCL 160) which was raised by the appellants Counsel in the proceedings before the Court of Appeal for determination by the Supreme Court before applying the said provision to the appellants case."

"4.The learned Justices of the Court of Appeal therefore erred in applying a provision that is unconstitutional to the appellants' case."

"5.The Learned Justices of the Court of Appeal erred in applying section 92(1) ofGhana Ports and Harbours Authority Law,1986 (PNDCL 160) when the defendants/appellants/respondents itself pleaded the Limitation Decree ACT (NRCD 54) which was the Act plaintiffs /respondents/appellants admitted was the applicable statute."

“6.The learned Justices of the Court of Appeal erred in setting aside the judgment of the high court on a technicality while ignoring the issue of doing substantial justice in the matter.”

“7. Further and additional grounds of appeal will be filed upon receipt of the record of appeal.”

The applicant filed and argued two additional grounds as follows

A “The learned justices of the Court of Appeal erred when they failed to apply the modern purposive approach to their interpretation of section 92(1) of the GPHA Act,1986 (PNDCL 160) resulting with respect, in a wrong interpretation being placed on the said provision by their Lordships in the Court of Appeal”

B “The learned Justices of the Court of Appeal erred when they held that the maxim generaliaspecialibus non derogant applied in the present case and therefore section 92(1) of the GPHA ACT is applicable”

The summary of counsel’s submissions before the Ordinary Bench were that

1 The plaintiffs’ action is seeking to compel the defendant to perform the part of the bargain which was contained in the contract of employment, i.e. the collective bargaining agreement. The reliefs against the against the defendants being equitable reliefs, under section 6(1) of the Limitation Act 1972, the law relating to limitations of actions cannot be invoked against the plaintiffs.

2.The plaintiffs’ action being one brought to enforce their constitutional rights, the defendant cannot rely on an inferior legislation such as PNDCL 160 which seeks to set a limitation period of twelve months only in actions brought against the defendant. This according to counsel

would offend the provisions of Article 17 of the constitution that frowns on anything discriminatory, since all actions founded on contracts against all other persons have a limitation period of six years. Counsel therefore submitted that it is the limitation period applicable to all actions brought by the citizenry without discrimination that ought to be applicable and that is the Limitation Decree Act 1972 NRCD 54. Under NRCD 54 the limitation period is six years and so if the cause of action accrued in September 2002, in May 2008, when the action was instituted, same was not statute barred.

3 Granting that section 92(1) of the GPHA Act is applicable, (which is denied), a purposive construction of same would reveal that the 12 months limitation period within which to bring an action against the Authority is not applicable to all actions or for that matter actions bothering on enforcement of simple contract of employment such as was brought by the plaintiffs, but referable to maritime actions as the twelve months limitations period is in accord with international maritime legislation. Counsel therefore concluded thus;

"...the provision is not intended to apply to all actions against the Authority. If it had so been intended, it would have been framed in a language such as "no civil action shall be brought…….The use of the indefinite article "a" together with the restrictions to an act done in pursuance or execution or ……..duty or authority shows that the purpose of section 92[1] was not to provide all pervasive provision in respect of limitation of suits against the Authority"

All these grounds of appeal were argued extensively by counsel for the applicant before the Ordinary Bench.

After reviewing submissions by counsel on the various grounds, the Ordinary Bench concluded as follows.

"Having come to this conclusion, I do not find it necessary to consider the other arguments of counsel for the Appellants on the applicability of section92 of the GPHA Act of 1986. In the circumstances in as much as the writ of summons in this case was issued in May 2008, well over the 12 months limitation period under section 92 the appellants' action was statute barred. The court of Appeal therefore did not fall into any error when it so decided".

In this application before us the gravamen of counsel's submission is the unconstitutionality of section 92(1) of the GPHA act as interpreted by the ordinary bench and for that matter its non-applicability to the applicants' action. It is counsel's submission that, the ordinary bench failed to advert its mind to the fact that as interpreted, the GPHA act is in contravention of and inconsistent with articles 17(1), 37(1) and 190 of the 1992 Constitution and that the failure of the Ordinary bench to consider and determine its constitutionality and strike same down as such, had occasioned a miscarriage of justice which should be the basis for a review by this panel.

We believe that counsel has misconstrued the scope and remit of the review jurisdiction. As the case law review at the beginning of this ruling portray, the review process is neither another avenue to take a second bite at the proverbial cherry, nor is it another forum of appeal. It is only a forum to redress exceptional errors like applying a wrong law or a law whose existence was not brought to the attention of the ordinary bench, and which would have affected the decision of the ordinary bench.

Infact the limit to which the review jurisdiction can be utilized is exemplified by these quotations by our esteemed brother, Dr Date-Bah in the case of**Gihoc Refrigeration &Household Products (no1) v Hanna Assi(no 1) [2007-2008]1 SCGLR 1**

"Even if the unanimous judgment of the Supreme Court on the appeal in this case were wrong, it would not necessarily mean that the Supreme Court would be entitled to correct that error. This is an inherent incident of the finality of the judgments of the final court of appeal of the land. The brutal truth is that an error of law by the final court of the land cannot ordinarily be remedied by itself, subject to the exceptions discussed below. In other words, there is no right of appeal against a judgment of the Supreme court, even if it is erroneous."

And Atuguba JSC in the case of **Tamakloe** v **Republic 1 SCGLR29**;

"The review jurisdiction of the supreme court was not an appellate jurisdiction, but a special one. Accordingly, an issue of law that had been argued before the ordinary bench of the Supreme Court and determined by that court, could not be revisited in a review application, such as in the instant case, simply because the losing party had not agreed with the determination. Even if the decision of the ordinary bench on appeal from the judgment of the court of appeal, were wrong, it would not necessarily mean that the Supreme Court would be entitled to correct that error. That was an inherent incident of the finality of the judgment of the supreme court as the final appellate court"

The issue of unconstitutionality of section 92(1) of the GPHA Act was raised before the Court of Appeal and same was a ground of appeal before the Ordinary Bench of the Supreme Court.

For emphasis let me quote 3 grounds of Appeal before the Supreme Court

"2.The learned justices of the court of appeal erred when they held that the plaintiffs action was statute barred upon the application of section 92(1) of the Ghana Ports and Harbours Authority Law(sic),1986 (PNDCL 160)."

"3.The learned Justices of Court of Appeal erred in not making a reference to the Supreme court under article 130(2) of the 1992 Republican Constitution of Ghana on the question of the constitutionality or otherwise of section 92(1) of the Ghana Ports and Harbours Authority Law, 1986 (PNDCL 160) which was raised by the appellants' Counsel in the proceedings before the Court of Appeal for determination by the Supreme Court before applying the said provision to the appellants case."

"4.*The learned Justices of the Court of Appeal therefore erred in applying a provision that is unconstitutional to the appellants' case."*

Counsel in his submissions before the ordinary Bench referred extensively to the constitution and authorities to show that, section 92 (1) is unconstitutional and therefore the limitation therein contained should not be used to decide this case. He has virtually repeated the same submission before the review panel. The only difference between the two submissions was that whiles that before the ordinary bench discussed the constitutionality and also the need to do a purposive interpretation of Section 92(1) of the GPHA act, the one before the review panel was devoted solely to questioning the constitutionality of

Section 92(1) of the act which, counsel feels, is discriminatory and therefore infringes the 1992 Constitution. Contrary to counsel's submission that the ordinary bench failed to make a determination on the constitutionality of Section 92(1), impliedly they did. The submission on the unconstitutionality of the section argument did not find favour with the Ordinary Bench. Even though the Court did not specifically rule on the constitutionality or otherwise of the said section vis a vis the mentioned articles in the constitution, impliedly, this argument was rejected. This is because the court came to the conclusion that Section 92 (1) was the applicable law in determining the period of limitation in relation to the Respondent authority. This remains the finding of the court until same is overturned even though it is obvious that applicant disagrees with the court. Unfortunately, unpalatable as the outcome of this judgment may be to the applicant, it is not open to him by way of review to have the decision overturned.

I will conclude this ruling by borrowing the words of our esteemed brother Dr Date-Bah in the case of **Internal Revenue Service v Chapel Hill Ltd [2010] SCGLR 827 at 850 especially 852-853** where the learned judge said:

"I do not consider that this case deserves any lengthy treatment. I think that the applicant represents a classic case of a losing party seeking to re-argue its appeal under the garb of a review application. It is important that this court should set its face against such endeavour in order to protect the integrity of the review process.

This court has reiterated times without number that the review jurisdiction of this court is not an appellate jurisdiction, but a special one. Accordingly, an issue of law that has been canvassed before the bench of five and on which the court has made a determination cannot be revisited in a review application, simply because the losing party does not agree with the determination. This unfortunately is in substance what the current application before this court is."

We believe that the application before us is nothing more than a rehash of the appeal before the ordinary bench. We find no merit in it and proceed to reject same.

(SGD) P. BAFFOE BONNIE

JUSTICE OF THE SUPREME COURT

(SGD) G. T. WOOD (MRS)

CHIEF JUSTICE

(SGD) J. ANSAH

JUSTICE OF THE SUPREME COURT

(SGD) R. C. OWUSU (MS)

JUSTICE OF THE SUPREME COURT

(SGD) J. V. M. DOTSE

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