



JUDICIAL REVIEW GETS A SHOT IN THE ARM IN EX PARTE HODA HOLDINGS LTD.

By

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Introduction

A regular feature of every practicing lawyer's life is the relentless reading of cases that have been decided by the courts. Favourite cases, in order of ascending hierarchy, are those from the High Court, Court of Appeal and the Supreme Court (collectively known as the Superior Courts of Judicature). There is nothing more fulfilling and pleasurable than reading a well-reasoned decision of a court. Regardless of the level of the court in which the decision was given, it is always a delight to savour a sweet decision. Some judgments evoke awe and admiration. Some judgments induce laughter and embarrassment. And some judgments provoke anger and annoyance. It is a joy to read a judgment or ruling that is well-thought through, researched and presented. One such judgment is the Court of Appeal's recent decision in *Ex parte Hoda Holdings Ltd.* This article discusses the decision in *Ex parte Hoda Holdings Ltd* and posits that, the decision is the latest refreshing 'treatise' on the concept of judicial review in Ghana.

Different shades of court decisions

Within the space of one week, three decisions of the Superior Courts I have read have made profound but varying impressions on me. Two out of those three decisions won my admiration. They were well-written, properly analyzed and reached clear conclusions based on the law as I understand it. One of the decisions was given by the Court of Appeal, which I intend to discuss shortly.¹ The other was a High Court decision - *Republic v Godwin Osei & Another; Ex parte Nene Narh Matti III & Another* - in which the judge showed class and industry in a 33 - page, single-spaced ruling that ended with the committal of two persons into prison for contempt of court.² The judge discussed the rules and virtually all relevant court decisions on contempt of court in Ghana. Since the allegation of contempt was in relation to a land case, the judge made forays into land law, as well as a previous Supreme Court case between the parties, before reaching his conclusion. In both the Court of Appeal and High Court cases, the depth of the learned Justices' analyses of the facts and the applicable law, and reference to relevant legal authorities reflected the hard work that was invested in the adjudicatory process.

The third decision was a ruling in a High Court case known as *Springfield Exploration & Production Ltd v ENI Ghana Exploration & Production Ltd & Another*³ that left me in a trance for several minutes. It was a ruling in an application for interlocutory injunction. The judge stated that the grounds for the application were in the applicant's affidavit in support and so,

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- 1 Republic v Bank of Ghana; *Ex parte Hoda Holdings Ltd* Civil Appeal No. H1/194/2021, Judgment dated 7th July, 2022, CA (Coram: Suurbaareh, Wood and Bartels-Kodwo, JJA) (unreported)
 - 2 Suit No. D 16/100/2021 Ruling dated 14th July, 2022, HC, (Commercial Division) (Coram: Nana Yaw Gyamfi Frimpong, J.) (unreported)
 - 3 Suit No. CM/BDC/0924/2020, Ruling dated 15th July, 2022, HC (Commercial Division) (Coram: Mariama Sammo, J.) (Unreported). The ruling is available at <https://www.ghanaweb.com/GhanaHomePage/business/Commercial-Court-restrains-GNPC-MoE-from-making-further-gas-payments-to-ENI-Vitol-1586525>

she “need not reproduce nor paraphrase them”. Even the basic principle of judicial notice took on a new meaning when Her Ladyship stated that the court had taken judicial notice of the facts in previous proceedings in the court. So, apart from the Judge, and perhaps, the applicant itself, no one knows the facts that gave rise to the application for interlocutory injunction. The respondents’ lawyers appeared on record but not a word was said about their response to the facts-less application. Lastly and most impressionably, the injunction orders made by the court were against Ghana National Petroleum Corporation (GNPC), Ministry of Energy and Ministry of Finance. These entities were not parties in the case and there is no indication that they were parties to the application for interlocutory injunction. But they have been ordered by the court to stop making Government of Ghana’s payments under its agreements with the defendant companies. Judgment debt is in the air?

The concept of judicial review and the courts’ supervisory role over administrative and regulatory bodies

In every democracy worth its salt such as Ghana, there are several administrative institutions and bodies that help in the general running of the State. In the course of carrying out their duties, these administrative bodies take decisions and exercise their discretion in many areas so as to assure ease of governance. In undertaking such duties, the administrative bodies need to be checked and supervised, as it were, to ensure that they operate within the confines of the power given to them by law. State institutions usually exercise public law rights that are given to them under laws passed to regulate their activities.

The doctrine that mandates that state institutions must act within their power is known as the ‘*ultra vires*’ doctrine. Principles of law such as the rules of natural justice and the maxim, *delegatus non potest delegare*⁴ are aspects of the ultra vires doctrine. The role of the supervisor in that regard is entrusted to the courts to keep a fair balance between the citizens and the state institutions and bodies and the administrative functions they exercise. This is the concept known as judicial review of administrative action.

Under the Constitution, the High Court supervises all lower courts and any lower adjudicating authority and state institutions and regulatory bodies. The High Court can issue orders and directions for the purpose of enforcing or securing the enforcement of its

4 The rule that a person to whom a power, trust, or authority is given to act on behalf, or for the benefit of, another, cannot delegate this obligation unless expressly authorized to do so. For instance, an auditor who has been appointed to audit the accounts of a company cannot delegate the task to another unless expressly allowed to do so. If express authorization has not been granted the auditor will have acted ultra vires. Source: <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095708380>. Ultra vires means “beyond the powers.” It describes actions taken by government bodies or corporations that exceed the scope of power given to them by laws or corporate charters. Source: https://www.law.cornell.edu/wex/ultra_vires

supervisory powers.⁵ A person who is dissatisfied or unhappy with any decision taken by a state institution, regulatory body or administrative tribunal has the constitutional right to make an application to the High Court to seek redress. The High Court can issue orders such as habeas corpus, certiorari, mandamus, prohibition and quo warranto to address wrong administrative decisions by state or government institutions, agencies, regulators, panels and tribunals. Persons who are aggrieved can appeal up to the Supreme Court.

Bank of Ghana revokes Unicredit's license: The High Court case

The Facts: Hoda Holdings Ltd is the company that owns Unicredit Ghana Limited, a registered savings and loans company licensed by Bank of Ghana. On 16th August, 2019, Bank of Ghana issued a notice declaring that Unicredit Ghana Limited (simply called 'Unicredit') was insolvent. Bank of Ghana revoked Unicredit's license to operate as a Specialised Deposit Taking Institution. About 22 other financial institutions were affected; they were declared insolvent and their licenses were revoked.⁶ Hoda Holdings Ltd, as the owner of Unicredit, were not happy with the action taken by Bank of Ghana. Since Bank of Ghana is a public regulatory institution, Hoda Holdings Ltd filed an application for judicial review at the High Court (Human Rights Division) against Bank of Ghana for revoking Unicredit's license. The High Court was being called upon to exercise its power of judicial review to review the decision that was taken by Bank of Ghana to revoke Unicredit's license. (Excuse the pun, please.)

The grounds for the application: Hoda Holdings Ltd stated that, Bank of Ghana was wrong in revoking its license in the manner it did. The company stated that, Bank of Ghana did not invite the company's Board of Directors and shareholders to hear their side of the story before revoking the license and announcing it to the public without their knowledge. The company argued that the actions of Bank of Ghana were in breach of the rules of natural justice, and, therefore, unlawful.

The reliefs sought: Hoda Holdings Ltd requested the High Court to issue an order of certiorari to quash the notice issued by Bank of Ghana to revoke Unicredit's license. It also asked the court to issue an injunction against Bank of Ghana and its privies and refer the issues about the license revocation to arbitration as provided under the law.

The High Court's decision: The High Court ruled that, it found nothing wrong with the way Bank of Ghana revoked Unicredit's license.

5 Article 141 of the 1992 Constitution. Article 162 (3) of the Constitution provides that "supervisory jurisdiction" includes jurisdiction to issue writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto. The Supreme Court also exercises supervisory jurisdiction under Article 132 of the Constitution. See also: Section 16 of the Courts Act, 1993 (Act 459). For more background on judicial review, see: Richard B. Turkson, "Prerogative writs: An appraisal" [1983-86] VOL. XV RGL 87

6 Bank of Ghana announced that the revocation of Unicredit's license was done under Section 123 of the Bank and Specialised Deposit Taking Institutions Act, 2016 (Act 930). It will be recalled that Bank of Ghana declared insolvent and revoked the licenses of 23 institutions by a notice dated 16th August, 2019 and titled "NOTICE OF REVOCATION OF LICENCES OF INSOLVENT SAVINGS AND LOANS COMPANIES AND FINANCE HOUSES, AND APPOINTMENT OF A RECEIVER Accra, Ghana. Unicredit Ghana Limited, a company owned by Hoda Holdings Ltd, was one of the affected institutions.

The Court of Appeal's decision in *Ex parte Hoda Holdings Ltd*

Hoda Holdings Ltd was not satisfied with the High Court's decision so it filed an appeal against the decision at the Court of Appeal.

The grounds of appeal: Hoda Holdings Ltd appealed against the High Court's decision on three grounds. The first ground of appeal was that, the High Court was wrong in ruling that Bank of Ghana had the power to revoke Unicredit's license under Section 123 of Act 930 instead of Section 16 of the Act, and failing to give the company a hearing. Secondly, the High Court was wrong in saying that, Unicredit was undercapitalized when no evidence to such effect was placed before the court. The third ground of appeal filed by Hoda Holdings Ltd was that, the High Court was wrong in stating that Bank of Ghana was at liberty to impose any punishment, including a revocation of license of a bank or specialized Deposit Taking Institution which was undercapitalized, without first imposing the statutory penalty under Section 33 of Act 930. The Court of Appeal noted that the last two grounds related to substantive matters and accordingly declined to address them.

The Court of Appeal's decision and the reasons for it: The Court of Appeal held that, the High Court's decision in refusing to issue an order of certiorari to quash Bank of Ghana's revocation of Unicredit's license was wrong. The Court of Appeal set aside the High Court's decision and stated that, Bank of Ghana was wrong in revoking Unicredit's license without following the procedure laid out in the law, that is, Act 930. The Court of appeal ordered that the notice issued by Bank of Ghana and dated 16th August, 2019 revoking Unicredit's license be accordingly quashed.

Adding his voice to the Court of Appeal's unanimous decision, Suurbaareh, JA stated that, the role of the respondent [Bank of Ghana] as regulator/ supervisor of all matters relating to deposit taking business under Section 3 of Act 930, no doubt, gave it a lot of powers. These powers range from imposing penalties for breaches of provisions of the Act and the revocation of a license of an institution in certain circumstances. He noted that with such wide and far-reaching powers under Act 930, Bank of Ghana, being an administrative body, cannot do as it pleases. Its actions must comply with laid down procedure in the Act as well as the provisions of Article 296 of the Constitution. His Lordship concluded that, Bank of Ghana cannot revoke the license of any bank or specialised deposit-taking institution without complying with the provisions of Section 16(3) of the Act 930, by giving the notice which will afford the institution the opportunity to respond to the issues raised by Bank of Ghana.

In her concurring opinion, Bartels-Kodwo, JA (Mrs.) discussed a plethora of decided cases on judicial review and observed that, Hoda Holdings Ltd's interpretation of the requirements contained in Section 123 of Act 930 more accurately reflected the intention of the law makers. She noted that this was especially the case as the revocation of the license of a bank or specialised deposit-taking institution often led to job losses, and was most likely coupled

with the appointment of a receiver or administrator, who would take over the running of the affairs of the bank, essentially taking away the Bank or specialised deposit-taking institution from the shareholders. Her Ladyship added that, that was tantamount to depriving persons of their property, which under Article 20 of the 1992 Constitution, could not be done without meeting certain requirements. In the *Ex parte Hoda Holdings Ltd* case, Her Ladyship rightly noted, Bank of Ghana had not even attempted to assert that the necessary conditions for the deprivation of Hoda Holdings Ltd's private property existed before revoking its license.

Conclusion

The Court of Appeal's bold and erudite decision in *Ex parte Hoda Holdings Ltd* is a timely lesson for public administrative, adjudicatory and regulatory bodies. Such public entities are created and operate under laws and are mandated to act strictly in accordance with such laws and regulations. Unfortunately, most public officers are oblivious to the huge statutory and regulatory responsibilities that attend their roles as public officials. They act with impunity, often actuated by motives other than the adherence to the rule of law. When they encounter adjudicators who are quick to abdicate their constitutional supervisory functions, the happier they get. But as the saying goes, justice will always prevail, no matter how long it takes.