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

CORAM: ATUGUBA, JSC (PRESIDING)
ADINYIRA (MRS), JSC
ANIN YEBOAH, JSC
BAFFOE-BONNIE, JSC
GBADEGBE,JSC
AKOTO - BAMFO (MRS), JSC
BENIN JSC

WRIT
No. J1/5/2013

20TH APRIL 2016

JOHN AKPARIBO NDEBUGRE - PLAINTIFF
H/NO. 84 SOWUTUOM
P. O. BOX AC 277
ACCRA

VRS

1. **THE ATTORNEY GENERAL - DEFENDANTS**
   MINISTER OF JUSTICE
   MINISTRIES
   ACCRA

2. **AKER ASA**
   FJORDALLEEN 16
   OSLO, NORWAY 0250

3. CHEMU POWER COMPANY LTD -
NO. 2 SECOND CLOSE AIRPORT
ACCRA

JUDGMENT

ATUGUBA, JSC

I have read, with advantage, the masterly judgment of my able brother Benin JSC. Whilst agreeing with his conclusion I have some views to express on some of the issues in this case.

FACTS OF THE CASE

The 1st defendant's statement of case dated the 21st day of November 2013 reveals the following:-

2.1. *On the 24th of October 2008, the Government of Ghana signed a petroleum agreement ("Petroleum Agreement")* over the South Deepwater Tano block with the Ghana National Petroleum Corporation ("GNPC"), Aker ASA, a Norwegian company, and Chemu Power Company Limited, a Ghanaian company.

2.2 *On 29th October 2008*, Aker ASA incorporated *a wholly owned local subsidiary, Aker Ghana Limited ("AGL")* to conduct petroleum operations in Ghana pursuant to Section 23 (15) (a) of the Petroleum (Exploration and Production) Law, 1983 (PNDCL 84), Chemu Power

Company Limited, a Ghanaian company, was incorporated earlier on 7th February 2008.

2.3 On the 5th of November, 2008, the Petroleum Agreement was ratified by Parliament pursuant to Article 268 (1) of the Constitution 1992.

2.4 In a letter dated 24th February 2009, the Managing Director of *GNPC informed Aker ASA of the need to assign its interest in the Petroleum Agreement to AGL pursuant to section 23 (15) (a) of the Petroleum (Exploration and Production) Law, 1983 (PNDCL 84).* Aker ASA in a response *dated 26th February 2009* noted that in its view Aker ASA could be a co-signatory with AGL to the Petroleum Agreement and did not have to assign its interest to AGL. However, in another letter dated 27th February, 2009, Aker ASA informed GNPC of its readiness to assign its interest to AGL.

2.5. *On 17th February 2009* Aker ASA informed GNPC that *AGL had entered into seismic contracts and had started performing its obligations under the Petroleum Agreement. Aker ASA again noted its intention to make AGL signatory to the Petroleum Agreement.*

2.6. In a letter dated *26th March, 2009, GNPC informed the Minister of Energy that Aker ASA had applied to the Ministry and GNPC for approval to assign its 85% participating interest in the Petroleum Agreement.*

2.7. *On 30th December 2009, the Minister for Energy wrote to Aker ASA refusing the assignment of its interest in the Petroleum Agreement to AGL. The Minister's decision was based on Aker ASA's non-compliance with PNDCL 84 to have a Ghanaian subsidiary as signatory to the agreement and allegations of corruption on the process of awarding the license. The Minister informed Aker ASA that they would be reimbursed for the work carried out on the block*.

2.8. Further to the letter of *30th December 2009,* the Government of Ghana, GNPC, Aker ASA and Chemu Power Limited signed a Termination Agreement *on 11th November 2011* whereby Aker ASA agreed to transfer data acquired on the South Deepwater Tano block to GNPC. It was agreed that GNPC would pay US$29,000,000 to Aker ASA for the data."

CONSTRUCTION OF ARTICLE 268 OF THE CONSTITUTION.

Much mental fuel has been burnt as to the due construction of article 268 of the 1992 Constitution which is the central region of this case.

That article provides thus:

"**268. Parliamentary ratification of agreements relating to natural resources**

(1) Any transaction, contract or undertaking involving the grant of a right or concession by or on behalf of any person including the Government of Ghana, to any other person or body of persons

howsoever described, for the exploitation of any mineral, water or other natural resource of Ghana made or entered into after the coming into force of this Constitution shall be subject to *ratification* by Parliament.

(2) Parliament may, by resolution supported by the votes of not less than two-thirds of all the members of Parliament, exempt from the provisions of clause (1) of this article any particular class of transactions, contracts or undertakings."(e.s)

The nagging question is whether when parliament has ratified a natural resource exploitation transaction, contract on undertaking under article 268(1) its termination, must be done with the leave of Parliament. It is said that the protective purpose, in the interest of the people of Ghana, of the article necessarily and as a matter of common sense compels a positive response to that question. I readily agree that common sense is necessary in the construction of statutes inclusive of a constitution. Indeed it is one of the rules of the construction of statutes and Dr. Bimpong- Buta has stated that much at pages 134-136 of his Maxwellian book, The Law of Interpretation in Ghana (Exposition and Critique).

Indeed in *Barnes v Jarvis* (1953) I WLR 649 at 652 Goddard CJ said "*A certain amount of common sense must be applied in construing statutes*. The *object of the Act* has to be *considered* …"

I however do not think that the applicable common sense includes unbridled and illegitimate common sense.

It must not be thought that the plain and unambiguous wording of a statute can never correctly and properly transmit the real intent or purpose of the legislature. I do not think that the word "ratification" in article 268 connotes any power sharing between the legislature and the Executive with regard to the implementation of a natural resource exploitation agreement after its ratification by the former. The expression, ratification, in the context of article 268 simply means approval. One does not have to travel far to find that that is so.

It is a hackneyed principle of construction of statutes that their provisions be construed as a whole, each part throwing light on the other, all geared towards the attainment of a harmonious goal. And so the construction I have placed on the word ratification in article 268 is the product of reading articles 268 and 269 together. They are as follows:

"**268. Parliamentary ratification of agreements relating to natural resources**

(1) Any transaction, contract or undertaking involving the grant of a right or concession by or on behalf of any person including the Government of Ghana, to any other person or body of persons howsoever described, for the exploitation of any mineral, water or other natural resource of Ghana made or entered into after the coming into force of this Constitution shall be subject to *ratification* by Parliament.

(2) Parliament may, by resolution supported by the votes of not less than two-thirds of all the members of Parliament, exempt from the provisions of clause (1) of this article any particular class of transactions, contracts or undertakings.

269. The Natural Resources Commission

(1) Subject to the provision of this Constitution, Parliament shall, by or under an Act of Parliament, provide for the establishment, within six months after Parliament first meets after the coming into force of this Constitution, of a Minerals Commission, a Forestry Commission, Fisheries Commission and such other Commissions as Parliament may determine, which shall be responsible for the regulation and management of the utilization of the natural resources concerned and the co-ordination of the polices in relation to them.

(2) *Notwithstanding article 268* of this Constitution, Parliament may, upon the recommendation of any of the Commissions established by virtue of clause (1) of this article, and upon such conditions as Parliament may prescribe, authorize any other agency of Government *to approve* the grant of rights, concessions or contract in respect of the exploitation of any mineral, water or other natural resources of Ghana." (e.s)

It is clear that the *delegatus* of Parliament in article 269(2) is intended to have and exercise the power conferred on Parliament by article 268(1) and the word approval appearing in article 269(2) is therefore a statutory

synonym of the word ratification in article 268(1). In any case statutory words are construed in their ordinary meaning unless a contrary intention appears in the statute, see *Awoonor-Williams v Gbedemah* [1970] 2 G&G 1184(2d), *Osei v Ghanaian Australian Goldfield Limited* [2003-2004] 1 SCGLR 69. Any euphoria about the word ratification in article 268 (1) must keep in view the user and implications of the same expression under article 75 (2) of the Constitution.

The purpose of requiring parliamentary approval of agreements or measures of critical national importance has been held by this court to be to ensure transparency, openness and parliamentary consent in the national interest, but this court has never attributed an overbreadth role to parliament in such matters beyond the parameters of the particular matter in regard to which such parliamentary approval is required. See *Attorney-General v Faroe Atlantic Co. Ltd.* (2005-2006) SC GLR 271, *Amidu (No. 2) v A-G, Isofoton S A & Forson (No. 1)* [2013-2014] 1 SCGLR 167, *Klomega (No. 2) v A-G & Ghana Ports and Harbours Authority & Ors.* (2013-2014) 1 SCGLR 581.

It must be emphasized that when parliamentary approval is given under article 268(1) the agreement in question remains an executive act and not the act of the legislature. I dwelt at length on a similar matter in *Okane v Electoral Commission of Ghana & Attorney-General* (2011)2 SCGLR 1136 at 1148-1149 as follows:

> "This incidence of the annulment power of Parliament over the Minister's proposed subsidiary legislation does not dislodge the Minister from his

status as the maker of that subsidiary legislation. Thus in *Metcalfe v Cox* [1895] AC 328 at 339-340, HL Lord Herschell in reaction to a contention that because a statutory power of making subsidiary legislation was subject, ***inter alia, to parliamentary and Crown approval,*** the actual power did not reside in the Commissioners, said:

> "It is urged by the respondents that … *it cannot be correct to say that the Commissioners have power to affiliate the college, and make it form part of the university, inasmuch as all the ordinances made by the Commissioners are ineffectual unless approved by the Queen in Council. I do not feel pressed by this argument. Although it is true that an ordinance might be disapproved of, and might therefore never become effectual, yet, when approved of, that which is ordained by its takes effect by the act of the Commissioners,* and it does not seem to me inaccurate to say that the Commissioners have power to do everything which they can direct to be done by an ordinance, merely because that ordinance is made subject to approval of the Sovereign. *It is a common case for appointments made by one public official to require the approval of another. Such appointments cannot take effect without that approval; but I do not think that any one would hesitate to say that the appointment was made by the person who selected and nominated the appointee.*"(The emphasis is mine).

Similarly (at page 351 of the Report) Lord Macnaghten said:

> "The learned counsel for the respondents …dwelt mainly on the difference in language between sect. 15 and sect. 16. In the

latter section they pointed out that the power of affiliation is given directly to the Commissioners. *In the former the Commissioners have only the power of making ordinances to extend any of the universities by affiliation. The ordinance is inoperative without more. The real power; they said, is in Her Majesty in Council. But there is a fallacy, I think, in that view. The power is in the Commissioners, though they do proceed by ordinance. The power, no doubt, is in suspense until the ordinance is duly published, laid before parliament, and approved by Her Majesty in Council. But when the final stage is safely reached whatever the ordinance does is the doing of the commissioners.*" (The emphasis is mine).

Article 297(d) therefore cannot enable Parliament which is not the maker of LI 1983 to amend it. "

Indeed long ago in *Republic v Chieftaincy Committee on Wiamosehene Stool Affairs; Ex parte Oppong Kwame* (1971) 1 GLR 321, it is stated in holding (3) thereof as follows:

"…where the National Liberation Council *confirmed a recommendation* under the chieftaincy Act, 1961, *it was, in such a case, the recommendation of the chieftaincy committee which in fact would operate* ……." I prefer this view to that of Osei Hwere JA, as he then was in *Maritime and Dockworkers Union of the Trade Union Congress v State shipping Corporation [Black Star Line]* (1982-83)1 GLR 671. Similarly in *Amidu (No. 1) v A-G, Waterville Holdings (BVI)*

Ltd Woyome (No. 1) [2013-2014] 1 SCGLR 112 at 157 Dr. Date-Bah JSC stated the legal effect of non compliance with statutory preconditions thus: "It is obvious that the second defendant is in error as to the legal effect of the *inchoate contracts* embodied in the two stadia agreements.

Without the satisfaction of their conditions precedent, they could not become *enforceable contracts*"(e.s) It is clear therefore that upon the parliamentary approval of the oil exploration agreement involved in this case the principles of contract including, privity, termination etc will govern its operation unless there is clear statutory variation of that legal position.

I cannot see any direct role for parliament in the termination of the agreement in this case after it has approved the same. Any undue interference with the operation of the contract will damage the commercial image of the government to the detriment of the public interest. This was, mutatis mutandis, emphasized by Dr. Date-Bah JSC delivering the ruling of this court in the *Republic v High Court (Fast Track Division) Accra; Ex parte Attorney-General* (2013-2014)1 SCGLR 70 at 78-83.

The 1992 Constitution has adopted Montesquieu's theory of the separation of powers, however with checks and balances, but not overbreadth incursions into each others' spheres of authority. This point was stressed in Asare v Attorney-General [2003-2004] 2 SCGLR 823.

Parliament does however have oversight responsibility over the functioning of the President and his agents, particularly ministers of state under articles

58 (3) (4), 78 (2) 69, 82, 103 (3) and 111. These provisions are the legitimate supplementary checks over the Executive by Parliament and therefore eliminate any need for further extensions to parliamentary authority over the Executive.

Foreign Decisions

The purposive rule of construction does not authorize this court in construing the provisions of the constitution to emplane for destinations uncontemplated by it.

It is for this reason that though in *Captan v Minister of the Interior* (1970) 2 G & G 1223 (2d), C.A the court held that the 1969 constitution was patterned in some respects on the American Constitution, some caution is needed in the resort to American decisions. The texts of the two constitutions must be shown to be similar before they can be applied in Ghana, see *New Patriotic Party v Attorney-General (31st December Case)* [1993-94] 2 GLR 35 S.C, *J H Mensah v Attorney-General* [1996-97] SCGLR 320.

The context of the constitution militates against the notion that Parliament must be resorted to in case of the termination of a parliamentarily approved transaction.

There is no such parliamentary reversionary interest in respect of the several instances of parliamentary approval, in the constitution, see articles 78, 79, 144(1) and (2), 148 and 151. Article 268(1) should not therefore be given an erratic construction.

Indeed in *Agbevor v Attorney-General* [1999-2000]2 GLR 186 S.C, this court, *mutatis mutandis*, stressed this point. The headnote to that case, as far as relevant, states as follows:

> "The plaintiff, while in the employment of the Judicial Service as a deputy judicial secretary, received a letter from the office of the President, dated 20 March 2000, which informed him that the *President had accepted the recommendation of the Judicial Council given in accordance with section 28 (2) of the Judicial Service Regulation, 1963(LI 319) and had therefore directed his immediate redeployment outside the Judicial Service for displaying a high degree of incompetence in the discharge of his duties*. Consequently the plaintiff filed suit in the Supreme Court for, inter alia, a declaration that his removal from the Judicial Service as a judicial officer for the reasons stated in the letter dated 20 March 2000 was contrary to article 151(1) of the Constitution, 1992. In his statement of case the plaintiff, who contended that he was a judicial officer, maintained (i) the effect of the President's letter was to remove him from his judicial office; (ii) since the coming into force of the Constitution, 1992 the provisions of regulation 28 (2) of LI 319 either ceased to apply for the purpose of removing a judicial officer or that its application should be with such modifications as were necessary to bring those provisions in conformity with articles 151 and 127 of the Constitution, 1992 of the Constitution, 1992 and (iii) by virtue of articles 151 and 127, *it was only the Chief Justice who had the power to remove a judicial officer from office* and such removal could only be upon the grounds and pursuant to the process stipulated therein. In response, the

Honourable Attorney-General in his statement of case contended, inter alia, that regulation 28(2) of LI 319 was not inconsistent with article 151 and remained applicable for the purpose of removing a judicial officer against whom allegation were made; and further that the plaintiff was not a judicial officer and so could not avail himself of article 151.

Held, upholding plaintiff's claim:

(1) "Pursuant to the object of the framers of the Constitution, 1992 of assuring and safeguarding the independence of the Judiciary, article 148 of the Constitution, 1992 clearly vested the power to appoint persons to hold or act in a judicial office in the Chief Justice, acting on the advice of the Judicial Council. *Such appointments were however, made subject to the approval of the President*. Where such an officer was *to be removed from office on the other hand, article 151 expressly stipulated that this might be done by the Chief Justice* on grounds only of stated misbehavior, incompetence or inability to perform his functions arising from infirmity of body or mind and upon a resolution supported by the votes of not less than two-thirds of all the members of the Judicial Council. Article 151 (2) also stipulated that such an officer was entitled to be head in his defence by himself or a lawyer or other expert of his choice. *Significantly, there was no reference whatsoever in article 151 to the President, whether in a directive or approving capacity, or in any other wise. The President was therefore under the Constitution, 1992 clearly not the disciplinary authority for the removal of a judicial officer.* Consequently, to the

extent that any portion of the Judicial Service Act, 1960 (CA 10) or the Judicial Service Regulations, 1963 (LI 319) gave any power of removal or discipline of a judicial officer to any person other than the Chief Justice, that provision should, pursuant to article 11(6), be read with such modifications, adaptations and exceptions as were necessary to bring them in conformity with the Constitution, 1992." (e.s)

Right to terminate the contract in this case

Following immediately upon the above, I hold that the right of the parties to terminate the transaction herein arises from the common law of contract which is part of the existing law of Ghana under article 11(1)(e) and I can't see anything in it that is inconsistent with the constitution in so far as it regulates the parties' right of termination of their contract. For violating s.23(15) of the Petroleum (Exploration and Production) Law, 1984 (PNDCL 84), the contract herein was illegal and unenforceable, and the government was entitled to take that stand. They did not have to return to Parliament for leave to abandon the agreement. As was eloquently and classically put by Lord Mansfield CJ in *Holman v Johnson* [1775-1802] I All ER 98 at 99.

"The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident; if I may so say. The principle of public policy is this: *Ex dolo malo non oritur actio.* No

court will lend its aid to a man who founds his cause of action on an immoral or an illegal act. If, from the plaintiffs own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is on that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

This plainly means that at law a party is free (though there are some exceptions, not relevant here), to resile from an illegal contract and cannot be compelled to comply with the same.

Indeed the stance that the government should have returned to Parliament in this case is not different from that which was disallowed in respect of the respondents in the celebrated case of *Zagloul Real Estates Ltd. v. British Airways Ltd*. [1997-1998]2 GLR 428 S.C. In that case the parties entered into a lease the payment of the rent of which was to be in cedis contrary to the provisions of the External Companies and Diplomatic Missions (Acquisition or Rental of Immovable Property) Law, 1996 (PNDCL 150) which required payment in convertible currency.
However the lease, contained an indemnity clause for the refund of he cedi payment of the rent if the lessees were subsequently made to pay the rent in convertible currency.

In an action by the appellants, the trial judge entered judgment for them but ordered them to refund the cedi payment to the respondents. On appeal the Court of Appeal affirmed the judgment of the trial judge that the

respondents should comply with PNDCL 150 but remitted the issue of the refund of the cedi payment to the trial court for retrial. On further appeal this court held, allowing the appeal, that once the Court of Appeal had affirmed the trial judge's holding that the lease violated PNDCL 150 the order for retrial regarding the refund of the payment in cedis was misconceived and that upon affirming the trial judge's order that the respondents should comply with PNDCL 150, the Court of Appeal should simply have dismissed the residue of the appeal in its entirety.

Similarly in this case once the contract herein is illegal for violation of s. 23 (15) of PNDCL 84, the matter ends there and resort to Parliament will be misconceived. After all Parliament is as much subject to the laws of Ghana as any other person or institution in Ghana.

The $29,000,000.00 dollar Payment

This amount was paid by the government of Ghana for the data that the 2nd defendant generated in the course of the petroleum exploration. In the *Amidu cases* referred to by my brother Benin JSC, this court held that, as a general rule, nothing is recoverable under a contract that is unconstitutional as opposed to infringement of an ordinary statute.

In this case the infringement, in my view, was of an ordinary statute, that is to say, PNDCL 84 and therefore the equitable remedy of Restitution should avail the 2nd defendant.

I do not however think that the distinction between constitutional and ordinary statutory

illegality is a conclusive test for the availability of the equitable remedy of Restitution and the *Amidu* cases did not so hold.
In *Aerolift International Limited v Mahoe Heli-lift (SI) Limited and Others* (2002) 2 LRC 213 the High Court of the Solomon Islands held that having regard to the legislative Policy and Intent of the Investment Act, 1990, its breach could not accommodate the remedy of Restitution.

To my mind breaches of the 1992 Constitution have been treated with much flexibility by this Court and I do not think that a different approach should be had with regard to constitutionally illegal contracts.

Thus in *Kwapong and Another v Ghana Cocoa Marketing Board and Others;* (1984-86) 1 GLR 74 at 89-90 Osei-Hwere J.A (as he then was, sitting as an additional Justice of the High Court, held as follows:

> *"The President, by exhibit M, appointed the second defendant as chairman and the third and fourth defendants as members of a committee to manage the affairs for the cocoa industry pending the formation of the Cocoa Council*. Exhibit M was, *ex facie,* a personal appointment made by the President and it was clearly aimed at appointing the governing body of a public corporation. *This appointment was in clear contravention of article 57 of the Constitution, 1979 because he could only make the appointment with the advice of the Council of State.* It was conceded by the defendants counsel that on 9 October when the President made his appointment the Council of State had not been constituted. *The appointments of the second, third and fourth defendants (which seem*

to have been made out of necessity) were, therefore, quite irregular. Although their appointments were irregular they constituted the de facto governing body of the first defendants and they could properly execute the lawful powers of the first defendants. What they could not do was to exercise powers not allowed them by either the Constitution or their governing enactment and they remained liable for acts ultra vires of these powers."

Although the plaintiffs obtained their reliefs, inclusive of reinstatement, consequent upon the declaration of unconstitutionality of their dismissal, the Court of Appeal, was without disrespect, more pragmatic in almost identical circumstances in *Ghana Cocoa Marketing Board v Agbettoh and Others* [1984-86] 1 GLR 122 C.A. The relevant parts of the headnote thereof are as follows:-

"The plaintiffs were all senior employees of the defendants, a statutory corporation established entirely out of public funds as a commercial venture. The defendant board had a stereotype form of appointment letters by which the terms of the plaintiffs' contracts of employment were defined. Under its provisions, the appointment of the plaintiffs could be terminated by either side on giving three months' notice or payment of three months' salary in lieu of notice. The defendant board, however, reserved the right to dismiss the plaintiffs summarily on grounds of "indiscipline" and "inefficiency." Without reference to their terms of employment, the defendant board prematurely retired the plaintiffs "to take immediate effect" in accordance with an alleged "re-organisation exercise." That action

was taken in pursuance of the purported implementation of paragraph 35 of a government white paper on the Archer Committee of Enquiry into the affairs of the Ghana Cocoa Marketing Board, popularly known as the Archer Report, which recommended, among other things, that "all senior officers of the rank of Deputy Chief Executive, Directors, General Managers and Heads of the various departments and units" be redeployed outside the cocoa industry upon the formation of a Cocoa Council. The plaintiffs sued for a declaration that the dismissal was unlawful as being violative of article 138(b) of the Constitution, 1969 which provided that no member of the public services should be dismissed or removed from office or reduced in rank or otherwise punished without just cause. The plaintiffs also sought perpetual injunction to restrain the defendant board from ejecting them from their accommodation and an order for their salaries to be paid. The trial judge found that the only reason why the plaintiffs were purportedly retire was a mistaken belief on the part of the interim management committee of the defendant board that paragraph 35 of the Archer Report gave it power to do so. The judge therefore declared the dismissal to be unlawful and granted the other reliefs sought. In the instant appeal against the decision, the board complained, inter alia, that the judgment ordering reinstatement was wrong because the action was about contracts of service between the plaintiffs and the board the breach of which was properly redressable in pecuniary damages and not specific performance. The court however found that (i) the trial judge did not *eo nomine* make an order for reinstatement, and (ii) after a witness of the defendant board had concluded his evidence, the plaintiffs had filed without leave, a

notice of amendment in which they sought to add to the indorsement on the writ, the word “Reinstatement.”

On these facts,

Held, dismissing the appeal:

(3) If the rights and liabilities of the parties had fallen to be decided only by their contracts of employment, the plaintiffs could have lawfully contented themselves with pecuniary damages only since to enjoin the specific performance of a contract of employment would turn a contract of service into a status of servitude. However, the law that the normal remedy for the breach of service contracts was pecuniary damages and not specific performance was not an inflexible one. There were cases where irrespective of the terms of the contract of employment the determination of the contract was regulated by legislation as, in the instant case, where the plaintiffs’ rights to remain in the service of the defendant board were determined by a constitutional provision. *Vine v National Dock Labour Board [1959] AC 488, HL; Francis v Municipal Councillors of Kuala Lumpur [1962] 3 All ER 633, PC and Bank of Ghana v Nyarko [1973] 2 GLR 262*, CA cited.

(4) It was not competent for the plaintiffs to have filed without leave, notice of amendment of the writ after the witness of the defendant board had concluded his evidence. Thus if the High Court had granted them leave under Order 28, r 1 of LN 140A, the plaintiffs would still have had to comply with the procedure prescribed under Order 28, r 7 in order for the leave to

become effective. But as the plaintiffs had failed to comply with the procedural rules, there was no valid claim for reinstatement and as such the High Court could not be held to have granted such a relief. That conclusion would, however, not avail the defendant board because *if the purported retirement of the plaintiffs from office was a nullity in the face of a clear constitutional injunction, then the question of reinstatement did not arise.*

(5) Although *de jure the plaintiffs were still technically in the service of the defendant board, de facto they had ceased to be so since November 1979, and as such it would be unrealistic to assume that the status quo in 1979 still existed five years afterwards in 1984 and to grant perpetual injunction restraining the latter from ejecting the former* from their bungalows in addition to making an order for the payment of salaries for work they had not done in the circumstances, whilst not permitting the injunction imposed by the High Court to stand, it would be just and proper for the court to mark its disapproval of the plaintiffs' unconstitutional retirement by ordering that the defendant board pay to each plaintiff an amount equal to two years' salary in addition to receiving their entitlements under their contracts of employment."

This pragmatic approach is gaining ground in climes where parliamentary sovereignty is absolute. Thus in *Republic v High Court (Fast Track Division) Accra, Ex parte Attorney-General (Maud Nongo Interested Party)* [2013-2014] 1 SCGLR 70 at 78-82 Dr. Date-Bah JSC stated at length as follows:-

"…there was claimed to be a limitation on the liability of the Crown in relation to a contract dependent on a grant from Parliament. This limitation was extrapolated from dicta uttered in Churchward v R (1865) LR 1QB 173. In this case, Shee J. said (as stated at 209-210):

> "In the case of *a contract with commissioners on behalf of the crown to make large payments of money during a series of years, I should have thought that the condition which clogs this covenant, though not expressed, must, on account of the notorious inability of the crown to contract unconditionally for such money payments in consideration of such services, have been implied in favour of the crown.* The inconvenience suggested by Sir Hugh Cairns as likely to arise from so holding, were it necessary so to hold, could practically have no existence. The condition of parliamentary provision is usually notified to government contractors, for services of a continuing character, by covenants… When not so notified, the occurrence of the alleged inconvenience – such are known to be the justice and honour of parliament – is too improbable to induce any of the Queen's subjects to forego when the opportunity offers the advantages of a good government contract. *It was beyond the power of the commissioners, as suppliant must have known, to contract on behalf of the crown, on any terms but those by which the covenant is restricted and fenced. I am of the opinion that the providing of funds by parliament is a condition*

precedent to it attaching. The most important department of the public service, however negligently or inefficiently conducted, would be above control of parliament were it otherwise." (e.s)

Some have interpreted these words of Shee J as asserting that government contracts contain an implied term that they are conditional on Parliamentary appropriation of funds to enable their execution. The underlying policy rationale for this position is, as expressed by Shee J. above:

> "The most important department of the public service, however negligently or inefficiently conducted, would be above control of parliament were it otherwise."

However, this rationale is refutable. *The need for the executive branch of government to be subject to Parliamentary financial control does not necessarily imply that contractual obligations entered into by the executive without a Parliamentary appropriation should be viewed by the courts as invalid and void*. Indeed, in the same case, there were dicta by Cockburn CJ to a contrary effect, when he earlier said (as stated at page 200 of the Report):

> "I am very far, indeed, from saying, *if by express terms, the Lords of the Admiralty had engaged, whether parliament found the funds or not, to employ Mr. Churchward to perform all these services, that then, whatever might be the inconvenience that might arise, such a contract would not have been binding;* and I am very far from saying that in such a case a petition of right would not lie, where a public officer or the head of a department

> makes such a contract on the part of the crown, and then afterwards breaks it."

This difference of opinion as to whether a contract requiring a Parliamentary grant or appropriation is valid or enforceable without such grant or appropriation relates to an issue that is distinct from that around which the controversy in this case revolves. Nevertheless, the underlying policy issues are similar and that is why the judicial dicta above have been cited.

In the Australian case of *New South Wales v Bardolph (1934) 52 CLR 455, the Australian High Court doubted the dictum of Shee J. supra and inclined towards the dictum by Cockburn CJ*. It did so in holding that the Crown can validly and enforceably promise to pay money. Evatt J in that case said (as stated at pages 467-468):

> "The judgment of Shee J. has always been accepted as determining the general constitutional principle. But it should be added that CockburnC.J. said[(1865)L.R.1QBatp.201]:
>
> "I agree that, if there had been no question as to the fund being supplied by Parliament, if the condition to pay had been absolute, or if there had been a fund applicable to the purpose, and this difficulty did not stand in the petitioner's way, and he had been throughout ready and willing to perform this contract, and had been prevented and hindered from rendering these services by the default of the Lords of the Admiralty, then he

would have been in a position to enforce his right to remuneration."

It appears clear that the first part of this passage has not been acted upon by the Courts in the cases subsequently determined, and that, even where the contract to pay is in terms "absolute" and the contract fails to state that the fund has to be "supplied by Parliament," the Crown is still entitled to rely upon the implied condition mentioned by Shee J.

The second part of Cockburn'sC.J. statement, that, if there is a fund "applicable to the purpose" of meeting claims under the contract, the contractor may enforce his right to remuneration, has never, so far as I know, been questioned. Moreover, its correctness was assumed by the terms of the Crown's third plea in Churchward's Case [14] which denies that moneys were ever provided by Parliament "out of which the suppliant could be paid for the performance of the said contract.""

Evatt J's concluding view (as stated at pages 474-475) was that:

"…I am satisfied that, in the absence of some controlling statutory provision, contracts are enforceable against the Crown if (a) the contract is entered into in the ordinary or necessary course of Government administration, (b) it is authorized by the responsible Ministers of the Crown, and (c) the payments which the contractor is seeking to recover are covered by or referable to a parliamentary grant for the class of

service to which the contract relates. In my opinion, moreover, the failure of the plaintiff to prove (c) does not affect the validity of the contract in the sense that the Crown is regarded as stripped of its authority or capacity to enter into the contract. Under a constitution like that of New South Wales where the legislative and executive authority is not limited by reference to subject matter, the general capacity of the Crown to enter into a contract should be regarded from the same point of view as the capacity of the King would be by the Courts of common law. No doubt the King had special powers, privileges, immunities and prerogatives. But he never seems to have been regarded as being less powerful to enter into contracts than one of his subjects. The enforcement of such contracts is to be distinguished from their inherent validity."

The Australian High Court strains to uphold the validity of contracts involving payments of money from the public purse for the obvious reason of protecting the creditworthiness of the State in the interest of its citizens." (e.s)

In this case the Ghana National Petroleum Corporation and the Minister for Energy in their correspondence with the 2nd defendant were not sure of the legal position concerning the oil exploration agreement, themselves. Their role in this agreement was very dilatory and Parliament itself hailed it as compliant with PNDCL 84. Ex concessis, the construction of section 23 (15) of PNDCL 84 troubled this court much, owing to its nebulous drafting. In all these circumstances there will be a deficit of justice if the refund of the $29,000,000.00 to the 2nd defendant were disallowed by this court.

It is a cardinal principle in the administration of justice that the courts stand for justice and should not be deflected from doing justice, having regard to the facts of the particular case. This has been poignantly stated by that great star of substantial Justice Lord Denning in his book, *Road to Justice at pages* 6-7, quoted with approval by Archer J, as he then was, in Pearce v The Republic (1968) GLR 211 at 225 as follows:-

> "When you set out *on this road* (to justice) you must remember that there are two *great objects to be achieved*: one is to see that *the laws are just*; the other that *they are justly administered*. Both are important; *but of the two, the more important is that the law should be justly administered*." (e.s)

This is the crux of article 1 (1) of the Constitution which is anchored in the welfare of the people of Ghana. This is the crux of *Tuffour v Attorney-General* (1980) GLR 637 C.A. (sitting as the Supreme Court) which emphasizes that both the letter and spirit of the Constitution must move in harmony. This is also the crux of articles 23 and 296 of the Constitution and s. 10(4) of the Interpretation Act 2009, (Act 792).

For all the foregoing reasons I agree that this action be dismissed.

(SGD) W. A. ATUGUBA

JUSTICE OF THE SUPREME COURT

BENIN, JSC:-

The plaintiff has invoked the original jurisdiction of this court in a matter which for a moment seems to raise question of his locus. This is because it is a matter which involves the termination of a petroleum exploration contract which had been signed and received the required constitutional parliamentary ratification. The parties affected by the termination do not complain, but rather the plaintiff who has nothing to do with the contract. Yet that is the right given to citizens of this country to seek interpretation of the constitution even in matters in which they have no direct interest so long as it raises a question of interpretation under Article 2 of the Constitution, 1992. The Constitution thus permits what passes for public interest litigation endorsed by this court in cases like ***Adjei-Ampofo v. Accra Metropolitan Assembly and Attorney-General (No.1) (2007-2008) SCGLR 611*** and ***Amidu (No. 2) v. Attorney-General, Isofoton SA & Forson (No.1) (2013-2014) SCGLR 167*.** This is one of such cases.

The facts giving rise to this case are not in dispute. On or about the 24th day of October, 2008 the Government of Ghana entered into a petroleum exploration agreement with a Norwegian company, 2nd defendant herein, and a local company the 3rd defendant herein. In line with the provisions of Article 268(1) of the Constitution the said agreement was placed before Parliament which duly ratified it on the 5th day of November 2008. Subsequently, the Ghana National Petroleum Corporation (GNPC) advised the Minister for Energy that the agreement violated section 23(15) of PNDCL 84. It was apparent that acting on this advice the Minister for Energy together with the GNPC, on one side, opened termination talks with the defendants, on the other side. The parties agreed upon terms of termination. They also agreed on the payment of the sum of twenty-nine million US dollars ($29,000,000.00) by the GNPC to the 2nd defendant which was thereby required to surrender to the GNPC seismic data gathered by them from their operation of the oilfield under the agreement. This termination agreement was not referred to Parliament for approval. The Minister purported to act under section 23(15) of PNDCL 84 to terminate the agreement. The plaintiff believes the action of the Minister

was wrongful as same was in violation of Article 268(1) of the Constitution, hence this action wherein he seeks these reliefs:

(a) A declaration that upon a true and proper construction of Article 268 of the Constitution 1992 of the Republic of Ghana, the Minister for Energy had no power and/or authority by himself to annul or terminate the Petroleum Agreement executed on 24/10/08 between the Government of the Republic of Ghana of the one part and Aker ASA (2nd defendant herein) of the other part consequent and upon the approval of the said agreement by Parliament of the Republic of Ghana in accordance with the aforesaid Article 268 of the 1992 Constitution.

(b) A declaration that upon a true and proper construction of Article 268 of the Constitution, 1992 of the Republic of Ghana, the decision by the Minister for Energy to terminate the Petroleum Agreement concluded on 24/10/08 between the Government of the Republic of Ghana of one part and Aker ASA of Norway subsequent to its approval by the Parliament of the Republic of Ghana on the 5th day of November 2008 is null and void and of no effect.

(c) A further declaration that the Termination Agreement concluded between the Government of the Republic of Ghana, Aker ASA of Norway and Chemu Power Limited of Ghana on the 11th November 2010 is null, void and of no effect.

(d) An order for recovery of the sum of twenty-nine million United States dollars (US$29,000,000.00) paid by the Government of the Republic of Ghana to Aker ASA of Norway consequent upon the Termination Agreement of 11/11/2010.

The plaintiff's argument in a nutshell was that the Constitution had empowered Parliament to ratify any agreement that falls within the purview of Article 268(1) of the Constitution. Therefore the same body, that is Parliament, is entitled to be notified about any decision to abrogate the agreement for its consent. Thus any decision to terminate any such contract without reference to Parliament was contrary to the letter and spirit of this Constitutional provision.

The 1st defendant rejected the plaintiff's arguments. Among others, they argued that parliamentary approval was not required in the termination of an agreement that Parliament had ratified under Article 268(1) of the Constitution. The 2nd defendant did not take part in the proceedings. The 3rd defendant appeared to have taken a position which largely supported that of the plaintiff. All the various arguments will be highlighted as we proceed to discuss the various issues agreed upon for hearing.

The issues set down for determination are:

i. Whether or not the Minister for Energy can without recourse to Parliament of the Republic of Ghana terminate an agreement ratified by Parliament.
ii. Whether or not it was legally proper for the Government of the Republic of Ghana to pay the sum of $29,000,000.00 to the 2nd defendant upon terminating the agreement declared by the same Government to be null and void.
iii. Whether or not the Petroleum Agreement between the Government of the Republic of Ghana and the 2nd defendant violated section 23(15) of PNDCL 84.

Article 268(1) of the Constitution provides that:

Any transaction, contract or undertaking involving the grant of a right or concession by or on behalf of any person including the Government of Ghana, to any other person or body of persons howsoever described, for the exploitation of any mineral, water or other natural resource of Ghana made or entered into after the coming into force of this Constitution shall be subject to ratification by Parliament.

This provision is clear and unambiguous in so far as the prior ratification by Parliament was concerned. But the problem that arises is whether Parliamentary approval must be sought to make any termination or purported termination of an agreement effective and legal. Thus the first issue that calls for determination is whether or not under Article 268(1) Parliamentary approval is required to render legally valid the termination of

an agreement it has ratified. If a determination is made that Parliamentary approval is required, the next issue will then have to be addressed, that is, whether in the instant the Minister for Energy acted in violation of this constitutional provision when he failed to seek Parliamentary approval either before or after terminating the Agreement. Thereafter reliefs (ii) and (iii) set out in the memorandum of issues will be addressed.

The first question raised in this case appears at first blush to be quite small and insignificant since the executive it is which enters into all kinds of agreements and treaties on behalf of the State, applying the laws of the country at it is enjoined to do under Article 58(2) of the Constitution. However, upon a deep reflection on the constitutional framework it has deep consequences on good governance of the country which the framers of the Constitution sought to achieve. Thus the court is enjoined by section 10(4)(a) of the Interpretation Act, 2009 (Act 792) to take account of matters of good governance in interpreting this constitutional provision.

The words or expressions ‘undertaking’, ‘contract’ and ‘transaction’ as used in Article 268(1) of the Constitution have no special meanings; they must be given their ordinary meanings in order to give effect to this provision. In the law of contract the person whose ratification of a contract is required is a necessary party to give the contract its validity and legal enforceability. Without the ratification, either expressly or impliedly given, such an agreement is invalid. Thus a person with a right to ratify an agreement has three things in mind. Firstly, he must examine and review the agreement and inform himself about all its terms and conditions in order to be clear about what he seeks to do. Next, he must make an express or implied declaration that he accepts the terms and conditions of the agreement. Finally, by ratifying the agreement the person is legally bound by it and thus becomes legally liable for any breach thereof.

Thus even going by the terms of ratification of an ordinary contract the person who has the right to ratify an agreement is necessarily a party to be involved in its termination since he can be held liable for the consequences resulting from its breach.

But here we are dealing with a constitutional provision which could dispense with this result in contract law. But unless the intention of the framers of the Constitution to dispense with this requirement could be gathered from the letter and/or spirit of the provision, prima facie the plaintiff would be right that Parliament should be notified for its consent. The letter of Article 268(1) does not say anything about Parliament's involvement in termination of agreement it has ratified. Indeed the provision is completely silent on variation and termination of such an agreement. They might have been left for those terms to be spelt out in the contract, which is normal in written contracts, or to be found in existing statute law, if any.

Let me proceed to consider the spirit of that provision. Since the Constitution is silent on what happens if it becomes necessary to vary or terminate an agreement after it has been ratified by Parliament, it is reasonable to suggest that all the parties involved in the agreement should have a say. There is no justification to rule out any of the parties which brought the contract into fruition. It is reasonable to say that each party should play the same role as before the contract was made valid. Even a common sense approach will dictate that course of action.

This brings us to the rationale for Parliamentary involvement in approval of such agreement. Clearly it is to enhance transparency and expansive participation in matters involving the nation's natural resources. Hence it was considered unwise and unsafe to entrust that responsibility to the executive alone, which by practice of party politics which the Constitution permits, may be formed by only one party at any given time. But with a multi-party system in Parliament the nation's natural resources would have several persons from different parties and interests examining any agreement in respect thereof. That ensures good governance and the court could not lose sight of that fact in giving effect to this important provision which has been placed there to assure the people that the nation's natural resources would be well taken care of no matter which political party is in charge of the executive. Counsel for the 1st defendant was therefore right when he said that "…….*parliamentary ratification is intended to ensure transparency and prevent abuse by executive power when it comes to the*

execution of contracts relating to our natural resources. Parliamentary intervention in the award of this category of contracts is thus an important check on executive action." Having said this, the only logical conclusion should have been that in order to prevent executive abuse in the performance of the contract through a possible variation and termination, then Parliament should be involved. In other words the executive could revise the terms of the contract or even terminate it altogether for political or other reasons which have nothing to do with the efficient execution of the contract, thereby rendering ineffectual what Parliament had ratified. But Counsel then submitted that "*the same logic, however, does not apply to the termination of contracts by the executive as this may be challenged in court. Access to court is thus sufficient check on the arbitrary termination of agreements."* This argument belies the fact that arbitrary variation or termination could cost the taxpayer some fortune, payment of which Parliament would have to authorize. That is the more reason why Parliament should come in to check possible abuse by the executive. The performance of the contract after it has been ratified by Parliament is an executive act which Parliament cannot interfere with. But a variation or termination of the contract will amount to a unilateral decision by the executive to alter or curtail a legislative act without Parliament's involvement and that will be unconstitutional. It is noted that unlike parliamentary approval of certain appointments for which clear provisions for their termination have been provided for in the Constitution, in this case no such provision exists. The situation is thus fluid and in line with good governance and the object sought to be achieved by this provision, it is safe to say that all the parties to the agreement as well as Parliament should have a say in its variation and termination.

In some developed democracies this provision and others like Article 181(5) of the Constitution are likely to cause some friction between the Executive and Legislative branches of government over the dispersal of power between them. The intense political struggle and uneasy compromise that have characterized the relationship between the US Congress and the President over the years have so far eluded this country largely on account of the fact that since the 4th Republic was ushered in,

one party has dominated both branches of government at any given time. Hence some inroad into the domain of one or the other is likely to be overlooked by members of the same party even in cases of breach of the law. But we must remember always that the acts of the executive and parliament are perpetual and continual even if the present executive and parliament which respectively signed and ratified the agreement are no longer in place. With that continuity assured by the Constitution, it could not have been the intention of the framers of the Constitution that the next executive should undo what the previous Parliament had ratified without reference to the present Parliament which has succeeded the previous one. It was not intended that one branch of Government should have absolute monopoly over how the nation's resources are utilized at any point in time.

Besides, Parliament has sole responsibility over how state resources are to be applied or disbursed through its power of approving or disapproving the budget presented by the executive. Indeed it exercises full control over how public funds are to be disbursed from the Consolidated Fund as well as the Contingency Fund. Articles 108, 174, 175, 176, 177 and 178 of the Constitution are very clear in their terms. Thus since it has to approve funds to pay for any damages that may result from the variation or termination of a contract it has ratified, it stands to reason that it should be involved in the variation or termination, as the case may be, except where it has delegated that power to the executive.

In the case of ***Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure case), 343 U.S. 579 (1952)*** the issue arose as to whether the President's order for the seizure of some steel works without Congressional approval was justified by the President's exercise of executive authority under the Constitution. The US Supreme Court found there was no express constitutional provision that justified the President's action. And there was also no legislation in force which authorized him to take that kind of action. The argument founded on the aggregation of the President's executive power under the Constitution was rejected by the court. I would only refer to the concurring opinion expressed by Mr. Justice Douglas when he said "……..***though the seizure is only for a week or a month, the***

condemnation is complete and the United States must pay compensation for the temporary possession…..The President has no power to raise revenues. That power is in the Congress by Article I, Section 8 of the Constitution. The President might seize and the Congress by subsequent action might ratify the seizure. But until and unless Congress acted, no condemnation would be lawful. <u>The branch of government that has the power to pay compensation for a seizure is the only one able to authorize a seizure or make lawful one that the President had effected."</u> Emphasis mine.

Parliament has the power to decline a request by the executive to appropriate funds for a particular purpose, including funds to pay penalties under an agreement which the executive had terminated without recourse to it. In such a chaotic situation the State suffers. That is why such executive acts must be presented to Parliament for ratification even if prior approval was not sought before the action was embarked upon by the executive due to the exigencies of the moment.

Thus in my opinion, applying a purposive interpretation, in order to ensure good governance, Parliament, whose ratification was required to give validity and legality to any agreement in respect of the nation's mineral and natural resources, and which would be required to approve funds to pay compensation or even penalty arising from breach of the agreement by the State acting per the executive, is a necessary party and their approval is sine qua non to its variation or termination or to make the executive action valid. The only exception is where, as earlier mentioned, Parliament has delegated the ultimate right and power to terminate such an agreement to the executive, not excluding individuals and other State institutions performing part of executive mandate, which is likely to be found in the terms and conditions spelt out in the agreement it has ratified. Indeed the delegation in such matters may be embodied in the terms and conditions of the contract itself so after the ratification it need not go back to Parliament again.

The next issue is whether the Minister for Energy violated this constitutional provision when he negotiated and executed the termination agreement with

the defendants, without recourse to Parliament. The Minister and/or the GNPC had the mandate to act under Article 23.5 of the agreement to terminate it. Indeed Article 23 of the agreement was devoted to terms of termination. For its full force and effect I propose to set out Article 23.5. It provides:

If GNPC and/or the State believe an event or failure to act as described in Article 23.4 above has occurred, a written notice shall be given to Contractor describing the event of failure. Contractor shall have thirty (30) days from receipt of said notice to commence and pursue remedy of the event or failure cited in the notice. If after said thirty (30) days Contractor has failed to commence appropriate remedial action, GNPC and/or the State may then issue a written Notice of Termination to Contractor which shall become effective thirty (30) days from receipt of said Notice by Contractor unless Contractor has referred the matter to arbitration. In the event that Contractor disputes whether an event specified in Article 23.3 or Article 23.4 has occurred or been remedied, Contractor may, any time up to the effective date of any Notice of Termination refer the dispute to arbitration pursuant to Article 24 hereof. If so referred, GNPC and/or the State may not terminate this Agreement in respect of such event except in accordance with the terms of any resulting arbitration award.

In the agreement the State was described as the Republic of Ghana represented by the Minister for Energy. Thus by article 23.5 either the GNPC or the Minister for Energy or both of them could terminate the agreement upon the occurrence or non-occurrence of certain events mentioned in the agreement. Thus in my opinion by ratifying the entire agreement without reservation, Parliament had ceded the power or right of termination to the persons named therein. Nothing prevented Parliament from asking that it should be involved in termination of the agreement. I say so because even though Article 268(1) of the Constitution clearly calls for Parliamentary ratification, yet it was found necessary to insert it as a term of the contract, per article 26.9 thereof. Indeed it is normal for such a written contract to embody all the terms and conditions that the parties want to govern their relationship, to give certainty to the parties. The party who complains that there is a term or condition which is to be found outside

what is expressed in the agreement assumes the burden of proof. It could not be said that the document left something out unless all parties were aware of it and agreed expressly, impliedly or by operation of law, to be bound by it as an integral part of the agreement. In this case the intent of the parties, including Parliament as the ratifying party, was fully expressed in the agreement.

From the foregoing discussion, it is certain the action by the Minister was justified in terms of Article 268(1) of the Constitution in the sense that whatever he did had its derivative source from not only article 23.5 but also from article 26.1 of the agreement. The relevance of article 26.1 of the agreement will become apparent in due course. The Minister had thus Parliamentary blessing to terminate the agreement under the conditions spelt out in articles 23.5 and 26.1 of the agreement. This point will be further addressed when I come to consider relief (iii).

It is necessary at this stage to say a word about Parliament's right to delegate part of its quasi-legislative functions to other persons and departments outside the legislature. Admittedly, I examined this subject in the light of the practice and experience in the USA only, because I was satisfied it represents what I believe to be the correct position under the 1992 Constitution. The accounts show that this principle of non-delegation, as it was commonly known in the USA, was the prevailing view because on grounds of policy, it was believed that it would ensure Congressional accountability to the people. But the US Supreme Court began to realize that it might become necessary for Congress to delegate some of its quasi-legislative functions to individuals and agencies in the executive branch for more effective governance.

In the case of ***Marshall Field & Co. v. Clark, 143 U.S. 649 (1892)*** Congress had delegated some power to the President. It was contended that the law had delegated to the President both legislative and treaty-making powers and was thus unconstitutional. The court held that what the President was required to do was merely in execution of an Act of Congress; it was not the making of the law. He was the mere agent of the

lawmaking body to ascertain and declare the event upon which the expressed will was to take effect.

In the case of ***J. W. Hampton, Jr. & Co. v. United States, 276 U.S.*** 394 ***(1928),*** The Tariff Act, 1922 empowered and directed the President to increase or decrease duties imposed by the Act so as to equalize the differences which, upon investigation, he finds and ascertains between the costs of producing at home and in competing foreign countries the kinds of articles to which such duties apply. The Act laid down certain criteria to be taken into consideration in ascertaining the differences, fixed certain limits of change and made an investigation by the Tariff Commission, in aid of the President, a necessary preliminary to any proclamation changing the duties. The court held that the delegation was not unconstitutional and that a valid delegation must establish "*an intelligent principle to which the person or body authorized to take action is directed to conform……The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made*." The legislature had not delegated any authority or discretion as to what the law shall be, which would not be allowable, but had merely conferred an authority and discretion, to be exercised in the execution of the law by Congress, and authorize the application of the congressional declaration, to enforce it by regulation equivalent to law.

In the 1930's delegation of Congressional authority to the executive was rampant through what was known as the New Deal era. During this period two cases of delegation or non-delegation that came before the Supreme Court were decided against delegation by Congress. The first one was ***PANAMA REFINING CO v. RYAN, 293 U.S. 388 (1935)*** wherein the court invalidated a provision of the National Industrial Recovery Act of 1933 which delegated to the Executive the authority to prohibit the interstate transportation of oil violating state mandated production quotas. The court held that the vagueness of the statute did not sufficiently direct the Executive's actions and therefore impermissibly delegated legislative

discretion to the President. Next, in SCHECTER POULTRY CORP. v. UNITED STATES, 295 U.S. 495 (1935) the Supreme Court rejected a statute authorizing the Executive to promulgate a “live poultry code” which established regulations governing the sale and quality of chickens, unfair competition and employee wage and hour limits. The court stated that Congress was not permitted to abdicate or transfer to others the essential legislative function with which it is thus vested, the constant recognition of the necessity and validity of such delegated provisions, and the wide range of administrative authority which has been developed by means of them cannot be allowed to obscure the limitations of the authority to delegate if the constitutional system is to be maintained.

These are the only two cases I came across in which the court has struck down legislation for improper delegation of quasi-legislative function. For since then from the cases I came across, the court has upheld all such legislations as proper. Subsequent decisions have approved a broad variety of generalized delegations. A case in point is ***Yakus v. United States, 321 U.S. 414 (1944),*** typical of the modern approach to delegated Congressional authority to individuals and agencies in the Executive branch. The YAKUS case involved a challenge to the Emergency Price Control Act, which allowed the office of Price Administration to issue regulations fixing the maximum prices of commodities and rents. The Act declared that prices were to be fixed to effectuate the Act’s policy of preventing wartime inflation, directed the Administrator to give consideration to prevailing prices and mandated that the prices set be “fair and equitable.” The court held that the legislation did not involve an unconstitutional delegation to the Price Administrator of the legislative power of Congress to control commodity prices in time of war. The court said this: “*The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct- here the rule, with penal sanctions, that prices shall not be greater than those fixed by maximum price regulations which conform to standards and will tend to further the policy which Congress has established. These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence,*

ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment; and for the formulation of subsidiary administrative policy within the prescribed statutory framework....." The court made reference to the New Deal era and continued thus: "*We ought not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority solely out of concern that we should thereby reinvigorate discredited constitutional doctrines of the pre-New Deal era. If we are ever to re-shoulder the burden of ensuring that Congress itself makes the critical policy decisions, these are surely the cases in which to do it."* See also **American Textile Manufacturers Institute v. Donovan, 452 U.S. 490 (1981**). The court has largely moved away from the principle of non-delegation.

In view of the fact that it is almost impossible and impracticable for Parliament to oversee all the activities and functions that fall within its domain, it is appropriate that it delegates some of these functions which do not involve law-making to others to execute the policies it has set out, within the framework and the policy outlined in the law. This does not infringe the principle of separation of powers. Thus the principle of delegation is permissible if it does not infringe the power granted to Parliament to make laws for the country uner Article 93(2) of the Constitution.

Now to relief (iii) set out in the memorandum of issues. It is '*whether or not the Petroleum Agreement between the Government of the Republic of Ghana and the 2nd defendant violated section 23(15) of PNDCL 84, that is Petroleum (Exploration and Production) Law, 1984'.* The sub-section provides:

Except for such sub-contractors as may be exempted from the requirements of this subsection by the Regulations, a contractor or sub-contractor which is not an incorporated company in Ghana under the Companies Code, 1963 (Act 179) shall-

(a) register an incorporated company in Ghana under the provisions of the Companies Code, 1963 (Act 179) to be authorised to carry out solely petroleum operations in respect of which a petroleum agreement or petroleum sub-contract has been entered into under this Law and such company shall be a signatory to any petroleum agreement;

(b) maintain an office or establishment in Ghana to carry out petroleum operations and shall have in charge of such office or establishment a representative with the authority to act and enter into binding commitments on behalf of the contractor or sub-contractor, as the case may be; and

(c) in respect of such petroleum operations, open and maintain an account with a bank in Ghana.

Counsel for the 3rd defendant made this relevant reference in his submissions when he said that "……..in the spirit of the purposive approach to interpretation, words or phrases used in a statute are in the first instance to be given their ordinary or where appropriate the technical meaning in context. This basic rule of statutory interpretation is put by the learned authors of Halsbury thus: '*if there is nothing to modify, alter or qualify the language which a statute contains, the words and sentences must be construed in their ordinary and natural meaning.'* Halsbury's Laws of England 4th edition vol 44, paragraph 863" This provision is clear and must thus be given its ordinary and natural meaning contrary to the conclusion reached by Counsel for the 3rd defendant. The said provision states that a foreign company which seeks to take advantage of this Law to engage in petroleum exploration business must register a subsidiary company in Ghana with full powers of management and local presence. The local subsidiary is required to be a signatory to any petroleum agreement. It follows that no agreement entered into without a local subsidiary in place and without the signature of the local subsidiary shall be valid. Therefore, before Parliament ratifies any such agreement it ought to ensure that the provisions of section 23(15) of PNDCL 84 have been complied with otherwise its ratification would be an exercise in futility.

In this case the agreement was executed on the 24th of October 2008 whilst the local subsidiary of the 2nd defendant company was said to have been incorporated on 29th October 2008, see the narration of facts by the 3rd defendant. It is thus clear that as at the date the agreement was executed there was no local subsidiary in place, let alone one to be a co-signatory to the agreement. Contrary to the position taken by the plaintiff, the 3rd defendant's signature did not satisfy the requirements of the law as it was not the subsidiary of the 2nd defendant; the 3rd defendant was a signatory in its own right. The agreement therefore clearly violated section 23(15) of PNDCL 84 and was thus invalid. Thus Parliament's ratification of the agreement given on 5th November 2008 was also done in error, for it could not ratify an invalid contract. Thus all acts done in relation to the invalid contract were equally invalid. Therefore the Minister for Energy, when he purported to act under section 23(15) of PNDCL 84 to terminate the agreement was perfectly justified, for the executive is enjoined by Article 58(2) of the Constitution to uphold all the laws of the country. Besides, Article 26.1 of the agreement states that it shall be "governed by and construed in accordance with the laws of the Republic of Ghana……" The Minister did not purport to terminate the agreement under any of the conditions prescribed under article 23.5 of the agreement but did so under section 23(15) of PNDCL 84 for non-compliance with the law. His action was thus justified. He did not have to refer it to Parliament since the agreement was invalid and did not exist in law and he had the right to terminate in terms of the Constitution which enjoins all executive action to be guided by the laws of the land. Moreover article 26.1 of the agreement also justified this course of action, as the agreement was not governed by the laws of the country.

The 3rd defendant considers that since the Minister did not purport to act under article 23.5 of the agreement to terminate it, he was bound to refer it to Parliament or to go to court to determine the agreement. That argument sounds persuasive, but as pointed out the duty cast upon the executive to act in accordance with the laws of the land, enjoins the Minister to put a halt to any infraction of the law that comes to his attention. Contrary to the position taken by the 3rd defendant, he does not require a court order to

stop an illegality which does not involve a constitutional interpretation. It is the party who is affected by the Minister's action and who feels aggrieved who may proceed to court for a declaration of his rights under the contract. In respect of whether the Minister should have referred to Parliament for approval, I would have accepted that but for the fact that the agreement itself clearly stated that it must conform to the laws of this country. Therefore, since the Minister had the right to terminate the agreement, he could do so under any of its provisions, besides article 23.5. It is unreasonable to isolate the other provisions of the agreement; indeed the principle of construction that a document or deed must be read as a whole is applicable to this situation. Thus by a combined reading of articles 26.1 and 23.5 of the agreement, the Minister was mandated by Parliament to terminate the agreement if it did not conform to the laws of the country, inter alia.

I fully appreciate the fears expressed by Counsel for the 3rd defendant when he said this: "…..where Parliament has studied the Petroleum Agreement vis-à-vis the existing laws of the land, the executive on its own motion claim that Parliament made a mistake and therefore move to correct the said mistake……..if this position is left to stand, it will obviously lead to a chaotic situation as every Minister who thinks there is a 'mistake' in an act of Parliament will take steps to correct the perceived mistake on its (sic) own accord." This fear will be reduced and even non-existent if Parliament limits the amount of power delegated or if it removes any such delegation altogether in such important matters that require joint action from both arms of government. Counsel's fear really stems from the facts of this case, where the Minister acted without going back to Parliament as a result of the power given to him to terminate the agreement if it does not conform to the laws of the country, inter alia.

Finally I will consider relief (ii). The question that logically arises is this: since the Minister was legally justified in terminating the agreement, why did he agree to pay the sum of $29 million to the 2nd defendant? The plaintiff has raised this issue in view of this court's decisions in these cases: ***Amidu (No. 3) v. Attorney-General, Waterville Holdings (BVI) Ltd & Woyome (No. 2) (2013-2014) SCGLR 606; Amidu (No. 2) v. Attorney-***

General & 2 others**,** supra, called Amidu cases, for short. These cases decided, inter alia, that when the contract is invalid because it violated the Constitution then all acts done under it including payment of money could not hold and that no order of restitution could be made under such invalid contracts. It was for that reason that payments made under those contracts were ordered to be refunded to the State.

Let us get the facts right. The Minister communicated his decision to the 2nd defendant by letter dated 30 December 2009, exhibit JN4. In the said letter the Minister suggested to the GNPC to pay for the data that the 2nd defendant had gathered in the course of the petroleum exploration activities in the country. This is the penultimate paragraph of the said letter and it reads:

"Considering that you had undertaken some data acquisition, I am, by copy of this letter, asking GNPC, as owner of such data, to reimburse you the costs of the data."

It was on the strength of this that the $29 million was negotiated and paid for. Thus it is certain that the money was not paid as compensation or penalty for the termination of the agreement per se, but to enable GNPC gain access to the data which was in the possession of the 2nd defendant. It was purely a commercial or business deal which benefited both parties, regardless of the termination. For going by the principle of no restitution in the two Martin Amidu cases under reference herein, the 2nd defendant would not be entitled to compensation under an illegal contract; by parity of reasoning the GNPC, and for that matter the State, could also not derive any benefit, by way of the data, from the illegal contract. There was thus nothing wrong in deciding that though the contract is illegal, yet they would take mutual benefits thereunder in a business deal. In my opinion so long as the payment was not made under and pursuant to the contract but outside of it, the facts should be distinguished from the Martin Amidu cases. The payment was not made for breach of contract but as consideration for data GNPC obtained from the 2nd defendant.

In conclusion, whilst I uphold the issues, (i) and (iii), I disallow issue (ii) for reasons explained above. Consequently, subject to the decision that parliamentary approval, unless otherwise delegated to the executive, is a requirement in a revision or termination of a contract ratified by Parliament under Article 168{1} of the Constitution, reliefs (a) and (b) are dismissed. Reliefs (c) and (d) are entirely dismissed.

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT

(SGD) S. O. A. ADINYIRA (MRS)

JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE - BONNIE

JUSTICE OF THE SUPREME COURT

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