IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2021

CORAM: DOTSE, JSC (PRESIDING)
MARFUL-SAU, JSC
DORDZIE (MRS.), JSC
OWUSU (MS.), JSC
TORKORNOO (MRS.), JSC
PROF. MENSA-BONSU (MRS.), JSC
KULENDI, JSC

WRIT NO.
J1/04/2021

28TH JULY, 2021

ASSOCIATION OF FINANCE HOUSES ..... PLAINTIFF

VRS

1. BANK OF GHANA
2. ATTORNEY GENERAL } **..... DEFENDANTS**

JUDGMENT

KULENDI JSC:-

INTRODUCTION

Before us is a writ invoking the original jurisdiction of this Court brought by the Plaintiff seeking the interpretation and the enforcement of the 1992 Constitution, and appropriate orders and directions to give effect to any orders made.

CAPACITY

The Plaintiff says that it is a company limited by guarantee and as such brings this action in the capacity of a person under Articles 2(1) and 130 of the 1992 Constitution of the Republic of Ghana.

BACKGROUND

According to averments made by the Plaintiff, specifically at page 3 of its Statement of Case, this suit is provoked by a "document of the 1st Defendant dated in December 2018 and titled; "*Explanatory Notes on the Revised Corporate Governance Directive issued in December 2018"* and the "Corporate Governance Directive of 2018."

These Documents, and not "document", are referred to by the Plaintiff as "the directives" and while the Plaintiff says that both the explanatory notes and the Corporate Governance Directive of 2018 are marked as exhibit 1, it appears that only the Corporate Governance Directive of 2018 is exhibited and marked as Exhibit 1.

The 1st Defendant issued a directive described as the Banking Business Corporate Governance Directive in March 2018, pursuant to sections 56 and 92(1) of the Banks and Specialised Deposit-Taking Institutions Act 2016 (Act 930) hereinafter referred to as Act 930.

According to Plaintiff's Statement of Case, the 1st Defendant subsequently issued transitional provisions to the banking industry in July 2018, aimed at operationalizing the directive of March 2018 and ensuring full compliance with the directive by 31st December, 2018.

The Plaintiff says that due to concerns raised by various stakeholders affected by the directives, the 1st Defendant revised the March 2018 directives and issued the 27th December 2018 directives which are the subject-matter of the instant suit.

GROUNDS FOR APPLICATION

The Plaintiff is of the view that *"the directives of 27th December 2018, which were made pursuant to Sections 56 and 92 of Act 930, are legislative instruments that is to be precise, rules and regulations within the intendment of Article 11(1)(c) of the 1992 Constitution and therefore ought to be promulgated in accordance with Article 11(7) of the 1992 Constitution of the Republic of Ghana and as a result, could only come into force upon*

being laid before parliament for a period of 21 sitting days and published in the gazette on the day it was laid before parliament."

The Plaintiff contends that the failure of the 1st Defendant to comply with this provision of the Constitution renders the directives unconstitutional, and for that matter, null and void.

RELIEFS SOUGHT

The Plaintiff is the reliefs reproduced *verbatim* below:

I. A declaration that upon a true and proper interpretation of article 11 clauses (1) (c) and (7) of the 1992 Constitution of the Republic of Ghana, to the extent ***The Bank of Ghana (BOG) Corporate Governance Directive - December 2018 On The Tenure For Managing Directors/Chief Executive Officers, Board Chairs And Non-Executive Directors Of Regulated Financial Institutions*** was made pursuant to the provisions of sections 56 and 92(1) of the Banks and Specialised Deposit-Taking Institutions Act 2016 (Act 930), the said directive are rules and/or regulations within the meaning of Article 11 clauses (1)(c) and (7) of the 1992 Constitution of the Republic of Ghana.

II. A declaration that to the extent ***The Bank of Ghana (BOG) Corporate Governance Directive - December 2018 On The Tenure For Managing Directors/Chief Executive Officers, Board Chairs And Non-Executive Directors Of Regulated Financial Institutions*** are rules and/or regulations made within the meaning of Article 11 clauses (1)(c) and (7) of the 1992 Constitution, the said directive ought to have been laid in Parliament, published in the Gazette on the day it was laid before Parliament, and could only come into force at the expiration of twenty one sitting days after being so laid unless Parliament annuls the said directive by votes of not less than two-thirds majority of Parliament before the expiry of the said twenty one days.

III. A declaration that to the extent ***The Bank of Ghana (BOG) Corporate Governance Directive - December 2018 On The Tenure For Managing***

Directors/Chief Executive Officers, Board Chairs And Non-Executive Directors Of Regulated Financial Institutions was not laid in Parliament and published in the Gazette on the day it was laid before Parliament, to come into force at the expiration of twenty-one sitting days after being so laid unless Parliament [annuls the said directive by votes of not less than two-thirds majority of Parliament before the expiry of the said twenty one days] the said directive was made in violation and/or contravention of the provisions of article 11 clause 7 of the 1992 Constitution of the Republic of Ghana.

IV. A declaration that to the extent ***The Bank of Ghana (BOG) Corporate Governance Directive - December 2018 On The Tenure For Managing Directors/Chief Executive Officers Board Chairs and Non-Executive Directors of Regulated Financial Institutions*** was made in violation and/or contravention of article 11 clause 7 of the 1992 Constitution of the Republic of Ghana, the said directive is null, void and of no effect.

V. An order of perpetual injunction restraining 1st Defendant [The Bank of Ghana] from or in any way enforcing the said ***Bank of Ghana (BOG) Corporate Governance Directive - December 2018 On The Tenure For Managing Directors/Chief Executive Officers, Board Chairs and Non-Executive Directors of Regulated Financial Institutions*** against Plaintiff and/or all persons affected by the said directive as same is unconstitutional, null, void and of no effect.

CASE OF THE PLAINTIFF

It is the case of the Plaintiff that since they are seeking an interpretation of the Constitution, the original jurisdiction of this Court is that which ought to be invoked for the resolution of this dispute. Citing the case of **Republic v. Special Tribunal; Ex Parte Akosah [1980] GLR 592**, the Plaintiff makes the point that where the words of a constitutional provision are imprecise or unclear, the original jurisdiction of the Supreme Court of the Republic of Ghana arises to resolve the imprecision and give meaning to the words of the constitution. Supporting that point, the Plaintiff quoted the dictum of my esteemed colleague Amegatcher JSC in the case of **Dynamic Youth of Ghana v. Ofori Atta (Writ No. J1/04/2018 judgment dated 5th May, 2020)**, reproduced below:

"... the latter provoked the formulation of a roadmap by the then Court of Appeal performing the functions of the Supreme Court some forty years ago to guide parties and practitioners think through the issues before them thoroughly before appearing in the apex court to seek an interpretation. That was the case of ***Republic v. Special Tribunal; Ex parte Akosah [1980] GLR 592****. In that case, the roadmap was set out for triggering the interpretative jurisdiction of the Supreme Court under the 1979 Constitution. At Page 605, Anin JA, speaking on behalf of the Court, stated that the original, interpretative jurisdiction of the Supreme Court would be invoked where under the following* [sic]:

> *"(a) the words of the provision are imprecise or unclear or ambiguous. Put another way, it arises if one party invites the court to declare that the words of the article have a double-meaning or are obscure or else mean something different from or more than what they say;*
> *(b) rival meanings have been placed by the litigants on the words of any provision of the Constitution;*
> *(c) there is a conflict in the meaning and effect of two or more articles of the Constitution, and the question is raised as to which provision shall prevail;*
> *(d) on the face of the provisions, there is a conflict between the operation of particular institutions set up under the Constitution, and thereby raising problems of enforcement and interpretation."*

It is the Plaintiff's contention that the 1st Defendant's directive is a rule or regulation under **article 11(1)(c)** and therefore per **article 11(7)** should have been laid before Parliament for 21 days before coming into force as law. The Plaintiff is therefore asking this Court for an interpretation or a determination of the true nature of the directive issued by the 1st Defendant. In other words, the Plaintiff is asking this Court to make a determination as to whether or not the directive is a "rule or regulation" under **article 11(1)(c)**.

The Plaintiff also argues that the directives are rules and regulations under **article 11(1)(c)** and therefore it is seeking the enforcement of **article 11(7)** by this Court.

The Parties identify two issues that arise from the facts of this case which I shall reproduce in full below, and then proceed to address as follows:

I. Whether or not upon a true and proper interpretation of Article 11 clause 1(c) and 7 of the 1992 Constitution ***The Bank of Ghana (BOG) Corporate Governance Directive - December 2018 On The Tenure For Managing Directors/Chief Executive Officers, Board Chairs And Non-Executive Directors Of Regulated Financial Institutions*** made pursuant to the provisions of section 56 and 92(1) of the Banks and Specialised Deposit-Taking Institutions Act 2016 (Act 930) are rules and/or regulations within the meaning of article 11(1)(c) of the 1992 Constitution of the Republic of Ghana.

II. Whether or not the 1st Defendant in issuing its directives titled "***The Bank of Ghana (BOG) Corporate Governance Directive - December 2018 On The Tenure For Managing Directors/Chief Executive Officers, Board Chairs And Non-Executive Directors Of Regulated Financial Institutions***" pursuant to the provisions of sections 56 and 92(1) ought to have complied with the provisions of article 11(7) of the 1992 Constitution.

The Plaintiff argues that the main question that arises with regard to the first issue is "...the nature of the rules and directives which the 1st Defendant is empowered to make pursuant to **sections 56 and 92 of Act 930**"

The Plaintiff reproduces **section 56 of Act 930** and says that there is no ambiguity in that statutory provision. The Plaintiff submits that the only way the 1st Defendant is allowed to regulate the issues that it is mandated to regulate under section 56 is by rules.

The Plaintiff reproduces section 92(1) and 92(2) of the Act 930 and says that the heading alone of section 92 "makes it clear" that section 92 differs from section 56 in the sense that section 92 is for regulation via directives and section 56 is for regulation via rules.

The Plaintiff avers that the heading hints at the fact that there is a difference between the nature and manner of exercising the powers conferred on the 1st Defendant by Act 930 under **section 56** and under **section 92**. The Plaintiff further avers that upon a comparative analysis of these two sections, one would come to find that the matters to be regulated under section 56 and under section 92 differ.

The Plaintiff further contextualises the nature of 'rules' and 'directives' by saying that they are both manifestations of the exercise of the 1st Defendant's statutory powers under **Act 930** which govern how the 1st Defendant sets standards of practice for the banking and non-bank financial industry in the country.

The Plaintiff refers to **paragraph 731 of the Memorandum on the Proposals for a Constitution for Ghana, 1968** which states that no parliament, no matter how well intentioned or well resourced, can carry out all its legislative duties, and therefore there is the need to give **"Ministers"** some discretionary legislative powers under acts of Parliament. The said paragraph refers to these legislative powers as delegated legislation.

The Plaintiff says that the **Interpretation Act, 2009 (Act 792)** refers to such legislation as statutory instruments, which are defined in **section 1** of that Act as instruments made under a power conferred by an Act of Parliament. The Plaintiff concludes by saying that the definition of statutory instruments under **Act 792** leads to the conclusion that directives or rules under **Act 930** put out by the 1st Defendant are statutory instruments.

The Plaintiff quotes the definition of an instrument under **section 1 of Act 792** and says that since these directives and rules issued by the 1st Defendant are not an order made or warrant issued by a Court, the rules and directives put out by the 1st Defendant are statutory instruments. In conclusion, the Plaintiff submits that due to the arguments canvassed above, the rules and directives put out by the 1st Defendant under Act 930 are "rules and regulations" under **Article 11(1)(c) of the 1992 Constitution**.

The Plaintiff says the second issue "flows from" the determination of the preceding issue. Under this issue, the plaintiff submits that the directives at issue in the instant case are not mere administrative fiats but possess the force of law and are therefore enforceable.

The Plaintiff refers to the case of **Prof. Kweku Asare v. The Attorney General & General Legal Council (J1/1/2016 Judgment dated 22nd June 2017)** and argues that to the extent that the rules and directives put out by the 1st Defendant under Act 930 are rules and regulations under Article 11(1)(c) of the Constitution, the promulgation of these rules and directives is governed by Article 11(7) of the 1992 Constitution. The Plaintiff cites **Asare (supra)** and the case of **Republic v. Minister for Interior; Ex Parte Bombelli [1984-86] 1 GLR 204** to support this argument.

The Plaintiff evokes the purpose of the rule contained in Article 11(7) saying that "it is not for mere sophistication and fanciful delights" that the framers of the constitution put that provision in place.

CASE OF 1ST DEFENDANT

The 1st Defendant on the other hand submits that the directive at issue in this case is not a 'rule or regulation' in terms of Article 11 of the Constitution and therefore there was no obligation to follow the procedure under Article 11(7).

The 1st Defendant argues that while there is no explicit separate definition of "Orders, Rules, and Regulations", it is instructive to note that whenever the Constitution uses those terms, it capitalises them, meaning that they are terms of art. The 1st Defendant avers that the Constitution then appears to define or narrow the application of the terms by qualifying them as '*made by a person or authority under a power conferred by this Constitution or any other law*'. The 1st Defendant says that this means that "*in order to qualify under article 11,* ***the Constitution or other statute must expressly provide that it is a law-making power that is being vested under the Constitution or the statute***." (emphasis added)

Without this express provision, the 1st Defendant postulates, every power donated under the Constitution or Statute, whether administrative or executive, would require compliance with **Article 11(7)**. The 1st Defendant further argues that this is not the intention of the framers of the constitution. The 1st Defendant refers to the case of **Opremreh v. Electoral Commission of Ghana & Attorney General [2011] 2 SCGLR 1159** to buttress this argument.

The 1st Defendant also referred to the case of **Osei-Akoto v. Attorney-General [2012] 2 SCGLR 1295** where this Court held that an executive order was not an 'order, rule or regulation' under **Article 11(1)(c)** which had to be promulgated in the manner mandated in **Article 11(7)**, saying that in that case, this Court cited with approval, the decision in the **Bombelli** case (supra) in which, according to the 1st Defendant, this Court held that "even if an instrument is 'statutory', the enactment procedure under the Constitution (specifically under article 11(7)) would not apply unless that instrument is legislative in nature."

The 1st Defendant further contends that "there is therefore no question" that if a body is exercising an "executive act", there is no obligation to comply with article 11(7). The 1st Defendant cites the unreported case of **Gregory Afoko v. Attorney General suit no J1/8/19 19/06/19** in support of this argument. In this case, this Court was called upon to determine whether the power of the Attorney-General to enter a *nolle prosequi* under **section 54(1) of Act 30** had to satisfy the requirements of **Article 296(c)** and **Article 11(7)** of the Constitution. This Court held that there was no need for the Attorney-General to comply with Article 11(7) since the Attorney-General was exercising an executive and not a legislative power.

The 1st Defendant also argues that a legislative power is one used to lay down the law for people in general, whereas administrative power is used to lay down the law for them or to apply the law to them in some particular situation. The 1st Defendant contends that the directive in issue is based on an already existing law of general application i.e. Act 930, and is going to regulate the behaviour of a specified group of people, and is consequently different from instruments contemplated by Article 11.

The 1st Defendant cites the Australian case of **Arthur Yates & Co. Pty. Ltd. v. The Vegetable Seeds Committee (1945) 72 CLR 37** to differentiate between legislative acts and administrative acts, quoting the dictum of Latham CJ as follows:

> "*The distinction between legislative and administrative acts is one which is easy to state in general terms, but which is sometimes difficult to apply. The distinction between making a law and administering a law made by some other authority is quite clear in many cases. A parliament passes a Lands Act, and a Lands Department administers the Act by putting it into operation. But where a law gives power to some person or body to give directions in order to put the law into operation, it is not always a simple matter to apply the distinction.*
> *Persons using the highways must obey the directions of traffic constables and they may be punished for failing to do so. But no one could say that the constable makes a law when he stops traffic or moves it forward. A military officer may give orders to soldiers under his command, an employer may give 'lawful orders' to his employee, a court may give directions to parties in relation to proceedings before it. None of these orders or directions are laws, though disobedience to any of them produces legal consequences."*

The 1st Defendant adds that just because **section 56 of Act 930** gives the power to the 1st Defendant to prescribe rules (with a lowercase 'r'), it does not mean that these are the Rules (with a capital 'r') contemplated by the framers of the constitution under **Article 11.**

The 1st Defendant also espouses the view that even though there is no ambiguity or obscurity in the provisions of **Article 11**, it is helpful to look at the Memorandum to the Interpretation Act, 2009 (Act 792) as **section 10(2)(b) of that Act** implores interpreters to do. Specifically, the 1st Defendant urged that attention be paid to the part of the Memorandum which states:

> *"There are other instruments not mentioned under Article 11 of The Constitution, such as bye-laws and proclamations. The express mention of the Orders, Regulations, and Rules excludes, by necessary implication, the other statutory*

instruments or statutory documents not so mentioned. These instruments, therefore, do not fall within the ambit of Article 11."

The 1st Defendant also makes the point that **Section 1 of the Interpretation Act** distinguishes between a "Statutory Document" and a "Statutory Instrument" and that while both documents are made under an authority conferred by an Act, a Statutory Document is not made under a subsidiary or subordinate legislative power. It cites the **Osei Akoto** case (supra) and argues that even if the directives herein were statutory instruments, they are not of a legislative nature and therefore not subject to the requirements under **Article 11(7).**

The 1st Defendant refers to **Article 183 of the 1992 Constitution** and says that the Constitution established the 1st Defendant as an independent regulator of the financial industry in Ghana and therefore it is not subject to the control of anyone.

The 1st Defendant argues that Parliament is clear in the **Bank of Ghana Act, 2002 (Act 612)**, as to which of its functions or acts require compliance with **Article 11(7).** It cites **Sections 4(2) and 66 of Act 612** as examples of provisions that specify the legislative nature of some of its powers. Similarly, the 1st Defendant says that in Act 930, where Parliament requires it to use subsidiary or subordinate legislation which would require compliance with **Article 11(7)**, it so specifies such as in **section 115 of Act 930.** On the other hand, **section 16(1)(g) of Act 930,** according to the 1st Defendant, is an example of a provision that uses the term "regulations" which is not subject to the procedure under **Article 11.**

The 1st Defendant contends that a judicial endorsement of the interpretation of **Article 11(7)** being urged by the Plaintiff, would result in Parliament micromanaging the work of the 1st Defendant, an outcome which was not the intention of the framers of the Constitution.

The 1st Defendant then sets out some provisions contained in the Directive of December 2018 and argues that they comply with its mandate to issue directives as administrative acts.

The 1st Defendant distinguishes its December 2018 Directives from the rule made by the General Legal Council in the **Asare** case (supra) and argues that the latter was expressly required by the **Legal Profession Act (Act 32)** to be made by a Legislative Instrument. Besides, the rule was made to override a statutory provision. In contrast, in **Act 930** there is no requirement that the December 2018 Directives be made by way of a Legislative Instrument, and further, that the Directives do not affect any matters which are already the subject of a statutory instrument.

The 1st Defendant concludes the Plaintiff is urging an overly expansive interpretation of **Article 11** which would "melt down the regulatory work of" the 1st Defendant and "grind down the work of Parliament in a way that the Constitution does not anticipate" and prays the Court to reject the Plaintiff's case.

CASE OF THE 2ND DEFENDANT

The 2nd Defendant says that the purpose of delegated legislation is that "*while Parliament deals directly with general principles, the body empowered to make subordinate or delegated legislation is given the opportunity to declare what parliament itself would have laid down had its mind been directed to the precise circumstances*."

The 2nd Defendant argues that though the 1992 Constitution does not define what 'Orders, Rules and Regulations' are, the jurisprudence of 'the Superior Court' is that in order to constitute an Order, Rule or Regulation under the ambit of **Article 11(1)(c)**, the instrument must be legislative in nature. The 2nd Defendant generally repeats the argument of the 1st Defendant and cites the **Osei-Akoto** case (supra), among others. The 2nd Defendant in paragraph 38 of its Statement of Case argues that not all statutory instruments are legislative in character and that the mere fact that an instrument is statutory in nature does not mean that it was intended to fall under **Article 11(1)(c).**

The 2nd Defendant contends that such an interpretation of the Constitution is in line with the provisions of **Sections 10(4)(c) & (d) of the Interpretation Act, 2009 (Act 729)** which mandate Courts to interpret the Constitution and other laws in a manner that

allows for the creative development of the laws of Ghana and avoids technicalities and recourse to niceties of form and language which defeat the purpose and spirit of the Constitution and the laws of Ghana.

The 2nd Defendant further argues that the interpretation that not all statutory instruments are of legislative character is one that has been applied in other Commonwealth jurisdictions, such as Australia. The 2nd Defendant also states that the directive does not seek to change the law but rather applies existing law already prescribed in Act 930. The 2nd Defendant gives examples in Act 930 where it acknowledges that the procedure under **Article 11(7)** ought to be followed due to the legislative character of the imperative contained therein, such as **Section 155 of Act 930.**

The 2nd Defendant concludes that **Article 11(7)** makes it mandatory for subsidiary legislation to be laid down before Parliament and published in the Gazette on the day it is laid before Parliament. This, the 2nd Defendant says, is to afford Parliament some form of control over subsidiary legislation. However, it is erroneous, in the opinion of the 2nd Defendant, to consider the Directives of December 2018 to be subsidiary legislation. It therefore submits that on a true and proper interpretation of the 1992 Constitution, the provisions of **Article 11(7)** do not apply to the directives issued by the 1st Defendant in December 2018.

LAW AND ANALYSIS

At issue in this case is the nature of the directives made by the 1st Defendant entitled ***The Bank of Ghana (BOG) Corporate Governance Directive - December 2018 On The Tenure For Managing Directors/Chief Executive Officers, Board Chairs and Non-Executive Directors of Regulated Financial Institutions*** made pursuant to the provisions of **sections 56 and 92(1) of the Banks and Specialised Deposit-Taking Institutions Act 2016 (Act 930).** We commence with the first issue.

ISSUE I

The Plaintiff has urged this Court to find that the directives at issue are Orders, Rules or Regulations in the **Article 11(1)(c)** sense and therefore required to comply with the provisions of **Article 11(7).**

The pathway to resolving this issue is an analysis of the said provisions of the 1992 Constitution, together with **sections 56 and 92(1) and (2) of Act 930,** all of which provisions I shall reproduce below:

Article 11(1)(c) -

(1) The laws of Ghana shall comprise-

(c) any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution.

Article 11(7) -

(7) Any Order, Rule or Regulation made by a person or authority under a power conferred by this Constitution or any other law shall -

(a) be laid before Parliament;

(b) be published in the Gazette on the day it is laid before Parliament; and

(c) come into force at the expiration of twenty-one sitting days after being so laid unless Parliament, before the expiration of the twenty-one days, annuls the Order, Rule or Regulation by the votes of not less than two thirds of all the members of Parliament

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Section 56. **Corporate governance**

The Bank of Ghana may prescribe rules regarding any matter of corporate governance of a bank, specialised deposit-taking institution or financial holding company that the Bank of Ghana considers necessary or appropriate to

(a) ensure prudent operation, including matters relating to the scope and nature of the duties of directors of a bank, specialised deposit-taking institution or financial holding company;
(b) the requirements for audit and other specific committees of the Board;
(c) the responsibilities of key management personnel;
(d) risk management;
(e) internal audit; and
(f) internal controls and compliance.

Section 92. Directives

(1) The Bank may issue directives to banks, specialised deposit- taking institutions or financial holding companies generally or to a class or classes of banks, specialised deposit-taking institutions or financial holding companies where the Bank of Ghana is satisfied that
(a) it is necessary to secure the proper management of a bank, specialised deposit-taking institution or financial holding company generally;
(b) it is necessary to prevent the affairs of banks, specialised deposit-taking institutions or financial holding companies being conducted in a manner detrimental to the interest of depositors and other stakeholders or prejudicial to the interests of the banks or specialised deposit-taking institutions or financial holding companies;
(c) it is necessary to maintain the overall stability of the financial system in the country; or
(d) it is necessary to give full effect to the provisions of this Act.

(2) Without limiting subsection (1) the Bank of Ghana may issue directives
(a) to provide for
(i) the licensing of banks and specialised deposit taking institutions;
(ii) the minimum level of capital for banks, specialised deposit-taking institutions and financial holding companies;
(iii) the prescription of prudential norms on asset quality, bad debt and write-offs;

(iv) the liquidity reserve requirements and net open position requirements;
(v) the computation of on-going capital adequacy requirements for banks, specialised deposit-taking institutions and financial holding companies;
(vi) the lending limits on credits extended to insiders;
(vii) the limitations for advances or credit facilities to a single borrower;
(viii) the rules and regulations against the use of banks, specialised deposit-taking institutions and financial holding companies for money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction;
(ix)the classification of entities as banks or specialised deposit-taking institutions for the purposes of this Act;
(x) the reporting requirements to the Bank of Ghana;
(xi) the issue, form and content of advertisements for deposits;
(xii) consumer protection principles, rules and requirements and their enforcement; and
(xiii) anything required under or authorised by this Act to be provided for by directives;
(b) to address specific characteristics of specialised deposit taking institutions to modify the application of a provision of this Act to a specialised deposit-taking institution; or
(c) to exempt a specialised deposit-taking institution or specific categories of specialised deposit-taking institution from the application of a provision of this Act.

WHAT IS THE NATURE OF AN ORDER, RULE OR REGULATION UNDER ARTICLE 11?

Before proceeding to answer this question, I think it is necessary to note that while **Article 11(1)(c)** talks about Orders, Rules and Regulations made by any person or authority under a power conferred by *this Constitution*, **Article 11(7)** talks about Orders, Rules and Regulations made by a person or authority under a power conferred by *this*

Constitution or any other law. It is intriguing that neither party brought up this difference between the two provisions, which would have invoked this Court's jurisdiction to interpret the Constitution where there is seemingly a conflict between two of its provisions, as was envisaged by Anin JA in the **ex Parte Akosah case (supra)**.

I believe this is worthy of note because in searching for or establishing the nature of an Order, Rule or Regulation, the first place to look for answers to this question is in **Article 11** itself. The first thing one ought to note is that the article says that these Orders, Rules and Regulations are made by a power granted a person or authority, ***either*** under a power given by the constitution, or under a power given by any other law. It then begs the question of whether the fact that the Constitution or any other law has granted a person or authority the power to make rules, means that every single rule that that power or authority seeks to enact must be brought before Parliament for twenty one days and published in the Gazette the day it was brought before Parliament?

The Plaintiff seems to think so. In arguing for this point, the Plaintiff at paragraph 18 of its statement of case refers to **paragraph 731 of the Memorandum on the Proposals for a Constitution for Ghana, 1968** which states as follows:

> *"Exercise of Discretionary Power*
> *731. Experience has shown that it is practically impossible for any Parliament however well-intentioned to carry out all its legislative duties properly. It has thus become the fashion for discretionary power to be given to* ***Ministers*** *(emphasis mine) under Acts of Parliament for certain things to be done, usually of an administrative nature.* ***This is often referred to as delegated legislation.****"*

Counsel for the Plaintiff goes on to argue "*From the above, the body of rules by which the business of government is usually carried on is known as delegated legislation",* ignoring the fact that the 1st Defendant is neither a minister nor a ministry and therefore not covered by this particular reference to the **Memorandum on the Proposals for a Constitution for Ghana, 1968.** The remainder of the Plaintiff's argument that is built on this premise therefore requires us to make one too far an inferential leap — that is, to accept that something that the Plaintiff has defined as applicable to **Ministers** should

apply *mutatis mutandis* to institutions such as the 1st Defendant. We are therefore of the view that this gap in the Plaintiff's reasoning renders the Plaintiff's argument short of a conclusion that the 1st Defendant's directives are 'Orders, Rules and Regulations' under **Article 11.**

That notwithstanding, when a Plaintiff invokes the original jurisdiction of this Court in a matter of constitutional interpretation, while he is required by law to submit a statement of case to support his action, he has no burden to establish one way or another what the correct constitutional interpretation of a provision in the constitution is. Even if he is unable to convince the Court of his position on the constitutional provision, the Court is constitutionally mandated to examine the provision comprehensively and come out with a conclusive interpretation of the law which itself will become law.

As a result, even though I am of the belief that the Plaintiff has been unable to establish its case, this Court remains under an obligation to pronounce on the issue of interpretation as well as perform its constitutional duty to enforce the constitution.

A question that should be asked at this point to get to the bottom of the nature of the directive in question is, "is every requirement created by any person or authority with power granted them by law, required to be promulgated in the manner contemplated under **Article 11(7)**?"

In our considered view, surely the answer to this question is no, for a number of reasons. In more general terms, doing so would severely slow down the already slow-paced manner in which Parliament works, inundating the body with Legislative Instruments which, although it is not to debate and pass, it still has the mandate to consider and interject. This will undermine the purpose of giving powers to persons and authorities to make administrative decisions.

In more specific terms, ruling that the 1st Defendant is required to present requirements, regulations and directives it uses to regulate and administer the financial sector of this country to Parliament, undermines the independent nature of the 1st Defendant while placing unnecessary fetters on the efficiency with which the 1st Defendant can work and

take steps to create an enabling financial and economic environment. This is the "mischief" for which these rules are in place and for which these powers have been granted to the 1st Defendant. The 1st Defendant is a body entrusted with the object of maintaining price stability and secure management of economic policy with a view to create growth of the economy to create opportunity for the people of Ghana and has been granted independence to do per **section 3 of the Bank of Ghana Act, 2002, (Act 612)**.

This is not to say that ***no*** requirement created by any person or authority with power granted them by law, is required to be promulgated in the manner contemplated under **Article 11(7).** Far from that. There are situations where a person or a body is required to comply with the said article.

The first scenario is when the Constitution provides the power to make subsidiary legislation to a person or a body. These are rules required by the Constitution to be made by Constitutional Instrument. **Article 297** describes a "Constitutional Instrument" as "*means an instrument made under a power conferred by this constitution*" - using and matching the language found in **Article 11(1)(c)** as opposed to in **Article 11(7).**

Examples of these may be found in **Article 203(2)**, which empowers the Police Council to make regulations for the performance of its functions under the Constitution, **Article 69(8)** which empowers the Rules of Court Committee to make rules governing the practice and procedure for the tribunal or medical board convened to look into the removal of the President for medical reasons, and **Article 167** which gives the National Media Commission the power to make regulations to govern its functions (See also **Article 65** on Presidential Election Regulations and **Article 158(2)** on the setting of the terms and conditions of employees of the Courts).

The second scenario is where the power is conferred by a law that is not the Constitution, which law grants that person or authority the power to make a regulation or rule and states that the person or authority must proceed by way of a statutory instrument. At this point it is worthy to note that neither **Section 56** nor **Section 92 of Act 930** require the 1st Defendant to proceed by way of a statutory instrument. As a matter of fact,

Section 92(3) of Act 930 gives the 1st Defendant the power to amend directives it issues "*as it deems fit*" lending more credence to the view that the 1st Defendant need not proceed by way of the procedure contained in **Article 11(7)** to enact directives.

The third scenario is one which was raised in the **Asare** case (supra), which is where the person or authority given a power is seeking to change the law. It is trite that if a law is made by Parliament, it cannot be changed by fiat, or by a person or authority. However, if that law was enacted by way of a statutory instrument, the person or authority is obligated to proceed by a statutory instrument in order to amend it.

In the **Asare case (supra),** Gbadegbe JSC stated as follows:

> *"It is observed that when administrative bodies which have been endowed with discretion under statutes to regulate a system that they are authorised to put in place have done so in the first instant by a legislative instrument, then when there are changed circumstances ... the correct thing to do ... is to take advantage of the constitutional provisions contained in Article 297(b) and (d) to amend, or revoke the existing legislation and substitute it with a new one.*

For ease of reference, Article 297(b) and (d) are reproduced below;

297. In this Constitution and in any other law -

> (b) where a power is conferred or a duty is imposed, the power may be exercised and the duty shall be performed, from time to time, as occasion requires;
>
> (d) where a power is conferred to make any constitutional or statutory instrument, regulation or rule or pass any resolution or give any direction, the power shall be construed as including the power, **exercisable in the same manner,** to amend or to revoke the constitutional or statutory instrument, regulation, rules or resolution or direction as the case may be (emphasis mine);

That being said, it is not all statutory instruments that are required to conform with the provision under **Article 11(7)**. The fourth scenario would be a situation where the statutory instrument is not legislative in character. A statutory instrument may be administrative or executive in character as opposed to being legislative in character.

The 1st Defendant in its statement of case referred to the learned authors of **Wade's Administrative Law (6th Edition) at pages 847-848** which distinguishes between legislative power and administrative power. To recap the thoughts expressed therein in other words, an administrative power is one that is used to lay down the law or apply the law in particular situations, whereas legislative power is the power to lay down the law for people in general. The Directive at issue in this case was to apply the already existing law or lay down the law when it comes to ***corporate governance*** of the Banks, necessitated by the recent financial sector crisis that our country has emerged from. It does not create laws that are of general application and therefore is an administrative (or executive) act and not a legislative act.

An example of an administrative act can be found in the **Afoko case** (supra)**.**

When it comes specifically to the 1st Defendant's functions under law, it is also instructive to examine in detail the parent Acts of Parliament which governs these regulations for direction as to when such subordinate legislation is subject to Parliamentary oversight, and when it is not. In their Statement of Case, the 1st Defendant outlines some examples of such cases which we reproduce with approval below. On page 16 of the Statement of Case, the 1st Defendant states as follows:

> *"Further, in Act 612, Parliament was clear on which aspects of 1st Defendant's functions are 'legislative' in nature and would require the passage of a legislative instrument. In sections 4(2) and 66, Parliament states clearly, the only instances where 1st Defendant's Board or the Minister For finance would be exercising powers under Article 11, for which the legislative process would be required. Section 4(2) provides as follows:*

The Board may, by legislative instrument, authorise a person to exercise the power of the Bank to regulate and supervise non-banking financial institutions.

And section 66 provides that:

The Minister may, after consultations with the Board, by legislative instrument, make Regulations that are necessary to give effect to this Act.

Thus, it is clear that it is only in instances where 1st Defendant wants to authorise a person to exercise some of its functions to regulate and supervise non-banking financial institution (sic) and when it is necessary to make regulations to give effect to the Act, that 1st Defendant would be exercising a legislative function, and would require (sic) to comply with article 11(7).

My Lords, Act 930 also provides the exact instances where subordinate or subsidiary legislative powers may be exercised. In section 155, Parliament sets out when a legislative instrument would be required as follows

Regulations

(1) The Minister may, in consultation with the Bank of Ghana, by legislative instrument, make Regulations prescribing or making provision for anything which under this Act may be prescribed or provided for by Regulations.

(2) Without limiting subsection (1), the Minister may make Regulations to provide -

(a) for the payment of fees and charges under this Act; and

(b) generally for the effective implementation of this Act

My Lords it is instructive that the Act provides that it is the Minister who is mandated to make the Regulations, which are legislative in consultation with 1st Defendant. Clearly, 1st Defendant is not expected to prepare regulations or make legislation in exercising its inherent regulatory functions under Article 183, Act 613 and Act 930.

We are in agreement with these views presented by Counsel for the 1st Defendant and we are of the view that he correctly explains that **Act 930** distinguishes between "Regulations" and "directives". The references to several parts of the Act which show that

these two are different from each other, such as **Section 9(g), Section 16(g), Section 87(1)(c)(ii), Section 102(1)(a), Section 103(1) & (2)** is on point.

Adopting the Plaintiff's argument would send all acts under the powers of the 1st Defendant contained in these sections to Parliament, which we do not believe would be the intention of the framers of the 1992 Constitution. The 1st Defendant, when issuing directives, which are administrative and not legislative, is therefore not intended to send the directives to Parliament under **Article 11(7) of the 1992 Constitution.**

For the above reasons, we have come to the conclusion that the 1st Defendant's directives are not 'Orders, Rules or Regulations' within the meaning of **Article 11(1)(c).**

ISSUE II

Having resolved issue 'I' in the negative, it follows by deduction that the 1st Defendant was under no obligation to comply with the provisions of Article 11(7) in issuing its Directives of December 2018 and for that matter, any other directives of that nature.

We are of the considered opinion that the directives issued by the 1st Defendant are administrative actions that the 1st Defendant is charged with the responsibility of crafting and given the power to issue. A ruling to the contrary would subject the administratively regulatory functions of the 1st Defendant, to Parliament, and caused a fossilized approach to what may only require an administrative and regulatory mechanism to correct a peculiar situation within the financial sector.

Additionally, there is a certain level of absurdity or repugnancy in making every executive or administrative action take the nature of a legislative function. It could not have been the intention of the framers of the constitution who created the 1st Defendant, to subject the internal workings and the regulatory responsibility of the 1st Defendant to the constant supervision of Parliament, thereby introducing the danger of slowing and

grinding the work done by the 1st Defendant to a gradual halt. Finding in favour of the Plaintiff would subject the 1st Defendant to undue parliamentary oversight, thereby upsetting the necessary independence of the 1st Defendant. The system of separation of powers ingrained in Ghanaian constitutionalism, and regulatory functions of specified institutions within the 1992 Constitution would be undermined.

We are therefore of the considered view that on a true and proper construction of **Article 11(1)(c)**, the directives and rules in question issued by the 1st Defendant do not fall under the ambit of the said article. This action ought to fail.

E. Y. KULENDI
(JUSTICE OF THE SUPREME COURT)

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

S. K. MARFUL-SAU
(JUSTICE OF THE SUPREME COURT)

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

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

G. TORKORNOO (MRS.)
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