IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT OF JUSTICE

ACCRA, AD. 2016

CORAM: DOTSE, JSC.[PRESIDING]

ANIN YEBOAH, JSC.

BAFFOE-BONNIE, JSC.

BENIN, JSC.

PWAMANG, JSC.

CIVIL MOTION
NO. J5/36/2016

3RD NOVEMBER 2016

THE REPUBLIC

VRS

HIGH COURT (COMMERCIAL DIVISION) SUNYANI–RESPONDENT
)

EX PARTE: ALFREDINA OFORI AND NIKABS – APPLICANTS

GBANDE, SUNYANI

JEMIMA OWARE (MRS) THE OFFICIAL LIQUIDATOR

SUBSTITUTED FOR DKM DIAMOND MICROFINANCE CO. LTD - INTERESTED PARTY

RULING

PWAMANG, JSC.

The facts giving rise to this application are as follows; DKM Diamond Micro Finance Ltd, hereafter referred to as "the Company", was incorporated under the Companies Act, 1963 (Act 179) as a private Limited Liability Company on 1st August, 2013. It had its registered office at Sunyani in the Brong Ahafo Region and operated mainly in that Region and the three regions of Northern Ghana. It was licensed by the Bank of Ghana on 25th October, 2013 to operate as a Micro Finance Company. As part of its activities it took deposits from the general public and in turn contracted to pay rather astronomical monthly rates of interests to the depositors. By May of 2015 the Company ran into difficulties as it started defaulting in the timely payment of the extra ordinary monthly rates of interest it had promised its numerous customers.

Initially the Bank of Ghana intervened to ensure that the Company paid its depositors but that did not yield the needed results. Consequently some of them resorted to the law courts so different suits claiming various sums against the Company were filed in a number of courts. The applicants herein are two of such depositors who filed suit No. RPC 17/2016 in the High Court, Commercial Division, Sunyani against the company and two sister companies namely; DKM Group of Companies Ltd and DKM Transport Company Ltd, claiming for refund of their deposits in the sum of GH¢198,056.00 with interest at 54.465% per month. Judgment was entered in favour of Applicants herein on 18/01/2016 to recover a total sum of GH¢599,313.00 being principal, interest and costs. The Applicants went into execution and attached a Yutong Bus with Registration No. GT 4553-15 and LPG Gas Filling Station situate at Nandom in the Upper West Region.

However, before the properties could be sold, the Company was put into official liquidation upon a request by the Bank of Ghana to the Register of Companies. In order that they could continue with their court case, Applicants applied to the court for leave pursuant to Section 17 of the **Bodies Corporate (Official Liquidation) Act, 1963 (Act 180)**. The application was granted. After that Applicants brought a motion to substitute the official liquidator, who is the Interested Party herein, for the Company and that too was granted.

In order to have the attached properties auctioned for Applicants to be paid their judgment debt of GHC599,313.00, they filed two motions; one in respect of the Yutong Bus praying for the reserved price to be reviewed, and the second praying for the fixing of a reserved price for the LPG Gas Filling Station. These applications were brought on notice to the Interested Party and she filed affidavits in opposition to both motions. In those affidavits she prayed the court to stay the proceedings in the case and to release the properties attached to her in order that she would add them to other assets of the Company to be sold for all depositors of the Company to be paid.

After hearing both parties who were represented by lawyers, the High Court gave its ruling on 12th July, 2016. It dismissed both motions by Applicants and made an order releasing the attached properties to the Interested Party. The court further directed that the claims of the Applicants as well as all other claims before it should be forwarded to the Interested Party in order that they will be paid like all other depositors/creditors of the Company.

Applicants are aggrieved by the orders made by the court and have filed this application praying for an order of certiorari to quash the decision of the court on the following grounds:

(a) The High Court judge exceeded her jurisdiction when she *suo motu* ordered the release of properties attached by the Registrar in execution of a judgment debt when no person had

interpleaded in respect of the said properties nor had any application for such purpose/order been filed before her.

(b) The judge exceeded her jurisdiction when she *suo motu* released attached properties of DKM Transport Company Ltd to a different and separate company being DKM Diamond Micro Finance Ltd, thereby occasioning a miscarriage of justice.

(c) The judge wrongly exercised her discretionary powers when in delivering a ruling on a motion on notice for reserved price, she entered into the arena of conflict and granted reliefs not prayed for and this occasioned a miscarriage of justice.

(d) The judge wrongly assumed jurisdiction when she *suo motu* unconditionally released properties from attachment when the judgment debt had not been paid to the judgment-creditor.

The Applicants filed an affidavit in support with exhibits and their lawyer filed a statement of case. The Interested party has opposed the application and filed affidavit in opposition and statement of case. We have closely studied these processes. The Interested Party stated that her affidavit in opposition in the High Court proceedings contained a prayer for the release of the properties and the judge saw merit in her submissions made in court so the release of the properties was not done *suo motu.* She also contends that the High Court, Sunyani erred in law in granting leave to the Applicants to proceed with their case after the commencement of the winding up as it is only secured creditors who may be granted such leave.

The Applicants subsequently filed a supplementary affidavit in which they brought to our attention two different decisions of the High Court Justices in Bolgatanga and Wa both in respect of the DKM Micro Finance liquidation. The High Court, Bolgatanga decided as a matter of law that the order by the Registrar of Companies for the winding up of the Company is invalid as same was not done under the applicable enactment. The Judge at the High Court, Wa agreed with him and further questioned the

procedure adopted by the Bank of Ghana in petitioning to the Registrar of Companies to wind up the Company. In response the interested party has maintained that the order for the winding up was validly made.

Before considering the merits of the present application we deem it proper to deal with the points of law that have been raised before us. The Interested Party filed an application in the High Court, Bolgatanga for a review of its decision that the order for winding up of the Company is invalid and has exhibited same in the proceedings before us. The ground for that application is purely on a matter of law so we shall have recourse to our powers in **Article 129(4) of the 1992** Constitution and determine the question of the validity of the winding up of the Company that has been raised in that application for review before the High Court, Bolgatanga. Article 129(4) of the 1992 Constitution provides as follows;

" 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."

From the processes filed before us, the Interested Party has started dealing with the numerous depositors/creditors of the company who have suffered hardship as a result of the activities of the Directors of the Company and are therefore anxious of their fate. In the circumstances it is in the public interest to speedily resolve the issue of the legality of the actions of the official liquidator.

The reason given by the High Court, Bolgatanga for holding that the order for the winding up of the Company is invalid was that the Bank of Ghana was wrong in relying on section 68(1) of the Banking Act, 2004 (Act 673) to request the Registrar of Companies to wind

up the Company because, according to him, micro finance companies are regulated by the Non-Bank Financial Institution Act, 2008 (Act 774) and not the Banking Act. The relevant provisions with regard to the coverage of those enactments are as follows;

Section 1 of the Non-Bank Financial Institution Act, 2008 (Act 774) provides;

"This Act applies to non-bank institutions and non-bank financial services as set out in the First Schedule to this Act, but does not apply to

(a) operators of micro finance services with risk assets which are not more than the amounts prescribed by the Bank of Ghana and whose sources of funds do not include deposits from the public; and

(b) any other institution or person as the Bank may specify by Notice published in the Gazette."

The services set out in the First Schedule are as follows;

: *Non Bank Financial Services*

1. *Operations*
2. *Money lending operations*
3. *Money Transfer services*
4. *Mortgage Finance operations*
5. *Non-deposit-taking micro finance services*
6. *Credit Union operations*
7. *Any other services or operations as the Bank of Ghana may from to time by notice designate as such.*

There is no dispute that DKM was a Micro Finance Company that took deposits from the public so clearly it is not covered under Act 774. All the activities mentioned in the first schedule of Act 774 do not involve the taking of deposits but DKM Diamond Micro Finance Ltd was licensed to take deposits.

On the other hand Section 47(6) of Act 774 lists non-bank financial institutions that are to be regulated under the Banking Act as follows;

"THIRD SCHEDULE

(Section 47 (6))

Institutions Previously Regulated under Financial Institutions (Non-Banking) Law, 1993 (P.N.D.C.L. 328) immediately before the coming into force of this Act and to be migrated to other regulatory regimes.

1. Savings and Loans Companies, Finance Houses, and deposit-taking micro finance institutions, to be regulated under the Banking Act 2004 (Act 673) as amended."

The provision talks of deposit taking micro finance institutions of which DKM Diamond Micro Finance Ltd is one, as those to be regulated under the Banking Act. We therefore hold that the Bank of Ghana was right in coming under the Banking Act to request the winding up of the Company.

The other aspect of the legal issue has to do with the lawfulness of the procedure whereby the Bank of Ghana wrote a letter to the Registrar of Companies for the official winding up of the Company. Section 3 of Act 180 provides for either a creditor or a member of a company to petition the Registrar of Companies to order the official winding up of a company if she is satisfied that the company is incapable of paying its debts. In the case of DKM Diamond Micro Finance Ltd, the Bank of Ghana relied on Section 68 (1) of the Banking Act to request for the official winding up. That section provides as follows;

"Where the Bank of Ghana

(a) has revoked the banking license of a bank, and

(b) is of the opinion that the bank is not likely to pay its depositors and creditors in full, it may, notwithstanding the provisions of the Bodies Corporate (Official Liquidations) Act, 1963 (Act 180) or any other law, appoint a liquidator to wind up the affairs of the affected bank."

The actual process adopted by the Bank of Ghana is referred to by the Interested Party in the Order for the official winding up which is Exhibit "OL1". She stated in the order as follows;

"That pursuant to the inability of the Company to fulfill its obligations to the depositors and creditors, the Bank of Ghana pursuant to its letter reference OFISD/52/2016 dated 1st March 2016 petitioned the Registrar of Companies in accordance with Section 68(1) of the Banking Act 2004 (Act 673) **requested the Registrar of Companies to wind up the affairs of the company pursuant to the provisions under the Bodies Corporate (Official Liquidation) Act, 1963 (Act 180)."**

We have not had the benefit of reading the letter written by the Bank of Ghana but from what we have quoted above the Bank of Ghana did not leave the matter of winding up of the Company to the discretion of the Registrar of Companies. The Bank requested her to wind up the affairs of the Company as Section 68(1) empowers it to do. In our understanding, the substance and effect of the letter from Bank of Ghana was to appoint the Registrar of Companies as the official liquidator to wind up the affairs of the Company. The intention of the legislature in Section 68(1) of Act 673 is quite clear so the fact that the Registrar of Companies misconstrued that appointment as a petition and purported to exercise her powers under Section 3 (2) and (4) of Act 180 does not affect the validity of her appointment under Section. Act 180 gives power to the Registrar of Companies and the Court to order the official winding up of insolvent companies in general but in Section 68(1) of Act 673, the legislature has conferred that power on the

Bank of Ghana in the case of licensed banks. In those instances it is the Bank of Ghana that determines the status of insolvency of the bank and not the Registrar of Companies or the Court. On the basis of the aid to interpretation stated in the Latin maxim *generalia specialibus non derogant* (general provisions do not derogate from special ones), we hold that the Registrar of Companies was validly appointed the official liquidator by the Bank of Ghana to wind up the affairs of DKM Diamond Micro Finance Ltd pursuant to Section 68(1) of Act 673. As the appointment directed, she is to wind up the Company in accordance with the provisions of Act 180 so the steps she has so far taken in line with the provisions of Act 180 are valid.

At this stage we shall deal with the point raised by the Interested Party challenging the lawfulness of the grant of leave by the court to applicants to proceed with their case after the winding up had commenced. The provision of section17 of Act 180 is clear and unambiguous. It provides that;

> *"On the commencement of a winding up, no action or civil proceedings against the company, other than proceedings by a secured creditor for the realization of this security, shall be proceeded with or commenced save by leave of the Court and subject to such terms as the Court may impose."*

What it means in simple language is that upon commencement of a winding up only secured creditors are allowed as of right to sue or continue with pending civil proceedings for the realization of their security. Any other person who has a cause of action against a company being wound up cannot sue as of right but may do so only with the prior leave of the High Court. Similarly an unsecured creditor who has pending civil proceedings cannot continue with them without leave of the High Court. So the Applicants in this case who are not secured creditors were within their rights to apply for

leave to continue with their case and the judge acted in accordance with law in granting same.

We shall now consider the application on its merits. The grounds upon which this court will exercise its discretion and quash a decision of a court by a writ of certiorari are as follows; (i.) Where the court or tribunal that gave the decision acted without jurisdiction or in excess of jurisdiction. (ii) Where the court or tribunal acted in breach of the rules of natural justice. (iii) Where the court or tribunal committed a grievous error of law that goes to jurisdiction and which error is apparent on the face of the record and. (iv) Where the court or tribunal contravenes the Wednesbury principles on reasonableness.

One of the grounds for the present Application can easily be answered. Applicant has contended before us that the Yutong Bus belongs to DKM Transport Company Ltd and the judge exceeded her jurisdiction when she ordered its release to the liquidator as property of DKM Micro Finance Ltd which is a separate legal entity. There is no issue of excess of jurisdiction here. If Applicants case is that there was evidence showing the vehicle is owned by DKM Transport Co. Ltd, then their remedy is in an appeal where the evidence will be assessed. In any case, the affidavit evidence before us does not sufficiently prove that the Yutong Bus belongs to DKM Transport Co. Ltd. That ground will be dismissed as misconceived. For the other grounds of the application, we have deduced three issues that arise for determination and they are as follows;

i. whether the order releasing the properties was made *suo motu*.
ii. whether in the absence of an interpleader the trial judge had jurisdiction to order the discharge of the properties from attachment.

iii. Whether the failure by the interested party to file a formal application praying for the release of the properties denied the court jurisdiction to make such an order.

In the first place, the manner counsel for Applicant has used the word *suo motu* in this applicant is problematic. The term "*suo motu*" is a Latin legal term which means "on its own motion". A similar term is "*sua sponte*" another Latin legal term meaning "on its own accord". So to say a court made an order *"suo motu"* as contended by Applicant in this case implies that the order releasing the attached properties to the interested party was upon the judge's own motion. However, on the processes before us the order was based on the prayer of the interested party contained in paragraphs 16 and 17 of her affidavits in opposition and urged on the court by her counsel during the hearing of the application. It is therefore wrong for the applicants to talk of *"suo motu*" in this application.

That leads us to the next issue which is based on the Applicants case that since no interpleader was filed by the Interested Party the court had no jurisdiction to order the release of the properties from attachment. It is important to recognise that the ground for instituting interpleader proceedings is where a third party is claiming that property attached to be sold in satisfaction of a judgment does not belong to the judgment debtor but is property of the party that files the interpleader. This is done by filing a notice of claim under **Order 44 Rule 12 of the High Court (Civil Procedure) Rules, 2004 (C.I,47).** The facts of this case are different. The liquidator did not apply for the discharge of the attachment on a claim that the property did not belong to the judgment debtor. In fact she based her claim on the ownership of the judgment debtor but her case was that on the commencement of winding up proceedings the liquidator by law is to take possession of all assets of the company under liquidation. Furthermore the law makes provision that if those properties are subject matter of civil proceedings the liquidator may apply to the

court for orders to be made in respect of those properties. **Section 6 (2) and 16 (2) and (3) of Act 180** provide as follows;

> *"6 (2). During the interval between the presentation of a petition for an official winding up and the commencement of the winding up, the Court may, on application being made by a party thereto or the Registrar stay any proceedings by or against the company* ***or in respect of its property****;* ***and accordingly any disposition of the property of the company, including things in action and any transfer of shares shall, unless the Court otherwise directs, be void****.(emphasis supplied)*
>
> *16 (1) Save as may otherwise be directed by the liquidator, the property of a company shall, during winding up proceedings, remain vested in the company.*
>
> *(2) Subject to the provisions of the preceding subsection, the liquidator shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled."*

It seems to us that the above provisions give authority to the interested party to apply to the court for orders in respect of the Yutong Bus and the LPG Filing Station and also confer jurisdiction on the court to consider the application. Consequently there is no issue of want or excess of jurisdiction on the part of the court in acceding to the prayer of the Interested Party and releasing the properties from attachment.

The last issue of the Applicant's complaint, as we understand it, is that the Interested Party did not formally apply for the release of the attached properties. Applicant is obviously referring to a formal application in terms of **Order 19 Rule 1 (1) and (4) of The High**

Court (Civil Procedure) Rules, 2004, (C.I 47) which provide as follows;

"1. (1) Every application in pending proceedings shall be made by motion.

4. Every application shall be supported by affidavit deposed to by the applicant or some person duly authorised by the applicant and stating the facts on which the applicant relies, unless any of these Rules provides that an affidavit shall not be used or unless the application is grounded entirely on matters of law or procedure which shall be stated in the motion paper."

It must be noted that the application made by the interested party was in the course of interlocutory proceedings mounted by the Applicants. Since the application was not made in initiating proceedings for a substantive relief from the court, the trial judge had authority under Order 81 (1) of C.I 47 to waive non-compliance with order 19 Rule 1(1) and (4) of CI 47 and determine it on the merits it being reasonably related to the subject matter of Applicant's motions. This is particularly so as the Interested Party has explained that when she became aware that the Applicants were about to obtain orders for reserve price which would enable them to sell the properties and pay themselves alone she had to intervene using the fastest means available in order to protect the interest of other depositors. Under the circumstances, she included her application in her affidavit in opposition. We appreciate the urgency with which the Interested Party had to act and do not consider that the failure to present a formal motion denied the court jurisdiction to hear her and grant same. Since the Applicants were served with the affidavit in opposition containing the prayer they cannot claim to have been denied opportunity to be heard on it.

We have considered all the circumstances of this case and in our considered opinion, since DKM Diamond Micro Finance Ltd was put under liquidation, equity alone would demand that all assets of the company ought to come to the possession of the liquidator so that all depositors across board will be paid part of their deposits. For all of the above reasons we find ourselves unable to grant the prayer of the Applicant and we therefore refuse the application.

(SGD) G. PWAMANG

JUSTICE OF THE SUPREME COURT

(SGD) V. J. M. DOTSE

JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE - BONNIE

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