IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2016

WRIT

NO: J1/5/2015

23RD JUNE 2016

CORAM: ATUGUBA JSC PRESIDING
AKUFFO (MS) JSC
ANSAH JSC
ADINYIRA (MRS) JSC
DOTSE JSC
ANIN YEBOAH JSC
BAFFOE-BONNIE JSC

JUDICIAL SERVICE STAFF ASSOCIATION OF GHANA (JUSAG) - PLAINTIFF

VRS

1 THE ATTORNEY-GENERAL - 1ST DEFENDANT

2. THE NATIONAL PENSION REGULATORY AUTHORITY - 2ND DEFENDANT

3. FAIR WAGES AND SALARIES COMMISSION - 3RD DEFENDANT

JUDGMENT

MAJORITY OPINION

DOTSE JSC:

CAPACITY OF PLAINTIFF AND RELIEFS CLAIMED

The plaintiff has instituted the instant action as a corporate citizen of Ghana pursuant to article 2 (1) of the Constitution 1992 for the benefit of its members, whose pension rights guaranteed by the Constitution 1992, are allegedly being infringed upon by the Defendants.

Additionally, the plaintiff states that, in so far as some of the reliefs it seeks against the defendants, go beyond the immediate confines of its members, ***(who are to a large extent the non-bench members of the Judicial Service)*** the plaintiff should be deemed to have commenced the action as a matter of public interest also pursuant to article 2 (1) of the Constitution 1992.

In that respect, the plaintiff is deemed to be seeking to enforce the pension rights of the Judges of the Superior Court of Judicature and also of the lower court, who by the nature of their profession cannot pursue their own grievances through the court's system whilst still in active public service. This then explains the basis of the reliefs which the plaintiff claims against the defendants which are as follows:-

i. Declaration that upon a true and proper construction of **article 127 (4) and (5) of the 1992 Constitution**, all persons serving in the Judiciary were entitled to be placed on CAP. 30 pension scheme upon the coming into force of the 1992 Constitution.

ii. Declaration that the practice of placing or continuing to place some of the persons serving in the Judiciary on or under the SSNIT pension scheme after the coming into force of the 1992 Constitution was wrongful and violates article 127 (4) of the 1992 Constitution.

iii. Declaration that the practice of placing or continuing to place ***Judicial Officers falling under Article 161 (b) and (c) of the 1992 Constitution*** on the SSNIT pension scheme, whiles leaving the Judicial Officers on the bench, namely Judges and Magistrates under article 161 (a) of the 1992 Constitution, on CAP. 30 pension scheme was discriminatory, contrary to article 17 (2) of the 1992 Constitution.

iv. Declaration that all persons serving in the Judicial Service were and are entitled to have their gratuity and pension entitlements computed or re-computed under CAP. 30 pension scheme and paid the difference of sums due and owing them between the two schemes, if any, together with interest, including a refund of all SSNIT contributions deducted from their salaries with effect from 1992.

v. Declaration that section 213 (1) (a) of the National Pensions Act, 2008 (Act 766), seeking to bring to an end the operation or continuing operation of CAP. 30 pension scheme in Ghana and compulsorily placing Judges of the Superior Courts and Judicial Officers under a contributory pension scheme under Act 766

violates the letter and spirit of Articles 127 (4) and (5) of the 1992 Constitution.

vi. Declaration that section 220 of the National Pensions Act, 2008 (Act 766) offends and contradicts article 71 (1) and 127 (4) and (5) of the 1992 Constitution and the same is null and void to the extent of the inconsistency.

vii. Declaration that upon a true construction of article 149 of the 1992 Constitution, Judicial Officers falling under article 161 of the 1992 Constitution are not amenable or do not fall under the purview of the SSSGS scheme administered by the 3rd Defendant.

viii. Declaration that the continuing placement of the Judicial Officers within the Plaintiff's ranks on the SSSGS scheme after migrating the Judges and Magistrates, is not only discriminatory, contrary to Article 17 (2) of the 1992 Constitution, but violates their rights.

ix. An order directed to the 3rd Defendant to ensure the restoration of the said affected persons to their positions status quo ante, away from the 3rd Defendant's jurisdiction.

INTRODUCTION

In a well prepared and articulated statement of plaintiff's case, Learned Counsel for the Plaintiff, Mr. Kweku Paintsil, contended that the plaintiff is a body corporate, registered under the Ghana Companies Act, 1963 (Act

179) as a company limited by guarantee in addition to having registered as a Trade Union, with a bargaining certificate for and on behalf of its members, who are the non-bench staff of the Judicial Service, already stated supra.

The 1st Defendant the Attorney-General, has been sued as the principal legal adviser to the Ghana Government and is a nominal defendant herein.

The 2nd Defendant the National Pension Regulatory Authority, has been sued as the statutory body established under section 5 of the National Pension Act, 2008 (Act 766) with responsibility for the regulation and policy development of pensions administration in Ghana, with a further mandate under Act 766 to unify all pension schemes in Ghana after the CAP 30 Pension ceases to be operative and the 3-tier mandatory pension scheme established under Act 766 becomes operational.

Finally, the 3rd defendant, the Fair Wages and Salaries Commission, has been sued as a statutory body established under the Fair Wages and Salaries Commission Act, 2007 (Act 737) ***with the purposes of ensuring a fair, transparent and systematic implementation of the Government Public Service Pay Policy***.

The Plaintiff has sued the 3rd Defendant because of it's alleged wrongful conduct in subjecting all of it's members to the Single Spine Salary Grade (SSSGS) notwithstanding that the Constitution 1992 ***excludes plaintiff's members, particularly Judicial Officers, from its purview***.

PLAINTIFF'S STATEMENT OF CASE

The thrust of the Plaintiff's case and arguments in the statement of case have been briefly summarized by learned counsel for the plaintiff, Mr. Kweku Paintsil as follows:

The three main areas of concern which the statement of case addressed are:

(i) "Which of the two existing pension schemes in Ghana, namely, (a) the CAP. 30 pension scheme and (b) the Social Security and National Insurance Trust ("SSNIT") pension scheme, ought to be the proper pension scheme determined by the 1992 Constitution to govern the contract of employment of persons serving in the Judicial Service of Ghana;

(ii) Whether the pension rights conferred by the 1992 Constitution on persons serving in the Judicial Service can subsequently be varied or taken away by a latter subordinate legislation, specifically, the National Pension Act, 2008 (Act 766). In the case of Justices of the Superior Court of Judicature and Judicial Officers, the further issue of whether the pension rights conferred on them by ***article 71 (1) (b) and article 127 (5) of the 1992 Constitution, namely,*** that their conditions of service shall not be varied to their disadvantage can be achieved by removing them from a purely non-contributory (CAP.30) pension scheme founded upon the Consolidated Fund to a purely contributory pension scheme under Act 766 managed by a Fund Manager outside the Consolidated Fund; and finally,

(iii) Whether the Single Spine Salary Grade Structure ("SSSGS") administered by the 3rd Defendant herein is applicable to all of

> Plaintiff's members, including the Judicial Officers therein, or, as contended by the Plaintiff, that it does not apply to the ***Judicial Officers within the Plaintiff's ranks***." *Emphasis supplied*

In articulating it's views in support of the above statement, the Plaintiff's members argued that the treatment being meted out to it's members by the Defendants amount to **discrimination** as provided for by Article 17 (2) of the Constitution 1992.

1ST AND 3RD DEFENDANT'S RESPONSES

The Learned Deputy Attorney-General Dr. Ayine, in his elaborate presentation in the 1st Defendant's statement of case denied the plaintiff's claims and instead argued that the plaintiff's case is based on a number of *"fundamentally flawed assumptions and a misapprehension of the nature and import of the constitutional provisions dealing with the salaries, gratuities, pension and other allowances of judicial officers*".

Proceeding from the above assumptions, the 1st defendant states as follows:-

> *"Your Lordships, the Attorney-General would argue that the current regime is totally in sync with the Constitution and that it is within Parliament's legislative power to set up a new pension regime for the country in line with the dictates of public policy. Consequently, to the extent that the new pension regime maintains or even enhances those benefits, it cannot be said to have violated the Constitution. This is because according to him, the basic rationale behind the constitutional injunction against disadvantageous variation of*

financial benefits for Judicial Officers is solely to protect those benefits from encroachment by the egregious political branches as an integral component of the independence of the judicial branch. ***In other words, the framers did not intend and could not have intended CAP 30 benefit be cast in stone even with changing circumstances in the economy as a whole and in the work place in particular."***

Secondly, the 1st defendant contended that the role of the 3rd defendants in determining the terms and conditions of the plaintiff's members is not unconstitutional since it is possible for that power and role to be delegated.

This is because, according to the 1st defendants, no efficient public service business can occur without delegation. ***They contend that the 3rd defendants are merely an instrumentality of state established to deal comprehensively with public sector wage issues.***

Thirdly learned Deputy Attorney-General submitted that the National Pensions Act, Act 766 is not unconstitutional vis-à-vis the provisions contained in article 127 (4) and (5) of the Constitution 1992. Learned Counsel submitted that, when read together, the two clauses, 127 (4) and (5) seek to achieve two distinct but interdependent objectives. **The first is to state clearly the source of funds out of which the administrative expenses of the judiciary, must be paid. The second is to prohibit deliberate and or formal encroachment on the independence of the Judiciary or of persons exercising judicial power through disadvantageous variation of the financial benefits due to such persons**.

The learned Deputy Attorney-General concludes his arguments by stating emphatically that, the Plaintiff's contention of there being a violation of article 127 is based on an expansive reading of that provision. Furthermore, learned Deputy Attorney-General, argued that, "***that way of thinking is a deliberate attempt to blend or combine the Judiciary, which comprises persons exercising judicial power, with the Judicial Service which comprises the public services arm of the Judiciary." Emphasis supplied***

This the 1st defendants contend, the plaintiff has succeeded in doing by sidestepping the clear provisions of the Constitution and importing the words "*person serving in the judiciary"* from article 127 (4) into 127 (5). In order to establish what is meant by exercise or vested with judicial power, learned counsel referred to Black's Law Dictionary which defines judicial power as a noun as follows:-

> ***"The authority exercised by that department of government which is charged with declaration of what the law is and it's construction. The authority vested in courts and Judges as distinguished from the executive and legislative power."***

(Reference Sixth Edition, West Publishing Co. USA, p. 849 which is an older edition of Blacks Law Dictionary.)

Flowing from the above definition, the learned Deputy Attorney-General contended that, Accountants, Human Resource Managers etc., who are members of the plaintiff's not being vested with judicial power do not fall within the scope of the term judiciary.

Fourthly, the learned Deputy Attorney-General urged this court to dismiss the claims of the plaintiff on the grounds that, section 213 of Act 766 which seeks to bring to an end CAP 30 pension benefits does not contradict articles 127 (4) and (5) of the Constitution 1992.

He argued that, merely charging the payment of all pension benefits of the Judiciary on the consolidated fund does not make the repeal of CAP 30 unconstitutional.

Indeed, learned counsel argued that, contextually speaking there is nothing to suggest the linkage of articles 127 (4) and (5) of the Constitution 1992 to CAP 30 pension benefits.

Learned Deputy Attorney-General then referred to the decision of this court ***in Brown v Attorney-General and 2 others [2010] SCGLR 183, at 200*** to the effect that payment of pension benefits to retired staff of the Audit Service from funds other than the consolidated fund was unconstitutional, to buttress his point.

Finally, the learned Deputy Attorney-General, challenged plaintiff's contention that there has been a discrimination in terms of article 17 (2) of the Constitution 1992 by the defendants in the treatment of plaintiff's members in terms of their conditions of service etc vis-a vis Judges of the Superior Courts and lower courts.

In conclusion, the learned Deputy Attorney-General prayed this court to dismiss the plaintiff's action as lacking in merit. He also prayed that the plaintiff having failed to establish that section 213 and 220 of Act 766 have violated the Constitution 1992, prayed the court not to be seen to bring dead statutes back to life. This is because, the said sections 213 and 220 of

Act 766 are not inconsistent with any constitutional provisions as contended by the plaintiff.

3RD DEFENDANTS STATEMENT OF CASE

In substance the 3rd Defendant's Statement of Case is not different from that of the 1st Defendants.

However, we will proceed to set out the arguments of substance of the 3rd defendant's as follows:-

1. LACK OF JURISDICTION

Learned counsel for the 3rd defendant, Dr. Aziz Bamba argued that the plaintiff has wrongfully invoked the exclusive jurisdiction of this court. This is because according to him, the plaintiff's suit does not raise any substantial, real or genuine issue of interpretation or enforcement of any provision of the Constitution 1992.

Relying on several decisions of this court, such as

i. Adumoa II and others v Adu Twum II [2000]SCGLR 167
ii. Republic v Special Tribunal, Ex-parte Akosah [1980] GLR 592 at pages 604-605
iii. Republic v High Court, (Fast Track) Division Accra, Ex-parte Electoral Commission (Mettle Nunoo & Others; Interested Parties) [2005-2006] SCGLR 514
iv. Republic v High Court, (Fast Track Division) Accra, Ex-parte Commission on Human Rights and Administrative Justice (Richard Anane, Interested Party) [2007-2008] SCGLR 213, 1
v. Nartey v Gati [2010] SCGLR 745

vi. Asare-Baah III and others v Attorney-General and Electoral Commission [2010] SCGLR 43 and

vii. Osei Boateng v National Media Commission [2012] 2 SCGLR 1038

just to mention a few, the 3rd defendant argued that this court should deny jurisdiction in the instant case on the basis of the decisions referred to supra.

2. APPLICATION OF THE PENSIONS ORDINANCE, CAP. 30 TO ARTICLES 127 (4) AND (5) OF THE CONSTITUTION 1992

The 3rd defendants, having traced correctly the history of the pensions law and practice from the Gold Coast era to date, argued that, prior to the coming into force of the Constitution 1992, the state of the law on Pensions or Social Security was that, all persons employed in the public sector on or after 1st January 1972, except those expressly exempted by or under enactments relating to Social Security and Pensions were deemed by law to be members of the Social Security Fund, and not beneficiaries of the Pensions Ordinance CAP 30.

The 3rd defendant stated categorically that, the members of the plaintiff's association do not form part of the categories of public officers whose pensions and gratuities must be determined pursuant to CAP 30.

The 3rd defendant's need to be commended for the accurate, and very helpful, historical background they provided for the analysis of the pension laws since the Gold Coast era. This has been acknowledged by the plaintiff's

composite response to the 1st and 3rd defendant's statement of case, filed on 22/4/2015.

The learned counsel for the 3rd defendant expended a considerable space in the statement of case to debunk the assertion that the plaintiff's members are entitled to the unfunded **pension scheme under** CAP 30. According to learned counsel for the 3rd defendants, the CAP. 30 Pension system is unsustainable, and is a sure recipe for national bankruptcy. They contend that the Plaintiff's argument is inconsistent with article 36 (7) of the Constitution 1992 which enjoins the state to ***"ensure that contributory schemes are instituted and maintained that will guarantee economic security for all self-employed and other citizens of Ghana."***

Relying on studies conducted by eminent Ghanaian jurist **Prof. Kofi Kumado** and economist **Dr. Fritz Gockel** who concluded that the unfunded CAP 30 is unsustainable, (reference Exhibit FWSC C), learned counsel for the 3rd defendants strenuously argued that, the embedding of CAP. 30 pension scheme into articles 127 (4) and (5) of the Constitution 1992 would work untold hardship on the economy as it's practical effect would lead to public sector workers whose pension rights are charged on the consolidated fund to claim to be entitled to this non contributory pension regime.

Based upon the above submissions, learned counsel for the 3rd defendant submitted finally that sections 213 and 220 of the National Pensions Act do not infringe articles 71 and 127 (4) and (5) of the Constitution 1992.

3. CLAIM OF DISCRIMINATION – PURSUANT TO ARTICLE 17 (2) OF THE CONSTITUTION 1992

The 3rd defendant argued that, the plaintiff has not led any cogent or substantial evidence to support the allegation that some categories of it's members are treated differently when it comes to pensions and gratuities.

According to the 3rd defendants, it is the Constitution 1992, that has provided different constitutional processes and regimes for the determination of the gratuities and pensions of the different categories of persons working in the Judiciary as is evident in articles 71, 149 and 158 of the Constitution.

Learned counsel for the 3rd defendant, referred to the case of ***Nartey v Gati*** already referred to supra and ***Kwaku Asare v Attorney-General [2012] 1 SCGLR 460*** to conclude that there is indeed no discrimination as alleged by the plaintiff.

RESPONSE OF PLAINTIFF TO 1ST AND 3RD DEFENDANTS STATEMENT OF CASE

On the 16th of April 2015, this court granted the plaintiff leave to respond to the statements of case of the 1st and 3rd defendants.

That task was complied with by the plaintiff who filed a composite response to these statements of case on 22/4/2015.

In that statement, learned counsel for the plaintiff, Kweku Paintsil, responded seriatim to all the arguments made therein and articulated the following submissions:-

1. Plaintiff submitted that, the Defendants arguments on the legal position and the purported divide between CAP 30 and SSNIT pension schemes before the coming into force of the Constitution is not tenable. Rather, the plaintiff maintained it's position that, despite the provisions of sections 1 and 3 of the Pensions and Social Security (Amendment) Decree, 1975 (SMCD8) articles 127 (4) and (5) of the Constitution have put all of the Plaintiff's members on CAP 30 pension scheme upon the coming into force of the Constitution. Plaintiff also stated that, whenever a reference is made in the Constitution to pension rights of public sector workers, that reference is to CAP 30. They also argued that, whenever a specific right is conferred on a specific person for example, the Chief Justice or Auditor General, it is also meant to apply generally to all other workers in the establishment headed by that person.

2. Secondly, the Plaintiff argued that, there was a clear intention on the part of the law makers to ensure that by a certain time in our legal history, (reference Social Security Act, 1965 (Act 279) to Social Security Decree 1972 (NRCD 127) up to SMCD 8) when all those who opted to remain on CAP 30 were all gone, that particular pension scheme would phase out and SSNIT pension scheme would be applicable to all.

3. However, the Plaintiff argued that, despite this clear legislative intent to shut the CAP. 30 door, there was a lot of legislative activity tending to open this CAP. 30 door before the Constitution 1992 came into

being. Reference the Ghana Police Service, (Pensions) Law 1985 (PNDCL 126), Public Officers (Pension) (Amendment) Law 1986 (PNDCL 165) for the Legal Class and Prison Service (Pension) Law, 1987 (PNDCL 168) for the Prisons Service. It must be noted that, all these specific laws excepted the application of (SMCD 8) to those organisations and institutions.

4. The Plaintiff then listed some institutions like the Police Service, Legal Service, Prisons, Ghana Immigration and the Armed Forces to argue that these were the institutions which were exempted from the purview of SMCD 8 and put on CAP 30, before the Constitution 1992 came into force. They therefore conceded that these did not include plaintiff's and Judges of the Superior courts as well as those of the lower courts.

5. The Plaintiff next responded that the Constitution 1992 exempted the following institutions from the SSNIT pension and enabled their employees to enjoy CAP 30 pension scheme. These are contained in (a) article 127 (4) in relation to "persons serving in the Judiciary" (b) article 187 (14) in relation to persons serving in the Audit Service (c) article 171 in relation to "persons serving with the (National Media) Commission" (d) article 54 in relation to "persons serving with (the Electoral) Commission and (e) article 227 in relation to "persons serving with CHRAJ". **Once these are to be a charge on the Consolidated Fund, Plaintiff submitted that they were out of the purview of SSNIT Pension.**

The plaintiff also listed the following institutions and their applicable laws that were enacted to exempt their employees from SSNIT pension as follows:-

(i) PNDCL 165 was amended by section 16 of the Legal Services Act, 1993 (PNDCL 320) for the Legal Services,

(ii) Section 34 of the Security Agencies and Intelligence Services Act, 1996 (Act 52)

(iii) See also section 27 of the Ghana National Fire Service Act 1997 (Act 537) which expressly removed personnel of the Fire Service from the purview of SMCD 8.

6. The Plaintiff then argued that the definition of CAP 30 as provided in Act 766 contained discrepancies as it included names of institutions like the Judiciary, but did not include the Audit Service. However, an exhibit that was produced from the Controller and Accountant-General as per letter dated 13th February 2015, contained the names of all public sector institutions including the Judiciary and the Audit Service as those institutions entitled to CAP 30 pension benefits. Learned counsel again referred to the case of ***Brown v Attorney-General,*** already referred to supra and reiterated the point that, after the decision by the Supreme Court in that case, the Audit Service Regulations 2011 (C.I. 70) was enacted which guaranteed the payment of retiring gratuities and pensions from the Consolidated Fund to staff of the Audit Service. Learned counsel for Plaintiff however correctly stated the view that, the inclusion of staff of the Audit Service in the payment of pension rights under CAP 30 took its

roots from article 187 (14) of the Constitution and not from C. I. 70 as contended.

7. Contending that the payment of pension benefits to Judges of the Superior Courts are based on the Constitution 1992 and not on PNDCL 165 as was urged by the Defendants, learned Counsel for plaintiff then posited that Judges and Magistrates of the lower courts and even some Directors within the Judicial Service are also paid CAP 30 pension benefits. They therefore reiterated the fact that, the denial of the payment of these pension benefits to the Plaintiff's members is unconstitutional. Plaintiff therefore reiterated the view that based on article 127 (4) the phrase, ***"persons serving in the Judiciary"*** must include the plaintiff.

8. Learned counsel for the plaintiff, Kweku Paintsil rightly in our view concluded his response to the Defendants statement of case by stating that it is wrong for the Defendants to use the value or quantum of pension benefits payable to persons entitled as a basis to deny them their rights if they are really and truly entitled to them.

In our opinion, it is completely wrong to appeal to our emotions on the cost element in this very serious constitutional matter affecting the pension rights of employees who have worked several years for the state.

MEMORANDUM OF ISSUES

We will therefore proceed to the analysis of the issues set down in the memorandum of issues taking into due consideration all the factors raised and argued by all the counsel referred to supra in this judgment. We will also relate the determination of the issues to the reliefs claimed by the Plaintiff.

The issues set down are the following:-

i. Whether and to what extent the Plaintiff's action raises any real, genuine or substantial issues of constitutional interpretation to warrant the invocation of the exclusive original jurisdiction of the Supreme Court.

ii. Whether or not the constitutional requirement in article 127 (4) of the 1992 Constitution that the ***"gratuities and pensions payable to or in respect of persons serving in the judiciary shall be charged on the Consolidated Fund"*** imposes a duty to place the Plaintiff's members on the CAP 30 pension scheme and not the SSNIT pension scheme; alternatively.

iii. Whether or not the expression *"all" "persons serving in the Judiciary"* appearing in Article 127 (4) of the 1992 Constitution applies only to the Justices, Judges and Magistrates to the exclusion of all other judicial service employees, including the non-bench Judicial Officers.

iv. Whether or not the payment of CAP. 30 pension benefits to the Justices, Judges and Magistrates to the exclusion of members of the Plaintiff Association amounts to discrimination against the latter within the meaning of Article 17 (2) of the 1992 Constitution.

v. Whether or not the duty imposed on the President by article 149 of the 1992 Constitution to determine the conditions of service of Judicial Officers can be delegated to, or performed by, the 3rd Defendant.

vi. Whether or not the conduct of the Judicial Service in requesting the 3rd Defendant to remove the Judicial Officers on the bench from the purview of the SSSGS whiles retaining the non-bench Judicial Officers on the SSSGS constitute ***discrimination*** against the non-bench judicial officers within the meaning of article 17 (2) of the 1992 Constitution; and

vii. Whether or not sections 213 (1) (a) and 220 of the National Pensions Act, 2008 (Act 766) contradict articles 71 (i) (b), 127 (4) and (5) of the 1992 Constitution.

ISSUE I

WHETHER AND TO WHAT EXTENT THE PLAINTIFF'S ACTION RAISES ANY REAL, GENUINE OR SUBSTANTIAL ISSUES OF CONSTITUTIONAL INTERPRETATION TO WARRANT THE INVOCATION OF THE EXCLUSIVE ORIGINAL JURISDICTION OF THE SUPREME COURT

Even though the defendants have raised this jurisdictional issue and cited several of this court's decisions in support, we are of the considered view that the plaintiff's case raises substantial issues of genuine and real constitutional interpretation to warrant the invocation of the exclusive jurisdiction of this court.

This is because, in our opinion, having considered in detail the reliefs which the plaintiff's are seeking before this court, and taking into consideration the responses of the defendants, it is clear that serious and real issues of constitutional interpretation have been raised to evict the type of concern and response given thereto.

Taking the plaintiff's reliefs 1 and 2 into consideration, it is clear that some serious, genuine and real constitutional issues have been raised. For example, who are to be considered members of the Judiciary under articles 127 (4) and (5) of the Constitution 1992 to bring them under the CAP. 30 pension scheme when the Constitution 1992 came into force?

Secondly, relief 2 also raises some genuine issues of interpretation such as who among the Judiciary under the Constitution 1992 have been placed on SSNIT pension scheme contrary to article 127 (4) of the Constitution?

One may take a cue from the seminal book of our illustrious Justice Date-Bah, ***"Reflections on the Supreme Court of Ghana"*** in which he discussed and analysed some of the notable pronouncements on this issue of jurisdiction of the Supreme Court in the case of **Republic v Special Tribunal, Ex-parte Akosah**, already referred to supra, where he recounted the criteria used to determine whether an issue of enforcement or interpretation arises under the Constitution in analogous constitutional

provisions under the 1979 3rd Republican Constitution. The learned author taking guidance from the **Ex-parte Akosah case** supra adopted the criteria used by **Anin J.A (as he then was)** in the Akosah case as the criteria to be used to determine whether or not the Supreme Court's jurisdiction has been properly invoked.

(a) "Where the words of the provisions are imprecise or unclear or ambiguous. Put in another way, constitutional interpretation or enforcement arises if one party invites the court to declare that the words of the article have a double meaning or are obscure or else mean something different from or more than what they say".

In the instant case, the ferocious nature of the divergent interpretations being put on the Constitution and meaning of the words in article 127 (4) and (5) of the Constitution 1992 and also whether sections 213 and 220 of Act 766 are inconsistent with or violate the relevant provisions of the Constitution raise genuine issues which call for this court's jurisdiction to be invoked.

The learned author continued his references to the Akosah case as follows:-

(b) "Secondly, where the rival meanings have been placed by the litigants on the words of any provisions of the constitution."

In the instant case, this is exactly what has happened when both parties have divergent rival meanings on the relevant provisions of the

Constitution regarding what class of staff within the Judicial Service constitute the Judiciary and those who are not but are Judicial Officers and those who ought to be placed under *C.A.P 30 pension scheme*.

The learned author further states as follows:-

> ***(c) "Thirdly, where there is a conflict in the meaning and effect of two or more articles of the Constitution, and the question is raised as to which provision should prevail."***

In the instant matter, the apparent inconsistency between the provisions in article 127 (4) and (5) in respect of who or what constitutes "the Judiciary" (article 127 (4)) on the one hand and the meaning of article 127 (5) vis-à-vis the terms used therein and the addition of the words "Judicial Officer or other person exercising Judicial Power."

The learned author completed the categorization thus:-

> ***(d) "Finally, where on the face of the provisions, there is a conflict between the operation of particular institutions set up under the Constitution, and thereby raising problems of enforcement and of interpretation."***

In this particular instance, reference needs to be made to provisions in article 71 (1) of the Constitution 1992 which has set up a constitutional body for the determination of emoluments and conditions of service of some members of the Judiciary under article 127 (4) and (5) of the Constitution 1992. Those provisions have to be considered alongside the provision of articles 149 and 158 (2) which also set up different bodies and institutions

for the determination of emoluments and conditions of service of different levels within the Judicial Service.

Based on the above criteria, and the principles of law referred to in the decided cases, we are of the considered opinion that the preliminary objection raised by the defendants that the plaintiff's case does not raise genuine and real issues of constitutional interpretation and or enforcement and therefore should be dismissed is untenable. The said objection fails, and is overruled, and we will proceed to consider the remaining issues raised in the memorandum of issues seriatim.

We will take issues ii and iii of the memorandum of issues together. This is because they all touch upon and concern similar constitutional, legal and factual issues arising from the plaintiff's reliefs (I), (II) and (IV).

ISSUES II AND III

II. Whether or not the constitutional requirement in article 127 (4) of the 1992 Constitution that the *"gratuities and pensions payable to or in respect of persons serving in the judiciary shall be charged on the Consolidated Fund"* imposes a duty to place the Plaintiff's members on the CAP 30 pension scheme and not the SSNIT pension scheme; alternatively.

III. Whether or not the expression *"all persons serving in the Judiciary"* appearing in Article 127 (4) of the 1992 Constitution applies only to the Justices, Judges and Magistrates to the exclusion of all other judicial service employees, including the non-bench Judicial Officers.

Articles 127 (4) and (5) of the Constitution 1992 provides as follows:

(4) "The administrative expenses of the Judiciary, including all salaries, allowances, gratuities and pensions payable to or in respect of, persons serving in the Judiciary, shall be charged on the Consolidated Fund."

(5) "The salary, allowances, privileges and rights in respect of leave of absence, gratuity, pension and other conditions of service **of a Justice of the Superior Court or any judicial officer or other person exercising judicial power, shall not be varied to his disadvantage."**

In order to understand the real meaning of the expression, *"gratuities and pensions payable to or in respect of persons serving in the judiciary shall be charged on the consolidated fund,"* it is imperative that the entire article 127 (4) and the meaning of "judiciary" as used throughout in the Constitution be put in context and understood in clear terms.

Indeed, if one considers the use of the term *"Judiciary"* in articles 125 (1), (3) (4) (5) and 126 (1) (a) (i) (ii) (iii) and (b) for example, the meaning of the word *"Judiciary"* becomes clear and consistent with the definition of the word in current and contemporary law Dictionaries.

This is because, whilst article 125 (1) states *that "Justice emanates from the people and shall be administered in the name of the Republic by the **Judiciary** which shall be independent"*... article 125 (3) on the other hand states that "the **judicial power** of Ghana shall be vested in the

Judiciary" and the article proceeds to state *that "neither the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given final judicial power."*

These provisions are consistent with the practical everyday meaning of "judiciary" which is a system where a body of persons constituting a distinct group have been put together to exercise judicial power on behalf of the people in the country.

Thus Blacks Law Dictionary 9th edition, by Bryan A. Garner, page 924, defines Judiciary as follows:-

(1) "The branch of government responsible for interpreting the laws and administering justice,
(2) A system of courts and
(3) A body of judges – also termed judicature – Judiciary adj."

This definition is also consistent with the definition of judicial power contained in 1st Defendant's statement of case from Black's Law Dictionary which made reference to an earlier edition, the sixth edition by West Publishing Co., USA at page 849 which is that, ***"it is the authority exercised by the department of government responsible for declaring what the law and it's constructions are. This power is vested in courts and Judges, quite distinct from the executive and legislative branches of government."***

The above definition of the word judiciary and Judicial power are consistent with it's use throughout chapter eleven of the Constitution 1992 especially in article 126 (1) which states as follows:-

"The Judiciary shall consist of

(a) the superior Courts of Judicature comprising
    (i) the Supreme Court,
    (ii) the Court of Appeal; and
    (iii) the High Court and Regional Tribunals

(b) such Lower courts or Regional Tribunals as Parliament may by law establish."

From the above, it is clear that, the expression "judiciary" as used throughout the Constitution 1992, can only be deemed to refer to the body of persons exercising judicial power in the sense that they are charged with the responsibility of administering justice.

Thus, article 127 (4) can literally be said to mean that, "the administrative expenses including all the salaries, allowances, gratuities, and pensions payable to or in respect of, persons administering justice or who have been given the responsibility of interpreting the laws of the country shall be an encumbrance or a lien on the consolidated fund."

With the above definition and explanation of the entire article 127 (4), it is clearly apparent that, taken in context, where the word "Judiciary" is used in article 127 (4) there is a clear reference to only persons exercising judicial power and administering justice, in the sense that they are those persons entrusted with the responsibility of interpreting the Constitution and laws of the country in contra distinction to those in the Executive and Legislative branches of Government, and therefore does not include the

supporting staff of the Judiciary who do not exercise judicial power. In any case it is of crucial importance to note that no where in either article 127 (4) or 127 (5) does the expression *"all persons serving in the Judiciary"* appears. The phrase used is ***"persons serving in the judiciary".***

Furthermore, a reading of article 161 of the Constitution 1992 is very much revealing and needs to be taken into account. This article provides as follows:-

Judicial office means:-

(a) "the office of a person presiding over a lower court or tribunal howsoever described".

This definition or description is consistent with article 126 (1) of the Constitution which as aforesaid, states what the Judiciary consists of and sets out in a hierarchical order the composition of the Judiciary of Ghana and is also consistent with the contemporary meanings of judiciary and exercise of judicial power.

The above provisions are in tandem with the definition of the word Judiciary as used in article 127 (4). In essence, the gravamen of the provisions referred to supra are that the words *"Judiciary"* as used in article 127 (4) of the Constitution 1992 refers only to persons who consist of the Judiciary as described in article 126 (1) of the Constitution 1992. Furthermore, all the category of the persons mentioned therein are to our mind administering justice and exercising judicial power in the sense that they are involved in the declaration of what the law is, the construction and interpretation of the Constitution and Laws of Ghana and, authoritative settlement of disputes brought before any of the adjudicating bodies

established by and under the Constitution 1992 in chapter eleven of the Constitution. In coming to the following conclusions, we have been constrained to apply the meanings as ascribed to the words "Judiciary" and "Judicial Power" as appearing in context in the other articles of the Constitution 1992 whenever these words have been used.

We have also considered in great detail the arguments of learned counsel for the parties herein. We have indeed benefited tremendously from the submissions of learned counsel for the plaintiff.

For example, after setting out the historical, constitutional and legal development of Ghana's pensions regime from the pre 1957 constitutions and statutory provisions to our present Constitution, learned counsel for the plaintiff rightly in our view submitted as follows:-

> "From the foregoing, and reading articles 158 (1) and 161 of the 1992 Constitution together, we notice that in terms of service conditions, there are at least three broad categories of "persons serving in the Judiciary" namely

(i) Justices of the Superior Courts of judicature under Articles 71 and 127;

(ii) Holders of Judicial Officers defined under Article 161 (a), (b) and (c) as:-

a. persons presiding over the lower courts and tribunals and

(b) The occupants of the office of Judicial Secretary and or Registrars of the Superior Courts" such other offices connected with any court as may be prescribed by Constitutional Instrument made by the

Chief Justice acting in accordance with the advice of the Judicial Council and with the approval of the President.

(iii) officers and employees of the Courts", falling under Article 158 (1) and (2) being persons who the Chief Justice has unfettered jurisdiction to appoint or may direct other justice or other officers of the court in writing to appoint on the Chief Justice's behalf."

Learned counsel for the plaintiff's then concluded his submissions as follows:-

> ***"These three broad categories of persons serving in the Judicial Service can further be conveniently sub-divided into two, being those on the bench, consisting of about 324 in all and the non-bench, consisting of about 6,000 personnel in all, all of whom or the vast majority of whom are plaintiff's members."***

Even though we have seriously considered these submissions of learned counsel for the plaintiff as well as the responses of the learned counsel for the defendants which we have already referred to, we are with respect, unable to accede to the invitation being made to us by the plaintiff's to equate all such persons as belonging to the Judiciary.

Those arguments, though attractive and well intended are inconsistent with the clear terms and meanings ascribed to the expressions *"Judiciary"* and exercise of judicial power as used in article 127 (4) and other parts of the Constitution 1992.

The only qualification we would want to make is that, judicial notice can now be taken of the fact that, since 2008 or thereabout, the occupants of the positions of Judicial Secretary and the Deputies have specifically been appointed to substantive positions in the Judiciary under article 126 (1) of the Constitution 1992, i.e. High Court, Circuit Court Judge or District Court Magistrate.

Where such specific appointments have been made i.e. as a Superior Court Judge or Lower Court Judge or Magistrate, it is to those specific appointments that we must look to, in addition to the provisions in article 161 which defined the position of a Judicial Secretary for the true and practical meaning to be ascertained.

Secondly, it must also be emphasized that, where an officer, not being a member of the class of the Judiciary, as defined in Article 126 (1) of the Constitution 1992 i.e. is not administering justice or exercising judicial power as is stated supra, but has had his conditions of service made analogous (i.e. bench-marked) to that of a Superior Court Judge, or a Lower Court Judge, it is only to that specific office holder that the said conditions of service are applicable, rather than one for general application to other officers of that class. In any case, such descriptions must be frowned upon as the constitutional designation are, in essence, terms of science rather than art and referable only as stipulated in the Constitution. What must, therefore, be noted is that, such descriptive analogous positions to especially Superior Court Judges when made, must be taken to be in respect of remuneration and Conditions of Service only but not equating them with the functional and constitutional roles of Superior Court Judges. Furthermore, such positions are also based on contract benchmarking as

stated elsewhere in this judgment and therefore referable only to the contracting parties.

It should also be noted that Article 161 defines *"judicial officer" as "the holder of a judicial office*". If this meaning is considered alongside the earlier definition of what judicial office means in Article 161 (a) (b) and (c) supra, the following category of staff of the Judicial Service qualify to be called Judicial Officers.

(i) Judges and Magistrates of the lower courts and tribunals, e.g. persons presiding over Circuit Courts, District Courts, Juvenile Courts, Family Tribunals etc.

(ii) The Office of the Judicial Secretary, which includes his Deputies, and persons acting as Registrar's of the Superior Courts only. For the avoidance of doubts this includes persons acting as Registrars in charge of what are known as the Superior Courts of Judicature, to wit Supreme Court, Court of Appeal, High Court and the Regional Tribunals.

(iii) Thirdly, persons connected with any other court as may be denoted or prescribed by a constitutional instrument made by the Chief Justice acting in accordance with the advice of the Judicial Council and with the approval of the President.

Under the circumstances, it is very difficult, if not impossible to determine the class of persons captured under the category of Judicial Officers in Article 161

(c). For the time being, this class of persons must be deemed to be non-existent. But it does not preclude the Chief Justice and the Judicial Council from taking steps to correct the anomaly.

There being no controversy whatsoever about who under the Constitution qualifies as a Judicial Officer under Article 161 (a) and (b) thereof, it is our opinion that, the persons therein so qualified are capable of enjoying all provisions in the Constitution 1992 wherever the words "Judicial officer" has been used.

A clear example is Article 127 (5) where the salary, allowances, privileges and rights in respect of leave of absence, gratuity, pension and other conditions of service of a Justice of the Superior Court or **any judicial officer** or other person **exercising judicial power**, shall not be varied to his disadvantage. Beyond these and other rights conferred under the Constitution, Judicial Officers have been adequately provided for under Article 149 of the Constitution 1992.

In that article, the salaries, allowances, facilities and privileges and other benefits of the Judicial Officers are to be determined by the President, acting on the advice of the Judicial Council.

Indeed, it is quite apparent from the reading of Articles 149 through to 151 of the Constitution that, Judicial Officers in contra distinction to Superior Court Judges, and Judges and Magistrates of the Lower Courts have different conditions of service. *The only factor they have in common is*

that, under Article 127 (5) those conditions are not to be varied whatsoever to their disadvantage at anytime.

We will deal more on this when we consider the resolution of issues V and VII.

Based on the above analysis and discussions, our conclusions on the resolution of issues ii and iii are as follows:-

1. In respect of issue II, the phrase *"gratuities and pension payable to or in respect of persons serving in the Judiciary"* does not impose a duty to place the plaintiff's members on CAP 30 pension scheme because quite clearly, as demonstrated supra, they do not belong to the class of persons described as constituting the Judiciary.

2. In respect of issue III there is no phrase in Article 127 that makest reference to *"all persons serving in the Judiciary",* rather, the expression *"persons serving in the Judiciary"* appearing in Article 127 (4) of the Constitution 1992 actually and factually applies only to the Justices, Judges and Magistrates of the Superior and lower Courts to the exclusion of all other Judicial Service employees, including the non-bench Judicial officers.

Therefore considering reliefs I, II and IV which the plaintiff is claiming before this court, we are of the considered opinion that, the phrase *"persons serving in the Judiciary"* in the context in which it is used in article 127 (4) and (5) of the Constitution 1992, is inapplicable to the Plaintiff's members.

Consequently, the practice of placing the plaintiff's members on SSNIT pension whilst placing the Judges and Magistrates of the Superior and Lower Courts on CAP 30 is neither wrongful nor in violation of article 127 (4) of the Constitution

From the analysis made supra, it follows that relief (IV) as it stands is refused as there is no nexus between the employment contract of the plaintiff's members and CAP 30 pension scheme in the Constitution 1992.

In the premises, reliefs, (I), (II) and (IV) are refused.

Having now dealt with issue numbers I, II and III, we propose to deal with issue numbers IV and VI together since they also constitutionally and factually deal with the same matters.

ISSUES IV AND VI

iv. Whether or not the payment of CAP. 30 pension benefits to the Justices, Judges and Magistrates to the exclusion of members of the Plaintiff Association amounts to discrimination against the latter within the meaning of Article 17 (2) of the 1992 Constitution.

vi. Whether or not the conduct of the Judicial Service in requesting the 3rd Defendant to remove the Judicial Officers on the bench from the purview of the SSSGS whiles retaining the non-bench Judicial Officers on the SSSGS constitute discrimination against the non-bench judicial

officers within the meaning of article 17 (2) of the 1992 Constitution;

The resolution of these issues naturally involves a discussion of the provisions in article 17 (2) of the Constitution 1992 which provides as follows:-

> *"A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status."*

Article 17 (3) provides what the framers of the Constitution conceive this discrimination in the following terms:-

> "*For the purposes of this article, 'discriminate'* ***means to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description."***

What are the arguments of the plaintiff in support of these alleged discriminatory issues?

The plaintiff anchors it's submissions on a premise which was stated by learned counsel for the Plaintiff, Mr. Kweku Paintsil thus:-

"*Further, whatever doubts that one may entertain on the present constitutional dispensation to be enjoyed by "all" persons serving in the Judicial Service is dispelled by the interpretation given to the CAP. 30 pension scheme in the interpretation clause of the National Pension Act, 2008, Act 766, which defined the same as follows:-*

"CAP. 30 Pension Scheme" means a pension scheme operated under the Pension Scheme under the Pensions Ordinance, No. 42, chapter 30 of 1950, for

(a) Pensionable public servants in the civil and other public services, who have been in the Service before 1st January 1972 and

(b) *Public servants who have been exempted by law from participation in the Social Security Pension Scheme, i.e. the* ***Judiciary, Legal Service, Police Service, Fire Service, Prison Service, Immigration Service, the Bureau of National Investigation and the Research Unit of the Ministry of Foreign Affairs."***

Based on the above provisions, learned counsel for the Plaintiff, concluded rightly in our view that, until the passage of Act 766 in 2008, there were only two pension schemes that public servants were subject to, one being under CAP 30 and the other being the SSNIT Pension Scheme.

Learned counsel for the Plaintiff then submitted that, all persons serving in the Judiciary, were subject only to CAP 30 and not SSNIT Pension Scheme.

In the light of our earlier decision on the scope of what constitutes *"Judiciary"* under the Constitution 1992 to include only the Superior Court

Justices, Judges and Magistrates of the lower courts, and persons occupying the positions of Judiciary Secretary and the Deputies appointed to substantive positions on the bench, the statement that persons serving in the Judiciary, with the above description were subject to CAP. 30 is correct.

However, the crux of the arguments of learned counsel for the Plaintiff is that, contrary to the clear terms of the Constitution 1992, the Judicial Service has maintained a policy where only Justices of the Superior Courts and Judges and Magistrates of the lower courts enjoy CAP 30 Pension Scheme. The Plaintiff's continue by stating in their written statement of case that, in the enjoyment and application of pension benefits, the Judicial Service maintains a policy which is not transparent.

According to the Plaintiff this finds expression where some very senior employees in the category of Directors are placed on CAP. 30 pension scheme whilst others of the same or similar grades are placed on SSNIT Pension Scheme. The plaintiff therefore complains that whilst the bulk of their membership are subjected to compulsory contributions to the SSNIT Pension Scheme, others are not.

The Plaintiff contends that, the decision to put their members on a compulsory contributory SSNIT Pension scheme is wrongful, and unconstitutional. They further contend that, the conduct of the Judicial Service in placing the Justices of the Superior Courts and Judges and Magistrates on the non-contributory CAP 30 pension scheme whilst leaving out or placing plaintiff's members who are non-bench judicial officers such as Registrars on the SSNIT pension scheme was discriminatory and contrary to Article 17 (2) of the Constitution 1992.

As stated supra elsewhere in this judgment, learned counsel for the plaintiff made copious references to the decision of this court in the case of ***Brown v Attorney General & Others [2010] SCGLR 183.***

With respect, save for the fact that, this court, in that case decided that, the plaintiff therein, a retiree from the Audit Service must have his pension and gratuities paid from the consolidated fund and not from the Social Security Scheme, the reference to the Brown case is of no further relevance herein.

We have hereinbefore referred to the cases of ***Nartey v Gati*** and ***Kwaku Asare v Attorney-General.***

It is worth noting what the Supreme Court, speaking through Justice Date-Bah stated on this issue of discrimination in the **Kwaku Asare v Attorney-General,** case as follows:-

The court stated thus:-

> ***"In short, inequality in rights simpliciter is not a sufficient basis for declaring the unconstitutionality of the rights complained of. One needs to undertake a further inquiry that even discrimination on the grounds of social status is not unlawful simpliciter. It is unlawful if it is not for a lawful and legitimate purpose. After the fact of discrimination on the ground of social status has been established, a further inquiry is needed to find out why the discrimination has taken place. It is the result of this inquiry which will determine the unlawfulness or not of the offending discrimination."***

"To our mind, it is clear what article 17 does not mean. ***It certainly does not mean that every person within the Ghanaian jurisdiction has, or must have, exactly the same rights as all other persons in the jurisdiction****. Such a position is simply not practicable. Soldiers, policemen, students and judges, for instance, have certain rights that other persons do not have. The fact that they have such rights does not mean that they are in breach of article 17. The crucial issue is whether the differentiation in their rights is justifiable, by reference to an object that is sought to be served by a particular statute, constitutional provision or some other rule of law. In other words, article 17(1) is not to be construed in isolation, but as part of article 17. This implies that the equality referred to in article 17(1) is in effect freedom from unlawful discrimination. Article 17(2) makes it clear that not all discrimination is unlawful. It proscribes discrimination based on certain grounds.* ***The implication is that discrimination based on other grounds may not be unlawful, depending on whether this Court distils from article 17(1) other grounds of illegitimate discrimination which are not expressly specified in article 17(2).***

Thus, for instance, in India, the Supreme Court has there held that mere differentiation or inequality of treatment is not per se equivalent to discrimination within the proscription contained in that country's equal protection clause. That clause, which is article 14 of the Indian Constitution, reads as follows:

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

The Supreme Court of India has said in relation to this clause in the case of ***K Thimmappa v Chairman, Central Board of Directors AIR 2001 SC 467 (quoted in Jain, Indian Constitutional Law (Lexis Nexis Butterworths Wadhwa, 2009 (5th ed) p 858)*** *that:*

"When a law is challenged to be discriminatory essentially on the ground that it denies equal treatment or protection, ***the question for determination by the Court is not whether it has resulted in inequality but whether there is some difference which bears a just and reasonable relation to the object of legislation. Mere differentiation does not per se amount to discrimination within the inhibition of the equal protection clause****. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any rational basis having regard to the object which the legislature has in view."*

Continuing, the court stated thus

This approach is a reasonable one and flows from the obvious fact that no two human beings are equal in all respects. Accordingly, if the law were to treat all human beings rigidly equally, it would in fact result in unequal outcomes. Rigid equal treatment would often result in unfair and unequal results. Accordingly, it is widely recognized that equality before the law requires equal treatment of

those similarly placed, implying different treatment in respect of those with different characteristics. In simple terms, equals must be treated equally, while the treatment of unequals must be different. The law must be able to differentiate between unequals and accord them the differentiated treatment which will result in enabling them, as far as practicable, to attain the objective of equality of outcomes or of fairness. In effect, equality of opportunity will often entail the law treating people differently in order to give them a fighting chance of attaining equality of outcomes or of fairness. If the differentiated legal rights arising from such an approach to the law were to be struck down as not conforming with the constitutional prescription that all persons are equal before the law, it would be thoroughly counterproductive."

What should be noted is that, the type of discrimination that article 17 (2) of the Constitution 1992 outlaws has been explained in article 17 (3).

It is that type of different treatment to persons based on such criteria as race, gender, colour, place of birth or origin, political opinions etc. It is these that the Constitution outlaws and determines as discrimination.

Thus, if a person is denied certain rights on account of his religious beliefs, or the place of his origin, or political or ideological beliefs, gender etc. then article 17 (2) of the Constitution 1992 would be brought to bear on such an occurrence.

For example, if the position of the Director of Finance, or of the Director of Works within the Judicial Service, is reserved for only males, or persons and from a particular place of origin in the country or persons belonging to

a certain religious faith based group, then such requirement would be deemed to be in flagrant violation of article 17 (2) of the Constitution 1992.

What must be noted is that, the Constitution 1992 itself contains many instances where certain constitutional office holders are to be treated differently from others.

For instance, article 57 (2) of the Constitution 1992 states as follows:-

> *"The President shall take precedence over all other persons in Ghana, and in descending order, the Vice-President, the Speaker of Parliament and the Chief Justice, shall take precedence over all other persons in Ghana."*

Everybody in Ghana has to respect the above provisions. Whether you are a rocket scientist, or a Professor who has won a Nobel Peace Prize, or you may be the Bill Gates of Ghana, all the above four personalities take precedence over you in everything.

Similarly, the Constitution 1992, in articles 71 (1) and (2) make provisions for the treatment of the conditions of service of most of the various constitutional office holders therein mentioned differently. It states as follows:-

> *71. (1) "The salaries and allowances payable, and the facilities and privileges available, to*
>
> *(a) the Speaker and Deputy Speakers and members of Parliament*
>
> *(b) the Chief Justice and the other Justices of the Superior Court of Judicature;*

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

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

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

(ii) the Public Services Commission;

(iii) the National Media Commission;

(iv) the Lands Commission; and

(v) the National Commission for Civic Education;

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

(2) The salaries and allowances payable, and the facilities available, to the President, the Vice-President, the Chairman and the other members of the Council of State; Ministers of State and Deputy Ministers, being expenditure charged on the Consolidated Fund, shall be determined by Parliament on the recommendations of the Committee referred to in clause (1) of this article."

The point being emphasized here is that, the Constitution 1992 itself has in a number of instances made provisions which at first glance will appear as

discriminatory, but in essence are not at all, taking into consideration the cold words of articles 17 (2) and (3) of the Constitution 1992.

The fact that some Directors of the Judicial Service, may have been employed on the Conditions of Service benchmarked to those of Superior Court Judges, thereby placing them on retirement on CAP 30 pension scheme would not automatically and necessarily lead to discrimination contrary to the Constitution.

The placement of those Directors on CAP 30 does not mean that they were put on those conditions by reason of their gender, race, place of birth or origin, colour, religion, etc. so as to bring their employment under those conditions in breach of article 17 (2) of the Constitution 1992.

Matters of employment are purely contractual. There is a Court in the U.S. State of Virginia on the Campus of William and Mary College, where the Recorder of the Court receives remuneration that is higher than the President of the Court. That however does not mean that he or she is on a higher level than the Judges or that it constitutes discrimination. Once such conditions of service are based on open contractual terms to which the persons applied and are qualified, no discrimination results.

On the other hand notwithstanding the immediately preceding conclusions, we need to note that, though not discriminatory within the meaning of Article 17 of the Constitution, the practice of applying the said terms and conditions to some categories of staff not specified by the Constitution, is contrary to best practices in human resource remuneration management in the Judicial Service, and constitutional compliance. This practice does not follow procedures laid down, in Article 158 (2) of the Constitution 1992

which provides that the Judicial Council in consultation with the Public Services Commission and with the prior approval of the President make regulations prescribing the terms and conditions of service of persons employed pursuant to article 158 (1) of the Constitution 1992. We will therefore urge compliance with all constitutional provisions which require enactment of Constitutional Instruments to regulate the conditions of service of staff. See articles 149 and 158 (2). Furthermore, the Judicial Council is hereby mandated to harmonise all conditions and terms of office of Judicial Officers pursuant to article 149 of the Constitution 1992 to obviate any perception (however unfounded) of unlawful discrimination.

To conclude, it is our view that, the payment of CAP 30 pension benefits to Superior Court Justices and the Judges and Magistrates of the lower court bench to the exclusion of members of the plaintiff association does not amount to discrimination within article 17 (2) of the Constitution 1992.

Similarly, the conduct of the Judicial Service in requesting the 3rd defendants herein, (Fair Wages and Salaries Commission) to remove Judicial Officers on the bench from the purview and scope of the Single Spine Salary Structure SSSGS whilst retaining the plaintiff's members on the SSSGS does not constitute discrimination against the said officers within the meaning of article 17 (2) of the Constitution 1992. The said conduct is consistent with the relevant constitutional provisions referred to supra. The retention of Plaintiff's members on the SSSGS without compliance to appropriate constitutional provisions in articles 149 and 158 (2) are dealt with later in the judgment.

In view of the analysis made supra in respect of issues IV and VI, plaintiffs reliefs numbers III, and VIII are not sustainable and same are accordingly refused.

ISSUES V AND VII

Whether or not the duty imposed on the President by article 149 of the 1992 Constitution to determine the conditions of service of Judicial Officers can be delegated to, or performed by, the 3rd Defendant.

Whether or not sections 213 (1) (a) and 220 of the National Pensions Act, 2008 (Act 766) contradict articles 71 (i) (b), 127 (4) and (5) of the 1992 Constitution.

The Plaintiff sums up their argument in support of issue V as follows:-

> "*The Plaintiff contends that the terms and conditions of the Judicial Officers is a matter solely within the purview of the President, acting on the advice of the Judicial Council whilst those of the "officers and employees of the Courts" is essentially within the purview of the judicial Council and Public Services Commission, acting with the approval of the President through the enactment of a Constitutional Instrument.*

Article 149 of the Constitution 1992 provides thus:-

> *"Judicial Officers shall receive such salaries, allowances, facilities, and privileges and other benefits as the President may, acting on the advice of Judicial Council, determine."*

In order to put the arguments of learned counsel for the plaintiff into proper perspective, it is useful to set out the constitutional provisions he relied upon in relation to the terms and conditions of other staff of the Judicial Service. This finds expression in articles 158 (1) & (2) which states as follows:-

> *(1) "The appointment of officers and employees of the courts other than those expressly provided for by other provisions of this Constitution, shall be made by the Chief Justice or other Justice or other officer of the Court as the Chief Justice may direct in writing.*
>
> *(2) The Judicial Council shall, acting in consultation with the Public Services Commission and with the prior approval of the President, by constitutional instrument, make regulations prescribing the terms and conditions of service of the people to whom clause (1) of this article applies."*

From the above constitutional provisions, what is clear is that, different institutions and procedures have been created under the Constitution for determining the terms, conditions and facilities for the benefit of the various categories of staff covered in articles 149 and 158 of the Constitution 1992.

1. Under article 149, it is certain that Judicial Officers who have been defined in terms as set out in this judgment supra shall receive such conditions of service as the President acting on the advice of the Judicial Council shall determine.

2. On the other hand, the category of staff covered under article 158 (1) of the Constitution are those staff whose appointments are made by the Chief Justice or any Superior Court Judge acting on her behalf in writing. The terms and conditions of service of these category of staff are to be determined by the Judicial Council acting in consultation with the Public Services Commission, with the prior approval of the President who shall indicate this approval by a constitutional instrument to that effect.

However, the plaintiff's complaint against the Defendant is that, the continued placement of the non bench judicial officers who are essentially Plaintiff's members on the SSSGS was wrongful as in Plaintiff's own words "the SSSGS is essentially one made by the Public Services Commission for public servants generally and not one mandated by the President of the Republic of Ghana acting with advice of the Judicial Council."

It is noteworthy that, whilst the Plaintiff concedes that all the category of staff covered by the article 158 provisions qualify to be placed under SSSGS, it's major complaint is that no Constitutional Instrument has been enacted to date in pursuance of the said provisions. The plaintiff therefore urges this court to compel the President to act with alacrity to comply with the said constitutional provisions in article 158 (2).

The 3rd Defendants have conceded the fact that, it is articles 149 and 158 (2) which relate to the resolution in issue V. For example, the 3rd Defendants state that, *"it would be legitimate for the Chief Justice and the Judicial*

Council pursuant to articles 149 and 161 of the Constitution to have differentiated conditions of service for Judicial Officers based upon length of service, job description, nature of training or some other significant variable."

Having analysed the constitutional provisions in articles 149 and 158 of the Constitution 1992, what remains to be done in order to determine issue V is to consider the legal environment within which the 3rd Defendants functions in the Fair Wages and Salaries Commission Act, 2007 (Act 737).

It is proper to infer from the Act that, it is a law whose objective is to ensure fair, transparent and systematic implementation of the Government public service pay policy. The 3rd Defendants are therefore enjoined by law to develop salary structures for the public service.

Article 190 (I) (a) of the Constitution 1992, defines the Public Services of Ghana to include the Judicial Service inter alia other institutions. By parity of reasoning, the Judicial Service, in contra distinction to the Judiciary, as explained hereinbefore, constitutes part of the Public Services of Ghana.

However, there are clear constitutional provisions in articles 149 and 158 (2) of the Constitution denoting how salaries and other conditions of service of staff of the Judicial Service are to be determined. Without sounding to be repetitive, under article 149, Judicial Officers are enjoined to receive such salaries and allowances etc. as the President may, acting on the advice of the Judicial Council, determine. Similarly, pursuant to article 158 (2) the Judicial Council shall acting in consultation with the Public Services Commission and with the prior approval of the President by Constitutional Instrument make regulations prescribing the terms and

conditions of service of persons referred to in article 158 (1) of the Constitution.

That being the case, it is evident that, in either case, the relevant body, that is the Judicial Council must initiate the processes upon which the President will act in respect of article 149 provisions, and in consultation with the Public Services Commission with the prior approval of the President and culminate with the enactment of a Constitutional Instrument for staff covered under article 158 (1) and (2).

In the instant case, the 3rd Defendants even though have statutory backing cannot side step constitutional provisions to make recommendations direct to the President without the involvement of the Judicial Council in either case. The President and or the Judicial Council may use the expertise of the 3rd Defendants, but that cannot be used to completely relegate the position that the Judicial Council and the Public Services Commission have been granted by the Constitution.

Thus, whereas in this case it is clear that the Judicial Council was not part of the process by which the 3rd Defendants arrived at it's conclusions, then afortiori, the same will be flawed by virtue of it being an unconstitutionality, reference articles 149 and 158 (2). In that respect therefore, the President could not have delegated his functions to the 3rd Defendants since that is an unconstitutional conduct, is null and void and of no effect.

The president cannot delegate this function without the involvement of the relevant constitutional bodies mentioned therein.

In the premises, issue number V is determined in the negative. Plaintiff's reliefs, VII and IX are accordingly granted.

ISSUE VII

In order to appreciate whether sections 213 (1) (d), *(I believe this is really a typographical mistake and should rather be a reference to)* section 213 (1) (a) and 220 of the National Pensions Act, 2008 (Act 766) contradict articles 71 (1) (b), 127 (4) and (5) of the Constitution, it is worthwhile to set out the said sections of Act 766 in full as follows:-

> 213 (1) "The following enactments and schemes shall on the commencement of this Act apply for a transitional period of four years and cease to be in force after that period,
>
> (a) The Pensions Ordinance No. 42 of 1950 (CAP 30) as amended
>
> 220 "On the commencement of this Act where an enactment relating to pensions is inconsistent with this Act, this Act shall to the extent of the inconsistency prevail."

As, articles 71 (1) (b) and 127 (4) and (5) of the Constitution have already been referred to supra there is therefore no need to set them out again.

There appears to be some measure of incoherence in the formulation of this particular issue VII. This is because whilst section 213 (1) (a) of Act 766 makes it clear that it is the enactments referred to therein in sections 213 (1) (a) to (i) that are deemed to cease to apply four years after the coming

into force of Act 766, *(which came into force on the 12th day of December 2008)* the impression is given as if the provisions therein specifically repeal a constitutional provision which is not the case.

It is to be noted therefore that, a quick glance at the enactments contained therein indicate that they are all Acts of Parliament, and by virtue of the Interpretation Act, 2009 Act 792, it is possible for a later enactment to **retain** in force and effect an existing enactment for periods stated therein until the existing enactment is entirely repealed. See section 12 (5) of Act 792.

Viewed from against that legal background, we are of the opinion that there is absolutely nothing wrong with the formulation of section 213 (1) (a) of Act 766. Besides and more importantly, article 11 (1) (a) of the Constitution puts the Constitution 1992 at the apex of the Laws of Ghana, and in descending order from article 11 (1) (b) to (e) of the Constitution, Acts of Parliament, Orders, Rules and Regulations, the existing law and common law as the other laws of Ghana, are listed in that order of precedence.

Thus, it follows that, Act 766 could not have amended any provision of the Constitution and more particularly did not amend article 71 (1) (b), 127 (4) and (5) of the Constitution 1992. Indeed an Act of Parliament such as Act 766 cannot amend a constitutional provision. If it purports to do so, then it is in contravention of the Constitution and will be null and void.

If we properly understand the submissions of learned counsel for the plaintiff in this respect they are to the following effect:-

1. That the framers of the Constitution 1992 made a conscious effort to set apart the **Judicial Service** for special treatment by guaranteeing

the payment of their salaries, allowances, pensions and gratuities in a particular way.

2. That, however, Act 766 has come to put asunder this carefully arranged structure which was aimed at insulating the Judiciary.
3. That it is therefore wrong and unconstitutional for Act 766 which is subordinate to the constitution to seek to subvert it or contradict it.
4. That whether or not the new pension schemes put together in Act 766 might enhance the pension benefits of the Chief Justice and other Superior Court Judges, the fact still remains that they should not be put on a contributive pension scheme.

Again, there appears to be some element of incoherence in the above submissions. Whilst learned counsel for the Plaintiff uses the words "Judicial Service" in commencing his arguments, he in the latter stages substituted those words with "Judiciary". It has already been stated elsewhere in this opinion that whilst the Judiciary refers to the Superior Court Judges, Judges and Magistrates of the lower courts, the Judicial Service refers to the administrative and supporting staff.

Furthermore, the provisions contained in article 71 (1) (b) of the Constitution admit of no ambiguities whatsoever**.**

This is because, the category of persons whose emoluments are subject to the Presidential Commission on emoluments in article 71 (1) (b) has been clearly stated therein without any measure of doubt. These include the Chief Justice and the other Justices of the Superior Courts of Judicature. Quite clearly, those categorised do not include the members of the Plaintiff's Association, nor the Lower Court Judges and Magistrates.

In any case, Act 766, cannot be said to have set out to contradict any of the provisions of article 71 (1) (b) either directly or indirectly. The provisions in article 127 (4) and (5) of the Constitution does not indicate the type of pension scheme that must be provided for the Judiciary. Article 127 (4) only states the source from which the heads of expenditure including pensions stated therein are to be paid with regard to the Judiciary to wit, the Consolidated Fund. Article 127 (5) on the other hand contains reference to certain categories of staff, who happened to be within plaintiff's membership, but it does not indicate any particular pension scheme or mode. Indeed that provision (article 127 (5)) serves an entirely different purpose from Article 127 (4); it safeguards the conditions of service of the categories stated therein and guarantee's the efficacy of all the heads of expenditure benefits created therein by stating that these cannot be varied to their disadvantage.

We give credit to learned counsel for the Plaintiff for his candour in stating the obvious and correct position in our view in the footnote to the statement of case on page 32 where he delivered himself thus:-

> ***"We may wish to comment that in so far as the issue remains focused on the actual pension benefit that persons serving in the Judicial Service are entitled to be paid, it would appear that " a rose smells as good by whatever name you call it". It is to be noticed that the real issue at stake is not the name of the Scheme by which the affected persons will receive their pension benefits as long as the benefits are a charge upon the Consolidated Fund.*** *This is because in real essence, what is important is what ends up in*

beneficiaries pocket at the end of the day, coming from the correct source. ***On this note, CAP 30 as the name of a specific piece of legislation may die off, but the spirit of CAP. 30 containing the basis for computing pension benefits for public officers who are exempted from the SSNIT pension scheme or founded on the Constitutional provisions would live forever and may have to be fashioned upon or borrowed from CAP. 30".*** *Emphasis supplied.*

In that respect, the reference to and reliance by the plaintiff's on the decision of this court in the celebrated case of ***Nartey-Tokoli v Volta Aluminum Co. Ltd, [1989-90] 2 GLR*** 341 per Taylor JSC, even though good law is completely inapplicable under the circumstances of this case.

In our opinion, the difficulty of the plaintiff stems from a desire to read the provisions of the Constitution in a manner as would bring them at par with article 71 office holders. This is unfortunate. The National Pensions Act, Act 766, must be understood to be an Act whose objective is to provide for pension reforms in the country by the introduction of a contributory three-tier pension scheme, the establishment of a National Pension Regulatory Authority to oversee the administration and management of registered pension schemes and trustees of registered schemes, the establishment of a Social Security and National Insurance Trust to manage the basic national second security scheme to cater for the first tier of the contributory three tier scheme, and to provide for related matters.

Viewed against this background, we are of the considered view that, the National Pension Act, Act 766 has met all the stated objectives in the Long title of the Act.

However, learned counsel for the 3rd Defendants made references to a study conducted by Prof. Kofi Kumado and Dr. Fritz Gockel.

From the said study, the learned academics concluded that non-contributory pension schemes are not sustainable, but they were also very quick to add that employees should not be made to suffer disadvantaged pension benefits. Out of abundance of caution, we wish to refer briefly to the statements made by the two academics in that study.

Writing on non sustainability of unfunded pension schemes, they stated as follows:-

> *"As at now, there are three main retirement schemes namely the recently resurrected End of Service Benefits, CAP 30 and the SSNIT Fund. As we demonstrate shortly, besides the SSNIT Fund, the other two are virtually unfunded schemes with implications for sustainability. The Government of Ghana does not have the means to take on pension obligations that are not funded for its citizens."*

See page 8 of the study.

On the other hand, the learned authors were quick to caution that it would be dangerous to disadvantage employees in their pension benefits in the following terms:-

> *"The general scenario is that, social security as it exists today in Ghana, had been developed on a piecemeal basis for different target*

groups. It lacks cohesion or overall designs. Not surprisingly, those who are not under CAP 30 are fighting to get on it or trying to make SSNIT conditions identifiable with the largely advantageous benefits of CAP 30. ***What is prudent is that the disadvantaged person should be brought up but not for the advantaged person to be brought down; it is not acceptable in Pareto optimal relations or labour relations that condition of service could be made worse".***

See page 15 of the study.

With the above rendition, it is certain that learned counsel for the 3rd Defendants misrepresented the substance of what Prof. Kofi Kumado and Dr. Fritz Gockel really meant, when he failed to state in its entirety the views of the academics on the subject of the unsustainability of the CAP 30 pension scheme. The writers, made it quite clear that the solution to the problems of the inequalities of the pension regime in the country does not lie in removing those in the advantaged position downwards, but raising those in disadvantaged positions upwards. In any case, as we have indicated elsewhere in this judgment, the cost of a pension scheme or it's unsustainability should not be used as yardstick by this court in assessing whether or not to constitutionally uphold the application of the scheme to members of the Plaintiff.

On the basis of the foregoing analysis, and taking into account the effect of sections 213 (1) (a) and 220 of Act 766 vis-à-vis articles 71 (1) (b), 127 (4) & (5) of the Constitution which have been discussed elsewhere in this judgment we are of the opinion that sections 213 (1) (a) and 220 of Act 766

are not contradictory of articles 71 (1) (b), 127 (4) and (5) of the Constitution 1992.

What should however be noted is that any attempt by any of the provisions in Act 766 specifically sections 213 (1) (a) and 220 to amend the pension benefits of members of the Judiciary in terms as defined in this judgment and as it were take them out of their non contributory pension scheme guaranteed by the Constitution 1992, reference articles 71 (1) (b), 127 (4) and (5) is unconstitutional and to that extent is struck down as null and void and of no effect.

Issue number VII is therefore granted.

In substance, the Plaintiff has succeeded on their claims in respect of issue V.

Flowing from the above, reliefs, V, VI and IX are hereby granted.

We commend the plaintiff for the boldness displayed in initiating the action and pursuing it to its logical conclusion. We also commend all counsel in the matter, especially learned counsel for the plaintiff Kweku Paintsil for his candour and research capabilities.

In the exercise of our powers under article 2 (2) of the Constitution, the 1st Defendants are hereby directed to take requisite measures to ensure that all the constitutional requirements in articles 149 and 158 (2) of the Constitution are duly complied with within a period of three months from the date of this judgment.

CONCLUSION

In conclusion, we dismiss Plaintiff's reliefs, I, II, III and IV in their entirety. We however grant and allow plaintiff's reliefs VI, VII and IX in terms of judgment as is stated supra.

In respect of relief number V, to the extent that section 213 (1) (a) of Act 766 seeks to vary and or bring to an end the enjoyment of the pension scheme allowed Judges of the Superior Courts and other Judicial Officers mentioned in article 127 (4) and (5) therein, the said relief is granted.

Finally, relief number VIII is also granted in part to the extent that the migration of the Judges and Magistrates outside the SSSGS is not discriminatory, whilst the continued placement of the Judicial Officers on the SSSGS is unconstitutional and contravenes articles 149 and 158 (2) of the Constitution.

(SGD) V. J. M. DOTSE

JUSTICE OF THE SUPREME COURT

AKUFFO (MS) JSC:-

I agree

(SGD) S. A. B. AKUFFO(MS)

JUSTICE OF THE SUPREME COURT

ANSAH JSC:-

I agree

(SGD) J. ANSAH

JUSTICE OF THE SUPREME COURT

ADINYIRA (MRS) JSC:-

I agree

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

JUSTICE OF THE SUPREME COURT

ANIN YEBOAH JSC:-

I agree

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

BAFFOE - BONNIE JSC:-

I agree.

(SGD) P. BAFFOE - BONNIE

JUSTICE OF THE SUPREME COURT

DISSENTING OPINION

ATUGUBA, JSC:

FACTS

The Plaintiff has invoked the exclusive original jurisdiction of this Court under article 2 of the 1992 Constitution seeking the following reliefs:

"I. Declaration that upon a true and proper construction of Articles 127(4) and (5) of the 1992 Constitution all persons serving in the judiciary were entitled to be placed on CAP 30 pension scheme upon the coming into force of the 1992 Constitution;

II. Declaration that the practice of placing or continuing to place some of the persons serving in the judiciary on or under the SSNIT pension scheme after the coming into force of the 1992 Constitution was wrongful and violates article 127(4) of the Constitution;

III. Declaration that the practice of placing or continuing to place Judicial Officers falling under article 161(b) of the 1992 Constitution on the SSNIT pension scheme while leaving the judicial officers on the bench, namely judges and magistrates under Article 161(a) of the Constitution on CAP 30 pension scheme was discriminatory, contrary to article 17(2) of the 1992 Constitution;

IV. Declaration that all persons serving in the Judicial Service were and are entitled to have their gratuity and pension entitlements computed or recomputed under CAP 30 Pension scheme and paid the difference of sums due and owing them between the two schemes, if any, together with interest, including a refund of all SSNIT contributions deducted from their salary with effect from 1992;

V. Declaration that section 213(1)(a) of the National Pensions Act 2008 (Act 766) seeking to bring to an end the operation or continuing operation of CAP 30 pension scheme in Ghana and compulsorily placing Judges of the superior court and judicial officers under a contributory pension scheme under Act 766 violates the letter and spirit of Articles 127(4) and (5) of the 1992 Constitution;

VI. Declaration that section 220 of the National Pensions Act, 2008 (Act 766) offends and contradicts Articles 71(1) and 127(4) and (5) of the 1992 Constitution and the same is null and void to the extent of the inconsistency;

VII. Declaration that upon a true and proper interpretation of Article 149 of the 1992 Constitution Judicial Officers falling under Article 161 of the Constitution are not amenable or do not fall under the purview of the SSSGS scheme administered by the 3rd Defendant;

VIII. Declaration that the continuing placement of the Judicial Officers within the Plaintiff's rank on the SSSGS after migrating the judges and magistrates is not only discriminatory, contrary to Article 17(2) of the 1992 Constitution, but violates their rights;

IX. An order directed to the 3rd Defendant to ensure the restoration of the affected persons to their positions status quo ante, away from the 3rd Defendant's jurisdiction."

The parties' memorandum of Issues dated the 27th day of April 2015 has set down the following:

"i. Whether and to what extent the Plaintiff's action raises any real, genuine or substantial issues of constitutional interpretation to warrant the invocation of the exclusive original jurisdiction of the Supreme Court;

ii. Whether or not the constitutional requirement in Article 127(4) of the 1992 Constitution that the "gratuities and pensions payable to or in respect of persons serving in the judiciary shall be charged on the Consolidated Fund" imposes a duty to place the Plaintiff's members on the CAP 30 pension scheme and not the SSNIT pension scheme; alternatively;

iii. Whether or not the expression "all persons serving in the judiciary" appearing in Article 127(4) of the 1992 Constitution applies only to the Justices, Judges and Magistrates to the exclusion of all other judicial service employees, including the non-bench Judicial Officers;

iv. Whether or not the payment of CAP.30 pension benefits to the Justices, Judges and Magistrates to the exclusion of members of the Plaintiff Association amounts to discrimination against the latter within the meaning of Article 17(2) of the 1992 Constitution;

v. Whether or not the duty imposed on the President by Article 149 of the 1992 Constitution to determine the conditions of service of Judicial Officers can be delegated to, or performed by, the 3rd Defendant;

vi. Whether or not the conduct of the Judicial Service in requesting the 3rd Defendant to remove the Judicial Officers on the bench from the purview of the SSSGS whiles retaining the non-bench Judicial Officers on the SSSGS constitutes discrimination against

the non-bench judicial officers within the meaning of Article 17(2) of the 1992 Constitution; and

vii. Whether or not section 213(1) (d) and 220 of the National Pensions Act, 2008 (Act 766) contradict Articles 70(1)(b), 127(4) and (5) of the 1992 Constitution."

Issue i

Whether and to what extent the Plaintiff's action raises any real, genuine or substantial issues of constitutional interpretation to warrant the invocation of the exclusive original jurisdiction of the Supreme Court.

This is becoming typical and endemic in constitutional litigation in recent times. This need not detain this court further than to state that (1) inasmuch as it is aided and abetted by this court's decision in *Osei-Boateng v National Media Commission* [2012]2 SCGLR 1038 to the effect that the enforcement jurisdiction of this court cannot be invoked unless the provision sought to be enforced requires interpretation, this court has departed from the same in *Emmanuel Noble Kor v The Attorney-General and Justice Delaili Duose,* Suit no. J1/16/2015 dated 10/3/2016, unreported and (2) the decision on the other issues will impliedly also more fully deal with this issue.

Issues ii and iii:

ii. Whether or not the constitutional requirement in Article 127(4) of the 1992 Constitution that the "gratuities and pensions payable to or in respect of persons serving in the judiciary shall be charged on the Consolidated Fund" imposes a duty to place the Plaintiff's members on the CAP 30 pension scheme and not the SSNIT pension scheme; alternatively

iii. Whether or not the expression "all persons serving in the judiciary" appearing in Article 127(4) of the 1992 Constitution applies only to the Justices, Judges and Magistrates to the exclusion of all other judicial service employees, including the non-bench Judicial Officers.

A close scrutiny of issue (iii) reveals that it ought to precede issue (ii) in which case issue (ii) will not arise if issue (iii) is answered positively.

A minority status stares me in the face for daring to answer issue (iii) in the negative. However after very prolonged reflexion on this issue I am quite clear in my mind that that issue must be answered in the negative. The provision in question, article 127(4) of the 1992 Constitution is as follows:

> "(4) The *administrative expenses of the Judiciary*, including all salaries, allowances, gratuities and pension payable to or in respect of, *persons serving in the Judiciary*, shall be charged on the Consolidated Fund."(e.s)

The word Judiciary has, as it were, been defined in article 126 (1) as follows:

> "(1) The Judiciary shall consist of -
>
> (a) the Superior *Courts* of Judicature comprising,
> (i) the Supreme *Court*
> (ii) the *Court* of Appeal, and
> (iii) the High *Court* and Regional Tribunals
> (b) such *lower courts* or tribunals as Parliament may by law establish." (e.s)

It must be noticed that article 126(1) defines the Judiciary in terms of courts and not merely judges or magistrates. Do courts comprise only persons on the bench? It should be noted that article 125(1) provides as follows:

> "(1) *Justice* emanates from the people and *shall be administered in the* name of the Republic *by the Judiciary* which shall be independent and subject only to this Constitution."

Article 125(3) of the constitution provides that "the Judicial power of Ghana shall be vested in the Judiciary----"

Who are the persons involved in the administration of justice and the exercise of judicial power?

There is no doubt that the Judiciary as set out in article 126(1) is the Judiciary that is to exercise the judicial power vested in it by article 125(3). In *Akainyah v The Republic* (1968) GLR 548 C.A it was held that an essential feature of judicial power is the power to enforce the decisions of the body exercising that power. Upon scrutiny it is noticeable from the judgment in that case that it also states that the power of enforcement of a decision is not an indispensable part of judicial power, see the excerpt therein from the Australian case of *Huddart, Parker & Co Proprietary Ltd. v Moorehead* (1909)8 CLR 330 at 357. See also *Brandy v. Human Rights and Equal Opportunity Commission and Others* (1995)2 LRC 9. Whatever it is, it is indisputable that where the power to enforce a binding decision affecting the rights and obligations of the parties is also given to a court or tribunal that power of enforcement is a part of the judicial power conferred. It necessarily means therefore that when a court enforces its decisions through its own officers it is the Judiciary that is doing so in exercise of its judicial power and therefore since such enforcing officers are not judges or magistrates but are nonetheless part of the courts system, they are part of the Judiciary, though an administrative segment thereof. Short of enforcement of court orders some administrative staff of the judiciary perform functions that are a necessary auxiliary or even complementary part of the exercise of judicial power, e.g the filing of court processes, preparation of dockets, court records, etc. Thus in *Banson v Abbey* (1962)1 GLR 213 S.C the High Court granted an application for extension of time to execute a bond for security for costs on appeal. To an objection that the High Court had no jurisdiction so to do, Korsah C.J delivering the judgment of the court held at 215-216 thus:

> "In support of the preliminary objection, counsel for the respondent has referred to the concluding passage of the learned judge's order when granting the extension. He said, "In exercise of

the powers conferred on me by rule 6 of Order 64 of the Rules of Court, 1964 I grant an extension of time 7(seven) days within which the applicant may execute the bond".

In our view the objection is not well founded, because failure to execute the bond within the time limit fixed by the registrar is not a breach of a statutory provision which cannot be cured by extension, but merely a breach of a procedural rule which the court, in exercise of its discretion, may rectify: see *Kojo Pon v. Atta Fua* and *Fugah and Others v. Tamakloe and Another*. It is further contended that there is no provision in the rules enabling the registrar to extend the time. This omission in our view does not preclude the registrar from granting extension when necessary. Relying on the provisions of the Interpretation Act, 1960, section 10(2), "Where an enactment confers power, or imposes a duty, to do any act or thing all such powers shall be deemed to be also given as are reasonably necessary to enable that act or thing to be done or are incidental to the doing thereof." *If the registrar can grant extension, a fortiori the court must be deemed, in the exercise of its inherent jurisdiction to have the power which its officers have in matters concerning* which the rules of procedure *require the registrar to perform duties relating to appeals*."

Indeed it has frequently been said that jurisdiction attaches to the court and not the judges unless otherwise provided, see *Asare v The Republic* (1968) GLR 37.

In *NPP v Attorney-General* [31st December case] (1993-94)2 GLR 35 S.C at 50 Archer CJ shed some light on the real composition of courts when he said thus:

"I have always held the view that this court like equity must not act in vain. In other words, it should not make orders that could be lawfully and legitimately circumvented so as to make the court a laughing stock. Under the Constitution, 1992 the President is the commander-in-chief of the Ghana Armed Forces. Suppose he accepts the declaration sought and confers with his commanders and service chiefs not to hold any route marches on 31st December 1993, yet the

> non-commissioned officers who were instrumental in staging the 31 December 1981 coup d'etat choose to parade through the streets of Accra, who can stop them? *Is this court going to send judges,* magistrates, *registrars, court bailiffs and ushers to erect barricades in the paths of the marchers*?" (e.s)

Again in *Baiden v Ansah* (1973)1 GLR 33 at 35 Baidoo J said:

> "During the transitional period from the moment the notice of appeal is lodged right up to the time the appeal is entered, the trial court can entertain interim applications especially on matters affecting execution. *By virtue of its inherent* jurisdiction *to control the registrar, the bailiffs and the whole staff*, the High Court is the appropriate forum to deal with the judgment debtor's application, especially as the order was made on 31 July 1972 just when the Court of Appeal went on long vacation."

That the courts have consistently recognized the Registry staff as part of the courts is also evident from *Forson v the Republic* (1976)1 GLR 128 at 147, *Ameyibor v Komla* (1980) GLR 820 C.A at 824, In re *Yendi Skin Affairs; Andani v Abudulai* (1982-83)2 GLR 1080 S.C at 1087, In *re Odonkor (Decd) Odonkor v Odonkor* (1982) GLR 57 at 60.

It is therefore quite clear that at common law employees such as registrars, bailiffs, court clerks, etc are part of the courts. This is statutorily supported by section 112 of the Courts Act, 1993 (Act 459)

It is notorious that the 1992 Constitution has largely been based on the 1969 and 1979 constitutions of Ghana. Therefore since the Judiciary has been set out in virtually the same manner under these constitutions and the officers I have referred to *ut supra*, have consistently been judicially held to be part of the courts it follows that they are part of the Judiciary. It is trite law that the Legislature legislates with regard to the existing law and is deemed not to alter the same unless very expressly or by necessary implication otherwise provided. Although it will presently appear that there are other provisions in the 1992 Constitution from which it can be deduced that the administrative staff of the Judiciary are part of the

Judiciary and that the expression "Judiciary" does not bear one and the same meaning in all the contexts of the constitution, the common law which is part of the existing law of Ghana under article 11 of the constitution clearly shows that some persons aforementioned, intimately connected with justice delivery are part of the courts or the Judiciary.

At this stage I state it bluntly that in my humble opinion, the Judiciary when considered against all the relevant provisions of the 1992 Constitution, consists of two components, i.e the Adjudicative and Administrative segments and that these segments are better described and constitute the Judicial Service of Ghana.

First of all the whole of Chapter II of the Constitution is headed "THE JUDICIARY." It therefore stands to reason that this chapter, *inter alia*, sets out the organs or components of the Judiciary. Furthermore, article 127(1) provides thus:

> "(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."

This clearly shows that for the purposes "*of the exercise of the Judicial power of Ghana*" it is necessary for the Judiciary to perform both judicial and administrative functions. Quite clearly the phraseology, "the Judiciary, in both its judicial and administrative functions, including financial administration" means that the constitution envisages that apart from the judicial functions the Judiciary will be performing also administrative functions including even financial administration.

Certainly since it is not judges or magistrates who perform, at any rate, the bulk of the administrative functions for the benefit of the judges and magistrates but the constitution categorises those functions as ones performed by the Judiciary it must follow that those other persons who perform them are constitutionally constituted as part of the Judiciary. And since all these actors in the said judicial and administrative functions must

be paid for their services and purchases incurred for their undertaking must also be paid, article 127(4) provides quite starkly that:

> "(4) The *administrative expenses of the Judiciary,* including *all salaries, allowances, gratuities and pension payable to or in respect of, persons serving in the Judiciary*, shall be charged on the Consolidated Fund."

The words "*persons serving in the Judiciary*" in article 127(4) are significant. These words shed light on the preceding words "*The administrative expenses of the Judiciary*" in that clause. In the context of this provision "*persons serving in the Judiciary"* are part of the word "Judiciary" therein appearing. The question is whether the non-bench employees of the courts can be considered as "serving in the Judiciary." In addition to the authorities I have already cited, *ut supra*, in *Seyire v Anemana* (1971)2 GLR 32C.A Azu Crabbe J.A (Amissah and Anin JJ.A concurring), at 41 stated as follows:

> "Though the Courts Ordinance Cap. 4, as subsequently amended, was repealed by section 156 of the Courts Act, 1960 (C.A. 9), *the repeal has not in any way affected the functions of the registrars of the superior courts, nor has it diminished their importance and status in our court system.*"

At 47 his Lordship emphasized that "The registrar has *no separate existence apart from the high Court …*" I think, therefore that a registrar of the courts is certainly a person "*serving in the Judiciary*" and mutatis mutandis all the other persons employed to work in the courts, though with varying degrees of closeness to the operation of the courts, are also "*persons serving in the Judiciary*."

This is particularly so since a person can be said to be working in an Institution without even being an employee thereof, see *Pauley v Kenaldo Ld*. (1953) IWLR 187.

<u>Holistic and Purposive Construction</u>

It is obvious that if article 126(1) is not read in isolation but together with, inter alia, articles 127(1) (4), and (7), 148 to 160, it will be seen that the word "Judiciary" has an overall larger meaning than any restrictive meaning that may be attributed to that provision and is used in the larger institutional, organizational and functional sense. In *Republic v Secretary, to the Cabinet; Ex parte Ga Traditional Council* (1971)1 GLR 71 at 76, Abban J quoted Lord Esher MR in *Barlow v Ross* (1890)24 Q B.D. 381, C.A at 389 as follows "But it is a familiar rule of construction that, although the Courts are prima facie bound to read the words of an Act according to their ordinary meaning in the language, *if there are other circumstances which show that the words must have been used by the legislature in a sense larger than their ordinary meaning, the Court is bound to read them in that sense*." (e.s)

The need for holistic and purposive interpretation has been stressed in several decisions of this court and is exposed, for example, by a consideration of article 127(4) concerning the charge of the administrative expenses of the Judiciary on the consolidated fund. That provision, standing alone, gives the impression that those expenses once arisen are a charge on the consolidated fund, whereas that provision is subject to article 179(3)-(6). The oft quoted words of Acquah JSC (as he then was) in *JH Mensah v Attorney General* (1996-97) SCGLR 320 at 362 bear eternal warning. He said:

> "*I think it is now firmly settled that a better approach to the interpretation of a provision of the 1992 Constitution is to interpret that provision in relation to the other provisions of the Constitution as to render that interpretation consistent with the other provisions and the overall tenor or spirit of the constitution. An interpretation based solely on a particular provision without reference to the other provisions is likely to lead to a wrong appreciation of the true meaning and import of that provision. Thus in Bennion's Constitutional Law of Ghana (1962) it is explained at page 283 that it is important to construe an enactment as a whole*:

.....since it is easy, by taking a particular provision of an Act in isolation, to obtain a wrong impression of its true effect. The dangers of taking passages out of their context are well known in other fields, and they apply just as much to legislation. Even where an Act is properly drawn it still must be read as a whole. Indeed a well-drawn Act consists of an inter-locking structure each provision of which has its part to play. *Warnings will often be there to guide the reader, as for example, that an apparently categorical statement in one place is subject to exceptions laid down elsewhere* in the Act, but *such warnings cannot always be provided*." (The emphasis is mine)."

In *Ampiah Ampofo v Commission on Human Rights and Administrative Justice* (2005-2006) SCGLR 227 the plaintiff challenged as unconstitutional the panel of CHRAJ that investigated corruption charges against him on the ground that the Commission on Human Rights and Administrative Justice consists of only the three persons enumerated in article 216, whereas the panel that investigated him included some other persons.

Rejecting the contention Dr. Twum JSC (his brethren concurring), held at 234-235 as follows:

"It is not clear whether the Commission was established as a body corporate. In such situations it is advisable to proceed empirically. In my view, the word "*Commission" appearing in Chapter Eighteen of the Constitution is used in two senses*. In article 216 and 217, *it must refer to the three persons*, namely, the Commissioner and the two Deputy Commissioners. In particular, when article 217 speaks of appointing the members of the Commission, it can only be a reference to these three persons. *But where article 220 provides for the creation of regional and district branches of the Commission, this can only refer to something which can have branches*. It would lead to manifest absurdity if the word "Commission" in article 220 were to be interpreted to mean the three persons who would thus have regional and district branches. *In this context, the word must refer to*

an organization, a body, an institution, an establishment or a bureaucracy."(e.s)

Similarly at 242 Dr. Date-Bah JSC forcefully said:

> "Applying a purposive approach to the interpretation of the provisions of Chapter Eighteen of the 1992 Constitution and the Commission on Human Rights and Administrative justice Act, 1993 (Act 456), I am of the view that *the interpretation contended for by the plaintiff is not viable and not in keeping with the spirit and purpose* (both subjective and objective) *of the provisions concerned*: see *Asare v Attorney-General* [2003-2004]2 SCGLR 823. I am further of the view that *the Commission should be viewed as a particular kind of statutory corporate entity comprising the Commissioner, the two Deputy Commissioners and the staff employed by them to assist them in carrying out the functions of the Commission*." (e.s)

His lordship continued in this vein at 244 thus:

> "*A concept of the Commission as a corporate body comprising the Commissioner and his or her two deputies as well as the staff employed by them to assist them in carrying out their functions is compatible with the language of the relevant provisions and make better sense*. Although section 2 of Act 456, reflecting article 216 of the Constitutions, provides that the Commission shall consist of the Commissioner and the Deputy Commissioners, *this provision need not be interpreted to mean that the Commission consists exclusively of these three. The employees of an organization can hardly be sensibly conceived of as apart from the organization. Thus the employees of the Commission, for which section 20* of Act 456 makes provision, *can reasonably be interpreted as forming a part of the Commission. This implies that what the Commission does through its employees, it does itself*." (e.s)

Mutatis mutandis this reasoning should apply to the word "Judiciary" as used in the constitution. It is to be emphasized however that the word

"Judiciary" cannot be given the same peremptory and narrow meaning throughout the constitution. The context and purpose matter much. Such narrow meaning is properly attributable to provisions like articles 125(5), 126(4), etc but not to others like articles 127(1), (4), (7), etc. In particular were the Judiciary to consist always exclusively of the bench one would wonder why article 127(5) relating to the non disadvantageous variation of the monetary entitlements of the persons therein enumerated could not simply be expressed in terms of the word Judiciary.

Viewed from the governance and functional perspective as eloquently emphasized by the eminent Dr. Date-Bah JSC in his invaluable book, Reflections on the Supreme Court of Ghana and supported by section 10(4) of the Interpretation Act, 2009(Act 792) against the fundamental foundation of the 1992 Constitution as springing from particularly the 1968 Proposals of the Constitutional Commission, particularly paragraphs 539 to 549 thereof, the Judiciary is to be considered as a composite whole comprising the adjudicating and administrative personnel thereof.

This is particularly borne out by the unanimous decision of this court in the celebrated case of *Agbevor v Attorney-General* (2000) SCGLR 403. The facts of the case are that "by a letter from the office of the President, dated 20 March 2000 and addressed to the plaintiff, the plaintiff was informed as follows:

> "His Excellency (HE) the President has accepted the recommendation of the Judicial Council, given in accordance with LI 319, section 28(2) of the Judicial Service Regulations, 1963 and has directed your immediate redeployment out of the Judicial Service for displaying a high degree of incompetence in the discharge of your duties."

The plaintiff brought an action in this Court for a declaration that his removal from the Judicial Service as a judicial officer by the President, for the reasons stated, is contrary to article 151(1) of the 1992 Constitution. At 407-408 Sophia Akuffo JSC delivering the judgment of herself, Edward Wiredu Ag. CJ(as he then was) and Adjabeng JSC, said:

"Articles 148 to 151 of the 1992 Constitution deal with the appointment, retirement and removal of judicial officers. *These provisions fall under chapter 11,* of the 1992 Constitution *which is concerned with the Judiciary, in whom the judicial power of Ghana is vested.* The *underlying concept upon which chapter 11 of the 1991 Constitution is founded is that of assuring and safeguarding the independence of the Judiciary.* Consequently, the *Committee of Expects, in its Report on Proposals for a Draft Constitution of Ghana,* at paragraph 252 at p 117 included amongst the principles that must be reflected in the Constitution to assure the realization of this concept, the following principle:

> *"5. The Judiciary should be assured full financial and administrative autonomy. This means that the governmental structure should not subordinate the Judiciary to any Government department or Ministry for the purposes of presenting or realizing its administrative or financial requirements"*

In pursuance of this principle, article 127(1) stipulates that:

> "*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." (*The emphases are ours)"

Kpegah JSC at 411 said poignantly as follows:

> "That the President took this action on "the recommendation of Judicial Council" devastates me. The President should expect and, indeed, deserves quality professional legal advice from the Judicial Council because it is a body which is dominated by what can be described as the *crème de la crème* of the legal profession in this country. To recommend to the President the type of action typified in the letter quoted above is to needlessly mislead and embarrass the President and I am saddened by it. I say so because *the council, in*

effect, recommended to the President to do an act which is in clear violation of article 127(1), which guarantees, in very robust language, the independence of the Judiciary in its administrative matters. For the avoidance of doubt, I beg to quote the said provision:

> "127(1). In the exercise of the judicial power of Ghana, the Judiciary, in both its judicial and administrative functions, … is subject only to this Constitution and shall not be subject to the control or direction of any person or authority."

This provision completely insulates the Judiciary from the type of directive emanating from the Secretary to the President's letter.

The second point I find disturbing about the recommendation by the Judicial Council is that *it has not only undermined its own authority under article 151(1) of the Constitution*, but also that of the Chief Justice, the disciplinary authority for judicial officers. He alone can punish such officers (for example, removal from office) upon the resolution of not less than two-thirds of all the members of the council."

Clearly, Sophia Akuffo and Kpegah JJ.S.C. are rightly holding that the President can't interfere with an administrative member of the Judiciary by virtue of article 127(1) of the Constitution.

Articles 158-160 clearly show that the constitution provides for certain employees to be part of the courts (and therefore the Judiciary) though they are not judges or magistrates or panel members of a tribunal. They are as follows:

> "**158**.(1) The *appointment of officers and employees of the Courts* other than those expressly provided for by other provisions of this Constitution, shall be made by the Chief Justice or other Justice or other officers of the Court as the Chief Justice may direct in writing.
>
> (2) The Judicial Council shall, acting in consultation with the Public Services Commission and with the prior approval of the President, by

constitutional instrument, make Regulations prescribing the terms and conditions of service of the persons to whom clause (1) of this article applies.

x x x

160. Fees of the Courts to form part of the Consolidated Fund

The fees, fines and other *monies paid to the Courts* shall form part of the Consolidated Fund."

Under article 160 are the "*monies paid to the courts*" paid to judges? Certainly not. It therefore means that article 160 regards the administrative officers to whom such monies are paid as being a component part of the courts.

In summary, it is obvious from all the provisions of the constitution referred to herein that (a) the appointment of the administrative staff covered by those articles is to be done in essence and substance by the Chief Justice,(b) their conditions of service are likewise in essence and substance determined by the Chief Justice and the Judicial Council and (c) their disciplinary authority is exclusively an internal matter for the Chief Justice alone or upon the decision of the Judicial Council. It must therefore follow that they are an administrative segment of the Judiciary. Attention is particularly hereby called to the legal effect of article 154 which concerns the administrative supervision, though auxiliary, of the Judicial Council over the Judiciary. Since the judicial council's functions relate to the Judiciary and it is indisputable that their functions extend to the administrative staff of the courts it must follow that such staff is a component part of the Judiciary. It must be emphasized that unless a matter relates to the Judiciary under article 154 1(a) and (b) the Judicial Council cannot deal with it.

Issue iii

Whether or not the expression "all persons serving in the judiciary" appearing in Article 127(4) of the 1992

Constitution applies only to the Justices, Judges and Magistrates to the exclusion of all other judicial service employees, including the non-bench Judicial Officers.

There is no "all" before the words "persons serving in the Judiciary" in this provision.

In consequence of my holding that the plaintiffs are within the purview of article 127(4) of the constitution it follows that any gratuities and/or pensions payable to them must be a charge on the Consolidated Fund and payable to them therefrom and not the SSNIT pension scheme, see *Brown v Attorney General* (Audit Service Case) (2010) SCGLR 183 h.(5), mutatis mutandis.

However the constitution has not set up any particular pension fund for the plaintiffs and I cannot therefore peg the same for them on Cap. 30 pension scheme. Whatever pension scheme there is for them the moneys payable for the same must be from the Consolidated Fund.

Issue iv

Whether or not the payment of CAP.30 pension benefits to the Justices, Judges and Magistrates to the exclusion of members of the Plaintiff Association amounts to discrimination against the latter within the meaning of Article 17(2) of the 1992 Constitution.

This issue has been fully dealt with by my industrious and respected brother Dotse JSC and I agree with him.

Issue v

Whether or not the duty imposed on the President by Article 149 of the 1992 Constitution to determine the conditions of service of Judicial Officers can be delegated to, or performed by, the 3rd Defendant.

This issue is deceptively simple. The power of delegation by the President was discussed, with varying views, in *Kuenyehia v Archer* (1993-94) 2 GLR 525 S.C. Article 58 of the 1992 Constitution did not appear to have been considered therein. Article 58 as far as relevant is as follows:

"**Executive authority of Ghana**

(1) The executive authority of Ghana shall vest in the President and *shall be exercised in accordance with the provisions of this Constitution*.
(2) The executive authority of Ghana shall extend to the execution and maintenance of this Constitution and all laws made under or continued in force by this Constitution.
(3) Subject to the provisions of this Constitution, *the functions conferred on the President* by clause (1) of this article *may be exercised by him either directly or through officers subordinate to him*.
(4) Except as otherwise provided in this Constitution or by a law not inconsistent with this Constitution, all executive acts of Government shall be expressed to be taken in the name of the President."(e.s)

Article 149 is as follows:

"**Conditions of service of judicial officers**

Judicial officers shall receive such salaries, allowances, facilities and privileges and other benefits as the President may, acting on the advice of the Judicial Council, determine."

I find it difficult to consider the Fair Wages and Salaries Commission as an "officer … subordinate" to the President within article 58(3), see by analogy *Republic v Ghana Industrial Holding Corporation; Ex parte Appiah* (1981) GLR 736, C.A. Accordingly I would answer this issue in the negative.

Issue vi

Whether or not the conduct of the Judicial Service in requesting the 3rd Defendant to remove the Judicial Officers on the bench from the purview of the SSSGS while retaining the non-bench Judicial Officers on the SSSGS constitutes discrimination against the non-bench judicial officers within the meaning of Article 17(2) of the 1992 Constitution

On the aspect of discrimination against the non-bench judicial officers involved in this issue I agree with my brother Dotse JSC that there is no proof of discrimination. However my resolution of issue (iii) supra is handy here.

Issue vii

Whether or not section 213(1) (d) and 220 of the National Pensions Act, 2008 (Act 766) contradict Articles 70(1)(b), 127(4) and (5) of the 1992 Constitution.

Under this issue I agree with Dotse JSC that section 231(a) and not 23(1)(d) was probably intended by the plaintiffs. The intendment behind this issue is not clearly expressed. However viewed in the context of the plaintiffs' submissions I would hold that sections 23(1) (a) and 220 of Act 766 or any provision thereof that seeks to vary the conditions of service to the disadvantage of persons covered by article 127(5) or to require contributions from any employee of the Judiciary or Judicial Service to his pension scheme or to authorize payment of any of the monetary entitlements of any such person from any source other than the Consolidated Fund or to determine the pecuniary rights or entitlements of any such person contrary to articles 70(1) (b), 127(4) and (5) or any other provision of the 1992 Constitution is or are unconstitutional.

<u>Conclusion</u>

A consideration of the background proposals for the 1992 Constitution dating back to 1968 and the intent thereby to create a strong and independent Judiciary reveals that the concept of the Judiciary was a holistic one embracing both the judicial and administrative welfare of the

Judiciary. Hence in paragraph 255 sub paragraphs 4 and 5 thereof the Committee of Experts which formulated the Proposals for the 1992 Constitution stated as follows:

> "4. *The Judiciary should be insulated from all subtle forms of Executive pressure or influence.* In the words of the Akufo-Addo Report, the Executive should not be "placed in a position vis-à-vis the Judiciary such as would enable it, or at least would offer it the temptation, to exert any pressures, however subtle, on the Judiciary.
>
> 5. *The Judiciary should be assured full financial and administrative autonomy.* This means that *the governmental structure should not subordinate the Judiciary to any Government Department or Ministry for the purposes of presenting or realizing its administrative or financial requirements.*"(e.s)

The Judicial Service Act, 1960 (C.A. 10) in s.1 groups all persons working in the courts together as members of one and the same Judicial Service. This reinforces my opinion that the expression "Judicial Service" is meant to cover both the Judicial and Administrative Staff of the Judiciary.

Indeed I think "Judicial Service" means Service in the Judiciary, in a composite and holistic sense.

The case of *Akufo-Addo v Quashie-Idun* (1968) GLR 667 C.A [Full Bench] shows that the Judiciary, in terms of the bench, is part of the Judicial Service.

Again the Judiciary (Retention of Revenue) Act, 2003 is revealing, particularly as to its preamble and s.3(1) thereof.

They are as follows:

> "**ACT 661**
>
> **JUDICIARY (RETENTION OF REVENUE) ACT, 2003**

AN ACT to reproduce the provisions on the expenditure of the Judiciary as set out in the Constitution; to authorize the Judiciary to retain a percentage of the moneys it collects in the course of the performance of its functions to defray specified expenses of the Judiciary and to provide for related matters

x x x

3. Retention of percentage of collection

(1) *The Judiciary shall*, to supplement its budgetary provisions, *retain fifteen percent of moneys collected by it in the course of the performance of its functions* for the purpose of defraying the expenses of the Judiciary."(e.s)

It is difficult, to see how unless, since *lex non cogit ad impossibilia,* the non-bench staff are part of the Judiciary as a holistic Institution, the Judiciary can be conceived in terms of "the operation of banking facilities by the Judiciary" under article 127(7) or the Judiciary retaining "fifteen percent of moneys collected by it" within the preamble and s.3(1) of Act 661.

By way of ultimate clarification, I state emphatically that the 1992 Constitution has set up the Judiciary as an Institutional arm of government. That Institution consists of a system of courts. That system consists of the adjudicative and administrative members of the courts. Very plainly article 158(1) in providing for "The appointment of officers and employees of the Courts other than those *expressly provided for by other provisions of this Constitution* … "is referable to the appointment of (a) the bench members of t he courts and (b) judicial officers, which has already been covered by articles 144, 148 and 152. It follows that since article 158(1) categorises the residue of the appointments therein dealt with as also "officers and employees of the Courts," all persons appointed pursuant to articles 144, 148, 152 and 158 are "officers and employees of the Courts" and since article 126(1) constitutes the Judiciary in terms of a system of courts, all those persons are members of the Judiciary.

It should also be clear from all the foregoing, that the constitutional provisions relating to the Judiciary aim at setting up the Judiciary as a unique, special and independent Institution of governance that should be treated as such in its terms and conditions of service away from other public services or entities except where commonalty is expressly or by clear implication countenanced.

I however acknowledge that this has been a difficult case and I am therefore not surprised that we are not unanimous as to its determination on all the issues involved. I also thank counsel on all sides of this case for their immense help to the court by their industry and ingenuity.

(SGD) W. A. ATUGUBA

JUSTICE OF THE SUPREME COURT

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