IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, A.D.2016

CORAM: **ANSAH JSC (PRESIDING)**
DOTSE JSC
ANIN YEBOAH JSC
BAFFOE-BONNIE JSC
GBADEGBE JSC
AKOTO-BAMFO (MRS) JSC
AKAMBA JSC

REFERENCE

NO. 16/1/2015

5TH DECEMBER 2016

FRANK OTAH ENYEREM

VRS

1. **LOGISTICS INC. LIMITED**
2. **MR. DOMPREH**
3. **P. S. C. TEMA SHIPYARD LTD**
4. **MAXWELL FORSON**
5. **SETH KUBLENU**
6. **THE REGISTRAR, HIGH COURT, TEMA**

JUDGMENT

DOTSE JSC

On the 5th day of December 2016 this court by a unanimous decision dismissed the referral action necessitated by the preliminary legal objection filed and argued by learned counsel for the 3rd to 5th Defendants against the legal representation of the 6th Defendants by the Attorney-General.

Following that dismissal, this court directed as follows:-

> "*Accordingly the Judge before whom the suit was pending in the High Court, Tema, or any other Judge presiding over the Court in which the suit is pending is to continue the suit with the Attorney-General representing the 6th Defendant in terms of the orders and judgment of this Court. The full and reasoned judgment of this court are to be filed later.*

We now proceed to give the reasons for our said decision.

INTRODUCTION

By an order of His Lordship Adjei-Frimpong J.,presiding over the High Court, Tema the following issues formulated by him were referred to the Supreme Court for interpretation:

1. Whether on a true and proper interpretation of Articles 124 (1); 127 (1) and (2) and 161 of the 1992 Constitution, the Attorney General who is a Minister of State under Article 88 (1) of the Constitution can properly represent the 6th Defendant who is a judicial officer in legal suit.

2. Whether, the representation of the 6th Defendant by the Attorney-General who is a Minister of State under Article 88 (1) of the 1992 Constitution is in contravention of and inconsistent with the letter and spirit of Article 125 (1), 127 (1) and (2), and 161 of the said Constitution.

FACTS OF THE CASE

The facts of this case admit of no controversy whatsoever. They are as follows:-

The plaintiff, formerly an engineer on board the vessel M/V MIDEN ANIE brought a suit against the said vessel together with her owners and operators for unpaid salaries before the High Court Tema. In the said suit titled ***Frank Otah Enyerem v Miden Systems & 3 Ors***, the plaintiff obtained judgment in the

total sum of Three Hundred and Twenty-Eight Thousand, Five Hundred US Dollars ($328, 500.00) in June 2013.

Following the said judgment the plaintiff caused to be attached by a writ of fifa the property of the defendants therein. The property so attached has been described as *"Dive Spread Equipment"* in four (4) separate 20 footer containers ("the property"). In the instant suit, the plaintiff alleges that at all material times the property was in the custody of the 3rd defendants herein, (PSC, Tema Ship yard)

The plaintiff alleges that, following the attachment of the property, his lawyers wrote to the 6th defendant (Registrar, High Court, Tema) to issue a letter to the selected valuer to proceed with the valuation of the property pending judicial sale. The 6th defendant is alleged to have unduly delayed in issuing the said letter.

Consequently, the plaintiff filed an application for an order of mandamus against the 6th defendant to issue the letter. The said application was eventually slated for 28th August, 2013. The application was however withdrawn on the said day upon an

announcement by the 6th defendant to the Court that he had already issued the letter.

The plaintiff alleges that upon receipt of the letter, he discovered that the 6th defendant had either connived with the 3rd to 5th defendants to convey the property to the 1st and 2nd defendants on the pretext that the property was an integral part of the vessel M/V MIDEN ANIE which had previously been sold by auction in a separate action.

RELIEFS IN THE SUIT IN WHICH THE REFERRAL WAS MADE

The Plaintiff in the instant suit claims jointly and severally against all defendants for the following reliefs:-

i. A declaration that the action of the 1st and 2nd defendants in picking up the lawfully attached Dive Spread Equipment contained in four (4) separate 20 footer container

supported by the 3rd and 4th defendants is unlawful and void in law.

ii. An order directed at the 1st, 3rd, 4th, 5th defendants to produce all the said four (4) separate 20 footer containers and deposit same at the 3rd defendants' Drydock Shipyard, Tema for valuation work to be conducted by the assigned valuer

Or in the alternative

An order for compensation commensurate to the full judgment debt in favour of the plaintiff

iii. Damages for negligence in office and loss suffered by the plaintiff thereof

iv. Costs including legal costs of the suit

On 21st October, 2013, the Attorney-General entered appearance for the 6th defendant and proceeded to file a statement of defence in that behalf on 5th November, 2013.

On 24th February, 2015, the lawyer for the 3rd to 5th defendants filed a notice of preliminary objection against the legal representation of the 6th defendant by the Attorney General; citing breaches of Articles 88(1), 125(1), 127(1) & (2) and 161 of the 1992 Constitution.

It is in pursuit of the above argument that the High Court Judge presiding over the Tema High Court referred the issues set out supra to the Supreme Court for determination.

Pursuant to an order of this court dated 17th June 2015, statements of case were filed by counsel for 3rd to 5th defendants and 6th defendant respectivley on these issues.

The crux of the arguments of learned counsel for the 3rd to 5th Defendants can be summarised briefly as follows:-

ARGUMENTS OF COUNSEL

Relying on the constitutional provisions in article 88 (1) to (5) of the Constitution 1992, and celebrated cases like **Tsikata v The Chief Justice & Attorney-General [2001-2002] I GLR 186, S.C** and **Amegatcher v Attorney-General (No. 1) & Others [2012] I SCGLR 679, SC** the said Defendants urged the court to interpret the word *"state"* as used in the context in which it has been used in article 88 (5) as limited to Government as it is defined by the Constitution vide Article 295. According to learned counsel, Mr. Osafo Buabeng, because no serious attempt was made to really define the word *"state"* in the article 88 (5) context, this court should use the instant opportunity to straighten the law on the subject. According to learned counsel, the position as currently existing with the case law is that the Attorney-General is at liberty to interfere with the independence of the Judiciary and this will lead to absurdities. He therefore concluded that the 6th Defendant, being the Registrar of the High Court, Tema is a Judicial Officer and a public servant vide Article 190 (1) (a) of the Constitution.

On the other hand, learned counsel for the 6th Defendant, Adwoa Obeng, Senior State Attorney, relying on the same cases referred to supra in addition to the following case and statutes such as

Asare v Attorney-General [2003-2004] SCGLR 823, at 825 and 833, State Proceedings Act, 1998, (Act 555) Judicial Service Act, 1960 (CA 10) and the Judicial Service Regulations, 1963 (LI 319) argued that although the Constitution has carefully built an architecture that preserves and protects the doctrine of separation of powers into three distinct organs of state, to wit the Executive, Legislature and Judiciary, these are independent of each other, however, they all have checks and balances.

This special working relationship between the three arms of government had been stated by me in my opening remarks in the opinion I delivered in ***"In Re Presidential Election Petition, No. 4" [2013] SCGLR Special Edition, 73, at 303***, as follows:-

> *"In 1776, John Adams, one of the United States most respected statesmen and author, wrote in his book: Thoughts of Government (as quoted at page 178 of the book: The Quotable Founding Fathers (2008 Edition) edited by Buckner F. Melton Jr), the following profound statement on the working relationship between the three arms of government, to wit, the Executive, Legislature and Judiciary:*

"The dignity and stability of government in all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skillful administration of justice, ***that the judicial power ought to be distinct from both the legislature and executive, and independent upon both,*** *that so it may be a check upon both, and both should be checks upon that."*

From the above, it is clear that the independence of the Judiciary cannot be over-emphasised. Indeed the situation in Ghana even has constitutional endorsement in article 127 (1) (2) of the Constitution. But that should not lead us to conclude that as an independent body, the Judiciary should not have any working relationship with the Executive where the Attorney-General belongs or the Legislature, where he could be a member, or by virtue of his position as an Attorney-General attend proceedings of Parliament. See article 111 of the Constitution

According to learned Senior State Attorney, under the current constitutional and legal regime, and until Article 88 of the Constitution is amended, it is perfectly lawful for the Attorney-General to represent a member of the Judiciary or Judicial Service

in a civil suit irrespective of the clear provisions of Article 127 of the Constitution in their entirety which guarantee's Judicial Independence.

The 6th Defendants therefore urged this court to decide and rule on the referral issue in favour of the 6th Defendant that the Attorney-General can represent him.

REAL ISSUES FOR DETERMINATION

Even though the learned trial Judge formulated the two issues stated supra for determination, in reality they both can be subsumed into one issue re-formulated as follows:-

> *"Can the Attorney-General represent the 6th Defendant the Registrar of the High Court, Tema in the suit pending therein?"*

In determining this case, it will be pertinent to refer particularly to Articles 88 and 127 of the Constitution 1992. We will therefore set them out clearly as follows:-

Article 88 (1) - (5)

(1) "There shall be an Attorney-General of Ghana who shall be a Minster of State and the **principal legal adviser to the Government.**

(2) The Attorney-General shall discharge such other duties of a legal nature as may be referred or assigned to him by the President, or imposed on him by this Constitution or any other law.

(3) The Attorney-General shall be responsible for the initiation and conduct of all prosecutions of criminal offences.

(4) All offences prosecuted in the name of the Republic of Ghana shall be at the suit of the Attorney-General or any other person authorised by him in accordance with any law.

(5) The Attorney-General shall be responsible for the institution and conduct of all civil cases on behalf of the state; and all civil proceedings against the state shall be instituted against the Attorney-General as defendant." Emphasis

Article 127

(1) "In the exercise of the judicial power of Ghana, the Judiciary, in both its judicial and administrative functions, including financial administration, is subject only to this Constitution and **shall not be subject to the control or direction of any person or authority**.

(2) **Neither the President nor Parliament nor any person acting under the authority of the President or Parliament nor any other person whatsoever shall interfere with Judges or Judicial officers or other persons exercising judicial power, in the exercise of their judicial functions;** and all organs and agencies of the State shall accord to the courts such assistance as the courts may reasonably require to protect the independence, dignity and effectiveness of the courts, subject to this Constitution." Emphasis

Our role in this case has been well cut for us by the two previous decisions of the court in the **Tsikata v Chief Justice & Attorney-General**, supra and **Amegatcher v Attorney-General**, also supra.

It is worthwhile to note that, in the Tsikata case supra, a preliminary objection like the instant one had been raised by the Plaintiff therein to the representation of the Chief Justice by the Attorney-General, claiming that, the Attorney-General being a member of the Executive as clearly denoted by the provisions of Article 88, such representation amounted to interference with the independence of the Judiciary as captured in article 127 supra.

The court, speaking through Ampiah JSC held inter alia as follows:-

> "*The Chief Justice was a public officer appointed by the President in consultation with the Council of State, and with the approval of Parliament. Acts performed by him in the pursuance of the functions of his office were therefore official acts.* ***Accordingly, as provided by article 88 (5) any attack on him in the performance of his duties needed to be defended by the Attorney-General on behalf of the state.***"

We cannot but agree and endorse the views of the court as expressed therein. However, when another opportunity presented

itself in the more recent case of **Amegatcher v Attorney-General, (No. 1) and others**, supra, the Court speaking through Atuguba and Date-Bah JJSC, raised certain pertinent issues but did not depart in the main from the decision in the Tsikata case supra. Instead, the court in the Amegatcher case, opened the window wide and indicated the possibility of future expansion of the scope of the principle.

Atuguba JSC at page 684 of the report stated his views as follows:-

> "***Consequently, we consider that, the time has come for a realistic revisit to article 88 (5) of the 1992 Constitution***. *Accordingly, we would come down on article 88 (5) as follows – all the Constitutionally established independent bodies like the Commission on Human Rights and Administrative Justice, the Electoral Commission, etc can sue and be sued on their own relating to their functions per counsel of their choice. Any person affected by an action involving the state can, upon application, be joined to such action his or her interest.* ***With regard to the Judiciary and legislature where their position on an issue is in***

conflict with that of the Attorney-General, they may proceed on their own by counsel of their choice. However, any of these bodies referred to may access the services of the Attorney-General if they so choose." *Emphasis*

Even though, Dr. S.Y. Bimpong-Buta in his Editorial note to the Amegatcher case on pages 680 and 681 sought to create the impression that the Tsikata case had been departed from that view cannot be the case. Instead, the Amegatcher case is an improvement upon the Tsikata case with a window of hope for members of the Judiciary to opt for legal representation from the Attorney-General or not.

It is also very important to observe that, Dr. Date-Bah JSC in his opinion in the Amegatcher case, raised the following pertinent questions:-

"Article 88 (5) provides that all civil proceedings against the state shall be instituted against the Attorney-General as defendant. Does this mean that every civil action against any organ or institution of the state has to be brought against

the Attorney-General who is infact a member of the executive? ***Does this not compromise the principle of the separation of powers? What happens if the Attorney-General wants to sue the speaker or the Chief Justice? Must he sue himself? If a member of the Attorney-General's political party sues the Chief Justice, can the Attorney-General compromise the suit, since he is the nominal defendant, irrespective of the wishes of the Chief Justice? These are but a few of the many troubling issues that arise from a literal reading of article 88 (5)".*** *Emphasis supplied*

We have perused the erudite decisions of our brethren in the cases just referred to supra. We have also given in depth consideration to the erudite submissions of learned counsel for the parties in this referral action.

GUIDELINES

After many anxious considerations of the various constitutional and statutory provisions, notable among them being articles 88 and 127 (1) (2) and (CA 10) and Act 555, and the cases referred

to supra, we are of the view that it is useful to work with the following guidelines whenever a decision is to be made whether to permit the Attorney-General to represent the Judiciary or an employee or staff thereof. We realize that, it will certainly be imprudent to lay down a hard, fast and unbending set of criteria whenever such a decision is to be made. The following are however to be considered:-

1. Independence of the Judiciary or of the Judicial Service. Since this is a core and critical element, whenever the representation by the Attorney-General will compromise the independence of the Judiciary, that representation must not be accepted.

2. Conflict of interest situations. Any such representation which gives the slightest indication of there being a conflict of interest situation arising must equally be avoided.

3. Thirdly, any representation by the Attorney-General which also gives any indication as it were that the Judiciary stands

the risk of being compromised one way or the other, must also be avoided.

4. Finally, an assessment must be made on a case by case basis, especially when one considers the pertinent questions posed by our illustrious brother Dr. Date-Bah JSC in the **Amegatcher v Attorney-General's** Case supra.

Applying the above guidelines to the circumstances of the instant referral, we are certain in our minds that, the representation by the Attorney-General of the 6th Defendant, in the suit pending at the High Court, Tema will not undermine the independence of the Judiciary or of the 6th Defendant, who by definition under article 161 of the Constitution is a Judicial Officer, or result into a conflict of interest situation, or compromise the office of the 6th Defendant in anyway whatsoever. Each determination must be made on a case by case assessment.

It is in respect of the above reasons that we decided the referral issue on the 5th of December 2016 and held that it was perfectly legitimate for the Attorney-General to represent the 6th Defendant in the suit currently pending before the said court.

We therefore accordingly direct the continuation of the suit with the said representation.

V. J. M. DOTSE

JUSTICE OF THE SUPREME COURT

ANSAH JSC

I agree

J. ANSAH
JUSTICE OF THE SUPREME COURT

ANIN YEBOAH JSC

I agree

ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

BAFFOE - BONNIE JSC

I agree

P. BAFFOE - BONNIE
JUSTICE OF THE SUPREME COURT

GBADEGBE JSC

I agree

N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

AKOTO- BAMFO (MRS) JSC

I agree

V. AKOTO – BAMFO (MRS)
JUSTICE OF THE SUPREME COURT

AKAMBA JSC

I agree

J. B. AKAMBA
JUSTICE OF THE SUPREME COURT

COUNSEL

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EKOW DADSON FOR THE 1ST AND 2 ND DEFENDANTS.
OSAFO BUABENG WITH HIM FRANCIS GARBA FOR THE 3RD, 4TH & 5TH DEFENDANTS.
ADWOA O. OBENG (SENIOR STATE ATTORNEY) FOR THE 6TH DEFENDANT