IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2020

CORAM: YEBOAH CJ (PRESIDING)
DOTSE JSC
GBADEGBE JSC
MARFUL-SAU JSC
AMEGATCHER JSC
PROF. KOTEY JSC
OWUSU (MS.) JSC

WRIT NO. J1/2A/2020

23RD JUNE, 2020

GHANA INDEPENDENT BROADCASTERS ASSOCIATION ..... PLAINTIFF

VRS

1. THE ATTORNEY-GENERAL

2. NATIONAL CONNUNICATIONS AUTHORITY } **..... DEFENDANTS**

JUDGMENT

GBADEGBE JSC:-

The question for determination in this action purportedly brought under our original jurisdiction is whether the conditional access system published by the 2nd defendant as part of the standardization requirement by the 2nd defendant under sec 2 of the Electronic Communications Act, 2008, (Act775) is in breach of the Constitution , 1992

such as to require our intervention by enforcing the various provisions of the Constitution on the freedom of the media contained in articles 21 (1 (a) and (f)), 162 (1) and (3). But, before then, we have to determine the preliminary question raised by the defendants that the instant action is an improper invocation of our jurisdiction under article 2(1) of the 1992 Constitution. It is only when the plaintiff overcomes the jurisdictional hurdle that we are empowered to consider the action on the merits.

In compliance with the relevant rules of the Court, the plaintiff initiated the action herein by a writ that was subsequently followed by a statement of its case setting out the facts and law on which the action was founded. Briefly stated, the plaintiff seeks to enforce the various constitutional provisions referred to in the opening paragraph of this delivery relating to the media consequent upon the publication by the 2nd defendant of minimum standard requirements that are to be complied with by operators of Free-to-Air Television channels in the country. By the said action brought under the original jurisdiction of the Court, the plaintiff claimed the following reliefs:

(a) A declaration that the conditional access system introduced and published as mandatory requirement by the National Communications Authority by which the media content of Free-to- Air broadcasters are blocked by the Government which shall to be met before access to require certain criteria content is granted to the viewing public constitutes an unnecessary restraint on the establishment and operation of private press media and therefore contravenes Article 162(3) of the 1992 Constitution of the Republic of Ghana.

(b) A declaration that the blockage of media content of Free-to-Air broadcasters through the conditional access system introduced by the National Communications Authority is unconstitutional as same constitutes an unreasonable and unnecessary abridgement of the freedom of the media contained in Article 21(1) (a) and 162 (1) of the 1992 Constitution.

(c) A declaration that the blockage of the media content of Free-to-Air broadcasters through the use of conditional access system introduced by the National Communications Authority contravenes the spirit and letter of the constitution of the Republic of Ghana since same constitutes unnecessary abridgement of the right to information guaranteed under the 1992 Constitution.

(d) An order directed at the National Communications Authority to remove from the Minimum Requirements for Reception of Digital Terrestrial and Satellite Television Services any system in the nature of conditional access that encrypts or blocks the content of Free-to-Air Television channels from being received.

In the respective statements of case filed by the defendants they denied that there was at the date of the action herein any conditional access system as alleged and that the policy is to be effective by the end of 2020. According to the 2nd defendant, although the policy as announced in the publication on which this case turns was to implemented from 17thof June 2020, it has been rescheduled to come into being by the end of this year. Therefore, they contended that there has been nothing done by the 2nd defendant that has the semblance of curtailing the rights of members of the plaintiff association such as to trigger the enforcement jurisdiction of the Court in the matter herein in which the writ was issued on January 28, 2020. It is significant to observe that the contention of the defendants is amply supported by the publication on which the action herein is anchored at page 12 thereof in a document exhibited to the statement of case of the plaintiff as 'GIBA E' entitled "MINIMUM REQUIREMENTS FOR RECEPTION OF DIGITAL TERRESTRIAL AND SATELLITE TELEVISION SERVICES FROM THE NATIONAL DIGITAL TELEVISION NETWORK." It is that single document which has provoked concerns by members of the plaintiff association resulting in the instant action.

This being the case, we are of the view that the essential pre-requisite for the invocation of our enforcement jurisdiction (if at all) has not been met , the plaintiff having failed to demonstrate affirmatively that there has been anything done by the 2nd defendant that comes within the stipulation contained in article 2 (1) of the Constitution as

> *"anything contained in or done under the authority of that or any enactment or any act or omission of any person …"*

For the action herein to be a proper invocation of our enforcement jurisdiction, the plaintiff's plaint must clearly assert an act by the 2nd defendant which has the effect of curtailing or whittling down any of the rights of the media provided for in the Constitution of 1992. It is observed that any action brought under articles 2(1) and 130(1) of the Constitution that fails to make any specific allegation that satisfies the pre-requisites set out in article 2 (1) the Constitution is improperly constituted and must be terminated without a merit consideration as its effect is that there is no cause of action on which the J) action herein is planked. Indeed, this position was emphasised by the Court in National Democratic Congress v Electoral Commission [2001-2002] 1GLR, 340 wherein it was held among others that:

"where an act or omission of any person was challenged under article 2 of the Constitution, 1992 on the ground that it contravened a provision of the Constitution, 1992, the party had to show that; (a0 such an act or omission had taken place; and (b) it fell foul of a specific provision of the Constitution, 1992 or at the very least, the spirit of an actual provision…"

See also: **Amidu v Electoral Commission** [2001-2002] 1 GLR, 457.

The failure by the plaintiff to prove that the act on which the plaint herein is based actually occurred is fatal to the action under article 2 of the Constitution of 1992. In our

view, it is not sufficient to show as the plaintiff has sought to do; actions brought under article 2 of the Constitution are not based on anticipatory breach but actual breach of a specific provision of the Constitution. The Court has consistently emphasized in a collection of cases that the failure to meet the requirements of article 2(1) of the Constitution is an instance of jurisdictional absence depriving us of the authority to proceed with a merit determination of the action.

Although the above reasons are sufficient in our opinion to terminate the proceedings herein, we wish to comment on a procedural lapse committed by the plaintiff. It concerns the reliefs sought in the action before us. The reliefs claimed in the action were expressed argumentatively contrary to the settled practice of the Court. For example, relief (a) ends with the words "and therefore contravenes Article 162 (3) of the 1992 Constitution of the Republic of Ghana. Similarly, reliefs (b) and (c) are formulated by the utilization of the words "as same…."in the concluding part thereby rendering them argumentative. Although this was not adverted to by the defendants, it is of so serious a nature that may have the effect of rendering the reliefs to which they relate being struck out as incompetent. Regarding relief (d), the plaintiff has taken the liberty of determining the consequential orders that the Court may make under the power conferred on it under article 2 (2) of the Constitution subject to a declaration of unconstitutionality under article 2 (1) of the Constitution. That, however, is something which under the Constitution is reserved for the learned justices of the Court to carefully craft taking into account all the circumstances of the case and its likely effect on future conduct relating to perceived acts likely to come within the scope of the particular provisions of the Constitution on which its declaration of unconstitutionality is made under article 2 (1) of the Constitution. Accordingly, although in certain cases, it is reasonable to predict the orders that the Court might make in a matter, better practice requires that the nature of remedial and or curative orders and directions that the Court may make to give effect to its decision be not specifically claimed as a relief in the action as it is essentially a matter of discretion for the Court.

For the above reasons, the action herein is struck out.

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

ANIN YEBOAH
(CHIEF JUSTICE)

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

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

N. A. AMEGATCHER
(JUSTICE OF THE SUPREME COURT)

PROF. N. A. KOTEY
(JUSTICE OF THE SUPREME COURT)

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

COUNSEL

KWAKU OWUSU AGYEMANG ESQ. FOR THE PLAINTIFF.

JONATHAN ACQUAH (PRINCIPAL STATE ATTORNEY) FOR THE 1ST DEFENDANT.

GARY NIMAKO MARFO ESQ. FOR THE 2ND DEFENDANT.