IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: DOTSE, JSC (PRESIDING)
APPAU, JSC
PWAMANG, JSC
DORDZIE (MRS.), JSC
OWUSU (MS), JSC

CIVIL MOTION
NO. J5/20/2019

29TH APRIL, 2020

THE REPUBLIC

VRS

HIGH COURT, ACCRA (COMMERCIAL DIVISION) …….. RESPONDENT

EX-PARTE:

1. ENVIRON SOLUTIONS
2. JAMES AKPALO
3. MIRFIELD PROPERTIES LIMITED
4. DR. ALBERT G. BOOHENE …….. APPLICANTS

1. DANNEX LIMITED
2. AYRTON DRUGS MANUFACTURING LIMITED
3. STARWIN PRODUCTS LIMITED
4. THE REGISTRAR-GENERAL
5. THE DIRECTOR-GENERAL
   SECURITIES AND EXCHANGE COMMISSION
6. THE MANAGING DIRECTOR
   GHANA STOCK EXCHANGE …….. INTERESTED PARTIES

RULING

PWAMANG, JSC:-

My Lords, this is an application invoking our supervisory jurisdiction to quash by certiorari the order of the High Court, Commercial Division, Accra dated 25th November,

2019. By the impugned order, the High Court, confirmed the merger of the 1st, 2nd and 3rd Interested Parties (hereafter referred to as the "interested parties") which are all companies engaged in pharmaceutical manufacturing in Ghana. The applicants are shareholders of the 3rd interested party who for sometime now have been battling changes in the share structure of 3rd defendant in the courts. Those changes resulted in the applicants becoming minority shareholders. On this occasion, their application for certiorari has been brought on four grounds. 1. Lack of jurisdiction of the High Court to hear the motion for confirmation of the merger, 2. Lack of jurisdiction of the High Court by reason of failure to observe the applicants' right to a hearing, 3. Actual Bias, and 4. Lack of fair hearing.

The basis on which the applicants contend that the High Court had no jurisdiction to hear the application for confirmation of the merger is that the motion paper filed on 15th November, 2019 that sought to invoke the jurisdiction of the High Court stated that the application was being made pursuant to **section 231(4)** of the **Companies Act, 1963, (Act 179).** But **Act 179** was repealed by **section 384(1)** of the **Companies Act, 2019 (Act 992)** which came into force on 2nd August, 2019. According to the applicants, as the motion was filed under the provisions of the repealed statute, it could not competently invoke the jurisdiction of the court. In response the interested parties say that merger of companies is a process that entails a series of activities prescribed under section 231 of **Act 179** and ending with an application for confirmation by the High Court. Their case is, that they commenced the merger about 10th December, 2018 under the provisions of **Act 179** and the application for confirmation is a sequel to those steps. They argue that **section 384 (2) of Act 992** saved all acts lawfully done under **Act 179** before its repeal and provides that all such acts shall be considered to have been done under the new Act. Therefore, the High Court did not err but had jurisdiction to hear the application for confirmation.

My Lords, the argument of the applicants suggests, that when a court process states on its face a wrong statute as authority for filing it, then, irrespective of whether the process is competent under some other law, the citation of the wrong statute nullifies

the process. I say this because the case of the applicants is not that the interested parties did not have legal basis for bringing the application. In fact, they have argued elsewhere that it ought to have been served on them pursuant to **section 231(5) of Act 179** to enable them object to the confirmation. Also, at the hearing of this application counsel for applicants conceded that **Act 992** has maintained the jurisdiction of the High Court to confirm mergers after companies have satisfied conditions similar to those stated in **section 231 of Act 179**. So, their quarrel is with the form and not the substance of the application. But I find it intriguing that while the applicants contend that the motion ought to have been brought pursuant to Act 992, they have not hinge their claim of entitlement to service on **section 239 (6) of Act 992** which is the same as **section 231(5) of Act 179** that has been repealed. That to me is an admission by the applicants that rights that accrued under the repealed legislation are still enforceable.

The citation on court processes of the correct law on the strength of which the process has been filed is a practice that is insisted upon by judges because it enables the court to understand precisely the legal basis of the case the party is making and for the opponent to understand fully the case she is required to answer. This is a useful practice that advances the requirements of fair hearing. That notwithstanding, stating the correct statute on court processes is not a strict rule of procedure failure to comply with which can nullify a court process. It is more of a practice for the convenience of proceedings than a rule. Courts have a duty to do substantial justice to the parties in every case so a court is not disabled from hearing a party on the only ground that she cited the wrong statute on her process. The court is required to consider the substance of the case presented through the process and if it alludes to a legal right that can avail the party, the court will deal with the merits of the matter. See the case of **Okofoh Estates Ltd v Modern Signs Ltd [1996-97] SCGLR 224.**

Section 384(2) of Act 992 states that;

"Despite the repeal of the Companies Act, 1963, (Act 179), the Regulations, by laws, notices, orders, directions, appointments or any other act lawfully made or done under the repealed enactment and in force immediately before the commencement of this Act shall be considered to have been made or done under this Act and shall continue to have effect until reviewed, cancelled or terminated."

Therefore, the key issue here is whether the interested parties complied with the processes outlined in **section 231 of Act 179** before its repeal. **Section 231(1)-(5) of Act 179** provide as follows;

231. Arrangement or amalgamation with Court approval

(1) Where an arrangement or amalgamation is proposed, whether or not involving a compromise between a company and its creditors or members or any class or classes of them, the Court, on the summary application of the company or a member or creditor of the company or, in the case of a company being wound up, of the liquidator, may order that meetings of the various classes of members and creditors concerned be summoned in the manner that the Court directs or that a postal ballot be taken of the various classes in the manner provided by subsections (7), (8), (9) and (10) of section 170.

(2) If a three-fourths majority of each class of members concerned and a majority in number representing three-fourths in value of each class of creditors concerned approves the arrangement or amalgamation the approval shall be referred to the Registrar who shall appoint one or more competent reporters to investigate the fairness of the arrangement or amalgamation and to report on the arrangement or amalgamation to the Court.

(3) The remuneration of the reporters shall be fixed by the Registrar and it and the proper expenses of the investigation shall be borne by the company or any other party to the application who the Court orders.

(4) If the Court, after considering the report, makes an order confirming the arrangement or amalgamation, with or without modifications, the arrangement or amalgamation as confirmed is binding on the company and on all members and creditors of the company and its validity shall not subsequently be impeachable in any proceedings.

(5) On the hearing by the Court of the application to confirm the arrangement or amalgamation, a member or creditor of the company claiming to be affected by the arrangement or amalgamation is entitled to be represented and to object.

The evidence on the record before us shows that the interested parties complied with the processes in subsection 1 and 2 above before the repeal. The court made the order for them to hold the relevant meetings, the meetings were held, the scheme for merger was presented and approved by resolutions that satisfied the thresholds in subsection 2, the Registrar's appointee carried out investigations and prepared a report recommending approval of the merger by the court. In those circumstances, the right of the interested parties to apply for confirmation accrued before the repeal.

By way of observation, I notice that **section 231(4) of Act 179 (supra)** provides that after confirmation by the court, the validity of a merger shall not be impeached in any proceedings. This appears to be an ouster clause denying the courts jurisdiction to entertain proceedings that seek to challenge the validity of a court confirmed merger. As to whether these proceedings seek to impeach the validity of the merger of the interested parties is an open question. Ouster clauses have been a litigation minefield in the courts both here and outside our jurisdiction so though ordinarily a court can *suo moto* raise the issue of jurisdiction, it is not appropriate in this case having regard to the very contentious nature of the question. Therefore, since it has not been raised by

the interested parties I shall proceed with the consideration of the merits of the application.

The only factor that would have denied the High Court jurisdiction is if the new enactment, **Act 992**, did not contain a provision similar to subsection 4 but it rather removed the requirement for confirmation by the court. In this case, subsection 5 of **section 239 of Act 992** is the provision that has maintained the jurisdiction of the High Court to confirm a merger of companies. The processes outlined in section 231 of Act 179 have been repeated in section 239 of Act 992. Though Act 992 has added alternative methods of effecting a merger of companies which may not involve court confirmation, it has preserved the method that culminates in confirmation by the Court. The purpose of section **384(2) of Act 992**, is to avoid the situation where, as in this case, the interested parties would have had to commence the merger processes all over again before applying for confirmation by the court. I therefore do not find any merit in the first ground urged on us by the applicants. The jurisdiction of the High Court was properly invoked by the motion for confirmation.

The second ground of the application wherein the applicants claim that they ought to have been served with the motion for confirmation has been premised on the provisions of subsection 5 of section 231 of Act 179, which I have already set out *ut supra*. It is therein provided that a member who claims to be affected by the merger is entitled to be represented and heard on an objection when the court is considering the application for confirmation of a merger. It does not say that members of the company shall be served with the application for confirmation, but the applicants argue that since the section confers on them a right to be heard before the court confirms the merger then service of the motion on members is implied. The applicants rely on the Natural Justice principle of *audi alteram partem* and argue that the failure to serve them with notice breaches the doctrine and renders the confirmation void on ground of lack of jurisdiction. They have referred to us a number of cases delivered by this court including **Ex parte Bank of Ghana [2013-2014] 1 SCGLR 477, Ex parte Salloum**

[2011] 1 SCGLR 574, and Ex parte The Charge D'Affaires of the Bulgarian Embassy (CM No. J5/34/2015; Ruling dated 24th February, 2016).

However, whenever the doctrine of *audi alteram partem* is touted in proceedings seeking to quash a decision, it must be remembered that the doctrine is not one of universal application in every enquiry and furthermore, it does not apply with the same rigour in all situations where a decision is to be taken that affects the interest of other persons. As Tucker L.J. observed in **Russell v. Duke of Norfolk [1949] 1 All E.R. 109, at page 118,:**

"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."

For instance, where a public official is required by a statute to determine the existence of a prima facie case against a person, it has been held that the requirements of Natural Justice are satisfied if the person is invited to comment on the substance of the allegations concerning her though she is not served with the documents being relied upon by the decision-maker to make the determination of the existence or otherwise of the prima facie case. See **Wiseman v Borneman [1968] 3 All ER 275.** In our legal system, the legislature may make laws on specific matters that affect the scope of the principle of Natural Justice or even to waive it all together. The rules of civil procedure have made provision for ex parte applications in situations of emergencies and **section 24 of the Limitations Act, 1972 (NRCD 54),** permits a court to grant extension of time by ex parte application for a plaintiff to bring an action outside the limitation period in a claim for damages for negligence, nuisance or breach of duty. Where the legislature has made such statutory provision, it is a matter of interpretation by the court to ascertain the intention of the law maker as to the scope of the right to a hearing that has been granted.

In the case of **Pearlberg v Varty [1972] 2 All ER 6** the House of Lords dealt with the issue where a tax statute waived the doctrine of *audi alteram partem* but an appellant insisted that he ought to have been heard nonetheless. The facts of the case are that, in March 1957 the Revenue authorities made an assessment on the appellant for the year 1951-52 for untaxed interest. It was within the 'first six years' back. So 1951-52 was the 'normal year'. He appealed against that assessment to the Revenue authorities. While the appeal was pending, in December 1967 the Revenue authorities decided to charge him for 'the second six years' back. To do this they had to obtain leave from a Commissioner. This requirement of leave was contained in s. 6(1) of the Income Tax Management Act 1964, which says that an assessment for the second six years back:

'…may only be made with the leave of a General or Special Commissioner given *on being satisfied by an inspector or other officer of the Board that there are reasonable grounds for believing that tax has or may have been lost to the Crown owing to the fraud or wilful default or neglect of any person.'(emphasis supplied).*

In accordance with the above provision the Inspector of Taxes' application for leave was granted by a Commissioner without hearing the appellant. Upon service of the assessment on him, he issued a writ against the Inspector of Taxes. He claimed that assessment was ultra vires and of no effect. The reason given in his statement of claim was that he was given no notice of the hearing, nor any opportunity of commenting on or controverting the facts and matters relied upon by the Inspector of Taxes in his application for leave.

The appellant lost in the High Court and his appeal to the Court of Appeal was unanimously dismissed. However, the Court of Appeal granted him leave to appeal to the House of Lords. There too, his appeal was unanimously dismissed. The House of Lords compared and contrasted the provisions of the statutes where in the case of the 'first six years' back there was a provision for the tax payer to be given a hearing whereas in respect of the 'second six years' back no provision was made for the tax

payer to be heard before leave may be granted for an assessment to be raised. They then concluded that failure to provide for a hearing in the case of the 'second six years' back was a deliberate omission. Lord Hailsham of St. Marylebone, L.C, said as follows;

"The point, and the only point, at issue in the appeal is whether the taxpayer has a right of audience before, or a right to make written representations to, the single Commissioner before he gives leave under s. 6(1) of the Income Tax Management Act 1964 to raise back assessments on an application of the Inspector of Taxes or other officer of the Board made under that section. The Appellant argues in favour of such a right on the basis of natural justice, or, as it was called by Byles J. in Cooper v. Wandsworth Board of Works (1863) 14 C.B.N.S. 180, at page 194, 'the justice of the common law'. *I am decisively of the opinion that the section affords no such right...*,(emphasis supplied)"

He further said as follows**;**

"Despite the majestic conception of natural justice on which it was argued, I do not believe that this case involves any important legal principle at all. On the contrary, it is only another example of the general proposition that decisions of the Courts on particular Statutes should be based in the first instance on a careful, even meticulous, construction of what that Statute actually means in the context in which it was passed. It is true, of course, that the Courts will lean heavily against any construction of a Statute which would be manifestly unfair. But they have no power to amend or supplement the language of a Statute merely because on one view of the matter a subject feels himself entitled to a larger degree of say in the making of a decision than the Statute accords him. Still less is it the function of the Courts to form first a judgment on the fairness of an Act of Parliament and then to amend or supplement it with new provisions so as to make it conform to that judgment. The doctrine of natural justice has come in for increasing consideration in recent years, and the Courts generally, and your Lordships'

House in particular, have, I think rightly, advanced its frontiers considerably. But at the same time they have taken an increasingly sophisticated view of what it requires in individual cases."

Our duty as a court in this matter is therefore to construe sections 231(4) & (5) of Act 179 to discover the degree of right to a hearing that the legislature accorded a member or creditor of a company who felt affected when the application for confirmation of a merger is being considered. The settled principle of interpretation of statutes is to read the statute as a whole and then to interpret the provision in issue against the background of the other provisions of the statute.

In the case of **Abu Ramadan & Nimako v EC & A-G [2013-2014] 2 SCGLR 1654,** Wood C.J, said as follows at page 1674;

"To arrive at a proper construction of regulation 1(3)(d) and (e) of the Public Elections (Registration of Voters) Regulations, 2012 (CI 72), firmly established principles of statutory interpretation require that CI 72 be read as a whole, not piecemeal, and purposely construed and the impugned legislation interpreted in the context of the other parts of CI 72."

By the provision of subsection 1 of section 231 (see supra), which sets out the procedure for effecting a merger, the main application to the court to commence the processes is to be made on "summary application" by the company or a member. It is not clear what the law maker meant by summary application as no interpretation of it is stated in the Act. In the case of **Mensah v The Republic [1976] 1 GLR 230,** the term "summary hearing" was used by Taylor J (as he then was) to refer to the hearing of a criminal appeal without serving the prosecution to appear and be heard. Then in **Hinson v Ankomah [1991] 2 GLR 61**, Kpegah J (as he then was) used the term "summary application" to refer to an oral application for stay of proceedings until costs awarded in interlocutory proceedings in the case was paid. He contrasted it with application by motion or summons. The general understanding of summary proceedings is that they are less formal and do not involve all the procedural requirements of

regular proceedings. But the point must be made however, that the fact that a statute has directed that an application be by summary proceedings does not necessarily imply that notice shall not be given to persons interested in the matter. It will depend on a careful reading and interpretation of the statute in question as a whole.

In the instant case, if the provision being considered is read in the context that the statute says in merger the company shall proceed by summary application, then the failure to include a provision requiring service of notice of the application for confirmation appears to me to be a deliberate omission. My view is supported by the observation that in situations where the legislature in Act 179 intended all members of a company to be served with notice of court proceedings concerning the company before they may be heard on a matter, express provision for service of notice has been made. **Section 210 of Act 179** contains provisions on court proceedings to enforce liability of a director to the company. It provides that such proceedings may be instituted by the company in its own name, or by the Registrar in the name of the company, or by a member of the company. Where a member of the company institutes such proceedings, she shall do so in a representative capacity on behalf of the other members. Subsections (9) and (10) of section 210 provide that;

(9) No proceedings under this section shall be dismissed, settled or compromised without the approval of the Court *after notice of the proposed dismissal, settlement or compromise has been given to all members of the company and to the Registrar* in such manner as the Court directs(emphasis supplied).

(10) Within the time prescribed by such notice any member of the company and the Registrar may appear and call the attention of the Court to any matters which seem relevant and may give evidence and call witnesses.

These provisions of section 210 precede section 231 of Act 179 so they were definitely within the contemplation of the law maker when the later section was drafted yet they were stated differently though they refer to similar situations. When section 210 (9) &

(10) are contrasted with section 231(4) & (5) of the same Act, it can be seen that with section 210 (9) & (10), the provision for notice of a settlement or compromise to be served on all members of the company in a manner the court directs is stated before the right to appear and be heard is conferred. But when it comes to section 231(4) & (5), no such provision for service is provided for before the grant of the right to be heard. It is plain that the scope of the right to a hearing in section 210(9) & (10) is wide whereas that in section 231(4) & (5) is narrow. The well known aid to construction in the Latin maxim; *Expressio unis est exclusion alterius (the express mention of one thing means the exclusion of other things of its class)* is applicable to these two provisions. In **Ghana Industrial Holding Corp v Vincenta Publications [1971] 2 GLR 24,** the Court of Appeal dealt with a similar issue where the rules of court made different provisions concerning similar situations**.** The Court speaking through Archer JA (as he then was) observed as follows at page 26 ;

"We think rule 11 should be carefully contrasted with rule 1 of Order 48A. Under rule 1 any two or more persons carrying on business within the jurisdiction may sue or be sued in the firm's name. Under rule 11, any person carrying on business within the jurisdiction may be sued under the firm name. Rule 1 has a wider ambit whereas rule 11 has a very narrow scope. In rule 1, there must be more than one person who can sue or can be sued in the firm name. Under rule 11, one person may be sued as defendant under the firm name. If it had been intended to enable such an individual to sue also as plaintiff under the firm name, rule 11 would have expressly provided for such a case. But the rule is completely silent and it is not open to any court of law to give it a greater field of operation."

Consequently, in my judgment, the law maker did not intend notice of the motion for confirmation of a merger to be served on all individual members and creditors for if that was the intention, it would have been so stated explicitly as was done in relation to enforcing liability of directors.

The prayer of the applicants requires of us to, in the name of interpretation, amend section 231(4) and add that "the court shall order the application for confirmation of merger to be served on all members in a manner the court shall direct". This, in my opinion, is not interpretation but amendment to give the section a wider application than was intended by the law maker. It is what the Court of Appeal refused to do in **Ghana Industrial Holding Corp v Vincenta Publications (supra)** and the House of Lords also rejected in **Pearlman v Varty (supra)**. Of course, as the House of Lords said in **Pearlman v Varty**, a court would lean heavily against a construction of a statute that would produce a manifestly unfair result, but not in this case where no such outcome has been established. Without service of the motion, members would definitely get to know of the processes for the merger through the general meeting ordered by the court pursuant to section 231(1) and any member that is outvoted in the passage of the special resolution for the merger, and still has an objection to it would then have to be proactive to take advantage of the final opportunity offered by section 231(5). After all, the 4th and 5th applicants got to know of the hearing of the application for confirmation without service on them and they were heard.

It must also be noted that the **Companies Act, 1963**, affords a member aggrieved by a merger resolution alternative remedies in section 217, where it is alleged that the action of the company is illegal or irregular, and section 218, if the case of the member is that the majority is acting in an oppressive manner. Section 231(5) by providing that a member claiming to be affected by the merger may intervene at the hearing of the application for confirmation without including a directive for members to be served is not without precedent in our legal system. The **High Court (Civil Procedure) Rules, 2004 (C.I.47) by Order 4 R 5(2)** provides for a person with an interest in a pending case to apply to be joined to it. **Rule 45(4) of the Supreme Court Rules, 1996, (C.I.16)** make a similar provision. In all of those instances, the persons applying to join would not have been served with notice of the proceedings. Therefore, there is nothing inherently unjust about section 231(4) and (5) of Act 179 as they stood.

Besides the above comments, the substance of the objection of the applicants to the merger does not appear to me to be within the intendment of Part S of Act 179 on Arrangements and Amalgamations as a whole. In my view, section 231(5) contemplates an objection on the basis that the merger is not in the interest of a member of the company for reasons such as being likely to adversely affect the company's solvency, or its bottom line or such other reason affecting the member's economic interest. The reason for the objection by the applicants in this case is that they have taken action in court to reverse the allotment of shares and if they succeed, the special resolution by members of the 3rd interested party approving the merger would be set aside. But that is a case to be made in the proceedings challenging the allotment of shares and not under subsection 5 of section 231. The record indeed shows that in those proceedings the applicants sought orders to stop the merger and in my opinion that is where their fortunes lie.

In sum, the applicants have not made out the second ground of their application and it is hereby dismissed.

The third ground relied upon by the applicants is that the judge is guilty of actual bias in his determination of the application for confirmation of the merger. It is the law that a party is entitled to have matters concerning her determined by an impartial decision-maker and a charge of bias alleges that the decision-maker is under the influence of extraneous factors that impede her ability to be impartial in the assessment of the evidence and the arguments in the matter. In the case of adjudicating authorities for the determination of civil rights and obligation, which includes courts in exercise of their civil jurisdiction, the **Constitution, 1992 by Article 19(13)** requires the authority to be independent and impartial. It is as follows;

"(13) An adjudicating authority for the determination of the existence or extent of a civil right or obligation shall, subject to the provisions of this Constitution, be established by law and shall be independent and impartial; and where proceedings for determination are instituted by a person before

such an adjudicating authority, the case shall be given a fair hearing within a reasonable time".

Bias takes different forms as there are many factors that may cause a decision-maker not to be impartial. She may have a pecuniary interest in the subject matter of the enquiry, or she may be related to one party or a witness by family or friendship, or may have dislike for one party or her witness, or may simply have a prejudiced opinion of the issue to be decided. Where an allegation of bias is made before the decision is taken, the decision-maker may be restrained from hearing the matter, but if the allegation is made after the decision has been taken, then if proved, the decision may be set aside by a reviewing court. On allegations of bias against a judge, our courts have insisted that cogent evidence must be led to satisfy the court that there is a real likelihood of bias. Mere suspicion of bias is not sufficient. See the cases of **Attorney-General v Sallah (1970) 2 G&G 487**; **Amadu v Mohammed [2007-2008] SCGLR 58 at 59, Republic v High Court, Denu; Ex parte Agbesi Awusu II (No 2) (Nyonyo Agboada (Sri III) (interested party) [2003-2004] SCGLR 907,** and **Republic v High Court, Kumasi; ex parte Mobil Oil (Ghana) Ltd Hagan (interested party) [2005-2006] SCGLR 312.**

In contemporary common law, bias is now seen in two main forms; 'actual bias' and 'apparent bias', which some decisions describe as 'apprehended bias' or 'imputed bias'. A claim of actual bias requires proof that the decision-maker approached the issues with a closed mind or had prejudged the matter for reasons of either partiality in favour of a party or some other form of prejudice that affected her mind and prevented her from being swayed by the evidence and arguments**.** A claim of apparent bias on the other hand requires a finding that a fair minded and reasonably well informed observer, considering all the circumstances under which the decision-maker took the decision or is hearing the matter, might conclude that the decision-maker did not or would not have an open mind, as the case may be. See the cases of; **Nana Yeboa-Kodie Asare II & 1 or. v Nana Kwaku Addai & 7 ors unreported, RM J7/20/2014, Supreme Court, dated 12/02/2015, Re Medicaments and Related Classes of Goods (No**

2) [2000] EWCA Civ 350 and Imperial Oil Ltd v Quebec (Minister of Environment)(2003), 231 Dominion Law Reports. In **Republic v High Court, Kumasi; ex parte Mobil Oil (Ghana) Ltd Hagan (interested party)(supra),** the court doubted if there is any substantial difference between the test of "real likelihood of bias" which was used in Ghana jurisprudence on bias, and the "real danger" of bias assessed according to what the reasonable observer would conclude, which was referred to in the English decisions of **R v Gough [1993] AC 646** and **Locabail (UK) Ltd v Bayfield Properties Ltd [1999] EWCA Civ 300.** The court however did not consider **Re Medicaments and Related Classes of Goods (No 2)(supra)** which was decided partly on Strasbourg jurisprudence and was considered by Benin, JSC in **Nana Yeboa-Kodie Asare II & 1 or. v Nana Kwaku Addai & 7 (supra).**

Proof of actual bias involves a subjective assessment of the evidence of proof that the mind of the decision-maker was actually influenced by extraneous matters. Proof of actual bias is therefore very difficult so it is rarely pleaded in court proceedings. But proof of apparent bias calls for an objective assessment of the evidence of the circumstances within which the decision-maker took the decision or is hearing the matter, to determine whether a reasonable fair minded and informed observer would consider the decision-maker as capable of being impartial or there is a real danger that she would not be. Therefore, there is a lesser burden of proof for apparent bias. In **Locabail (UK) Ltd v Bayfield Properties Ltd (supra);** the Court of Appeal of England explained this issue in the following terms:

"The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists."

But the applicants in this case chose to plead actual bias so the question is, what evidence have the applicants proffered in proof of actual bias on the part of the High

Court judge. It is that the judge in exercise of his discretion on two objections raised with regard to the use of affidavits, one by the applicants at the hearing of the application for stay of proceedings, another by the interested parties at the hearing of a motion seeking to set aside the order of confirmation. The judge dismissed the objection by the applicants but upheld that by the interested parties. As the proceedings to set aside the order were subsequent to the confirmation, it beats my imagination how that ruling can be used as evidence of bias in the earlier proceedings. By pleading actual bias the applicants assumed an onerous burden to prove that, as a matter of fact, extraneous factors affected the mind of the judge and made him partial in his consideration of the application for confirmation. But they have not offered a scintilla of evidence in that respect. If the fact that a judge has given two rulings on objections in a case against one party alone is accepted as evidence of bias, then no judge minded to administer justice in accordance with law will be qualified to hear any case. The applicants have not made out a case of bias against the High Court judge so this ground too fails.

Finally, the applicants in their affidavit in support of this application allege that the lawyer for the 4th and 5th applicants during the hearing of the motion for stay of proceedings made an oral application for leave to cross-examine on some depositions in the affidavit of the interested parties but the judge did not rule on the oral application. The only proceedings of 25th November, 2019 exhibited herein is "Exhibit JA2" and there is nothing in it that bears out the deposition of the applicants. The High Court is a court of record so it is unsafe to rely on this deposition which is inconsistent with the court's record. If the application were oral as has been alleged it is possible an oral ruling was rendered. Consequently, this ground is misconceived and would be dismissed. See **Republic v High Court, Ex parte; Concord Media Ltd, CMJ5/17/2010. Ruling dated 16th February, 2011.**

In conclusion, on account of the reasons explained above I do not find any merit in the application for certiorari and same is refused.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

DOTSE, JSC:-

I am in receipt of the well considered and incisive ruling authored by my illustrious brother, Pwamang JSC. Even though I agree in substance with his analysis and conclusions reached in the matter, I am of the considered opinion that because of the important legal principles raised in respect of interpretation and company law issues, I should add my concurring opinion to that of my brother, Pwamang JSC notwithstanding the fact that this might lead to the aphorism in Catholicism that the ***"benediction is longer than the mass".***

I wish to begin my Ruling with a quote from the preface to the Invaluable Book of the venerable Jurist and Academician, Justice V.C.R.A.C Crabbe's *"Principles of Legislative Drafting"*, *pages v- vi* where he stated thus:-

> *"It is the responsibility of Parliament to scrutinize the Bills which come before Parliament. The purpose is to ensure that the Bills which become Acts of Parliament espouse the policy of the Government and ultimately take care of good governance.* ***Bills are like razor blades. They are made to sell.***
>
> ***There is also the major audience, the Judiciary, the public servants, the ordinary man of the law, the prudent man of the law****. They too expect that the laws which they have to interpret, the laws which govern them and they have to obey* ***are easy for them to understand. The Judiciary are the masters.*** *They are not a Humpty Dumpty. They are real. They are the audience of last resort.* ***They interpret the Constitution and the law and therefore, in the end, tell us what the Law is-*** *whatever the Constitution says or what Parliament has said. Law, said Oliver Wendell Holmes",* ***"is a statement of the circumstances in which the public force will be brought to bear upon men through the Courts".***

The latter quote is from the decision in American Banana Co. v United Fruit Co 213 Us. 347,358.

In writing this opinion, during the Covid-19 lockdown that has been imposed on Greater Accra and Greater Kumasi areas in Ghana, I have decided to write in a language as the learned Author, Justice Crabbe indicated in his preface referred to supra, that will make sense to the general public, the ordinary people i.e. the man in the Accra-Newtown bus such that everybody will be able to understand.

NATURE OF APPLICATION

This is an application, where the Applicants herein seek an ***order of certiorari to quash the order of the High Court, (Commercial Division) Accra per Asiedu J, (as he then was) dated 25th November 2019, in Suit No CM/MISC/0159/2019 directed to the*** High Court, (Commercial Division) Accra and the Interested Parties herein.

The facts as set out in this narration will as far as possible, be chronologically stated with clarity to make it easy to comprehend.

BRIEF FACTS

The series of events leading to the applicants invoking the Supervisory Jurisdiction of the Supreme Court can be traced to the attempt **by Dannex Limited, Ayrton Drugs Manufacturing Limited and Starwin Products Limited (1st, 2nd and 3rd Interested parties herein) three companies registered under the laws of Ghana**, whose Boards on the 19th December, 2018 recommended **a merger, through a scheme of amalgamation under Section 231 of the Companies Act, 1963 (Act 179) now (Repealed).**

Mirfield Properties Ltd (4th applicant herein) was the majority shareholder of Starwin Products Ltd prior to a rights issue that gave Dannex Limited a shareholding of 71.33% from 2.61% in Starwin Products Ltd. Dissatisfied with the conduct of the rights issue, Mirfield Properties Ltd and Dr Albert G Boohene (4th and 5th applicants herein) mounted a challenge at the Administrative Hearings Commission (AHC) of the Securities and Exchange Commission to the rights issue. Dissatisfied with the outcome at the AHC, they exercised their right of Appeal to the High Court. On June 15 2016, the High Court dismissed the appeal in its entirety and affirmed the decision of the AHC. The 4th and 5th Applicants proceeded to file an Appeal to the Court of Appeal from the decision of the High Court. The Court of Appeal heard the Appeal lodged against the decision and on October 16, 2019 adjourned proceedings for judgment on 22nd January 2020. At the time this current application invoking the Supervisory Jurisdiction of the Supreme Court was heard which was the 10th of March 2020, judgment had not been given in the matter by the Court of Appeal.

Whilst the appeal was pending at the Court of Appeal, the 4th and 5th Applicants brought an application to the High Court seeking an interlocutory injunction pending appeal. On March 23, 2017, this application for injunction was dismissed by the High Court. The Court, presided over by Eric Kyei Baffour J, (as he then was) held dismissing the application for injunction pending appeal as follows:-

> *"Though I am oblivious of the fact that this is not the Court of Appeal,* ***no substantial grounds having been canvassed before the Court by the Applicant for*** *the grant of the Application and the application being bereft of merit, same is dismissed."*

They then brought two applications for interlocutory injunction at the Court of Appeal on two different occasions. First on July 24, 2017 and then May 13, 2019, but both applications were dismissed.

In stating their reasons for the dismissal of the Interlocutory injunction pending appeal on the 24th of July 2017, the Court of Appeal, coram: *Kusi-Appiah, presiding, Aduama-Osei and M. Agyemang (Mrs) JJAs* held as follows:-

> *Having heard rival arguments from Counsel for the parties and taken into account the relative strength of the case put forward by the parties, we are of the view that the majority shareholders and the Board of Directors stand to suffer greater hardship on the balance of convenience if the application is granted.* ***Besides, it is pertinent to note that Starwin Products Ltd. is a going concern and to grant this application will have the effect of tying the hands of the Directors of the Company in the running of the Company.***
>
> *For these reason the Applicant's application for an order of interlocutory injunction pending appeal is hereby dismissed." Emphasis*

It must be noted that, the Applicants therein, as always were the 4th and 5th Applicants herein, whilst the Respondents therein, are the Interested Parties herein.

The Court of Appeal *coram: Honyenuga (presiding) Ackah-Yensu & Agbevor JJA* was yet again called upon to pronounce upon and proffer reasons for their dismissal of the Application for interlocutory injunction pending appeal dated 13th May 2019 in the following terms:-

> "*Upon hearing arguments put forth and against the motion and upon a perusal of the process filed before us it is our candid opinion* ***that greater hardship and inconvenience would be suffered*** *by the Respondents/Respondents/Respondents if the application is granted. Consequently, the application is hereby dismissed. Emphasis.*

The same parties mentioned in the ruling dated 24th July 2017 are the same parties in the ruling referred to supra.

It should thus be noted that, the Applicants were given adequate hearing at all levels of the courts, from the High Court to the appellate courts on a number of occasions referred to supra.

The 4th and 5th Applicants then brought an application to the Supreme Court for Special Leave to Appeal against the decision of the Court of Appeal which was also unsuccessful.

Dannex Limited (1st Interested party) commenced the procedure for merger under Section 231 of Act 179 by obtaining an order on December 10, 2018 to hold an extraordinary general meeting to approve the merger. **The interested parties all held the necessary meetings and passed the necessary special resolutions to merge the three companies. They proceeded to obtain the Fairness Report required under Section 231(2) of the Companies Act, 1963 Act 179 on August 7, 2019.**

I have verified the said special resolutions of all the three Interested Parties (Companies) and found them to be regular on the face of the record.

The 1st Interested Party (Dannex Limited) then brought an application to the High Court for a **confirmation of the scheme of Amalgamation pursuant to Section 231(4) of the Companies Act, 1963 Act 179** without specifically notifying all the members of the company in particular the 1st- 3rd Applicants herein.

This application was thus opposed by the 4th and 5th Applicants by their filing of an application for stay of proceedings. The affidavit of opposition filed by the 1st Interested party appeared to be irregular, but the learned judge waived the irregularity by reason of Order 81 and 20 (8) of the High Court (Civil Procedure) Rules 2004 C.I 47. The High Court presided by Samuel K.A Asiedu J. (as then was) on the 25th of November **2019 proceeded to dismiss the application for stay of proceedings and confirmed a scheme of amalgamation of the three Companies.**

On January 6, 2020, the 1st and 3rd Applicants filed an application invoking the inherent jurisdiction of the High Court for an order setting aside the order confirming the Merger/Amalgamation made on the 25th November 2019 by Asiedu J. (as he then was).

On 14th January 2020 this application was also dismissed by the High Court constituted by the same Judge on the ground that the affidavit had an error, that is, the date it was sworn to "6th December 2020" could not be accurate as it was a long way in the future. The Applicant's however attributed this error as a clerical one by the Commissioner for oaths.

In this latest attempt by the applicants to put a spoke in the wheels of the three companies, they have invoked the Supervisory Jurisdiction of the Supreme Court for an order of Certiorari to quash the decision of the High Court (Commercial Division) Accra per Asiedu J (as he then was) dated 25th November 2019.

The applicants have anchored their application on four grounds:

GROUNDS FOR THE APPLICATION

1. **Lack of Jurisdiction:** the court had no jurisdiction to grant an order for confirmation of the merger/amalgamation upon an application made under the repealed Companies Act 1963, Act 179.
2. **Lack of Jurisdiction:** by reason of the failure to observe the rules of natural justice by not granting a fair hearing to the 1st -3rd Applicants/shareholders of the 3rd interested party by the failure to serve notice on the applicants of the hearing of the application for confirmation of the merger/amalgamation of the 1st-3rd Interested Parties to enable the applicants exercise their right to be heard under section 231(5) of the Companies Act 1963, (Act 179).
3. **Actual bias:** The learned judge admitted a defective affidavit of the 1st interested party but dismissed the application of the 1st -3rd Applicants on the basis of a defective affidavit.

4. **Lack of fair hearing:** The Learned judge refused to rule on an oral application to cross-examine the deponent to the 1st interested party's application for confirmation of merger to counter a patently false deposition misrepresenting the proceedings of the Supreme Court and refused to allow a supplementary affidavit to be filed to counter the false deposition either.

SUMMARY OF LEGAL ARGUMENTS

GROUND 1

LACK OF JURISDICTION

REPEAL OF THE COMPANIES ACT 1963, ACT 179

ARGUMENTS BY THE APPLICANTS

In support of this ground, Learned Counsel for the Applicants, Dennis Armah, submitted that it was evident from the application seeking the order of confirmation that, it was filed under Section 231(4) of the Companies Act, 1963 (Act 179) now repealed. Learned Counsel submitted that, at all material times, Act 179 had been repealed and the Companies Act, 2019 (Act 992) was now in force. As such, the application should have come under Section 384 of the Companies Act, 2019 (Act 992) and not Section 231 (4) of Act 179.

This meant that the Applicants therein could not have properly **invoked the jurisdiction of the court and therefore the subsequent grant of the order for confirmation of the merger by the High Court was a nullity and ought to be set aside. Counsel cited *British Airways v Attorney-General (1996-97) SCGLR 547* in support of his arguments.**

ARGUMENTS BY THE INTERESTED PARTIES

In response, learned counsel for the interested party, Amarkai Amarteifio submitted that all actions from the order to the call for a **meeting of shareholders to approve**

the merger, to the preparation of the fairness report by the Registrar General had all been done under the Companies Act, 1963, Act 179. All that was left to be done was a confirmation of the merger.

As such learned Counsel submitted that, their rights had accrued under the old Act and was therefore saved by section 384(2) of the Companies Act (Act 992) which provides:

> "*Despite the repeal of the Companies Act, 1963 (Act 179), the regulations , by-laws, notices,* ***orders, directions,*** *appointments or* ***any other act lawfully made or done under the repealed enactment*** *and in force immediately before the commencement of this Act, shall be considered to have been made or done under this Act and* ***shall continue to have effect*** *until reviewed, cancelled or terminated." Emphasis*

Learned Counsel for the Interested Parties therefore concluded that, the High Court could therefore grant the confirmation of the merger either on the basis of the saving provision of the new Act or pursuant to its inherent jurisdiction. Counsel further stated that the applicant's arguments are therefore fixed on form rather than on substance.

BASIC PRINCIPLES ON SCOPE OF THE SUPREME COURT'S SUPERVISORY JURISDICTION

This concurring opinion would be guided by the words of Wood JSC (as she then was) in the case of ***Republic v Court of Appeal, ex-parte Tsatsu Tsikata [2005-2006] SCGLR 612***, where she clearly outlined some considerations for the grant of certiorari by this court as follows:

> "*The clear thinking of this court is that, our supervisory jurisdiction under article 132 of the 1992 constitution, should be exercised only in* ***those manifestly plain and obvious cases****, where there are patent errors of law on the face of*

the record, ***which errors either go to jurisdiction*** *or are* ***so plain as to make the impugned decision a complete nullity****. It stands to reason then that the error (s) of law as alleged* ***must be fundamental, substantial, material, grave or so serious as to go to the root of the matter****.* ***A minor, trifling, inconsequential or unimportant error which does not go to the core or root of the decision complained of, or stated differently, on which the decision does not turn would not attract the courts supervisory jurisdiction***". Emphasis

The principle of law so eloquently stated in the locus classicus decision of Wood JSC (as she then was) in the Ex-parte Tastsu Tsikata case referred to supra was indeed a re-statement of earlier principles and or guidelines on the scope of the supervisory jurisdiction of this court which had been stated in several cases by the Supreme Court.

Some of these cases are the following:-

- ***Republic v High Court Accra, Ex-parte Commission on Human rights and Administrative Justice (CHRAJ) (Addo Interested party) [2003 – 2004] 1 SCGLR 312 at 345 – 346.***
- ***Republic v High Court (Land Division) Accra, Ex-parte Al-Hassan Ltd. (Thaddeus Sory, Interested Party) [2011] 1 SCGLR 478 at 487***

Upon the realisation by the Supreme Court that inspite of the clear admonition to practitioners and the general public on the limited scope of the supervisory jurisdiction of the Supreme Court set out in Article 132 of the Constitution 1992, has been abused times without number, the Court took the opportunity to state with emphasis the scope of this jurisdiction in the case of ***Republic v High Court, Commercial Division, Accra; Ex-parte The Trust Bank Limited (Ampomah Photo Lab Ltd and Three Others – Interested Parties) [2009] SCGLR 164 at 170 – 171.***

In this case, the Supreme Court speaking through the illustrious Date-Bah JSC reiterated the scope of this jurisdiction as follows:-

> "*The combined effect of these two authorities, it seems to me is* ***that even where a High Court makes a non-jurisdictional error which is patent on the face of the record, it will not be a ground for exercise of the supervisory jurisdiction of this court, unless the error is fundamental. Only fundamental non-jurisdictional error can found the exercise of the court's jurisdiction.***" *Emphasis*

Despite the decisions referred to supra, the tendency to wilfully abuse the scope of the exercise of this court's supervisory jurisdiction continued with relish. The Supreme Court however has not relented in its attempt to re-state and re-emphasise the essential principles upon which this Court's supervisory jurisdiction will be invoked or directions given in appropriate cases to reflect the scope of Article 132 of the Constitution. See ***Republic v High Court, Accra Ex-parte: Ghana Medical Association (Arcman Akumey – Interested Party),[2012] 2 SCGLR 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] I SCGLR 477***

In these cases, this court reiterated the following as the grounds upon which it will exercise its supervisory jurisdiction:-

1. Want or excess of jurisdiction
2. Where there is an error on the face of the record
3. Failure to comply with the rules of natural justice
4. Breach of the Wednesbury principle

These principles have been re-emphasised times without number in two recent decisions of this court, these are unreported decisions of ***Republic v High Court, (Financial Division 3) Accra, Ex-parte Ms Arch Adwoa Company Limited and 2***

Others, Suit No. J5/32/2019 dated 10th April 2019 and (2) Republic v High Court, Cape-Coast, Ex-parte John Bondzie Sey, (Interested Party – University of Education Winneba) Suit No. CMJ5/74/2019 dated 12th February 2020.

It definitely appears that, the message of the Supreme Court on the limited scope of the courts supervisory jurisdiction has not gone down well as the number of such applications are on the increase and many of them lack substance.

ALTERNATIVE REMEDY PRINCIPLE

In cases like ***Republic v High Court, Accra Ex-parte Tetteh Apain [2007-2008] 1 SCGLR 72 at 75, Barraclough v Brown [1897] AC 615 and Republic v High Court, Accra, Ex-parte (Ohene-Agyapong Interested Party) [2012] 2 SCGLR 1204 at 1205*** the Supreme Court after reviewing the cases listed supra maintained the legal position as follows:-

> ***"Where an applicant has a remedy other than Certiorari open to him or her, this is a factor that may be taken into account in denying the applicant the discretionary remedy of certiorari, even if the other preconditions for the grant of the remedy have been established. The existence of an alternative remedy is one of the factors that a Court can rely on to exercise its judgment against the grant of certiorari."*** *Emphasis*

Let me now apply these principles to the facts of this case which I have eloquently set out supra and distill whether this case meets the threshold for the grant of the application in respect of any of the four grounds of the application set out supra.

The crux of the Applicant's case in this ground one of the application is the complaint against the grant of the process of the merger or amalgamation under the repealed Companies Act, 1963, (Act 179). How is this tenable?

In his invaluable book, ***Understanding Statutes***, published by Cavendish Publishing Ltd. in 1994, ***V.C.R.A.C Crabbe***, the learned distinguished jurist authoritatively stated on the question of Express Repeals of Statutes on pages 140 -141 as follows:-

> *"The provisions of an earlier Act may be revoked or abrogated in particular cases by a subsequent Act,* ***either from the express language used being addressed to the particular point, or from implication or inference from the language used.***" *Emphasis*

The learned Author then explained further, that *"express repeals do not pose problems."*

An Act of Parliament, like what is provided in Section 384 (1) of the Companies Act, 2019 (Act 992) which specifically provides that Act 179 and all the amendments therein contained are repealed, have specific legislative and interpretative principles to govern such situations.

After reviewing situations where the repeal of legislation is express as happened with the repeal of Act 179, the learned author referred to guidelines stated by Fletcher Moulton LJ, in respect of the Copyright Act of 1842 in the case of ***Macmillan v Dent [1907] 1 ch. 107 at, 124.***

Justice Crabbe, then listed the following as guidelines or a "To do list" in the cases of Express Repeals of Acts of Parliament. These are

1. **"by means of a schedule which would specify the enactments to be repealed and the extent of the repeal."-** In the instant situation, the entire Act 179 and all the amendments made thereunder were specifically stated as having been repealed but there were some saving provisions in Sections 384 (2) & (3) of Act 992.
2. **"by "Statute Law Revision",** in which exercise, any doubts about inconsistency of enactments are dealt with.

3. **"by consolidation, where the enactments incorporated in the consolidation are specifically repealed."**
4. **"by codification, in which like consolidation, the enactments incorporated in the codification are specifically repealed."**

EFFECT OF REPEAL

The effect of a repeal is that, the enactment repealed is completely obliterated as if it had never been enacted.

The learned author then stated on pages 140-141 of his book as follows:-

> *"Now Interpretation Acts provide that, unless a contrary intention is expressed, the repeal of an Act of Parliament does not*
>
> a. *revive an enactment or anything not in force or existing at the time when the repeal takes effect;*
> b. *affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder;*
> c. *affect a right, a privilege, an obligation or a liability acquired, accrued, accruing or incurred under the enactment so repealed;*
> d. *affect an offence committed against or a violation of a provision of the enactment so repealed, or a penalty, a forfeiture or a punishment incurred under the enactment so repealed; or*
> e. *affect an investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment, and an investigation, legal proceeding or remedy as described in paragraph (e) may be instituted, continued or enforced, and the penalty, forfeiture or punishment may be imposed as if the enactment had not been so repealed.*
>
> *There is also a presumption – **the principle of implied repeal –**that where two Acts are inconsistent with each other the latter is construed as having repealed the earlier Act by necessary implications. See case of*

Paine v Slater (1883) 11 QBD 120*. The later Act is the latest expression of the will of Parliament and the latest will prevails."*

See also the cases of ***White v Islington Corporation [1909] 1 KB 133, Ellen Estates v Minister of Health [1934] 1 KB 590, British Columbia Electric Ry v Stewart [1913] AC 816***

It is interesting to observe that all the exceptions provided under section 34 of the Interpretation Act, 2009 (Act 792) is a verbatim insertion of what the author had listed on page 141 of His invaluable Book, already referred to supra and which was published in 1994.

It is appropriate at this stage to consider the specific legislations in Section 384 (1) & (2) of Act 992 and Sections 32 and 34 of Act 792.

Section 384 (1) of Act 992 effectively repealed Act 179 from the date it came in to force, that is, August 2, 2019. The repealing section provides as follows:

"***Repeals and Savings***
Section 384 (1)
(1) The Companies Act, 1963 (Act 179) as amended by
(a) The Companies (Amendment) Act, 1994 (Act 474)
(b) The Companies (Amendment) Act, 1997 (Act 531)
(c) The Companies (Amendment) Act, 2012 (Act 835), and
(d) The Companies (Amendment) Act, 2016 (Act 920)
are hereby repealed*."*

By the above provisions the Companies Act, Act 179 and its amendments had ceased to have effect. The effect of the repeal is provided for by Section 32 of the Interpretation Act, 2009 (Act 792***)*** which states:

"***Cessation of operation of enactments***

Where in an enactment it is declared that the whole or a part of any other enactment is to cease to have effect, that other enactment shall be deemed to have been repealed to the extent to which it is so declared to cease to have effect."

The import of this provision has been succinctly stated in the case of ***Nii Kpobi Tettey Tsuru vs. Attorney General (2010) SCGLR 904*** where Atuguba JSC citing Dr. S.Y Bimpong-Buta's invaluable book on "*The Law of Interpretation in Ghana"*, stated thus:

*"The effect of a repeal is succinctly stated by Dr. S.Y Bimpong-Buta in his classic work, The Law of Interpretation in Ghana, at p.171 as follows: "**The general common Law rule is: when an Act is repealed or expires, lapses or otherwise ceases to have effect, it is regarded, in the absence of a contrary provision, as having never existed except as to past and closed matters or transactions**."*

Once an enactment ceases to have effect, as a general rule all other things that derive some power or authority from that repealed enactment would effectively be extinguished. As such, where an enactment conferring jurisdiction on the High Court has ceased to have effect and is to be regarded as having never existed except as to past and closed matters or transactions, can such a repealed enactment confer jurisdiction on the High Court? The obvious answer is no. However, this position of the law is subject to certain exceptions.

EXCEPTIONS TO THE GENERAL RULE

The law maker cognizant of the harshness of such a position has created exceptions. As indicated supra, these exceptions in the Interpretation Act are the same as quotations from Justice Crabbe's book referred to supra. The exceptions can be found at ***Section 34*** of the ***Interpretation Act, 2009 (Act 792)***:

*"34. **Effect of repeal***

(1) Where an enactment repeals or revokes an enactment, the repeal or revocation shall not, except as in this section otherwise provided,

(a) revive an enactment or a thing not in force or existing at the time at which the repeal or revocation takes effect;

*(b**) **affect the previous operation of the enactment that is repealed or revoked, or anything duly done or suffered under the enactment**;*

*(c) **affect a right, a privilege, an obligation or a liability acquired, accrued or incurred under the enactment that is repealed or revoked**;*

(d) affect an offence committed against the enactment that is repealed or revoked, or a penalty or a forfeiture or a punishment incurred in respect of that offence; or

*(e) affect an investigation**, a legal proceeding** or **a remedy in respect of a right, a privilege, an obligation,** a liability, a penalty, a forfeiture or a punishment;*

*and the investigation, **legal proceeding or remedy may be instituted, continued or enforced, and the penalty, forfeiture or punishment may be imposed, as if the enactment had not been repealed or revoked**.*

*(2) Subsection (1**)** does not authorise the continuance in force after the repeal or revocation of an enactment or of an instrument made under that enactment.*

(3) Where an enactment expires, lapses or otherwise ceases to have effect, this section shall apply as if that enactment had then been repealed or revoked.

*(4) **The inclusion in the repealing provisions of an enactment of an express saving with respect to the repeals affected by the inclusion does not prejudice the operation of this section with respect to the effect of those repeals**."*

The resultant effect of the provisions quoted above (*in particular the portions emphasized*) as is relevant to the facts of this case is that, where rights have accrued or

legal proceedings have commenced under the repealed enactment such acts till their completion would be deemed to be continued under the new Act. This reasoning is further supported by the presence of the saving provision at ***Section 384(2)*** of ***Act 992*** which states that:

> "Despite *the repeal of the Companies Act, 1963 (Act 179), the regulations , by-laws, notices, orders, directions, appointments or* ***any other act lawfully made or done under the repealed enactment and in force immediately before the commencement of this Act, shall be considered to have been made or done under this Act and shall continue to have effect until reviewed, cancelled or terminated. Emphasis***

In further support of the above legal principle, the Supreme Court in ***Nii Kpobi Tettey Tsuru vs. Attorney General*** supra stated per Atuguba JSC that:

> ***"if a statute creates rights and obligations and such rights and obligations have actually materialized as per the provisions of the said statute, they remain good and enforceable even after the repeal of the statute in question."***

Also, the full bench of the Court of Appeal in the case of ***Spokesman (publications Ltd.) vs. Attorney General, [1974]1 GLR 88 at 89*** when confronted with accrued right under a repealed enactment held thus:

> "***A change in the existing law does not as a rule, affect accrued rights, unless there are plain words to the contrary in the enactment effecting the change***".

Considering the above positions of the applicable laws, it is my opinion that the High Court had jurisdiction to hear the application for confirmation of the merger even though it was made under the repealed law.

The facts indicate that on December 10, 2018 the High Court per Asiedu J gave an order for an Extraordinary General Meeting to be held by the three companies to pass the necessary resolutions to confirm the merger. This was the commencement of the procedure under Section 231(1) of Act 179 which provides that:

"*231.* ***Arrangement or amalgamation with Court approval***

(1) Where an arrangement or amalgamation is proposed, whether or not involving a compromise between a company and its creditors or members or any class or classes of them, ***the Court, on the summary application of the company or a member or creditor of the company or, in the case of a company being wound up, of the liquidator, may order that meetings of the various classes of members and creditors concerned be summoned in the manner that the Court directs*** *or that a postal ballot be taken of the various classes in the manner provided by subsections (7), (8), (9) and (10) of section 170*."

This was the first step that was taken by the 1st interested party, who was the applicant before the High Court. The interested parties called for the meetings and obtained the necessary votes to pass the resolution for the merger. Once this was done the next step was to obtain a fairness report as provided for by section 231(2) of Act 179 which states that

> "*If a three-fourths majority of each class of members concerned and a majority in number representing three-fourths in value of each class of creditors concerned approves the arrangement or amalgamation the approval shall be* ***referred to the Registrar who shall appoint one or more competent reporters to investigate the fairness of the arrangement or amalgamation and to report on the arrangement or amalgamation to the Court****" emphasis*

This fairness report was completed on the 7th of August 2019 as can be found in the record. The next step was the confirmation, the subject of this current application, as provided for by Section 231(4) of Act 179 which states that:

> "If the Court, ***after considering the report, makes an order confirming the arrangement or amalgamation, with or without modifications, the arrangement or amalgamation as confirmed is binding on the company and on all members and creditors of the company and its validity shall not subsequently be impeachable in any proceedings***."

Bearing in mind the effect of the repeal of Act 179 by Act 992 and the principles of law on interpretation referred to supra as well as provisions contained in the Interpretation Act 792 and Section 384 (2) of Act 992, the Applicants position is untenable.

From the foregoing it is evident that the processes that led to the application for confirmation before the High Court had long commenced before the repeal of Act 179. The rights of the parties had accrued and also legal proceedings were clearly on going in respect of the merger.

It must also be emphasized clearly that, from the principles of interpretation of statutes dealt with supra in respected legal texts, statutes as well as case law, it is apparent that, a repealed statute does not lose all of its effect and operating provisions simply because a new statute had been enacted. General principles of interpretation as well as the effects of relevant provisions in the Interpretation Act must all be considered and read together to give a wholistic application and meaning to the situation. When this is done, it becomes evident that the High Court had jurisdiction to hear the application for the confirmation albeit under a repealed enactment.

BRITISH AIRWAYS CASE

A key point that needs to be addressed is the applicants citing of the case of ***British Airways v Attorney-General (1996-97) SCGLR 547*** in support of his arguments that the High Court lacked Jurisdiction to hear the application under a repealed enactment***.***

This point could have been summarily dealt with, but for purposes of guidance I will spend some time on it.

The British Airways case can be distinguished from the present one on two main grounds, Firstly, it was in respect of a criminal matter and secondly: there was no saving provision to save the proceedings in that case. The latter point is relevant, because in this present case there is a saving provision. I will refer to the relevant part of the ruling of Bamford-Addo JSC. She stated as follows in the case thus:-

> "*Under section 8(1)(e) of CA 4, once an individual has committed an offence under a law, the subsequent repeal of that law would not bar investigation and prosecution of the offence under that repealed law. But then the repealing law may either repeal entirely the law creating the offence together with the punishment, or the repealing law itself or any other enactment may save the offence and the punishment. The former situation will result in leaving no existing law to support the offence and the punishment.* ***Whereas the latter situation will result in saving the enactment constituting the law, to justify continued investigation and prosecution of the offence. In other words, in the latter situation, the saving law will be a written law within the context of the article 19(11) formulation to satisfy the requirement in that formulation. Whereas the former situation is caught by the prohibition in the article 19(11) formulation since there is no saving law to justify the continued investigation and prosecution of the offence****."*

In the British Airways case, the repealed enactment ceased to exist and legal proceedings could not continue because no saving provision was placed in the new enactment. The court continued and stated thus:

> "*There is no doubt that this criminal trial had not concluded.* ***And Act 516 which is stated to be "an Act to repeal certain statutes that are no longer applicable or have become spent" repealed the entire PNDCL 150, without saving either the offence nor the punishment for it****.* ***Neither is there any other legislation re-enacting the offence and punishment in PNDCL 150.*** *The position, therefore, is that as from 13 September 1996 when Act 516 received Gazette notification, the offence the*

plaintiffs were facing at the Circuit Tribunal, Accra ***ceased to be defined and the punishment thereof equally ceased to be prescribed in any written law.*** *The continued prosecution of the plaintiffs for the said offence will therefore be inconsistent with article 19(11) of the Constitution, 1992 and same can therefore not be legally permitted*". Emphasis

It is perhaps necessary at this stage to refer to Article 19 (11) of the Constitution 1992 which provides as follows"-

> ***"No person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law." Emphasis***

Based on the above constitutional provision, it would have been futile for the Plaintiffs in the British Airways case to have been permitted or allowed to go through the trial because they could neither have been convicted nor punished by way of exacting sentences or fines.

It would also have been a shameless abdication of the Court's duty if the Supreme Court had permitted the trial to go on, because to have done so would have meant the Courts had put their stamp on illegality which if not stopped would have resulted in the interference with the breach of the rights to civil liberty of the plaintiffs in the British Airways case as enshrined in the Constitution 1992 referred to supra.

Finally, it should be noted that but for the decision which the Supreme Court rendered in the British Airways case, it would have meant that the accused would have been prosecuted for an offence which did not exist any longer.

It is for the above and other reasons stated by my brother Pwamang JSC, that the reference and reliance by the Applicants on the British Airways case does not apply and is thus distinguished.

CONCLUSION OF GROUND ONE (1)

Having taken into consideration the principles of law enunciated by the Supreme Court in the Ex-parte Tsatsu Tsikata line of cases already referred to supra, it is thus clear that there has been no error of law apparent on the face of the decision of the High Court, Accra dated 25th November 2019, which is so fundamental and substantial as to have affected the exercise of jurisdiction by the High Court.

From my analysis of the legal principles necessary for the invocation of this courts supervisory jurisdiction and or directions pursuant to Article 132 of the Constitution 1992, it is patent that the applicants have misconstrued the scope of the Court's jurisdiction and once the threshold stated in the decided cases referred to supra has not been met, it must suffer a dismissal.

It must also be emphasised here and now that, where there is an alternative effective remedy other than Certiorari, the Applicants might be better placed to avail themselves of that remedy, bearing in mind the discretionary nature of the order of Certiorari.

The court will therefore as in the instant case deny the Applicants of their remedy because there are other effective alternative remedies available to them.

Finally, the reference and reliance on the British Airways case has not been properly made out. Same is accordingly distinguished supra and for this and other reasons stated above, the application fails on this ground one (1).

SUMMARY DISPOSAL OF GROUND TWO (2)

On Ground two of this application, I agree with the summary of legal arguments as well as the analysis of the issues raised and the conclusions reached by my brother Pwamang JSC under Ground 2 of the application herein, "***that the applicants have not made out the second ground of their application on breach of the rules of natural justice i.e. the right to be heard.***"

This ground is thus dismissed.

GROUND THREE (3)

ACTUAL BIAS

EXERCISE OF DISCRETION IN REJECTION AND ACCEPTANCE OF DEFECTIVE AFFIDAVITS

ARGUMENTS OF LAW BY LEARNED COUNSEL ON GROUND THREE (3)

Applicants

Learned Counsel for the Applicants submitted that, the learned judge at the hearing of the application for confirmation of the merger, dismissed a preliminary objection raised by the counsel for the 4th and 5th applicants. The objection was the lack of exhibition and stamping of the documents attached to the affidavit in opposition to the application for stay of proceedings on the basis of Order 20(14) of the High Court (Civil Procedure) Rules C.I 47. The learned judge suo motu invoked Order 81 and Order 20 r (8) of C.I 47 to cure the defect raised.

However, on January 14, 2020 when the 1st -3rd applicants brought an application to set aside the order of confirmation of the merger, the learned judge dismissed the whole application on the basis of a clerical error by the Commissioner for oaths in dating the affidavit.

Counsel further submitted that the same judge had waived irregularities in one instance and refused to do so in another. According to counsel, such uneven handed application of the law and discretion of the court without any reason constitutes a manifest bias.

Interested Parties

Learned Counsel for the Interested Parties submitted that the defects in respect of the two affidavits in question were different in that, in the case of the first affidavit, the issue was that the certificate of the Commissioner for Oaths did not appear on the Exhibits. Otherwise, the affidavit itself was regular and competent. It was the Exhibits annexed to the Affidavits which was alleged to have a defect. If the exhibits were found

to have a defect, the Affidavit would remain valid. Also, the defect was only in respect of the copy of the Affidavit served on the 4rd and 5th Applicants. The other copies had the Certificate.

In the second affidavit, the error was that the affidavit was dated 6th December 2020. The correct date could have been either 6th December 2019 or 6th January 2020. The defect however was in respect of the affidavit itself and not the exhibits like in the first affidavit. The Court found the defect to be fundamental in the sense that it related to the competence of the entire application.

Learned Counsel for the Interested Parties, submitted that, the court therefore rightly exercised its discretion in the two scenarios and this cannot be said to have amounted to actual bias on the part of the learned trial Judge

GROUND FOUR (4)

LACK OF FAIR HEARING

REFUSAL TO GRANT LEAVE TO CROSS-EXAMINE ON DEPOSITIONS IN A DEFECTIVE AFFIDAVIT

ARGUMENTS OF LAW BY LEARNED COUNSEL FOR THE PARTIES

Applicants

Learned Counsel for the Applicants submitted that at the application for Stay of proceedings, counsel sought leave to cross-examine or for an adjournment to file a supplementary affidavit to prove a false and/or a misleading averment made in the affidavit in opposition. Particularly, paragraph 13 of Exhibit JA 6 where it was stated that the **Supreme Court had dismissed a previous application of the 4th and 5th Applicants.** The learned judge refused to rule on the submission and simply asked

counsel to proceed with the substantive application. This refusal to rule without any reason amounts to a denial of natural justice.

Counsel cited the case ***of Kojach Ltd v Multichoice Ghana Ltd [2013-2014] 2 SCGLR 1494*** in support of his argument.

Interested Party

Counsel submitted that this ground of appeal is confusing in that, the applicants indicate that they were refused the opportunity to cross-examine **the deponent to the 1st Interested Party's application for a confirmation of the Merger.**

The Affidavit annexed to the application for a Confirmation was an affidavit in support.

However, in the Statement of Case, the Applicants submit that they were denied leave to cross-examine the deponent to the affidavit in Opposition to the Motion for Stay of Proceedings. The Applicant may not depart from the ground which the applicants themselves have put forth. On this basis, the ground must fail.

Counsel submitted further that the applicants by their own submission sought leave to cross examine. No evidence of the application to cross-examine is produced. However, by admitting that leave was sought, the Applicants impliedly admit that the grant of the leave or otherwise is a question of discretion. A court will determine whether or not leave should be granted as a matter of discretion.

Furthermore, where a court is of the view that cross examination will not aid in the resolution of issues or may occasion unnecessary delay, the Court may refuse to grant leave. In the instant matter, the issue for which the 3rd and 4th Applicants wanted to cross examine the deponent was that it was deposed that **the application to the Supreme Court was refused as against struck out as withdrawn.** Whether or not it was struck out or refused, the end result is that it was not granted. The issue was not germane to the matters for resolution by the High Court.

Learned Counsel for the Interested Parties submitted that, it was for these reasons that leave was not granted. If the Applicants were dissatisfied with the exercise of discretion, their remedy was to appeal against the decision not to seek a certiorari.

ANALYSIS OF GROUNDS THREE (3) AND FOUR (4)

The locus classicus on the issue of bias, or real likelihood of bias has been adequately dealt with in the Supreme Court decision ***of Republic v High Court, Denu Ex-parte Agbesi Awusu II (No.2) (Nyonyo Agboada Sri III) Interested Party [2003-2004] 2 SCGLR 907.***

As a matter of practice, the Courts would not go beyond the confines or parameters of a case in their bid to discover whether in a particular case there has been bias or real likelihood of bias. In instances where allegations of bias have been levelled against a Judge or an adjudicator, the inferences in support of proof of this bias will be based on the surrounding circumstances of the case. **This therefore meant that the determination of this was a question of fact to be determined by the court on a case by case basis.**

In the unreported decision of this court in the case of ***Republic v High Court, (Financial Division 3) Accra, Ex-Parte Ms Arch Adwoa Company Limited, Auditor-General & Anr – Interested Parties, this Court deriving principles of law from the Ex-Parte Nyonyo Agboada Sri III case supra and Sasu v Amua Sekyi [1987-88] 2 GLR 221 at 225*** held whilst dismissing the application for prohibition on allegations of bias against the learned Trial Judge as follows:-

> "*To disqualify a Judge the ground of the objection had to be supported by cogent and convincing evidence. A mere or reasonable suspicion of bias was not enough, the law recognised not only actual bias,* ***but also that interest other than direct pecuniary or proprietary nature which gave rise to a real likelihood of bias. The fact of the trial Judge serially giving Rulings***

against the Applicant by itself does not qualify to disqualify the Judge on the basis of real likelihood of bias which is the standard test in this jurisdiction." *Emphasis*

An objection by learned counsel for the 4th and 5th applicants during the hearing of the confirmation of the merger application, on the basis that the exhibits had not been properly stamped and marked contrary to Order 20 r. 14 of the High Court (Civil Procedure) Rules 2004, C. I. 47 was dismissed by the learned Trial Judge. The Applicants objected to the different considerations of their objections and those raised by the Interested Parties.

Assuming without admitting that the learned Judge was wrong in exercising his discretion in the use of Order 81 and Order 20 r (8) to cure the defect by the non-compliance to the said Rule of Procedure referred to supra, the proper cause of action should have been an appeal and not an application to quash the decision by Certiorari on grounds of bias.

It must also be noted that, there have been times without number, when documents which have been presented for filing have some of them stamped with this or that stamp and or mark whilst some of them have not. The important thing for the court to determine is whether there is indeed a receipt indicating whether the documents have been duly sworn, filed, stamped and are on the files of the court and other counsel in the matter. I think judicial notice can be taken of this phenomenon and the way it has been addressed sometimes in this court. This definitely does not require a Certiorari application to resolve the issue.

Be as it may, once serious arguments on the lack of improper exercise of discretion by the learned trial Judge have been made by learned counsel for the parties, some effort should be made to deal with same in the following brief remarks.

The discussions supra, in respect of grounds 3 and 4 of the Certiorari application, bring into question the Learned Judge's exercise of discretion. In the case of ***The Republic***

vrs High Court, (Land Division, Court 2), Accra Ex-Parte: Al-Hassan Limited (Thaddeus Sory – (Interested ***Party) [2011] 1 SCGLR 478 at 485*** Adinyira JSC stated

> *"On the face of the ruling complained of, it is clear that both parties were heard on the issue as to whether or not the supplementary affidavit filed on behalf of the Applicant could be admitted as part of the process for determining the motion for Interlocutory injunction. In our opinion the High Court judge having heard both parties beforehand acted fairly and within jurisdiction to determine the issue.* ***It was a matter entirely within his discretion as required under Order 25 of the High Court (Civil Procedure) Rules, 2004, (C.I. 47) relating to the grant of Interlocutory injunction****. The learned judge may well be wrong in the decision made, but the avenue of remedy open to the applicant in such circumstances is not by way of certiorari.* ***A complaint that there has been an improper exercise of the discretionary jurisdiction is insufficient. A charge that a court has improperly misconceived a point of law or misdirected itself cannot per se constitute sufficient ground for the grant of certiorari in the absence of any jurisdictional error on the face of the record." Emphasis***

This principle also applies in appeals. It is a settled principle of law that an appellate court will only intervene in the court below in the exercise of discretion in limited circumstances. In the case ***Owusu v Owusu-Ansah [2007-2008] 2 SCGLR 870*** the court stated that

> "***an appeal against the exercise of the court's discretion may succeed on the ground that the discretion was exercised on wrong or inadequate materials if it can be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take relevant matters into account.***"

This principle has also been stated in ***Crenstil v Crenstil [1962] IGLR 171 SC*** which relied *on* ***Blunt v Blunt [1948] AC 517, HL.***

It is therefore my respectful opinion that the Applicants in their submissions have not shown sufficient reasons why this Honourable Court should temper with the discretion of the learned Justice of the High Court. The reasons canvassed are simply that they are dissatisfied with the courts exercise of discretion. As stated in the Thaddeus Sory case supra the remedy for such a grievance is a not certiorari. The proper remedy is an appeal.

With respect to ground 4, before a judge can order that a deponent should be cross examined on the facts contained in the affidavit, the judge must be sure that the said affidavit is indeed relevant to the determination of the issues before the court. In an action for stay of proceedings whether or not the Supreme Court refused the application as against struck out as withdrawn is irrelevant. The end result was that the application was not granted. The Applicant on this ground has not advanced any arguments based on the authorities cited why this discretion was wrongly exercised.

Whilst I agree in substance with the summary nature in which my respected brother Pwamang JSC dealt with the resolution of this ground 4, let me however deliver a lethal blow to the said ground.

What is of crucial importance is that, before the court grants leave to counsel to cross-examine a deponent on the depositions contained in an affidavit, he must find such an exercise very relevant to the determination of the crucial issues. In my estimation however, whether the Supreme Court struck out the application or dismissed it, the value is the same, in the sense that, the said application was not granted at that material instance by the court. No practical use and benefits would be achieved for the application for cross-examination of the deponent to be granted.

On the issue of relevance and proper exercise of discretion in resolving an issue germane to the resolution of the issues in dispute, the learned trial Judge exercised proper discretion in not re-opening the matter as it would have been futile to do so.

CONCLUSION

In the premises, I am unable to accede to the request of the applicants, to grant the instant application to quash the decision of the High Court, Accra dated 25th November 2019 by Certiorari.

The application is therefore dismissed on all the four grounds urged before us.

EPILOGUE

In order to stem the surge in the number of cases that are filed in this court invoking our supervisory jurisdiction pursuant to Article 132 of the Constitution 1992, there is the urgent need for the Court to come out with a criteria i.e., a threshold (roadmap) which must be met , before the application is considered on the merits. Failure to satisfy these guidelines must result into summary dismissal.

The time has come for the Rules of Court to urgently consider enacting Rules of Procedure to stem this tide.

V. J. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

A. M. A DORDZIE (MRS)
(JUSTICE OF THE SUPREME COURT)

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KWESI AUSTIN FOR 1ST, 2ND AND 3RD INTERESTED PARTIES.