IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2016

WRIT NO.J1/1/2017

14TH NOVEMBER 2016

CORAM: ATUGUBA JSC (PRESIDING)
DOTSE JSC
ANIN YEBOAH JSC
BAFFOE- BONNIE JSC
BENIN JSC
APPAU JSC
PWAMANG JSC

BETWEEN

DR. KWAME AMOAKO TUFFUOR — 1st Plaintiff
204 Lagos Avenue
East Legon, Accra

BENJAMIN ARTHUR — 2nd Plaintiff
House No. 4
Kasoa Bypass, Accra

ADREBA ABREFA DAMOAH — 3rd Plaintiff
House No. B 36
Beposo - Wenchi

AND

ELECTORAL COMMISSION — 1st Defendant
Sixth Avenue, Ridge-Accra

ATTORNEY GENERAL 2nd Defendant
Attorney General's Chambers
Ministry of Justice
Ministries – Accra

JUDGMENT

ATUGUBA, JSC:

FACTS

By their writ dated 27/10/2016 the plaintiffs claim as follows:

" 1. A declaration that upon a true and proper interpretation of Article 49 of the Constitution of the Republic of Ghana, 1992 'special voting' as provided for by Regulation 23 of the Public Elections Regulations, 2016; CI.94 is a part of public elections.

2. A declaration that upon a true and proper interpretation of Article 49 of the Constitution of the Republic of Ghana, 1992, and Section 13 of the Representation of the People Law, 1992; PNDCL 284 the ballots to be cast pursuant to Regulation 23(1), (2), (3), (4), (5), (6), (7), (8), (9) and (10) of the Public Elections Regulations, 2016; CI 94 by special voters in the December, 2016 presidential and parliamentary elections ought to be counted and announced there and then on the date(s) of the special voting; by the presiding officers and the results at each poling station; before communicating same to the returning officer.

3. A declaration that Regulation 23(11) of Public Elections and Regulations, 2016; CI.94 is inconsistent with "Article 49 of the Constitution of the Republic of Ghana, 1992.

4. An order striking down Regulation 23(11) of Public Elections Regulations, 2016; CI.94 as being inconsistent with Article 49(2), (3)(a) and (b) of the constitution of the Republic of Ghana, 1992 and

Section 13 of the representation of the People Law, 1992; PNDCL 284.

5. An order directed at 1st Defendant to comply with the provisions of Article 49(2), (3)(a) and (b) of the Constitution of the republic of Ghana, 1992 and Section 13 of the representation of the People Law, 1992; PNDCL 284 in respect of special voting for the 2016 presidential and parliamentary elections and any subsequent public election in the republic of Ghana.

6. Any further order(s) which this Honourable Court deems just and equitable ".

The plaintiffs per their memorandum of issues dated 8/11/2016 have set down the following issues for determination by this court.

" 1. Whether Special Voting as provided for at Regulation 23 of the Public Elections Regulations, 2016; C.I. 94 is part of public elections as provided for by Article 49 of the Constitution of the Republic of Ghana, 1992?

2. Whether Regulation 23(11) of the Public Elections Regulations, 2016; C.I. 94 is inconsistent with Article 49 of the Constitution of the Republic of Ghana, 1992? ".

The defendants for their part have set down one issue to the same effect as the plaintiffs' second issue.

Issue One

Issue one is res ipsa loquitur, since the elections to which article 49 relates are manifestly public elections of which the special vote invoked in this case is a component part.

Issue Two

This involves the interpretation of article 49 and Regulation 23(11) of the Public Elections Regulations, 2016 (C.I. 94).

Article 49 which is same as S. 13 of the Representation of the People Law,

1992 (P.N.D.C.L 284) is as follows:

" 49. Voting at elections and referenda

(1) At any public *election* or referendum, voting shall be by secret ballot.

(2) Immediately *after the close of the poll*, the presiding officer shall, in the presence of such of the candidates or their representatives and their polling agents as are present, proceed to count, *at that polling station*, the *ballot papers of that station* and record the votes cast in favour of each candidate or question.

(3) The presiding officer, the candidates or their representatives and, in the case of a referendum, the parties contesting or their agents and the polling agents if any, shall then sign a declaration stating.

(a) The polling station, and

(b) The number of votes cast in favour of each candidate or question, and the presiding officer shall, there and then, announce the *results of the voting at that polling station* before communicating them to the returning officer".

On the other hand Regulation 23 (10) and (11) of the Public Elections Regulations, 2016 (C. I. 94) are as follows:

" (10) Subject to subregulation (11) *voting at a* polling station for *special voters* shall be conducted in *the same manner as voting on polling day.*

(11) *The returning officer* shall at the end of the *special voting*

(a) Ensure that the ballot boxes are kept in safe custody *after the poll has closed;*

(b) Ensure that the ballot boxes are sealed with the seals of the commission and any candidates who wish to add their seal;

And

(c) arrange for the ballot boxes to be opened at the time of *the counting of the votes cast on the polling day and the*

ballot papers shall be counted in the same manner as those contained in the ballot boxes used on the polling day".

It is obvious that the expression "the poll has closed" in the context of sub-regulation (11) (a) refers to the poll of the special voting day and that sub-regulation (c) is contemporaneous with that of article 49 (2).

The plaintiffs contend that the results of the special vote should be declared on the day that vote is taken in accordance with article 49(2). However article 49(2) ties the duty to count and declare the votes cast at a polling station to *"immediately after the close of the poll*". What then is the meaning of the expression "the close of the poll", in article 49 (2)?. As contended by the 1st defendant the constitution does not define that expression. However that expression is defined by Regulation (49(1) of C. I. 94 as ' "close of the poll" means the conclusion of the poll *in all polling stations of the constituency* including polling stations where the poll has been adjourned;" '. (e.s)

It is clear from a careful consideration of the words "At any public election…" in article 49(1), when read together with the succeeding clauses (2) and (3), that article 49 as a whole relates to the holding of one and the same election and that the results to be declared thereunder relate to all the votes in respect of the election held in each polling station and not to some of them only. This is strengthened by the combined consideration of, inter alia, Regulations 4, 5, 15, 18, 21 and 23 of CI 94. Obviously the results from the special vote are only some of those results of the polling stations of a constituency relating to the election in question. Such fractional declaration of results of one polling station is not contemplated and could not have been reasonably contemplated by the constitution.

The Electoral Commission is enjoined inter alia by article 51 to make by constitutional instrument "Regulations for the effective performance of…" its duties. In *Kwesi Nyame-Tease Eshun v. The Electoral Commission and Attorney General,* Suit No. J1/24/2016, S.C., dated 27/10/2016, this court held that the Electoral Commission in the exercise of its functions under articles 45(c) and 51, has a duty to conduct free, fair, transparent and legal elections.

Certainly the fractional declaration of results is not an effective way of conducting elections, which to be effective must be, inter alia, as smooth, easy to track, coherent, complete and expeditious, as possible.

It is therefore understandable why Regulation 49(1) of C1 94 has defined "close of the poll" in the manner set out supra. This definition reflects well the letter and spirit of article 49 construed as a whole. That being so, the plaintiffs' writ seeks to compel the premature and unconstitutional declaration of the results of the special vote in the manner they contend for.

The Supremacy of the Constitution

In any litigation the courts and the parties are subject to the constitution. Accordingly this court has no jurisdiction to grant a relief that is contrary to the constitution or any law that is not inconsistent with or contrary to the constitution.

As held by this court in *Abu Ramadan & Nimako (No. 1) v. Electoral commission & Attorney-General & Ors,* (consolidated) (2013 – 2014)2 SCGLR 1654 as stated in Holding (2) of the head-note:

> " (2) *A meaningful actualization of the article 42 rights* would require, inter alia, that the first defendant Electoral Commission establish *credible and reliable structures, systems, processes and procedures for translating the constitutionally-guaranteed rights into reality*. Those mechanisms, structures, systems, processes and procedures must be such, as on balance, would guard protect and preserve the sanctity and credibility of the rights guaranteed thereunder. *A perfect electoral system was obviously utopian; hence the notion that the structures should, on balance, not undermine, detract from, dilute, nor whittle down the right to qualify to be registered,* the first crucial step that would enable the citizen to vote. Without that, the entrenched right to the franchise would remain an illusion".

This applies mutatis mutandis to the duties of the Electoral Commission under articles 49(c) and 51. Certainly therefore the 1st defendant in actualizing articles 45(c) and 51 must be constrained inter alia by article 49 which is one of the objects for which the 1st defendant's powers are conferred by article 51. See Re *Munhumeso and Others* (1994)1 LRC 282. Certainly the unjustifiable erosion of any constitutional provision in the exercise of its functions cannot be countenanced.

Accordingly in the *Kwesi Nyame-Tease* case, supra, this court, holding that regulation 42 of C. I. 94 relating to the constituency collation of parliamentary results is consistent with the letter and spirit of article 49 of the constitution, adopted it mutatis mutandis in respect of the collation of the presidential results also.

In the present case, however, the Electoral Commission is confronted with the dilemma of having election officers fully available for the performance of their electoral duties on the polling day of an election, without prejudice to their rights to vote as well as the excusable absence of registered voters on polling day, without prejudice to their voting rights. As is well known, the special vote is fixed for 1/12/2016 whilst the general election is fixed for 7/12/2016.

In order to do so effectively under article 51 of the constitution the Electoral commission has sought, inter, alia in regulations 23 and 24 to work out a balance between the competing electoral rights and the other relevant electoral provisions of the constitution. The resultant practical scenario of it's efforts is captured at p. 3 of it's publication, "GUIDE TO ELECTION OFFICIALS 2016" as follows:

> **" 2.2 Custody of Ballot Boxes for Special Voting**
> Ballots cast on special voting day must NOT be counted after the poll. The ballot boxes containing the ballots should be kept in a secured room at a police station in the constituency, and sealed with the seals of the Commission and any candidate/party who may wish to add their seals.
>
> **2.3 Counting of Special Voters Ballots**
> On polling day after polling ends at 5.00 p.m. (or when the last voter in the queue at 5pm has voted), the returning officer must retrieve the special voters ballot boxes from the police station and count the ballots in the presence of the candidates or their agents at the constituency collation centre.
>
> The results of the count should be recorded separately on both the presidential and parliamentary collation forms EL 23B and EL. 23A respectively in the spaces provided like any other polling station. The results of the special voting ballots should be added to the results from all the polling stations in the constituency before the

declaration of the constituency results. The statement of poll and result declaration forms EL 21/22 A and EL 22/22 B should be completed for the parliamentary and presidential elections respectively". See also p. 5 thereof.

We believe that this actualization of the powers of the 1st defendant, the Electoral Commission under article 51 of the constitution with regard to the need for special voting, resonates well with, inter alia, articles 42, 49, 23, 296 and 297 (c) of the constitution in terms of, letter coupled with spirit, and that the relief sought by the plaintiffs is inconsistent therewith, see *Tuffuor v. Attorney-General* (1980) GLR 634 C.A. (sitting as the Supreme Court).

For the avoidance of doubt we would also say that the fears of the plaintiffs regarding the sanctity of the special vote and the absence of the candidates' polling agents are unfounded in the face of Regulation 23 (11) and the Guide to Election Officials 2016.

We also emphasise that electoral interlocutory declaration of the results of the special vote contended for by the plaintiffs will gravely prejudice the secrecy of the ballots of the easily identifiable voters concerned contrary to article 49(1) of the constitution. It would further prejudice the freedom and fairness of the electoral process, as contended by the 1st Defendant in paragraphs 4.8 and 4.9 of their statement of case as follows:

" 4.8 *The integrity of the national elections can easily also be compromised or even jeopardized.* The reason for making this submission is that, *once the results of the special voting is declared even before the election, persons who have not yet voted can be influenced thereby. The result of the election will be discussed on every platform and this will influence other voters.*

4.9. *The various spins that could attend such public declaration of the results of the special voting will not augur well for a transparent electoral process.* The backlash will be blamed on these special voters whose only wrong is service to the nation and in so far as the electoral process is concerned ensuring that its integrity is preserved. It will be paradoxical that these selfless citizens whose avowed aim is to promote free and fair elections rather have their actions

innocently undermining the very process which they seek to protect". (e.s)

The excitement of such prejudice is arrested by the spontaneous counting and declaration of the electoral results required by article 49(2) and (3) as reflected by, inter alia, Regulations 23 and 24 of C.I. 94. The allowance of such prejudice can hardly be the efficient conduct of public elections demanded of the Electoral Commission under article 51 of the constitution. We are glad that no example of the advance announcement of the results of special or early voting in any country in the world could be cited to us by the parties. We are therefore fortified by the global wisdom regarding this matter.

Conclusion

Before we conclude we wish to acknowledge the sterling contribution of the 1st plaintiff to the development of Constitutional Law and Jurisprudence in this country largely triggered by his celebrated action in *Tuffuor v. Attorney-General* (1980) GLR 634 C.A. (sitting as the Supreme Court) and its salutary impact on the stability of the Judiciary in Ghana.

However for all the foregoing reasons we dismiss the plaintiffs' action.

(SGD) W. A. ATUGUBA

JUSTICE OF THE SUPREME COURT

DOTSE JSC

I agree

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

ANIN YEBOAH JSC

I agree

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

BAFFOE - BONNIE JSC

I agree

(SGD) P. BAFFOE - BONNIE
JUSTICE OF THE SUPREME COURT

BENIN JSC

I agree

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT

APPAU JSC

I agree

(SGD) YAW APPAU
JUSTICE OF THE SUPREME COURT

PWAMANG JSC

I agree

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MRS. DOROTHY AFRIYIE ANSAH (CHIEF STATE ATTORNEY) WITH HER MRS. ELFRIDA DENKYI (PRINCIPAL STATE ATTORNEY), IVY VANDERPUYE (SENIOR STATE ATTORNEY) AND VICTORIA ADORTEY (ASSISTANT STATE ATTORNEY) FOR THE 2ND DEFENDANT.