IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2016

WRIT NO.J1/24/2016

27TH OCTOBER 2016

CORAM: ATUGUBA JSC PRESIDING
ANSAH JSC
ADINYIRA JSC
DOTSE JSC
ANIN YEBOAH JSC
BAFFOE-BONNIE JSC
BENIN JSC

KWESI NYAME-TEASE ESHUN - PLAINTIFF

VRS

1. **ELECTORAL COMMISSION - 1ST DEFENDANT**
2. **THE ATTORNEY-GENERAL - 2ND DEFENDANT**

JUDGMENT

ATUGUBA JSC:

We heard this case on 21st October 2016 and in view of its obvious urgency, adjourned for judgment today 27th October 2016. The plaintiff by his writ dated 27th September 2016 claims as follows:-

1. "A declaration that on a true and proper interpretation of articles 42, 43, 45 (c) and 51 of the Constitution 1992, the function of the 1st Defendant under article 45 (c) of the Constitution, "to conduct and supervise all public elections and referenda" implies a duty to conduct such elections in a free, fair, transparent and credible manner."

2. A declaration that, on a true and proper interpretation of article 51 of the Constitution, 1992, the power of the 1st Defendant under Article 51 by constitutional instrument to make regulations for the effective performance of its functions under the Constitution or any other law implies a duty to make regulations that promote free, fair, credible and transparent elections.

3. A declaration that by the combined effects of Articles 23, 45 (c), 51 and 296 (a) & (b) of the Constitution and the core constitutional values of transparency, accountability and the rule of law (legality), the failure of the 1st defendant to make mandatory provisions in the Public Elections Regulations, 2016 (C. I. 94) requiring the returning officer of the 1st defendant to furnish the contesting parliamentary and presidential candidates, their representatives or counting agents with copies of the Parliamentary Elections-Result Collation Form, Form One E. L. 23A and Presidential Elections-Result Collation Form, Form One E. L. 23B, specified in the schedule thereto, is unreasonable, unfair, non-transparent and does not promote or secure free and fair elections and is accordingly inconsistent with and in contravention of Articles 23, 45 (c), 51 and 296 (a) & (b) of the Constitution and the core constitutional values of transparency, accountability and the rule of law.

4. A declaration that the failure of 1st defendant to make provision in C. I. 94 requiring the returning officer and the contesting candidates, their representatives or counting agents to sign the Parliamentary Elections Results Collation Form, namely Form One E. L. 23A and the Presidential Elections-Result Collation Form, namely Form One E. L. 23B in the schedule thereto is unreasonable, arbitrary, and non-transparent, and does not promote or secure free, fair and credible elections, and is accordingly inconsistent with, and in contravention of, the letter and spirit of the Constitution, particularly articles 23, 45 (c), 51 and 296 (a) & (b) thereof, and with the core constitutional values of transparency, accountability and the rule of law (legality).

5. A declaration that the failure of the 1st defendant to make provision for any column or space on the Parliamentary Elections-Result Collation Form, namely Form One E.L. 23A, in the schedule to C. I. 94 and on the Presidential Elections-Result Collation Form, namely, Form One E. L. 23 B, for the returning officer and the contesting parliamentary and presidential candidates, their representatives or counting agents to execute their signatures is unreasonable, arbitrary, non-transparent, and does not promote or secure free, fair and credible elections, and is accordingly inconsistent with, and in contravention of, articles 23, 45 (c), 51 and 296 (a) & (b) of the Constitution and with core constitutional values of transparency, accountability and the rule of law.

6. A declaration that the failure of 1st defendant to make clear provisions in C. I. 94 prescribing the detailed steps that the returning officer at the constituency collation centre shall methodically take to collate the total valid votes cast for each of the contesting presidential candidates, and to enter same in the relevant forms, namely the Certificate to be Endorsed on the Writ, Form One E. L. 1B and Presidential Elections-Result Collation Form, Form One E. L. 23B of the schedule thereto is unreasonable, arbitrary, non-transparent and does not promote or secure free, fair transparent and credible elections, and is accordingly inconsistent with, and in contravention of, the letter and spirit of the Constitution 1992, particularly articles 23, 45 (c), 51 and 296 (a) & (b) thereof and with the core constitutional values and principles of transparency and the rule of law.

7. A declaration that the failure of 1st defendant to make provision for a form in the schedule to C. I. 94, which answers to "the declaration of results form" referred to in regulation 42 (1) (d) of C. I. 94 is unreasonable, arbitrary and non-transparent and does not promote or secure free, fair and credible elections, and is accordingly inconsistent with, and in contravention of, articles 23, 45 (c), 51 and 296 (a) & (b) of the Constitution 1992 and the core constitutional values of transparency, accountability and legality.

8. Consequential orders directed at the 1st Defendant:-

a. To furnish the contesting parliamentary and presidential candidates, their representatives or counting agents at the constituency collation

centre with copies of the Parliamentary Elections-Result Collation Form, namely Form One, EL 23A, and the Presidential Elections-Result Collation Form, namely Form one, EL 23B both signed by the returning officer and the candidates.

b. To set out the steps to be taken in collating results of the presidential election at the constituency collation centre and entering valid votes cast on the Presidential Elections-Result Collation Form, Form One E.L23B.

c. Requiring the returning officer and the contesting parliamentary and presidential candidates, their representatives or counting agents at the constituency collation centre to sign both the Parliamentary Elections-Result Collation Form, Form One E. L. 23A and the Presidential Elections-Result Collation Form, Form One E. L. 23B.

d. To make provision on both the Parliamentary Election-Result Collation Form, Form One E.L. 23A and the Presidential Election-Result Collation Form, Form One E.L. 23B for relevant columns or spaces for the signatures of the returning officer and the parliamentary and presidential candidates, their representatives or counting agents.

e. Any other consequential orders and directions as this Honourable Court may consider appropriate for giving effect, or enable effect to be given to, the declarations made".

The parties have, as is now unhappily customary in constitutional litigation, felt that they must necessarily haggle over the question whether the Plaintiff's writ discloses a constitutional cause of action involving either an interpretation or enforcement of the 1992 Constitution of Ghana.

Reading the Plaintiff's writ and the parties' statements of case it is quite clear that the main issues involved in this case are whether by omitting to make provisions or clear provisions for the Collation Results to be signed by the returning officer and the candidates or their representatives as well as their agents and the provision of copies of these results to them the 1st defendant has breached the Constitution in terms of the core values of transparency, efficacy and fairness embedded expressly or by necessary implication in articles 42, 43, 45 (c), 51, 23 and 296 (a) and (b) of the 1992 Constitution.

The ensuing judgment of this court shows that the interpretation of the said provisions of the Constitution in the light of articles 23 and 296 (a) and (b) of the Constitution is called for since they are couched in broad, general terms and the confines of their requirements can only in most cases be determined in the context and circumstances within which questions as to them arise. It will be needless pedantry to set out the myriad of decisions of this court to the effect that a written constitution of our kind requires a broad, purposive, generous and spirit oriented mode of construction;see **Tuffour v Attorney-General** [1980] GLR 637 C.A (sitting as Supreme Court), **Kuenyehia v Archer** [1993-94] 2 GLR 525 S.C. In this regard it is pertinent to note that the Plaintiff's action relates also to certain omissions of the 1st defendant which will presently appear, as an omission relating to the terms of a constitutional provision can ground an action under article 2 (1) (b) of the Constitution. Furthermore an act or omission to be actionable under article 2 need not contravene the relevant constitutional provision in a picturesque respect but also suffices if it is inconsistent with the

relevant constitutional provision. The latter situation is the fertile ground for actions based on the core values, spirit, purposes and implications of the provision concerned, such as the plaintiff's action herein, see **New Patriotic Party v Attorney-General** [1993-94] 2 GLR 35 SC.

Although the pursuant relief relating to the plaint regarding the effect of inaccurate textual renditions and inaccurate references to the scheduled forms of the Public Elections Regulations, 2016 (C. I. 94) is hidden in the debris of the miscellany of the residual consequential order prayed for by the Plaintiff, it is one of the matters agitated by the Plaintiff at length between paragraphs 40-47 of the plaintiff's statement of case in this action. They are as follows:-

"40. Where a form in the schedule is referable to the main text of the legislation and vice versa, there is no problem. Where however, a form is mentioned in the main text of the legislation but cannot and is not referable to any of the forms in the schedule as is the case with some of the regulations of C. I. 94 and the schedule thereto, the result is to create confusion, incoherence and inconsistencies in the conduct of public elections, with the ultimate outcome being elections that are neither free, fair, credible nor transparent.

41. For instance the text of regulation 3 (1) (m) of C. I. 94, which deals with presidential election results provides thus:-

"3(1) A person appointed as a returning officer shall

(m) collate and forward to the Commission the endorsed writ and collated provisional results of the total of votes cast for each candidate in respect of the presidential election as set out in Form One of the Schedule and post a copy at the constituency collation centre". (Emphasis added).

42. Clearly, regulation 3 (1) (m) cannot be a reference to the Parliamentary Elections- Result Collation Form. Strangely and erroneously, however, the sub-heading to Form One E.L. 23 A in the schedule to C. I. 94 suggests it is. The text of the regulation 3 (1) (m) refers to "the endorsed writ and collated provisional results of the total number of votes cast for each candidate in respect of the Presidential election." This is, in fact, a reference to Form One E. L. IA to be found at page 36 in the schedule to C. I. 94. However, and strangely, both the Parliamentary Elections-Results Collation Form, Form One E.L. 23A and the Presidential Elections-Result Collation Form, Form One E.L. 23B are erroneously identified as the forms referred to in regulation 3 (1) (m) of C. I. 94. We shall analyze these and other unreasonable anomalies in the interplay between the main text of the regulations and the purported corresponding forms in the schedule thereto and thereby demonstrate the confusion and irrationality with which C. I. 94 is pregnant to make out the case of the plaintiff.

43. Another example of such confusion is a reference in the interpretation section in regulation 49 of C. I. 94 to "constituency collation sheet". Curiously, excepting the single instance in regulation 49, where a reference is made to "constituency collation sheet", nowhere else in C. I. 94 is "constituency collation sheet" mentioned or identified, neither in the text of the main provisions nor in the forms in schedule thereto.

44. Furthermore demonstration that the 1st defendant in drafting C. I. 94, simply employed the terminologies used in the repealed Public Elections Regulations, 2012 (C.I. 75), without a proper understanding of what they referred to under C. I. 75 is provided by the misconceived use of the "declaration of results form" or "results declaration form" in regulation 42 (1) (d) of C. I. 94.

45. Your Lordships will notice, from an examination of regulation 40 (d), (e) and (f) of the repealed C.I. 75, and paragraph 12. 2 (e) at page 10 of "A Guide to Election Officials – Election 2012 (Presidential and Parliamentary Elections) annexed as Exhibit "A" to Plaintiff's affidavit verifying the facts that the "Declaration of Results Form" at the constituency collation centre is in fact a reference to Form E.L.24A and Form E. L. 24B, specimens or samples of which, inter alia, can be found at pages 56 to 57 and annexed for your lordships convenience as Exhibit B. these forms are however not in the schedule to C. I. 94. We shall presently elaborate this.

46. An examination of regulations 3 (1) (k), 3 (1) (m) and regulation 42 (1) (d), of C. I. 94 however, reveals some baffling inconsistencies and contradictions. Regulation 42 (1) (d) directs the returning officer to "invite the counting agents of the candidates to sign the declaration of results form and when signed post a copy at the constituency collation centre". However, no form answers to that in the schedule to C. I. 94. Rather, regulation 3 (1) (K) of C.I. 94 directs the returning officer to "forward to the Commission at the end of the poll an endorsed writ and a note of the total number of votes cast for each candidate" in respect of the parliamentary elections. The endorsed writ and the note of the total number of votes cast for each candidate, is with respect, Part II of Form one E. L. 1A at page 36 of C. I. 94. On the other hand, regulation 3 (1) (m) of C. I. 94 commands the returning officer to "collate and forward to the commission the endorsed writ and collated provisional results of the total number of votes cast for each candidate in respect of the presidential election as Set out in Form One of the schedule and post a copy at the constituency collation centre.". The confusion is apparent my lords. In regulations 40 (1) (d), the returning officer is to post a "declaration of

results form" which cannot be found anywhere in the schedule. Yet, in regulation 3 (1) (m) the endorsed writ and the collated provisional results of the total number of votes cast for each candidate in respect of the presidential election as set out in Form one of the Schedule" (i.e. E.L. 1B which is headed "PART II, Certificate To Be endorsed on the Writ" at page 37 of C. I. 94) are to be forwarded to the Commission and a copy thereof posted at the constituency collation centre. Here it is no longer the non-existent "declaration of results form", which is to be posted at the constituency collation centre. Finally, to compound the confusion, instead of ensuring consistency in the use of phrases and directing that "the endorsed writ and the note of the total number of votes cast for each candidate in the constituency (regulation 3 (1) (k) be sent to the Commission and a copy thereof posted at the constituency collation centre, the 1st defendant rather directs in regulation 40 (1) (d) that a non-existent "declaration of results form" in respect of the Parliamentary election be posted at the constituency collation centre. In fact, as we show below, the endorsed writ and a note of the total number of votes cast for each candidate (regulation 3 (1) (k)) are a reference to Form One E. L. 1A; while the endorsed writ and the total collated provisional results of votes cast for each candidate in a presidential election, (see regulation 3 (1) (m)) are a reference to Form One E. L. 1B in the schedule to C. I. 94. It is not a reference to the "declaration of results form" which is completely omitted in the schedule to C. I. 94.

47. It is our respectful contention that such internal contradictions, inconsistencies and muddle in the use of, and interplay between, the substantive text of the regulations and the Forms in the schedule thereto, do not promote and/or secure free, fair, credible and transparent

elections, but rather undermine same and are accordingly inconsistent with, and in contravention of, article 45 (c) and 51 of the Constitution 1992."

With regard to this litany of inaccuracies it is a settled rule of construction that though the language of a statute maybe unhappily expressed and difficult of comprehension, all effort must be made to construe it intelligibly ut res magis valeat quam pereat. It is easy to see that the references were clearly aimed at the Parliamentary and Presidential results respectively.

Thus in **Osman v Tedam** (1970) 2 G&G 466 the Court of Appeal had to solve a puzzle in which a statutory provision sought to disqualify members of a "Regional Executive Committee" of the Convention People's Party from membership of Parliament whereas the Constitution of that party designated it's executive body at the regional level as the "Regional Steering Committee." The Court held that the two expressions referred to one and the same body and therefore the defendant was disqualified.

See also **Sasu V Amua-Sekyi** [1987-88]1 GLR 506 C.A and **R v Opia (1946) 8 WACA 10**. In the circumstances we order that the inaccurate references and expressions in C.I.94 stand construed as relating to the relevant intended matter or form.

With regard to the other declarations and consequential orders sought it is clear from Regulation 3 (1) (i) (j) K and (m) read together with Regulations 42 and 43 of C.I. 94 as well as forms One E. L. 23 A and One E. L. 23 B that these regulations contemplate and provide for collation forms in respect of both parliamentary and presidential elections.

However whilst Regulation 42 sets out the steps to be complied with for the purpose of the collation of the parliamentary results which would depict, inter alia, the signatures of the counting agents of the candidates there are no such corresponding steps in respect of Regulation 43 relating to the Presidential results. Similarly the aforementioned collation forms for both parliamentary and presidential results are inchoate in that they do not have spaces for the signatures of the returning officers and the candidates' agents.

It is quite clear from the provisions of article 49 (2) and (3) of the 1992 Constitution read together with the aforequoted Regulations of C. I. 94 that the legislative aim is to afford the same transparency in respect of the declaration of the polling station results in respect of the parliamentary and presidential elections and the collation of the results of the same at the constituency collation centre. However, as noted supra there is a casus omissus in respect of the steps towards the collation of these results as well as signature spaces for the relevant signatures on the collation Results forms in respect of both results.

In the result, the Declarations which we think just and fair to make in the circumstance of this case are that, with regard to the Declarations as expressed and sought by the Plaintiff, the 1st defendant did make provisions in respect of the matters listed for the purposes of transparency, fairness and efficacy of the conduct of the impending Parliamentary and Presidential elections but that such provisions were, in the respects set out by the Plaintiff inaccurately expressed and ought to be remedied, so as to bring them in line with the constitutional provisions and core values relied on by the Plaintiff. Id certum est quid certum reddi potest.

Accordingly following **Agyei-Twum v Attorney-General & Akwetey** [2005-2006] SCGLR 227 and **Appiah-Ofori v Attorney-General** [2010] SCGLR 484 we would read words into Regulation 43 of C. I. 94 to the effect that the provisions of Regulation 42 relating to the collation of the parliamentary results should apply mutatis mutandis to the collation of the presidential results and that Forms One E. L. 23 A and One E.L. 23 B be provided with spaces for the signatures of the returning officers and the candidates or their representatives and counting agents.

We further order copies of the collated results be given to each candidate or the representative of each candidate or counting agent as obtains under Regulation 38 (3) (b) of C.I.94.

For the avoidance of doubt we order the parties and their counsel to settle the Clarifications and orders forthwith for consideration by this court.

The Court adopts the clarifications and concluding orders as settled by the parties and their counsel as the final order of this court and same to be pasted in the Record Book of this court as follows:-

1. Regulation 3(1)(k) of the Public Elections Regulations, 2016 (C.I. 94) refers to Form One EL 1 A at page 36 of C.I. 94 headed "Part II CERTIFICATE TO BE ENDORSED ON WRIT" (for the parliamentary election)and not a reference to the Parliamentary Elections-Collation Form (Form One EL 23 A) on page 37 of C.I. 94.
2. Regulation 3(1)(m) refers to Part II Certificate to be endorsed on the writ (Form One EL 1B) to be found at page 39 of C.I. 94 headed "Part II CERTIFICATE TO BE ENDORSED ON WRIT" and not a reference to Form One EL 23B.
3. The reference to the declaration of results form provided for in regulation 42(1)(d) which does not refer to any Form in the Schedule shall be

understood to be a reference to Form One EL 1A for the parliamentary election.

4. For the Presidential election the declaration of results form shall be understood to refer to Form One EL 1B.

5. Provision shall be made on the Parliamentary Elections-Result Collation Form (Form One EL 23A) and on the Presidential Elections-Result Collation Form (Form One EL 23B) for the names and signatures of the returning officer at the constituency collation centre, the candidates or their representatives or counting agents.

6. The returning officer, the candidates or their representatives or counting agents shall sign Form One EL 23A (for the parliamentary election) and Form One EL 23 B (for the presidential election).

7 The returning officer shall give each candidate or their representative or the counting agent a completed and signed copy of Form One EL 23A (for the parliamentary election) and Form One EL 23 B (for the presidential election).

8. The returning officer at the constituency collation centre shall apply the same procedure set out in regulation 42(1) for collating the polling stations results for the presidential election. Regulation 42(1)(e) requiring the returning officer to name the person elected shall not apply to the presidential election.

9. The "Constituency Collation Sheet" in regulation 49(1) shall be understood to mean "PARLIAMENTARY ELECTIONS-RESULTS COLLATION FORM (Form One EL 23A) and PRESIDENTIAL ELECTIONS-RESULTS COLLATION FORM (Form One EL 23B).

(SGD) W. A. ATUGUBA
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

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