IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
AD- 2016

CORAM: ATUGUBA JSC
DOTSE JSC
ANIN YEBOAH JSC
GBADEGBE JSC
AKOTO - BAMFO (MRS) JSC
BENIN JSC
AKAMBA JSC

WRIT

NO. JI/16/2015

10TH MARCH 2016

EMMANUEL NOBLE KOR - PLAINTIFF

VRS

1. THE ATTORNEY GENERAL - 1ST DEFENDANT

2. JUSTICE ISAAC DELALI DUOSE - 2ND DEFENDANT

JUDGMENT

ATUGUBA JSC

THE FACTS

The facts of this case are that, by letter dated the 4th day of January 2013, signed by the Chief of Staff on his behalf the President of Ghana, His Excellency, John Dramani Mahama approved the implementation of the report of the Professor Marian Ewurama Addy Presidential Committee on the emoluments of the Superior Court Judges, subject to a variation that *"Gratuity shall be calculated as four months consolidated salary for each year (or fraction thereof) served".*

The Plaintiff by his writ challenges the power of the President to vary the said report.

The second defendant, Justice Isaac Delali Duose, a retired Court of Appeal Judge, having initiated an action in the High Court for reliefs relating to this same matter was on his application, joined to this suit as the 2nd defendant.

Both defendants, inter alia, contend that article 71 is clear and unambiguous and therefore raises neither an interpretation or enforcement issue within the original jurisdiction of this court.

The pursuant memorandum of agreed issues is as follows:-

1. "Whether the Plaintiff has properly invoked the jurisdiction of the Supreme Court.

2. Whether the instant suit raises any issue(s) of constitutional interpretation and/or enforcement.
3. Whether the determination by the President of the salaries including gratuities of the Chief Justice and Superior Court Judges should be done in accordance with the advice of the Council of State.
4. Whether in determining the salaries including gratuities of the Chief Justice and Superior Court Judges, the President is entitled to vary the recommendations of the Committee set up pursuant to Article 71 (1) (b) of the 1992 Constitution.
5. Whether the President in determining the gratuities of the Superior Court Judges acted outside the recommendations of the Committee set up under article 71 (1) (b).
6. Whether a Superior Court Judge who retires from 7th January 2009 is entitled to have his/her gratuity calculated on the basis of the new formula in Exhibit D (a) from the date of his/her appointment or (b) from 7th January 2009.
7. Whether the conduct of any of the parties in obtaining and using public/official documents in sustaining their case or defence should be deplored."

ISSUES 1 AND 2

The first two issues raise the question whether the original jurisdiction of this court has been properly invoked. The contention is that, as laid down in *Osei Boateng v National Media Commission & Appenteng* [2012] 2 SCGLR1038 no action can be brought in this court to enforce a clear provision of the Constitution

With celestial respect to the proponents of this view the converse of the matter is rather true. It is rather trite law that no action can be brought in this court to interpret a clear and unambiguous provision of the Constitution.

The original jurisdiction of this Court is governed by articles 2 and 130 of the Constitution. They are as follows:-

2. "Enforcement of the Constitution

(1) A person who alleges that -

(a) an enactment or anything contained in or done, under the authority of that or any other enactment; or

(b) any act or omission of any person,

is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect.

(2) The Supreme Court shall, for the purposes of a declaration under clause (1) of this article, make such orders and give such directions as it may consider appropriate for giving effect, or enabling effect to be given, to the declaration so made.

(3) Any person or group of persons to whom an order or direction is addressed under clause (2) of this article by the Supreme Court, shall duly obey and carry out the terms of the order or direction.

(4) Failure to obey or carry out the terms of an order or direction made or given under clause (2) of this article constitutes a high crime under this Constitution and shall, in the case of the President or the Vice President, constitute a ground for removal from office under this Constitution.

(5) A person convicted of a high crime under clause (4) of this article shall-

(a) be liable to imprisonment not exceeding ten years without the option of a fine; and

(b) not be eligible for election, or for appointment, to any public office for ten years beginning with the date of the expiration of the term of imprisonment. "

130. "Original jurisdiction of the Supreme Court

(1) Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in -

(a) all matters relating to the enforcement or interpretation of this Constitution; and

(b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution.

(2) Where an issue that relates to a matter or question referred to in clause (1) of this article arises in any proceedings in a court other than the Supreme Court, that court shall stay the proceedings and refer the question of law involved to the Supreme Court for determination; and the court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court."

It will be seen that article 2 of the Constitution is headed "*Enforcement of the Constitution"* and the ensuing provisions are meant to attain the enforcement of the Constitution. There is therefore express authority in the Constitution itself for the view that the enforcement jurisdiction of this court is a conspicuously independent item of jurisdiction of this court. Indeed, though it will be erroneous to say that a declaratory action cannot be brought within article 2 towards the enforcement of an ambiguous provision of the Constitution, it appears that while the enforcement purpose of that article is clear on the face of its provisions, its interpretative purpose is comparatively latent.

The *ratio constitution is* for an action to invoke the enforcement jurisdiction of this court under article 130 (a) is stated in article 2 to be that the event specified in its clauses (1) (a) and (b) " *is inconsistent with, or is in contravention of a provision of this Constitution."* Therefore a cause of action thereupon accrues for access to this court for enforcement of the Constitution.

Indeed it is difficult to see how the requirement of ambiguity can necessarily arise particularly in respect of the provisions of article 2 (1) (b) relating to *"any act or omission of any person."* (e.s)

Long ago it was held in *Akufo-Addo v Quashie-Idun* [1968] GLR 667 CA (Full Bench), that the courts will not tolerate breaches of the law.

As particularly explained by Azu Crabbe CJ, delivering the judgment of the Court of Appeal in *Okorie alias Ozuzu and Another v The Republic* (1974) 2 GLR 272 at 282, the basis for enforcing a constitutional provision is that "*Any breach of the provisions of the Constitution carries with it "not only illegality, but also impropriety, arbitrariness, dictatorship, that is to say, the breaking of the fundamental law of the land"*; see *The proposals of the Constitutional Commission For a Constitution For Ghana, 1968, p.22, para 88. The statements in exhibits A and K, were obtained in violation of the second appellant's constitutional rights, and consequently, we hold that they were inadmissible in evidence at the trial of the second appellant." (e.s)*

Similarly in *Gbedemah v Awoonor-Williams* (1969) 2 G&G 438 at 440 the Court of Appeal (sitting as the Supreme Court) held as follows:-

> "The pith of the plaintiff's claim… is that on 5th September, 1969, *the defendant took his seat as a Member of the National Assembly, notwithstanding the fact that he was not qualified so to do by virtue*

of article 71 (2) (b) (ii) and (d) of the Constitution, and that the defendant intends to continue to sit in the said National Assembly. *If the matter rests here, then prima facie there has been an infringement of the Constitution, and an alleged threat to continue such infringement. This would constitute a mischief, and it would become the inescapable duty of the Supreme Court to suppress it by enforcing the Constitution."*

Though this court held in *Yeboah v Mensah* [1998-99] SCGLR 492 that the action in that case was rather cognisable by the High Court and not the Supreme Court, the reasoning therein concerning the occasion for the invocation of the enforcement jurisdiction of this court holds good.

As Apaloo C.J, delivering the judgment of the Supreme Court in *Yiadom v Amaniampong* (1981) GLR 3 at 8 said, inter alia, *"To enforce a provision of the Constitution is to compel its observance."*

Certainly, it cannot be said that this court cannot compel the observance of a provision of the Constitution unless it first acquires the murkiness of ambiguity and is processed in the interpretative refinery of this court.

For all the foregoing reasons we would on this issue adopt the well-reasoned editorial note to the decision of this court in *Osei-Boateng v National Media Commission & Appenteng*, supra and depart from that decision.

We therefore hold that the Plaintiff has properly invoked the enforcement jurisdiction of this court and as will presently appear, also the interpretative jurisdiction of this court since the wording of article 71 (1) is not free from ambiguity contrary to the defendants contentions.

ISSUE 3

Even though the formulation of article 71 (1) is somewhat rambling, we do not think that it requires the President to determine the emoluments of the Chief Justice and Superior Court Judges in accordance with the advice of the Council of State.

It provides thus:

"71. Determination of certain emoluments

(1) The salaries and allowances payable, and the facilities and privileges available, to-

(a) the Speaker and Deputy Speakers and members of Parliament,

(b) the Chief Justice and the other Justices of the Superior Court of Judicature,

(c) the Auditor-General, the Chairman and Deputy Chairmen of the Electoral Commission, the Commissioner for Human Rights and Administrative Justice and his Deputies and the District Assemblies Common Fund Administrator,

(d) the Chairman, Vice-Chairman and the other members of-

(i) a National Council for Higher Education howsoever described;

(ii) the Public Services Commission,

(iii) the National Media Commission,

(iv) the Lands Commission, and

(v) the National Commission for Civic Education,

being expenditure charged on the Consolidated Fund, shall be determined by the President on the recommendations of a committee of not more than five persons appointed by the President, acting in accordance with the advice of the Council of State."

If it can be contended that this provision as it stands is capable of requiring the President to determine the salaries and allowances of the enumerated persons in accordance with the advice of the Council of State, it is also capable of requiring the President in appointing the Committee upon whose recommendations he is to determine them to act in accordance with the advice of the Council of State.

That being so it would be awkward and incoherent for that provision to be construed as requiring the President to act in accordance with the advice of the Council of State when appointing the said Committee and thereafter

act in accordance with the advice of the Council of State when determining these emoluments on the recommendations of the said Committee. That construction would render virtually futile the role of the Committee that is to make the recommendations relating to the said emoluments, for they would have been, in effect, superseded by the advice of the Council of State.

What then would have been the purpose of involving the Council of State in the appointment of the body that is to make the recommendations as to the said emoluments?

Again it is noticeable that it is the same committee that is adopted in clause 2 of article 71 to make recommendations as to the emoluments of the persons therein enumerated inclusive of the Council of State itself.

This clearly shows that the recommendations of the said Committee can and are meant to stand independently of the Council of State, for clearly, clause 2 does not require Parliament in determining the emoluments of the enumerated persons to act in accordance with any advice of the Council of State. It would plainly have been absurd, since the Council of State is one of the enumerated persons and institutions in clause 2.

Plainly it would be rational and non discriminatory to hold that clauses 1 and 2 of article 71 have set out to make use, in common, of the Committee that has been set up by the President in accordance with the advice of the Council of State.

That this is so is strengthened by the reference made in paragraph 44 of the 2nd defendant statement of case relating to the 1978 Constitutional Commission, as follows:-

> "44. Under the heading "Remuneration of Members of Parliament", in paragraphs 163, 164, 165 and especially 166 and 167, the commission dealt with the reason behind the predecessor of the current Article 71 which is Article 58 of the 1979 Constitution paragraphs 166 and 167 state as follows:-
>
> "166. We feel that it would be undesirable to give to Parliament itself the power to fix the salaries and allowances of Members of Parliament. That would put an unfair temptation in the way of members. On the other hand, *we do not consider it would be proper or acceptable to leave the determination of these salaries and allowances to the Executive alone*, since that might encourage the Executive to use the power of the purse to attempt to influence Parliament.
>
> 167. We think that *the best way out is to have these salaries and allowances determined by a relatively independent and uninterested body*, accordingly, we propose that the salaries, allowances and facilities of Members of Parliament *(and a number of other public officers)* should be determined by the President acting on the recommendations of a Committee *appointed in that behalf* by the

President acting in accordance with the advice of the Council of State. *The Committee* referred to above will have the *responsibility of advising on the levels of remuneration and allowances of a large number of important State office holders*, and it can, therefore, be expected that, in fixing these salaries, it will be in a position to consider the appropriate and necessary relativities and thus ensure that there is a rational and easily understood or explainable scheme of salaries and emoluments." (emphasis added).

It is trite knowledge that the Committee of Experts which prepared the proposals for the 1992 Constitution stated that it largely maintained the provisions of the 1969 and 1979 Constitutions of Ghana. Mutatis mutandis this has been re-enacted in article 71 of the 1992 Constitution.

It is therefore the appointment of the Committee that has to be done in accordance with the advice of the Council of State.

ISSUE 4

The question whether the President can vary the recommendations of the Committee set up under article 71 (1) (b) of the 1992 Constitution does not permit of a cut and dry answer.

When reference is made to the genesis of the proposals relating to the provisions of article 71, supra, it is noticeable that there was some

incoherence in the formulation of the proposal. In the one breath the committee stated thus:-

> "We do not consider it would be proper or acceptable to leave the determination of these salaries and allowances to the Executive ***alone." (e.s)***

Pausing here one would notice that the concern was that the Executive should not have the exclusive power to determine the emoluments involved. This contemplates therefore a participatory role for the Executive in the decision making process relating to these emoluments. Yet in the next breath the Committee stated *"that the best way is to have these salaries and allowances determined by a relatively independent and uninterested body."* This evinces exclusive power in the matter in favour of the body therein referred to.

The pursuant enactment however consigns the determination of the said emoluments to the President though acting on the recommendations of the Committee to be set up by the President in accordance with the advice of the Council of State.

All told, the following considerations emerge, for the proper construction of article 71, with some logical repercussions for some closely interconnected provisions. First, it is reasonable to hold (1) that the President is not excluded from the determination of the emoluments (2) that such determination should be dependent upon the recommendations of the

Committee set up by the President acting on the advice of the Council of State (3) that such a Committee is one of persons with considerable weight and expertise. Accordingly we would conclude that the President in determining the said emoluments must bear in mind the factor of restraint that the Committee's recommendations are intended to bear upon his power to determine the same.

We do not think that the President is inflexibly bound by the recommendations of the Committee otherwise the power conferred on him to determine those emoluments would be otiose since he would then have nothing really to determine. *Such inflexible duty to determine a matter arises under article 130 (2) of the Constitution. But clearly there, the power to determine a matter referred to the Supreme Court is a matter for the exclusive jurisdiction of the Supreme Court.* Such is not the scenario here.

We conclude that the President being the determining official of the said emoluments can vary the recommendations of the said Committee but having regard to the intent, spirit and policy behind the wording of article 71 (1) the President's variation should neither contravene article 127 (5), nor exceed reasonable bounds, see by analogy the celebrated case of *Brown v Attorney-General (Audit Service case)* [2010] SCGLR 183, holding (2).

ISSUE 5

In view of our holding on issue 4 supra, it cannot be said that the President acted outside the recommendations of the Committee in determining the gratuities of the Superior Court judges under article 71 (1). On our construction of that provision the determination of those emoluments is the product of the interactive powers of the President and the Committee within reasonable bounds. Since it has not been contended nor could it have been reasonably contended that the margin of variation by the President was gravely unreasonable, *cadit quaestio.*

In any event even if it can be said that the President acted outside the recommendations of the Committee he validly did so within a permissible range.

ISSUE 6

The aforementioned, formula (in exhibit D), for calculating the gratuity of a retired Superior Court Judge applies in respect of retirements occurring from 7th January 2009 based on the term of service of the judge concerned as from the date of his appointment, subject to the provisions of article 155. It should be noted that the said formula relates to the retiring stage of the Judge and the retirement is based on his period of service as a Superior Court Judge without losing sight of article 155 aforesaid.

The 2nd defendant prays that in the event of upholding his claim to retirement based on a gratuity of *"four months consolidated salary for each year (or fraction thereof served)"*, we should give him judgment for his claims in his action for the same pending in the High Court. With grave respect we do not think we can do so. The power under article 129 (4) relates to a matter within our jurisdiction and the pursuant judgment or order. Since the action here is not based on the action before the High Court, we cannot grant the 2nd defendant's said prayer. But obviously he is bound to succeed in the High Court, consequent upon our decision herein.

CONCLUSION

For all the foregoing reasons and subject to the caveats expressed in this judgment, we dismiss the plaintiff's action.

(SGD) W. A. ATUGUBA

JUSTICE OF THE SUPREME COURT

CONCURRING OPINION

GBADEGBE JSC:

I have had the advantage of reading in draft the judgment of my worthy brother, Atuguba JSC and hereby express my agreement with him on the conclusion reached in the matter herein. I do, however wish to express my own reasons for reaching the same conclusion with him in respect of two questions for our determination in the action herein. The said questions are issues 4 and 6. While issue (4) concerns the variation by the President of part only of the recommendations of the Committee set up under article 71(1) to determine the emoluments of specified persons, the other issue relates to the formula for computing the retirement benefits of superior court judges.

I shall in this short delivery deal with the issues in the order in which they arose in the memorandum of issues. In my view, it is unreasonable to contend that the President in whom the executive power of the state is vested cannot after appointing the committee specified in article 71(1) vary, alter or modify the recommendations but is obliged to give effect to same. That contention seems to undermine the authority of the President and leaves in the hands of an unaccountable body, the committee so appointed the sole responsibility of determining the emoluments of article 71 employees. Pausing here, I wish to say at once that in my view the version of the matter pressed on us by the plaintiffs is unreasonable

as it seeks to recognize the position of the President as the one in whom by article 58 of the constitution, the executive power of the state is vested, and yet seeks to withhold from him the means by which he can give effect to such power. I think that by the clear provisions of article 71(1), the determination of the emoluments of the specified public officers is a matter for the President subject to receiving recommendations from a committee appointed by him for that purpose. As the committee is only to make recommendations to him, it seems from a fair reading of the applicable constitutional provision that the determination of the emoluments, is his constitutional mandate. The only limitation on the exercise of his power under the said article concerns only the process by which the President constitutes the membership of the committee; which he is required to do in accordance with the advice of the Council of State. When the recommendations are submitted to him as the appointing authority, the constitution leaves to him alone the determination of what the emoluments should be. In my opinion if it was intended that the Council of State play any further role in the matter, express provision would have been made to that effect.

In my thinking by the use of the words *"…… shall be determined by the President on the recommendations of a committee…"* makes it quite clear that the determination of the emoluments is a matter left to the discretion of the President subject to him taking the recommendations that are submitted to him into account. It is plain from the formulation of article 71(1) that the reference to the

Council of State is limited only to advising the President on the membership of the committee to be appointed; once the committee is appointed by him under article 71 (1), the Council of State does not have any function conferred on it by the constitution in regard to the determination of the emoluments. It is observed that the words "*acting on the advice of the Council of State*", which are contained in part of article 71 (1) are in relation to the appointment of the committee of not more than five persons to make recommendations to him to facilitate his determination of the emoluments of the specified public office holders. Accordingly, any construction of the article which subjects the determination of the emoluments by him to be in accordance with the advice of the Council of State is a strained meaning which I refuse to give effect to.

The next issue for my consideration is the computation of the retirement benefits of superior court judges. Before us, it has been contended that the correct mode of computing the benefits should not include any period served by such retiring judges before January 07, 2009. It is further contended that in the premises, the formula contained in the letter signed by the Chief of Staff dated January 04, 2013 by which four months consolidated salary is to be used for each year or part thereof served by retiring superior court judges can only be utilized in relation to periods of service effective from January 07, 2009 and not before such date. In my view, the said contention undermines the concept of judicial

independence, which in its nature is not only limited to protecting judges from interference in the exercise of their functions as judges but also extends to affording such judges parity in treatment in their conditions of service such as salaries and retiring benefits. In the Canadian case of **Bodner** v **Alberta** [2005] 2 SCR 286, the Supreme Court of Canada confirmed that financial security in its institutional and individual components is with security of tenure and administrative independence, one of the three core characteristics of judicial independence. Financial security, it seems to me is a means by which judicial independence is attained and therefore nothing should be done to compromise it as in the long run , its attainment endures to the benefit of the public by ensuring that competent persons are attracted to the bench. Judicial independence is integral to the rule of law, which is an essential condition for the protection of rights of individuals and therefore one can say that as a core characteristic of judicial independence, financial security is an essential pre-requisite to the realization in any modern society of the rule of law. It follows that its absence creates an environment in which one cannot reasonably imagine individuals having tangible human rights capable of being enforced against the state. The existence of financial security is thus as said earlier in the course of this delivery is beneficial to the public as it provides a reasonable assurance of impartiality by courts in scrutinizing cases involving human rights violations. While conceding that it is consistent with the concept of judicial independence to pay different salaries to judges depending on

which court they are appointed to, it is unreasonable and indeed, incompatible with it to provide differential retirement schemes for judges even at the same level depending on whether the period served was before or after January 07, 2009.

Plainly, in my view, to accede to the submission of the plaintiff on this aspect of the matter, is to say the least an invitation to this court to abandon its responsibility of construing the constitution to advance the purpose of its provisions and embark upon a purely mechanical construction that does not concern itself with the fundamental principles underlying the independence of the judiciary. Inherent in the meaning placed on the computation of the retiring benefits by the plaintiff is the absence of any justifiable reason for which judges currently in the employment of the Judiciary may be subject to different retirement schemes.

I have tried in the course of the instant proceedings to apply my mind fairly by asking whether there is in principle any reason why the said meaning is being urged on us but the more I give thought to the question the more tolerably clear it seem to me that not only is there any but that to yield to the said contention will have the effect of undermining the concept of judicial independence. I cannot discern why judges who do the same work and suffer the same deprivations and enjoy the same privileges will be put apart when it comes to their retirement benefits. In my opinion, article 155 envisages equality of treatment to superior court judges in their

retiring awards hence the provision made in clause (1) (b) of the article to provide parity of treatment for judges who would not have served at least ten continuous years as superior court judges before their retirement by taking into account twenty years' service in the public sector of which five continuous years would have been as superior court judges. It is to be observed that such a scheme of differential retirement scheme would naturally be adverse to some superior judges and detracts from the constitutional provision contained in article 127(5) that precludes their salaries, pension and other conditions of service from being varied to their disadvantage. There can be no doubt that judges who might be adversely affected by the differential scheme will go through moments of financial anxiety and impact on their ability to discharge their functions impartially and erode a core characteristic of judicial independence namely security of tenure. I am in great difficulty comprehending how we can be invited to gloss over article 127 (5) which seeks to secure equality in retiring awards of judges as we attempt to determine the question for our decision which turns on the issue numbered as 6 in the matter herein. The said provision should put us on an inquiry by providing us with a useful guide as to the clear intendment of the constitution in regard to equality of retiring benefits to retiring superior court judges. Accordingly, I am of the view that the formula approved for the computation of the retiring awards applies to all superior court judges who retire after the effective date of January 07, 2009.

Subject to the above, I agree with the judgment of my esteemed brother Atuguba JSC in the matter herein.

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(SGD) N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

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

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

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