IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2024

CORAM: SACKEY TORKORNOO (MRS.) CJ (PRESIDING)

OWUSU (MS.) JSC

PROF. MENSA-BONSU (MRS.) JSC

GAEWU JSC

DARKO ASARE JSC

CIVIL APPEAL
NO. J4/62/2023

26TH JUNE, 2024

THE REPUBLIC

VRS

BANK OF GHANA ..... RESPONDENT/RESPONDENT/APPELLANT

EX-PARTE: HODA HOLDINGS LIMITED ..... APPLICANT/APPELLANT/ RESPONDENT

JUDGMENT

SACKEY TORKORNOO CJ:

Background of facts and law

1] Chapter 5 of the 1992 Constitution deals with fundamental human rights and freedoms. **Article 23** of the 1992 Constitution falls within chapter 5 and provides regarding the right to administrative justice:

Administrative Justice

23 *Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal*

2] This power of judicial review over administrative bodies and officials is placed in the hands of the high court under **article 140 (2) of the 1992 Constitution**. This jurisdiction may be invoked through the original and general jurisdiction of the high court in **section 15 (1) (a)** of the **Courts Act, 1993 Act 459, or** the high court's special jurisdiction over Fundamental Human Rights and Freedoms in article 33 (1) **section 15 (1) (a) (b)** of **Act 459.**

3] On 19th August 2019, the Applicant/Appellant/Respondent (hereafter referred to as Applicant) filed an application in the high court seeking judicial review of an Administrative Notice issued by the Respondent/Appellant/Respondent (hereafter referred to as BOG). An amended notice of motion was filed on 8th November 2019. The motion prayed the high court for the following reliefs:

1. *An Order of Certiorari directed at the Respondent to bring up to this Honourable Court for the purpose of being Quashed the Notice Dated the 16th day of August, 2019 declaring Unicredit Ghana Limited insolvent and revoking the license of Unicredit Ghana Limited to operate as a Specialized Deposit Taking Institution.*

2. *An Order of Interlocutory Injunction restraining the Respondent, their agents, assigns, privies hirelings or otherwise howsoever described from interfering with the operations of Unicredit Ghana Limited and to refer the subject matter of the instant application to arbitration.*

Summary of the case brought to court.

Jurisdiction

4] The applicant submitted that the application was made pursuant to **order 55 Rule (3) (1)** of the **High Court (Civil Procedure) Rules 2004 CI 47**. It referenced the basis of the application to the supervisory jurisdiction of the high court in **article 141**, of the 1992 Constitution, and **section 16 of the Courts Act, 1993 Act 459**. **Article 141** reads:

Supervisory Jurisdiction of the High Court

141. *The High Court shall have supervisory jurisdiction over all lower courts and any lower adjudicating authority; and may, in the exercise of that jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its supervisory powers*

Grounds for applying for certiorari

Applicant set down three grounds for the application for certiorari

a. Breach of rules of natural justice which requires that applicant be given a hearing before an adverse decision is given against it
b. Failure to give Unicredit's board of directors and shareholders a hearing and notice before revoking the company's license leading to the revocation being null and void
c. Unlawfulness of the revocation because of the failure to give the hearing

5] In the affidavit in support of the application deposed to by a staff of the Applicant, the Applicant was described as a majority shareholder of Unicredit Ghana Ltd (hereafter referred to as Unicredit) and Unibank Ghana Ltd. Unibank was a bank that had been placed under administrator-ship by the BOG on 20th March 2018 pursuant to the powers of BOG under the **Specialized Deposit Taking Institutions Act 2016, Act 930**. The Applicant averred that on 16th August 2019, BOG issued an Administrative

Notice declaring Unicredit to be insolvent and revoking the license of UniCredit to operate as a Specialized Deposit Taking Institution (STDI).

6] According to Applicant, at all times, Unicredit held investments in a company called Unisecurities, also a subsidiary of the Applicant. The investments of Unicredit that were held with Unisecurities became impaired, leading to a substantial reduction of the capital adequacy ratio of Unicredit. This prompted Unicredit to take steps to mobilize further income, in accordance with BOG's Guidelines as indicated in its Accounting Manual issued to Banks and STDIs.

The applicant further averred that BOG, although aware of the situation faced by Unicredit by reason of lack of access to its investments in Unibank after the revocation of the banking licence of Unibank, ordered Unicredit, by letter dated 8th July 2019, to reverse all attempts at restoring its capital through realizing investments that were held with Unisecurities.

Unicredit complied with the directive and demonstrated to BOG that its total assets position was unchanged, that it was solvent, and its capital adequacy was improving steadily, having braved the storm occasioned by the revocation of Unibank's license, and the withholding of Unicredit's funds.

The license of Unicredit was however revoked by BOG through the issue of a Notice dated 16th August 2019. The applicant urged that BOG's inexplicable attitude pointed directly to a premeditated agenda to revoke Unicredit's license, despite its' efforts to restore its capital adequacy. It was the position of applicant that, at all times prior to the revocation of Unicredit's license on 16th August 2019, Unicredit was solvent in terms of **Act 930**.

7] Applicant further averred that at no point in time did BOG indicate to Unicredit that it had become insolvent, and so the decision to declare Unicredit insolvent and revoke its license was not based on any empirical fact. It was based on deductions made against an extremely difficult financial situation created to induce Unicredit and its shareholders, including the Applicant, to '*give in to BOG's malicious intentions*'.

It was the case of the Applicant that the decision taken by BOG in its Notice of 16th August 2019 revoking Unicredit's licence was in contravention of **Act 930** and premature, arbitrary, malicious and capricious. It was also a violation of the constitutional right to administrative justice in **article 23** of the 1992 Constitution of Ghana.

8] The Applicant attached **exhibits OB1 to OB6** in support of the original application and referred to them in the affidavit attached to the amended notice of motion. It is not clear if the parties found it burdensome to attach these exhibits to the amended application within the Record of Appeal, or in truth, they were simply referred to in the second affidavit without being attached to it. The exhibits covered communications between Unicredit and BOG as regulator on the matters set out above. Exhibit OB6 is the Notice that revoked the licenses. Exhibits OB1 to OB6 were dated between August 2018 and 16th August 2019, when BOG issued exhibit OB6

Effect of the revocation on Applicant

9] The Applicant urged that the decision to declare Unicredit insolvent and revoke its licence has gravely affected the Applicant and its substantial investments with Unicredit, which the Applicant stands to lose if the decision is not quashed by the court. Further, unless restrained by the high court, BOG through their agents and others would go ahead and take control of, and interfere with the operations of Unicredit. This would be to the detriment of Unicredit and the depositors of Unicredit.

The natural justice rule of audi alteram partem/right to be heard

10] In the accompanying Statement of Case, the Applicant submitted that neither Unicredit nor its directors and shareholders were notified that it was in a precarious financial position. Neither were they notified of the possibility of a revocation of its license. They urged that both **section 16** and **section 106** of the **Specialized Deposit Taking Institutions Act 2016, Act 930** which govern the power of BOG to revoke the license of a Bank or a Specialized Deposit Taking Institution, make it

mandatory for the BOG to give notice and a period of time for remedial action to be taken before revocation of the license takes place.

11] Thus, all that the BOG had to do was to give appropriate notice to Unicredit and its directors and shareholders before revoking Unicredit's license. By so doing, they would have met their obligations prescribed by law. Applicant further urged that in three years prior to the impugned notice in this action, BOG had revoked the license of 7 banks and in all those occasions, it notified the whole world and given the shareholders and directors of those institutions, the opportunity to take remedial steps to save the institutions. BOG therefore was well aware of the statutory and constitutional duty to provide notification of revocations.

The Notice of 16th August 2019, therefore breached the audi alteram partem rule of natural justice. The failure to give a hearing before the revocation of Unicredit's licence was also unlawful, and rendered the said revocation null and void.

12] Applicant cited the dictum of this court in **Awuni v West African Examination Council [2003-2004] 1 SCGLR 471** on the legal position that the right to be heard has been elevated to a fundamental right under the 1992 Constitution, because it constitutes a critical component of administrative justice and the duty imposed on administrative bodies and administrative officials to act 'fairly and reasonably'. Further, a breach of the rule of natural justice in any decision making process, whether by judicial or administrative body, places the decision maker out of jurisdiction.

Applicant pointed out that not only was Unicredit not given an opportunity to make further efforts to remedy the financial problems it found itself in, but BOG took advantage of the circumstances it had created against Unicredit and its shareholders and directors, and used them to Unicredit's detriment.

13] Counsel for applicant submitted that there was a plethora of legal authorities to the effect that the courts would grant an order of certiorari to quash acts that breach rules of natural justice. These cases include **Republic v High Court Sekondi Ex Parte**

Ampong Alias Akrufa Krukoko 1 (Kyerefo 111 & others Interested Parties [2011] 2 SCGLR 716.

Injunction

14] The Applicant urged that it was entitled to seek an injunction to restrain the Bank of Ghana from interfering in the operations of Unicredit pursuant to Order 55 rule (1) (c) because it was wrongful and the interest of justice would be best served if the BOG was restrained from further interfering in the business of Unicredit. Applicant also prayed the court to refer the alleged insolvency of Unicredit to arbitration for an unbiased determination.

Opposition to the Application

15] The originating notice of application for judicial review was met with a motion to set it aside without a hearing. In the supporting affidavit to this application, the BOG argued that the jurisdiction of the high court had been wrongly invoked. That the revocation in issue was done pursuant to **section 123 of Act 930**, '*which requires the Bank of Ghana to revoke the license of a bank or specialized deposit-taking institution, where the Bank of Ghana determines that the institution is insolvent*', and not section 16 of **Act 930.** Further, **Act 930** had provided in **section 141 (1)** (a) that any person aggrieved with a decision of the Bank of Ghana in respect of matters arising under **sections 123 to 139 of Act 930**, and who desires redress of such grievances, shall resort to arbitration at the Alternate Dispute Resolution Center established under the **Alternate Dispute Resolution Act, 2010 (Act 798)**.

16] By reason of **Act 930** specifically providing the forum for seeking redress against the specific genre of decisions complained about, the Applicant ought to be disabled from circumventing that forum. He further urged that it would be an abuse of the process of the courts and contrary to public policy to permit a person seeking to establish that a decision of a public institution infringed rights to which he was entitled to protection under public law, to proceed without reference to the mechanism provided for redress under statute.

Dismissal of preliminary objection

17] In dismissing this preliminary objection, the high court was of the opinion that no special circumstances could oust the supervisory jurisdiction of the high courts over administrative decisions, because that power is constitutionally conferred by article 23 and article 141 of the 1992 Constitution, and affirmed in section 16 of the Courts Act 1993 Act 459.

As such, citing **Republic v Minister for Interior Ex Parte Bombelli [1984-1986] 1 GLR 204-219**, the court pointed out that the exercise of discretionary power conferred by statute on an administrative or executive body would be subject to the supervision of the high court to ensure that the power was exercised legally, or within the confines of law and the basis of control was legality, and not merits.

18] The learned trial judge also reviewed cases affirming the constitutionally conferred right to administrative justice such as **Awuni v West African Examination Council** cited supra, and the right to natural justice in the acts of administrative officials as distilled in cases such as **Awuku Sao v Ghana Supply Company [2009] SCGLR 710**, and **Aboagye v Ghana Commercial Bank Limited [2001-2002] SCGLR 797.**

He concluded that from these legal authorities, the high court has jurisdiction to hear matters where a complaint is that there has been breach of the right to natural justice by an administrative body, or that it has acted in excess of jurisdiction, or where it had acted with procedural impropriety, or had failed in compliance with common law requirements of procedural fairness.

19] Touching on the rule articulated in **Boyefio v NTHC Properties Ltd [1996-1997] SCGLR 531** that directs that where a law has prescribed a special procedure by which something was to be done, it was that procedure that was to be followed, the learned trial judge opined that that position did not take away the supervisory jurisdiction of the Courts in appropriate cases. The court is entitled to investigate the actions of administrative bodies such as BOG to determine whether the said actions fall

within the factors that should provoke reliefs allowed by the supervisory jurisdiction of the high court. He concluded therefore that the originating notice of motion had properly invoked the supervisory jurisdiction of the high court.

Summary of BOG's case

20] BOG filed its affidavit in opposition to the application in which it denied the factual basis and chronology of events as presented by the Applicant. In the affidavit, the BOG averred that the reliance of the Applicant on section 16 (3) and section 106 of Act 930 to urge that BOG was mandatorily required to give notice and a period of time for remedial action to be taken before revocation of a license was misplaced. This is because Unicredit's license was revoked under section 123 and not section 16 and 106 of Act 930.

21] Second, BOG had engaged in supervisory and regulatory interventions regarding revocation of Unibank's banking license, and directions given on investments held between Unicredit and Unibank and Unisecurities. These interventions were to address irregularities in transactions between the affiliated companies. Bog averred that it is these irregular transactions that also breached statutory compliance requirements under Act 930 that led to Unicredit being unable to access its investments and meet its capital adequacy requirements.

BOG attached exhibit BOG1 to BOG 12 dating from September 2017 and July 2019 to corroborate its averments regarding the records of Unicredit and communications between it and Unicredit, prior to the revocation of the license in August 2019.

22] In its statement of case, BOG submitted that an institution need not be insolvent for its license to be revoked under **section 16 (3) of Act 930**, but an institution has to be insolvent for its license to be revoked under **section 123 of Act 930**. Also, an institution has to be significantly under-capitalized for the measures outlined in **section 106** to be engaged.

Whereas revocation under **section 16 (3)** is subject to some discretionary consideration, BOG is compelled to revoke a license when an institution is insolvent. BOG urged that Unicredit was insolvent at all material times and it is insolvency that led to the revocation of its license. BOG sought to establish this with reference to the exhibits attached and an explanation of their content.

23] BOG also urged that the Applicant had failed to meet the legal requirements for grant of certiorari. Counsel for BOG urged that for a party to be entitled to certiorari, it '*must satisfy the court that respondent had acted unlawfully, unreasonably and in breach of procedure. They must also establish that respondent had acted in excess or want of its statutory mandate and/ or some breach of natural justice, or had committed an error of law in arriving at its decision to revoke Unicredit's license.*'

Citing **Republic v High Court Sekondi: Ex Parte Ampong** referred to supra, counsel for BOG reiterated that in considering an application for certiorari, a court ought not to be concerned with the merits of the decision made by a Respondent. It was a discretionary remedy that would be granted on grounds of excess or want of jurisdiction and or some breach of the rules of natural justice, to correct a clear error of law apparent on the face of the record, which error ought to be so grave as to amount to the wrong assumption of jurisdiction, and also be so obvious as to make the decision a nullity

24] Further, it is the settled position that what would constitute a breach of the audi alteram partem rule, arises from the substance of procedure engaged, and not any particular form urged. It was the case of BOG that exhibits BO7 to BO13 reflected opportunities given to Unicredit to repair its capital deficiencies and its inability to do as directed. Counsel for BOG invited the court to hold that BOG had acted fairly and within the law, and without breaching the audi alteram partem rule.

He also urged that the Applicant had not shown a legal right that ought to be protected by an injunction, and that on the balance of convenience, the detrimental effect of such

an injunction would be tilted against the receiver of Unicredit and all persons involved in the proper resolution of its affairs. Thus the application was grossly misconceived.

Final determination

25] In final determination, the high court dismissed the application for judicial review of the Notice of 16th August 2019. The court pointed out that from established cases such as **Associated Provincial Picture Houses Ltd v Wednesbury Cororation [1948] 1 KB 223**, and **Tema Development Corporation & Musah v Atta Baffuor [2005-2006] SCGLR 121,** judicial review must involve a challenge to the legal validity of the impugned decision and does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. What is required is for the decision to be challenged on the basis of failure of the test of legality, rationality and procedural propriety.

26] The court recognized that the notice of revocation of Unicredit's license passed the test of legality because on the face of the Notice, it was stated that it was made pursuant to **section 123** of **Act 930,** and on the ground of insolvency, which ground is supported by the provisions of **section 123 of Act 930**

Second, contrary to the assertions of the Applicant regarding the revocation of Unicredit's license being done in violation of the audi alteram partem rule of natural justice, BOG had communicated with Unicredit on the subject of capital insufficiency of Unicredit between March 2018 and August 2019, when the license of UniCredit was revoked by BOG. Some of these communications were attached by the Applicant itself as exhibits OB1 to OB5 and could be found also in BOG's exhibits.

27] Third, the act of the BOG in revoking the license of Unic redit passed the test of reasonableness. It was not arbitrary or capricious because the record reflected the capital insufficiency asserted by BOG, and directions by BOG to Unicredit to take corrective measures to address the capital insufficiency. The court pointed to notice given to Unicredit that if it failed to rectify its capital deficiency by 26th October 2018,

section 123 would be invoked against it. Unicredit had therefore been put on notice of the said revocation.

28] The learned trial judge concluded her judgment by asserting that '*In sum, I am unable to find the procedural misstep or missteps taken by the Respondent in relation to the revocation of the license of Unicredit to warrant the grant of Applicant's relief 1. Accordingly, Relief 1 is dismissed.*

Relief 2 is for an order of interlocutory injunction restraining the Respondent, its agents, assigns, privies, hirelings or otherwise howsoever from interrupting with the operations of Unicredit Ghana Limited and to refer the subject matter of the instant action to arbitration.'

The court dismissed the application for certiorari and refused the application for injunction.

29] Being dissatisfied with the judgment, the applicant appealed to the court of appeal on the following grounds:

Grounds of Appeal

a) *That the learned trial judge made an error when she found that the Respondent/Respondent had the power to revoke the license of Applicant/Appellant under section 123 of the Banks and Specialised Deposit Taking Institutions Act, 2016 (Act 930) instead of under section 16 of Act 930 which said error occasioned the Applicant/Appellant serious miscarriage of justice.*
b) *The Court erred in finding that the Applicant/Appellant was under capitalised which said erroneous finding was not borne out by the evidence*
c) *The Court erred in holding that the Respondent/Respondent was at liberty to impose any punishment including a revocation of license of a bank or specialized Deposit Taking Institution which was under capitalized without first imposing the statutory penalty under section 33 of Act 930.*

d) *That other grounds of Appeal will be filed upon receipt of the Certified True Copy of the Ruling*

30] The Applicant sought an order setting aside the judgment of the High Court dated 18th March 2021 as relief from the Court of Appeal

Judgment of the Court of Appeal

After hearing the appeal, the court of appeal reversed the decision of the high court. The court of appeal affirmed the guidance that the learned trial judge had given to herself regarding the duty of a court called on to conduct judicial review as stated in the case of ***R. v Secretary of State for Scotland [1999] 1 All ER 481*** *in these words 'Judicial Review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case'.*

It also agreed that what is required of a party seeking to quash the decision of an administrative body by invoking the review jurisdiction the High Court is to establish one of a cluster of necessary grounds being illegality, irrationality and procedural impropriety in the mode in which the decision maker arrived at the decision.

31] It went on to reiterate relevant authorities in establishing these grounds as cited in the high court being the dictum of Greene MR in the case **Associated Provincial Picture Houses Ltd vrs Wednesbury Corporation** cited supra and that of this court per Wood JSC (as she was then) in the case of **TDC & Musah vrs Atta Baffour** cited supra. In the end, it was the view of the court of appeal that the high court had misconstrued the basis of the revocation of Unicredit's license.

It pointed to **section 123 (1)** and **section 16 of Act 930** and opined that '*the questions that the high court should have been asking itself in deciding whether or not to grant the motion before it include, 'whether or not the applicant had been denied a right to be heard', 'whether or not the Respondent acted with procedural impropriety',*

'whether or not the respondent acted illegally', 'whether certiorari was the right remedy or redress for the Applicant's claim', among others'

32] The opinion of the learned justices was that, contrary to the positions taken by the high court, the answer to all these questions is 'yes', and that BOG violated each of these contexts of administrative justice.

Citing the direction of this court in **Koglex Ltd v. Field (no 2) [2000] SCGLR 175** that '*where the findings (of a court) are based on wrong propositions of law, if that proposition is corrected, the finding disappears*', the court of appeal held itself obligated to reverse the findings of the high court.

In the opinion of the court of appeal, the high court took into consideration irrelevant factors in deciding that the Applicant had not successfully compelled the exercise of the supervisory jurisdiction of the high court against the BOG, and in doing so, the high court had committed an error of law

33] According to the court of appeal, the high court had accepted submissions of the BOG that it was under no obligation to follow the procedure set out in **section 16 of act 930** when it revoked the license of Unicredit because it had applied the mandatory provisions of **section 123 of Act 930.**

Section 16 of Act 930 reads:

Revocation of licence

16. (1) The Bank of Ghana may revoke a licence issued under Section 12, where

(a) The Bank of Ghana is satisfied that an applicant provided false, misleading or inaccurate information in connection with the application for a licence or suppressed material information;

(b) The bank or specialised deposit-taking institution fails to commence business within one year from the date the licence was issued;

(c) The bank or specialised deposit-taking institution fails to fulfill or comply with the terms and conditions stipulated in the licence;

(d) The bank or specialised deposit-taking institution carries on business in a manner which is contrary or detrimental to the interests of depositors or the public;

(e) The bank or specialised deposit-taking institution has been convicted by a domestic court or any other court of competent jurisdiction of crime related to money laundering or terrorist financing or is an affiliate or subsidiary or a parent or holding company which has been so convicted;

(f) in the judgment of the bank of Ghana, the bank or specialised deposit-taking institution engages in unsafe or unsound practices;
or

(g) the bank or specialised deposit-taking institution persistently contravenes this Act, the Regulations, directives or orders made under this Act.

(2). Subsection (1) does not limit the power of the Bank of Ghana to take any other remedial or penal action against a bank or specialised deposit-taking institution

(3) Where the Bank of Ghana proposes to revoke the licence of a bank or specialised deposit-taking institution under subsection (1), the Bank of Ghana shall;

(a) give notice in writing to the bank or specialised deposit-taking institution,

(b) specify the proposed action and the grounds on which the action is proposed to be taken, and

(c) give the bank or specialised deposit-taking institution an opportunity to make a written representation within thirty days of the service of the notice.

(4). After the expiry of the notice period and considering any representations made by the bank or specialised deposit-taking institution, the Bank of Ghana may

(a) decide whether to take the proposed action; or

(b) vary the proposed action as the Bank of Ghana considers appropriate; and

(c) communicate the decision of the Bank of Ghana to the bank or specialised deposit-taking institution.

(5) Where the Bank of Ghana revokes the licence of a bank or specialised deposit-taking institution, that bank or specialised deposit-taking institution shall cease to carry on the deposit-taking business if the bank or specialised institution has already commenced business and shall surrender the licence.

(6). A revocation of the licence of a bank or specialised deposit-taking institution shall have immediate effect.

(7) Despite subsections (3) and (4), the Bank of Ghana may, in cases of emergency, or in the public interest revoke the licence of a bank or specialised deposit-taking institution without notice.

(8) Where a licence is revoked under this section, the Bank of Ghana shall immediately initiate a receivership as provided in sections 123 to 139 and notify the institution responsible for deposit protection.

34] Section 123 also reads:

Mandatory Revocation of license and initiation of Receivership

123 (1) Where the Bank of Ghana determines that the bank or specialised deposit-taking institution is insolvent or is likely to become insolvent within the next sixty days, the Bank of Ghana shall revoke the licence of that bank or specialised deposit-taking institution.

(2) The Bank of Ghana shall appoint a receiver at the effective time of revocation of the licence under subsection (1)
(3) The receiver appointed under subsection (2), shall take possession and control of the assets and liabilities of the bank or specialised deposit-taking institution.

(4) For the purpose of this section, the "insolvent" means the inability of a bank or specialised deposit-taking institution to pay its obligations as they fall due or the circumstances where the value of the liabilities of a bank or specialised deposit-taking institution exceeds the value of its assets.

(5) *The value of the assets, liabilities and regulatory capital of a bank or a bank or specialised deposit-taking institution shall be determined in accordance with valuation standards and procedures prescribed by the Bank of Ghana.*

(6) In determining the value of the assets and liabilities of a bank or specialised deposit-taking institution for a future date, the anticipated future income and expenses of the bank or specialised institution shall be taken into account.

(7) The Bank of Ghana shall immediately notify the institution responsible for deposit protection of a decision made under this section.

35] It was the view of the court of appeal that, when **Act 930** is read as a whole, and **section 16** is read in congruence with **section 123**, the conclusion should not be that **section 123** and **section 16 of Act 930** work in mutually exclusive enclaves of the regulatory work of BOG.

According to the court of appeal, '*there is nothing in the language of the two sections that shows that Section 123's revocations are exceptions to the requirements under section 16.*'

They opined that **section 16** directs a general procedure for revocation of licenses in **section 16 (3).** First, there had to be notice in writing to the bank or STDI, specifying the proposed action and the grounds on which the action is proposed to be taken, and second, an opportunity to the SDTI to make a written representation within thirty days of the service of the notice.

36] In the absence of evidence reflecting these processes, the court of appeal determined that there had been breach of the audi alteram partem rule of natural justice that rendered the Notice of 16th August 2019 arbitrary and capricious and in valid.

It went on to evaluate that a study of **Act 930** shows that when the authors of that legislation '*seek to exempt the provisions of one section from being affected by the provisions of another, they expressly say so, and an example of this deliberate exemption is found in section 81, which excepted the provisions of section 82 (2) regarding the appointment of an auditor of relevant companies*'..

'*Further, without words necessarily implying the exception of a procedure of an act in one section from the procedure set out in another where the same act is mentioned, the correct interpretation is that the procedure is required to be followed. In this case (the conditions for revoking a license pursuant to section 123), there is no express exception,*

and there is no necessary implication that the revocation under section 123 is exempt from the provisions of 16.'

37] According to the appellate court, '*the evidence is strong that if the lawmakers had wanted a special procedure for revocation under this section (123) to apply, they would have set out a procedure under this section (123)* because '*After all, in that very same section, they set out a definition of insolvency which applies solely under that section*'.

The court went on to indicate that it was applying the purposive model of interpretation distilled from **section 7 (4)** of the **Interpretation Act 2009, Act 792** and the standing jurisprudence of this court for determining the question at hand – which is whether **section 123** was meant to authorize the revocation of the license of a SDTI without going through the procedures set out in **section 16 of Act 930**.

38] In that context, the court of appeal asked itself which of the competing interpretations of **section 123** best honors and upholds the spirit and purpose of **Act 930**. Whether the construction presented by the Applicant that requires the BOG to proceed by the carefully laid out procedures in **section 16**, '*giving an ailing bank or SDTI the opportunity remedy its liquidity and capitalization issues and strengthen the economy, or one that allows the licence of the SDTI to be revoked without hearing granted to the bank to remedy issues?*'

The court pointed out negative effects of preferring BOG's model of revocation without going through the extensive outlined procedures of section 16, including loss of jobs, the appointment of a receiver or administrator who would take over the running of the affairs of the bank, leading to loss of control by shareholders and directors. According to the court of appeal, this would amount to deprivation of property in a manner that contravenes **article 20** of the **1992 Constitution**, because **article 20** protects citizens against deprivation of property except in defined circumstances. The court did not find any merit in excepted circumstances for deprivation of property in a manner unprotected by **article 20** of the **1992 Constitution**.

39] The court held it to be apparent in its view, that the model of construing **section 123** as being subject to the procedures of **section 16**, '*more accurately reflect the intention of the framers of the Act*'. BOG therefore could not be absolved of its statutory obligation to follow the steps provided for the revocation of a license of a Bank or STDI under **section 16 (3).** It was the view of the learned justices of appeal that **section 16 of Act 930** was the proper provision dealing with revocation of licenses and the BOG should therefore have activated the procedures in **section 16** (3) prior to revoking the license of Unicredit. Failure to do so constituted a procedural impropriety and this was a valid ground for the exercise of the high court's supervisory jurisdiction. The high court ought to have done so to intervene in the '*wrongful revocation of the license of Unicredit*'.

On the above premises, the court of appeal reversed the ruling of the high court and quashed same.

40] Appeal to the Supreme Court

The BOG appealed to the Supreme Court on the following grounds:

a) *The Judgment is against the weight of evidence*
b) *The Court of Appeal fell in grave error in holding that respondent/respondent/appellant was mandated and/or had to rely on the procedure set out in section 16(3&4) of the Banks and Specialised Deposit Taking Institutions Act, 2016 (Act 930) in revoking the license of Unicredit Ghana Limited under section 123 of Act 930, and this has occasioned on respondent/respondent/appellant a substantial miscarriage of justice;*
c) *The Court of Appeal misdirected itself and failed, refused and/or neglected to appreciate the essential requirements of notice laid down in section 16(3) of the Banks and Specialized Deposit Taking Institutions Act 2016 (Act 930) and thereby erred in law in holding that respondent/respondent/appellant breached due*

process and the rules of natural justice in revoking the license of Unicredit Ghana Limited, when the evidence on record showed otherwise;

d) *The Court of Appeal misconstrued the import of section 16(7) of the Banks and Specialised Deposit Taking Institutions Act, 2016 (Act 930);*

e) *The Court of Appeal erred in law in quashing the judgment of the high court (human rights division) presiding over by Her Ladyship Gifty Agyei Addo, and in revoking the license of Unicredit Ghana Limited for procedural impropriety, unreasonableness and illegality.*

f) *additional grounds to be filed upon receipt of the record of appeal*

Consideration and analysis

Ground (a) – The judgment is against the weight of evidence

41] We are of the considered view that the judgment of the court of appeal is manifestly against the weight of evidence, and the learned justices of the court of appeal erred grievously in their mode of construing **Act 930,** thereby exceeding their jurisdiction and occasioning miscarriage of justice not only against the parties, but against the financial system of the nation as carefully constructed through the provisions of **Act 930.**

As appreciated from the line of cases commencing from **Attorney General v Faroe Atlantic Co Ltd [2005-2006] SCGLR 271** and **Owusu Domena v Amoah [2015-2016] 1 SCGLR 790**, a ground of appeal that urges that a judgment is against the weight of evidence also places an obligation on the appellate court to determine the legal import of the evidence placed before the court, and not just the probative value of the evidence.

Proper grounds for determining an application for judicial review

42] The court of appeal erred when the learned judges allowed themselves to be deflected from the proper exercise of judicial review as established by common law principles, and **article 23 of the 1992 Constitution**.

The records before us reflect that it was well appreciated by the parties to this dispute, the trial court and the court of appeal that, in contesting and adjudicating over an application for judicial review of an administrative decision, parties and the court are not called on to concern themselves with the legally correct merits of the impugned decision. The decisions cited and littering the record of appeal include **Republic v High Court Kumasi, Ex Parte Mobil Ltd, Hagan Interested Party [2005-2006] SCGLR 312,** and **TDC & Musah vrs Atta Baffour cited supra**

43] What the court of appeal should also have appreciated is that the essential requirement in an application for certiorari is avoidance of examining the merits of the impugned decision. The focus must be on whether the decision, on the face of it, is patently void by reason of a fundamental error recognizable on the face of the record, or the decision is void because of an absence or excess of jurisdiction (or authority) in the public body that took the impugned decision.

Reference is made to the articulation of these principles in the decisions of this court in **Republic v High Court, Accra: Ex Parte Commission on Human Rights and Administrative Justice (Addo Interested Party) [2003 – 2004] 1 SC GLR 312;** and **Mansah & Others v Adutwumwaa & Others [2013 – 2014] 1 SCGLR 38;**

44] The test activated by this court's restatement on the proper conditions for invocation of the supervisory jurisdiction of the court in **Republic v Court of Appeal, Accra; Ex Parte Tsatsu Tsikata [2005-2006] 612** for the relief of certiorari is applicable to the instant case. In the articulation of Wood JSC as she then was, intoning the earlier review of the necessary grounds for disturbing a decision made by an otherwise authorized body or person, the error complained of must be manifestly plain and obvious, which errors go to jurisdiction (or in the present case, authority to take the decision) or so plain as to make the decision a nullity. The error must be fundamental, substantial, material, grave or so serious as to go to the root of the matter. An error of law must be one on which the decision turns.

45] As described as the Wednesbury principle on reasonableness, irrationality is reflected in a decision that is so outrageous in its defiance of logic or of accepted moral standards that no sensible person, applying his mind to the relevant question, could have arrived at the decision.

The court's remit on an application for judicial review cannot extend into the legal merits of the impugned decision, when the facts surrounding the decision are weighed. This is precisely because in an application before a court, the court has no tools to weigh the preponderance of factuality and veracity of the exhibits tendered. It is in the appreciation of the limitation of the remit of a court conducting judicial review of an administrative decision that the court of appeal misdirected itself.

46] While exhibiting communications between BOG and Unicredit on the issues of capital deficiency, illiquidity etc, and indeed while providing a narrative in the supporting affidavit regarding these communications, the Applicant's position was that in **sections 16 (3) and 106, Act 930** presented particular procedures that must ground revocation of a license. The BOG on the other hand took the position that the procedure for revocation of licenses set out in **section 16** covered certain of its functions other than insolvencies while the procedure in **section 123** was what was necessary for regulation of insolvencies.

From these arguments, it should have been clear to the court of appeal that the authority to make the decision, and the legal foundation for BOG's Notice was not in controversy. The parties recognized that BOG was empowered under Act 930 to revoke the license of SDTIs, and indeed, the law provided multiple provisions for the revocation of the license of STDIs. With the legal basis of BOG's authority to revoke Unicredit's license established, the court's evaluative duty should have ended. But the court of appeal went beyond this remit.

47] The court of appeal seemed oblivious of fact that the applicant was inviting the court to resolve a substantive question of law regarding how **Act 930** was to regulate revocation of licenses in all circumstances. That question was whether revocation of a license on grounds of insolvency under **section 123** of **Act 930,** as clearly articulated on the impugned decision, required the BOG to follow the procedures in **section 16 (3)** and **section 106**, before the revocation under **section 123** could be done. It is this invitation that sent the court of appeal into the odyssey of applying purposive models for construing **Act 930,** when on the face of the record before it, the impugned decision stated that the Notice was issued pursuant to the insolvency of Unicredit, and **section 123** indeed dealt with revocation of licenses in cases of insolvency.

That simple articulation should have satisfied the court of appeal that on the face of the record, the legal basis for arriving at the impugned decision had been provided for in **Act 930**. Examining a further question as to what the proper procedures for triggering **section 123** was to be activated and whether the shareholders, directors or the company Unicredit were given a hearing regarding its insolvency in the form set out in **Section 16 (3)**, and whether Unicredit was indeed insolvent to justify the revocation of its license, went beyond examining the face of the impugned Notice. It drew the court of appeal into resolving substantive questions of law.

48] To make matters worse, it should also have been clear to the court of appeal that the application for judicial review was further inviting the court to quash a Notice issued to affect twenty three SDTIs that were not parties to the application at bar, that no facts had been presented about in the application, and that had not been heard by the court.

No court has jurisdiction to enter into a determination of such substantive questions of law and matters of facts with extensive repercussions for unheard parties, on the basis of an application presented by a third party to quash the said administrative decision, and on the strength of facts submitted by just one of the many unheard parties. Acceding to the invitation ended up causing the court of appeal to exceed its jurisdiction in the limited remit of conducting judicial review of the administrative decision as pertained to the facts

ıd law placed before it. See **Republic v High Court Ho, Ex Parte Attorney General, (Margaret Kweku and 4 Others, Interested Parties) Civil Motion No J5/21/2021, 5th January 2021**.

Breach of audi alteram partem rule

49] In arriving at the construction that every revocation of a license under **Act 930** required the prior showing of the processes outlined in **section 16 (3),** the court of appeal held that Unicredit had not been heard by BOG prior to the revocation of its license. It was the opinion of the court of appeal that under section 16 of Act 930, and specifically section 16(3), the enactment had provided a general procedure for revocation of licenses of deposit taking institutions and so the determination of procedural validity ought to be done within the context of whether the directions of section 16 (3) had been complied with or not.

50] Section 16 (3) of Act 930 reads:
(3) Where the Bank of Ghana proposes to revoke the licence of a bank or specialised deposit-taking institution under subsection (1), the Bank of Ghana shall;

(a) give notice in writing to the bank or specialized deposit-taking institution,
(b) specify the proposed action and the grounds on which the action is proposed to be taken, and
(c) give the bank or specialised deposit-taking institution an opportunity to make a written representation within thirty days of the service of the notice.

51] In his submissions to us, counsel for BOG points out that the clear and simple meaning of sections 16 and 123 reveal that they regulate two different sets of circumstances that could lead to revocation of a license.

We do not intend to be drawn into settling substantive questions of law because an appeal is a rehearing. Since the process in issue is an application for judicial review of an administrative decision, we must evaluate all issues within the narrow lens of an application for judicial review of the Notice of 16th August 2019.

52] Our own reading of Act 930 establishes that while section 16(1) covers a broad range of practices that will lead to revocation of a license such as providing false, misleading or inaccurate information in the application for a license, failing to commence business within one year of a license being issued, carrying on business detrimental to the interests of depositors or the public, failing to fulfil or comply with the terms and conditions stipulated in the licence etc etc, and section 16 grants BOG discretion to follow the process of revoking a license under section 16 (3), section 16 (7) still allows BOG to revoke a license without notice, in the event of any of the section 16 conditions.

53] This clear language in section 16 (7) of Act 930 shows that it is erroneous to urge that there are no circumstances provided for in Act 930 generally and section 16 specifically that allow revocation of a license without notice. The intention of the law maker to allow BOG as regulator of the financial systems of the country to revoke licenses under special circumstances screams from the words in section 16 (7), and validates the specific peremptory context created for insolvencies in section 123.

The conditions for a section 16 (7) revocation are emergencies and circumstances that in the public interest. What are emergencies and matters of public interest? Once again, these are circumstances that can only be determined from facts and dedicated evidence elicited in a proper trial. And yet in a summary proceeding requiring a court to only focus on the face of the record to determine legality, procedural propriety and rationality, the court of appeal purported to make value determinations on what could be an emergency situation or a matter of public interest, and concluded that there was no emergency or public interest established from the exhibits attached, to justify revocation of a license

without going through the processes in section 16 (3). We think that the error in this reasoning is patent.

54] It is trite learning that a statute is to be read as a whole in order to determine the intents and directions of the lawmaker. What we see from reading Act 930 as a whole is that BOG, as regulator over the financial system of Ghana is given a range of tools to manage the security of capital under Act 930. While section 32 provides tools for managing non-compliance with capital requirements, including the payments of penalty units under section 33, Section 106 introduces a different regime for managing under 'significantly under-capitalized institutions'.

Thus the reasoning of the court of appeal that despite the clear statement that the revocation in issue was done under section 123, BOG should have employed the procedure outlined under section 16 (3) to manage the hearing between regulator and SDTI before revocation of Unicredit's license is untenable. It is not supported by the simple reading of Act 930.

55] On this point, we also note that the contest was not about an obvious lack of communication between BOG and Unicredit before revocation of the license to signal breach of the audi alteram partem rule, but whether the communication was with the right persons, or was in appropriate form. The applicant submitted that a hearing was not given to the shareholders and directors of Unicredit prior to revocation of its license. BOG also submitted various communication with the company itself. These two positions called not only for an evaluation of the content of the documents presented but also a determination of the obligation of BOG as a regulatory body in how it is to discharge its regulatory function on hearing STDIs under Act 930.

56] The very substantial number of exhibits submitted by the Applicant reveal extensive communication between Bank of Ghana and Unicredit regarding the need for Unicredit to have access to its investments, which was affecting the liquidity of Unicredit on account

of various acts that preceded the communications. OB1 is dated August 30th 2018. All the communications marked OB1 to OB5 were on the same range of subjects.

BOG also exhibited BOG1, BOG2, BOG3, BOG4, tBOG5, BOG6, BOG7, BOG8, BOG9, BOG 10, BOG11, BOG 12, to show the records that lay behind its action. Did these communications constitute a hearing of Unicredit prior to BOG's notice of revocation of license?

57] The firm position of the law is that to pass the audi alteram partem rule of natural justice in the conduct of administrative or official work, a hearing is accomplished in substance, and not form. In dealing with the principles of natural justice, it must be appreciated that they operate substantively, rather than as procedural safe guards. As long as a party has reasonable notice of the case he has to meet and is given the opportunity to give explanations or answer any arguments set out against the party, the threshold for compliance with the audi alteram partem ruling has been attained, unless a statute or regulation prescribes a specific format for conducting a hearing. See also **Republic v Ghana Railway Corporation [1981] GLR 752** cited with approval in **Lagudah v Ghana Commercial Bank [2005-2006] SCGLR 388.**

58] From the extensive relay of communication, we lean in agreement with the high court that there was notice in writing given to Unicredit regarding capital insufficiency and liquidity, proposals on actions to be taken and an opportunity to make a written representation on the matters raised.

Irrationality, Capriciousness, Arbitrariness, Reasonableness

59] Below is the opening text of the impugned Notice dated 16th August 2019 and exhibited as OB6, It reads:

CERTIFIED TRUE COPY
28/7/2021
REGISTRAR
SUPREME COURT, ACCRA, G/R

NOTICE OF REVOCATION OF LICENCES OF INSOLVENT SAVINGS AND LOANS COMPANIES AND FINANCE HOUSES, AND APPOINTMENT OF A RECEIVER (underlining provided)

Accra, Ghana, 16th August, 2019

The Bank of Ghana has, with effect from today, revoked the licences of twenty-three (23) insolvent savings and loans companies and finance house companies (see Annex 1). These actions were taken pursuant to section 123(1) of the Banks and Specialised Deposit-Taking Institutions Act (Act 930), which requires the Bank of Ghana to revoke the license of a Bank or Specialised deposit-taking institution (SDI) where the Bank of Ghana determined that the institution is insolvent. The Bank of Ghana has also appointed Mr Eric Nipah as a Receiver for the specified institutions in line with section 123 (2) of Act 930

60] The Notice goes on to provide reasons for arriving at the decision to revoke the licenses and consistently identify the specified SDTIs as 'insolvent'. The specific reference to Unicredit can be found in Annex 2 of the Notice and in paragraph 22 on pages 25 and 26. The specific reasons for revocation of Unicredit's license outlines the following:

a. *The institution's adjusted net worth of negative GH¢221.32 million as at end May 2019 indicates that its paid up capital is impaired in violation of section 28(1) of Act 930*
b. *The institution's adjusted capital adequacy ratio of negative 97.83% as at end May 2019 is in violation of section 29(2) of Act 930. This is mainly due to the non-performing related part exposures of GH¢160.10 million to unisecurities which is far in excess of tis negative net worth.*
c. *The Institution has been breaching the statutory cash reserve ratio requirement since April 2018*

d. *The institution is unable to meet the deposit withdrawals of customers due to its severe liquidity challenges. The Bank of Ghana has been receiving many complaint from the institution's customers about their inability to access their funds.*
e. *The institution has a high percentage of non-performing loans*

61] From the above, it is evident that BOG provided a basis for the revocation of Unicredit's license. Its decision cannot be evaluated as arbitrary or capricious.

Public Policy Considerations

62] There is a sound reason why a public law action is limited to the facetious enquiry of legitimacy through an application, and not determination of legal merit. It enables only the quick removal of illegality and irrationality by any member of the public, which illegality must be patently obvious, and nothing more. It is not meant to provide a forum for contests over the proper construction of law and proper application of law to weighed facts, or evaluation and realization of personal rights. Such a process can only be undertaken in a trial where parties are heard and cross examined,

Injunction

63] The learned trial judge ended her ruling with the direction that the Applicant has a right under Act 930 to go to arbitration on any grievance it has against the Respondent. We choose not to state a position on this, since the capacity to commence an action against any party for the enforcement of rights in arbitration is a matter of law. Determining the existence of such a right is not the remit of the current proceedings, and the opinion of the trial judge in that vein is not supported by her remit in the application that was considered.

Remaining grounds of appeal

64] **Rule 6(4) and 6 (5)** of the **Supreme Court Rules, 1996, CI 16** direct, and this has been articulated ad nauseam, that grounds of appeal shall be set out **concisely**

and under distinct headings, and **without any argument or narrative** (emphasis mine).

We must therefore point with disapproval at the argumentative structure of the appellant's grounds of appeal in grounds (b), and (c). But for the fact that the points raised therein are ably evaluated under ground (a), this court would have been bereft of any grounds of appeal to evaluate.

Judicial Review of Administrative acts and decisions and Supervisory Jurisdiction over lower courts and tribunals

65] Though not raised in controversy, we see that in twinning the supervisory jurisdiction over lower courts and tribunals with the jurisdiction to conduct judicial review over administrative orders in describing the source of jurisdiction over the matters in controversy in this application, the courts below have unconsciously presented the proposition that the two jurisdictions of the high court are the same. They are not, though the considerations made in the two jurisdictions are almost identical. This is why this judgment was commenced with a statement of article 23 as the relevant constitutional provision for judicial review of administrative acts and decisions, and section 15 (1) (b) of Act 459 as the relevant provision conferring jurisdiction on the high court to deal with administrative justice.

68] Supervisory jurisdiction is exercised over lower courts and lower adjudicating bodies and pursuant to **article 141** and **section 16** of Act 459, while the jurisdiction to judicially review administrative decisions is invoked pursuant to the fundamental right to administrative justice under **article 23**, as well as common law. This jurisdiction is exercised under **section 15 (1) (a) and (b)** of Act 459 and not **section 16** of **Act 459**. It may also be invoked pursuant to article 33(1) of the Constitution, as settled in **Awuni v. WAEC, op cit,** or by writ as was the case in **TDC v Atta Baffuor op cit.**

To the extent that the supervisory jurisdiction over lower courts and adjudicating bodies are specifically provided for under **article 141** and **section 16** of the Courts Act, and

administrative justice is specifically provided for in **article 23,** it is practically appropriate for jurists to retain clarity concerning these identical jurisdictions when articulating the jurisdiction invoked by an action under consideration.

Our conclusion

69] We are satisfied that on the face of the record, there is evidence of hearing between Unicredit and BOG prior to the revocation of Unicredit's license. We are also satisfied that the revocation of Unicredit's license was done in accordance with the stipulated law appearing on the face of the record. The appeal succeeds in its entirety and the judgment of the court of appeal judgment is reversed. The judgment of the high court is restored, save for the court's direction on the claim for injunction and reference to arbitration.

REGISTRAR
SUPREME COURT ACCRA G/R

CERTIFIED TRUE COPY

(SGD) **G. SACKEY TORKORNOO (MRS.)**
(CHIEF JUSTICE)

(SGD) **M. OWUSU (MS.)**
(JUSTICE OF THE SUPREME COURT)

(SGD) **PROF. H.J.A.N. MENSA-BONSU (MRS.)**
(JUSTICE OF THE SUPREME COURT)

(SGD) **E. Y. GAEWU**
(JUSTICE OF THE SUPREME COURT)

CERTIFIED TRUE COPY
22/7/24
REGISTRAR
SUPREME COURT, ACCRA G/R

(SGD)

Y. DARKO ASARE
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