IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2017

CORAM: **DOTSE, JSC (PRESIDING)**
GBADEGBE, JSC
AKOTO-BAMFO, JSC
BENIN, JSC
PWAMANG, JSC

CIVIL APPEAL
NO. J4/31/2014

19TH DECEMBER, 2017

MRS. ABENA POKUAA ACKAH ..... APPLICANT/APPELLANT/APPELLANT

VRS

AGRICULTURAL DEVELOPMENT BANK .... RESPONDENT/ RESPONDENT RESPONDENT

JUDGMENT

DOTSE, JSC:-

This is an appeal by the Applicant/Appellant/Appellant, hereafter Applicant against the judgment of the Court of Appeal dated the 10th day of April 2014 which affirmed the decision of the trial court in favour of the Respondents/Respondents/Respondents, hereafter, Respondents. This appeal had been filed by the Applicant pursuant to leave granted by this court on 25th/10/2017 as per Amended Notice of Appeal dated 1/11/2017.

Brief Introductory Facts

In order to give very clear understanding of the facts of this case, we wish to commence by a quotation of a letter dated 13th February 2012, which dismissed the Applicant from the employment of the Respondent Bank. This is because, to us, this letter served as the concluding stages of this protracted litigation.

The letter reads as follows:-

"13th February 2012

Mrs. Abena Pokua Ackah

Dear Madam,

GROSS MISCONDUCT – TERMINATION OF APPOINTMENT

We refer to our query to you on the above subject matter dated December 15, 2011, your reply thereto and your subsequent appearance before the Disciplinary Committee of the bank in the company of your lawyer.

We write to inform you that the Board of Directors has directed that your employment with the bank be and is hereby terminated with effect from the date of this letter for gross misconduct and for bringing the name of the bank into disrepute.

You will be paid an amount equivalent to three months basic salary in lieu of notice as well as other benefits due to you in accordance with the terms of your employment less your indebtedness to the bank.

Your entitlements and indebtedness to the bank are as follows:-

Benefits

1.	Provident Fund 'A' Contribution	6,251.92
2.	Provident Fund 'B' Contribution	2,078.54

3. Provident Fund ‘C’ Contribution 4,396.80
4. Social Fund
5. Salary in lieu of Notice 12,857.85
6. Pro rated Rent 428.60
7. Leave Days converted to cash 584.45
8. Gross Benefits Payable 26,598.16

INDEBTEDNESS

BALANCE OUTSTANDING AT THE END OF LEAVING ARE:-

9. Car Repair loan 174.96
10. Vehicle loan 152.73
11. Car Insurance loan
12. Personal loan (Amrt) 4,318.11
13. Mortgage 58,981.03
14. Welfare loan 1,749.96
15. Diff in kit allowance 2,946.60
16. Provident Fund ‘B’ contribution
17. Provident Fund ‘C’ contribution
18. Special loan
19. Interest on Fund ‘B’ contribution
20. Interest on Fund ‘C’ contribution
21. Salary in lieu of notice
22. Total indebtedness 68,917.89
23. Net Benefit payable (42,319.73)

On the basis of the calculations above you are indebted to the Bank to the tune of GH¢42,319.73 (Forty-two thousand three hundred and nineteen Ghana cedis Seventy-three pesewas). We are by this letter demanding the payment of the debt of GH¢42,319.73 within a period of thirty (30) days from the date of this letter.

You are advised to hand over to the undersigned any property of the bank in your custody within a period of three (3) days from the date of this letter.

Yours faithfully,

Akwelley A Bulley
Executive Head, Human Resource

Cc: Managing Director
Executive Director
Executive Head Finance Planning
Retail Performance Monitoring Manager- Southern Zone" Emphasis supplied

Considering the contents of the said letter as violating her human rights, the Applicant initiated action in the Human Rights Division of the High Court, pursuant to Article 33 (1) of the Constitution, 1992 and Order 67 of the High Court (Civil Procedure) Rules, C.I. 47, 2004 by Notice of Motion for enforcement of the said rights which are:-

The reliefs claimed by the Applicant per that action were as follows:-

i. "A declaration that the purported termination by Respondent of the Applicant's employment with the Respondent on the basis of comments made by the Applicant in a private telephone conversation between the Applicant and another person, and which was clandestinely recorded by the Respondent herein, is a gross infringement of the Applicant's fundamental human rights to the freedom of speech, expression, thought and opinion as well as the Applicant's rights to privacy guaranteed by the Constitution 1992, and therefore manifestly unlawful.

ii. A declaration that the purported termination of the Applicant's employment with the Respondent is in violation of the Applicant's right to a fair hearing.

iii. An order of certiorari to bring in the decision of the Respondent herein purporting to terminate the Applicant's employment complained of in (i) above and quash same as being in violation of the Applicant's fundamental human rights guaranteed by the Constitution 1992.

iv. An order of prohibition directed at the Respondent herein forbidding it from instituting disciplinary proceedings against the Applicant herein on the strength of commentary made by Applicant herein in a telephone conversation between the Applicant and another person and who was surreptitiously recorded by the Respondent herein.

v. Damages for breach of privacy

vi. Damages for violation of the Applicant's fundamental human rights to the freedoms of speech, expression and opinion

vii. Any other order (s) as to this honourable court may seem meet upon the grounds contained in the accompanying affidavit."

The salient facts upon which the Applicant relied upon for the trial of the action in the High Court are the following:-

Sometime in or between May and June 2011, the Applicant herein had a conversation with a certain Nana Yaw Yeboah, reputed to be a journalist. In that conversation which was allegedly secretly taped by the said Nana Yaw Yeboah, the Applicant was heard complaining about the restructuring of the Respondent Bank and the excessive bonus that was received by it's Managing Director.

After the contents of the tape had been made known to the Applicant by the Respondents on or by **8/8/2011**, she was called by the Human Resources Department to discuss her current debt profile. However, when she went, she was rather directed to meet the Board of Directors. At this meeting, an edited version of the recorded conversation was played, and the Chairman of the Respondent's Board of Directors described the remarks of the **Applicant as "vulgar, abusive and which qualified her for disciplinary action."**

On **10th August 2011,** the Applicant received a letter suspending her with half pay pending completion of the disciplinary proceedings. As stated supra, the letter described the recorded conversation and characterized her language as ***"vulgar, intemperate and abusive"*** **and** ***"criminal and defamatory."***

The letter also stated that she had ***"put into the public domain false and inaccurate information"*** and that her behaviour amounted to willful and gross misconduct, a breach of her oath of secrecy, and a poor reflection on her integrity as an officer of the bank. She was directed to show cause why disciplinary action should not be taken against her.

On the **18th of August 2011,** the Applicant reacted to the letter in two ways. The first was to file an application in the High Court for the enforcement of her fundamental rights to privacy and freedom of speech. The second was to submit a letter to the Chairman of the Respondent Bank through her Solicitors, in which she again asserted her rights to privacy and freedom of speech.

In **December 2011,** the Respondent appeared before the Respondents Disciplinary Committee with her Lawyer and the recorded conversation was played again. It had been contended by the Applicant that her Lawyer objected to the tape on grounds that the recording and use of the secretly recorded conversations in disciplinary hearings contravened her rights of privacy and freedom of speech.

The Committee invited her to comment on the contents of the tape, but beyond disputing their admissibility, she offered no further comment.

On **13th February 2012,** the Respondents' wrote the letter (referred to supra) terminating the appointment of the Applicant with immediate effect.

From the above narration, what is evident is that, the basis of her termination of appointment was based on what the Respondents unilaterally considered **as *"gross misconduct and for bringing the name of the bank into disrepute"***

On the **1st of March 2012**, the Applicant abandoned her previous application for the enforcement of her fundamental rights in the High Court and filed a fresh action in response to her dismissal, (which has been referred to supra).

The crux of the 32 paragraphed affidavit and an equally lengthy supplementary affidavit in support of the Applicant's case have been anchored on the following:-

i. "Denial of the opportunity to call witnesses or confront witnesses called by the Respondent and that this has resulted in a gross infringement on her fundamental human rights, **especially as the ruling on the objection had not been delivered by the committee**. Emphasis

ii. That the whole action of the Respondent using a 3rd party to clandestinely record a private conversation between the Applicant and that 3rd party and using same as the basis to terminate her employment constitutes a severe constitutional violation of her rights to privacy.

iii. That the Applicant cannot be punished for merely expressing an opinion and thought on the re-structuring exercise and how the financial resources of a state bank are utilized.

iv. That the oath of secrecy which the Applicant subscribed to upon assumption of duty must be construed only in respect of public communication of trade secrets or other information of the Respondents

with peculiar characteristics of confidentiality, the communication of which may prejudice the interests of the Respondents. This is however not the case in the instant as the matters Applicant talked about were already in the public domain.

v. Finally, that the conduct of the Respondent's towards the Applicant has been **capricious, malicious** and also **arbitrary,** which must be protected by the courts."

The Respondents on the other hand anchored their defence to the action in their over 31 paragraphed affidavit in which the essential features were the following:-

i. That as an employee, the Applicant's employment was governed by the Respondents Human Resource Policy Manual marked in these proceedings as Exhibit I, and by those terms of conditions of service, Applicant was said to be in breach of the following:-

   a. Oath of Secrecy

   b. tarnishing of the image of the Bank

   c. malicious spreading of false rumour or information

   d. acts which may bring the image of the Bank into disrepute

ii. The Respondents also referred to the various Disciplinary processes that are available to them which comprises of being given a query, reference to a Disciplinary Committee, interdiction, submission of report to Head of Human Resource and to management and eventual termination as happened in this case.

iii. The Respondents reiterated the conduct of the Applicant in engaging in a secret conversation with a 3rd party with the sole purpose of tarnishing the image of the Respondent Bank, and it's Managing Director, revealing of confidential information contrary

to her oath of secrecy which she subscribed upon assumption of office.

iv. That the Applicant was given a hearing and rather decided not to participate beyond what she and her Lawyer took part in and also denied the fact of the Applicant's Lawyer raising an objection to the admissibility of the tape and promise of a ruling therein." Emphasis

On receipt of the above, the Applicant filed a supplementary affidavit in support by which she deposed to the following facts:-

a. "Reiteration of the views on the re-structuring exercise **and the payment of an amount of GH¢228,000.00 in 2010 to the Managing Director of the Respondent Bank as Christmas bonus**.

b. That the Respondent in compliance with the relevant laws **published its annual financial report and statements for the year 2010 in which it fully disclosed its financial condition to the general public. This also includes the payment of a whopping amount of GH¢170,500.00 denoted as Director's fees. Emphasis**

c. That in view of the matters having been put in the public domain and concerning a public bank, the matters contained in the secretly recorded conversation cannot be deemed to be confidential thereby amounting to breach of the oath of secrecy.

d. Indeed by reference to several other media publications, the Applicant was able to show that the matters contained therein in the recorded tape were already in the public domain and had been confirmed by the Respondent's own rejoinders." Emphasis

DECISION BY HIGH COURT

After arguments by learned counsel for the parties, the learned trial Judge **Edward Amoako Asante J**, delivered a Ruling on the 7th day of June 2012, by which he dismissed the application in the following terms:-

> "In sum therefore, I hold that the applicant's conversation with the journalist which was used to penalize her at the Committee sitting was proper and cannot be said to be an infringement of the applicant's freedom of speech, expression etc**. From the available facts, the applicant admitted making those remarks which were found to be a breach of her oath of secrecy and amounted to divulging information about her employer to a third party**. All along, in her submission, she admitted making those remarks but she tried to justify them by saying that it was her opinion on the respondent's operations, and that it was a matter of public concern and so she was not at fault. Having admitted that she appeared before the committee where the admitted conversation was made, **the applicant in my view cannot say that she was not given a hearing especially so when she decided to remain silent before the committee**. In my view, her subsequent refusal to comment after the admitted tape had been played further buttressed her admission of the conversation. **The law requires that persons must be given a hearing but it does not demand that they must be forced to speak at the hearing, therefore since the applicant decided to remain silent, the respondent could not force her to speak but to proceed with its proceedings.** The applicant also contended that her lawyer raised the issue of inadmissibility of the tape and demanded a copy but the respondent's lawyer refused to rule on it and subsequently the respondent proceeded to terminate her employment, **we share the respondent's view that the committee gave the applicant the chance to defend herself but she refused to take it up.** This is because, applicant's counsel had the chance and duty to submit her defence before the Committee and raise the issue of the

admissibility or veracity of the tape as alleged by the applicant in her supplementary affidavit in support. **Having failed to offer any defence before the committee, the applicant, in my view, denied herself the chance to open her defence.** Following all this, we find that the applicant was invited to attend the committee sitting; she was afforded the chance to be heard and so this satisfies the audi alteram rule about fair hearing; see the case of ***Aboagye v Ghana Commercial Bank [2001-2002] SCGLR 797*** where the Supreme Court explained the principle vividly.

In sum, we find that the termination of the applicant's employment by the respondent was lawfully done in consonance with respondent's conditions of service. We therefore dismiss all the reliefs sought by the applicant as unproved. We however make no order as to cost." Emphasis

APPEAL AGAINST HIGH COURT DECISION OF EVEN DATE AND COURT OF APPEAL JUDGMENT DATED 10TH APRIL 2014 RESPECTIVELY

Feeling aggrieved and dissatisfied by the decision of the High Court, the Applicant appealed against same to the Court of Appeal, which dismissed same as per the judgment of the Court of Appeal, dated 10th April 2014 as per our directives dated 25/10/17.

FURTHER APPEAL TO SUPREME COURT

Feeling yet again aggrieved and dissatisfied with the Court of Appeal's decision, the Applicant on the 1st November 2017 pursuant to leave, which was granted by this court on 25/10/2012 filed an amended notice of appeal against the said judgment**.**

"Amended Notice of Civil Appeal to the Supreme Court filed on 1/11/2017 pursuant to leave granted on 25/10/2017

Take notice that the Applicant/Appellant being dissatisfied with the decision contained in the judgment of the Court of Appeal, ***Accra dated the 10th day of April 2014*** doth appeal to the Supreme Court upon the grounds set out in paragraph 3 and will at the hearing of the appeal seek the reliefs set out in paragraph 4

2. The part of the decision complained of is as follows:-

   The whole judgment

3. Grounds of Appeal

1. The court below erred in holding that the secret recording of the telephone conversation between the applicant/appellant/appellant, and, its subsequent delivery to the respondent/respondent/respondent did not amount to a breach of the appellant's right to privacy enshrined in the 1992 Constitution.

2. The Court below committed an error of law in holding that the applicant/appellant/appellant's right to privacy could be curtailed without recourse to a judicial action.

Particulars of error

a. The learned judges respectfully failed to note that the exceptions to the exercise of the right to privacy by a citizen spelt out in article 18 (2) of the Constitution enjoin a judicial scrutiny before same can be held to exist in any particular case;

b. The court used *"inconvenience and cumbersomeness"* of a court action as an excuse to defeat the effect of article 18 (2) of the Constitution.

3. The Court below committed a grave and fundamental error of law in holding that the contract of employment between the parties provide an exception to the general principles of fundamental human rights enshrined in the 1992 Constitution.

Particulars of error

a. The learned judges ignored the fact that a comment by a citizen of Ghana on any matter of public interest is in exercise of that citizen's rights to the freedoms of speech, expression and information enshrined in article 21 of the 1992 Constitution;

b. The Court below respectfully failed to appreciate that the restrictions on the exercise of the rights to freedoms of speech, expression and information are laid out in the Constitution itself and cannot be curtailed without recourse to them;

c. The Court after holding that the issues the subject matter of the secretly recorded tape were matters of public interest, erred in proceedings to hold that the principles of fundamental human rights in the 1992 Constitution have been excepted by the contract of employment entered into between the parties.

4. The court below erred in not recognizing that the views expressed by the applicant/appellant/appellant represented her opinion on matters of national/public importance and thus, not punishable.

5. The court below erred in failing to recognize that the respondent/respondent/respondent **had failed to comply with the procedure laid down in its own Human Resource Policy Manual for interdiction or suspension, by punishing the appellant with suspension and withholding of half of her salary, even before setting up a disciplinary committee and the applicant had been properly heard**. Emphasis

6. The Court erred in rejecting the submissions of the applicant/appellant/appellant that the conduct of the respondent/respondent/respondent **was tainted by prejudice, bias and in violation of article 23 of the Constitution.**

7. The learned judges fell into serious error in upholding the respondent/respondent/respondent's submission that the conversation in issue had defamed and disparaged it when there was no evidence to that effect led before the trial court.

8. The court erred in holding that the applicant/appellant/appellant failed to avail himself of the opportunity to offer a defence at the disciplinary committee set up after the appellant had already been punished.**"**

WHETHER APPLICANTS APPLICATION AT THE HIGH COURT WAS FILED WITHIN TIME AS ENVISAGED UNDER ORDER 67, RULE 3 (1) (a) and (b) OF C.I. 47

Before we consider the grounds of appeal, pursuant to our directive on the 25th day of October 2017, we think it is proper to deal with a matter that was raised by this court on the 17th day of February 2016.

That matter was a directive to the Counsel in the case to address the Court on the effect of Order 67, rule 3 (1) (a) and (b) of the High Court, (Civil Procedure) Rules, 2004, C. I. 47 in relation to determining whether the timelines imposed under the rules of procedure referred to supra were complied with by the Applicant when she instituted the action in the High Court.

We have observed that learned counsel for both parties have complied with this directive. Whilst learned Counsel for the Applicant at the material time, Godfred Yeboah-Dame,

filed his on the 23rd February 2016, that of the Respondents, Mrs. Sylvia Cudjoe, filed hers on the 10th of March 2016.

We have perused the written submissions of both counsel in relation to this Order 67 r. 3 (1) (a) and (b) procedure.

Briefly stated, it can be summed up as, the procedure where a person alleges that a provision of the Constitution 1992 in respect of the fundamental human rights and freedoms has been or being likely to be contravened, then without prejudice to any other action that is lawfully, available, that person may initiate action in the High Court, pursuant to article 33 (1) of the Constitution. Article 33 (4) of the Constitution 1992 then empowers the Rules of Court Committee to make rules of procedure for the regulation of these fundamental rights and freedoms. Order 67 rule 3 (1) (a) and (b) are therefore made pursuant to these constitutional mandate.

Under these rules of procedure, two methods of criteria for initiation of actions in respect of these fundamental rights has been provided. These are:

(1) The Six Months Rule

This is provided under order 67 r. 3 (1) (a) of C.I. 47 which provides that the action must be initiated within **six months of the occurrence of the alleged violation.**

(2) The Three Months Rule

This is spelt out under Order 67 r. 3 (1) (b) which states that the action must be commenced within **three months of the applicant becoming aware that the alleged violation is occurring or is likely to occur.**

We have already narrated the facts of this case in some detail supra. From that narrative, it is clear that there are two distinct scenarios that emerged. The first one is the interdiction period, and the second dismissal period. This is because, when the

Respondents embarked upon what the Applicant considered as wrongful and unlawful violations of her fundamental rights during the interdiction, she promptly went to court.

However, when the Respondents in what looked like an indecent haste proceeded to dismiss the Applicant, she then discontinued her previous action and embarked upon the present one which has travelled all the way to this court.

Whilst learned Counsel for the Applicant, also puts the submissions into this two way context, learned Counsel for the Respondents, Mrs. Sylvia Cudjoe puts the incidents in one transaction.

We have considered the two positions critically and come to the irreversible conclusion that the two way approach is in consonance with common sense and a desire to do justice. This is because, even though events which have given rise to the instant case commenced in or about 10th August 2011, it must be clearly understood that, it is the decision to terminate the Applicant's employment as per letter dated 13th February 2012 that is the *"casus beli"* of the instant suit. As a matter of course, a quick reference to the reliefs which the Applicant claimed before the High Court will make any doubting Thomas observe that it was in respect of the dismissal letter of 13/2/2012 that the Applicant reacted to by filing the application.

The previous action, that dealt with the issues on the interdiction of the Applicant had become moot as far as matters germane to the reliefs claimed are concerned. If that approach is used and applied, then the action commenced in the High Court, on the 1st day of March 2012 is to be considered as having been filed within time. This is because, the action therein will be deemed referable to the letter of dismissal dated 13th February 2012.

We have also satisfied ourselves that, the statement of Sophia Akuffo (JSC) (as she then was) in the celebrated case of ***Awuni v West African Examinations Council (WAEC) [2003-2004] SCGLR 47***1 where she indicated that *"impediments ought not to be*

placed in the way of the citizen in the enforcement of his fundamental human rights" are applicable to the circumstances of this case It was for the above considerations that the Supreme Court preferred an interpretation of the rules which enabled the Plaintiff therein to seek a redress of allegations of fundamental human rights by filing a simple application instead of a writ of summons in the Awuni v WAEC, case supra. As a matter of fact, Kpegah JSC, who also spoke with unanimity with the other members of the Court, went as far as to state that: *"**the need for citizens to be able to freely, and without the burden of undue technicalities, seek redress for flagrant violations of fundamental human rights**."*

CONCLUSION

In view of the above analysis, we are of the considered view that the Applicant's action in the High Court which has resulted into this appeal not only complied with the provisions of articles 33 of the Constitution but also with Order 67 rule 3 (1) (a) and (b) of the High Court (Civil Procedure) Rules 2004, C. I. 47. This point which was raised by the Court itself therefore cannot be a fetter to the consideration of the substance of the appeal which we now proceed to determine on the merits.

SUBSTANTIVE GROUNDS OF APPEAL

In this delivery, we observe that, the procedure adopted by the Applicant in invoking article 33 (1) of the Constitution and Order 67 rule 3 (1) (a) and (b) of C.I. 47 already referred to supra, has put the determination of the reliefs claimed therein in the trial High Court in a straight jacket situation.

It has to be noted however that, it is only the reliefs that are capable of being granted under articles 33 (1) and (2) of the Constitution that the Applicant would be entitled to in this delivery.

Where however, a determination is made on a ground of appeal not relevant under the constitutional provisions referred to supra, that determination or delivery should be considered as relevant only for the purposes of clarification of points of law or of

procedure. In any case, what is considered of importance are the reliefs that this court will grant at the end of the case.

In this appeal, grounds 1, 2, 3 and 4 with their particulars of errors will be taken as having been argued together. This is because the issues are similar and raise identical issues and or principles. Without intending to be repetitive, let us set out the grounds of appeal only without the particulars again as follows:-

1. **"The court below erred in holding that the secret recording of the telephone conversation between the applicant/appellant/appellant, and, its subsequent delivery to the respondent/respondent/respondent did not amount to a breach of the appellant's right to privacy enshrined in the 1992 Constitution.**

2. **The Court below committed an error of law in holding that the applicant/appellant/appellant's right to privacy could be curtailed without recourse to a judicial action.**

3. **The Court below committed a grave and fundamental error of law in holding that the contract of employment between the parties provide an exception to the general principles of fundamental human rights enshrined in the 1992 Constitution.**

4. **The court below erred in not recognizing that the views expressed by the applicant/appellant/appellant represented her opinion on matters of national/public importance and thus, not punishable."**

ARGUMENTS OF COUNSEL FOR APPLICANT

In his statement of case, learned counsel for the Applicant argued strenuously that, regardless of whether the ***"surreptitious recording of the telephone conversation between the appellant and the third person (Nana Yaw Yeboah) was made by the respondent or that third party, the reliance on same for the institution of disciplinary proceedings and measures against the applicant grossly infringed***

***on her constitutional right to privacy" as* enshrined in Article 18 (2) of the Constitution 1992.**

The learned Counsel conceded that this is notwithstanding the traditional common law position on admissibility of evidence, which states that, relevant evidence is admissible in legal proceedings regardless of how it was obtained.

In this regard, learned counsel respectfully disagreed with the *"bizarre definition"* given to private conversation by the Court of Appeal, when it stated thus:-

> *"A private conversation is one which is intended for the use of a particular person or group of persons whilst a public conversation is one concerned with ordinary people in society in general. If one was to talk about matters concerning himself it is a private conversation but where he extends his speech to cover others in general, it becomes a public speech."*

In the view of learned counsel for the Applicant, the touchstone of privacy is whether the maker of the conversation, had a reasonable expectation of privacy. In this respect, he posited the question thus:-

> ***"The true question to resolve in a claim of privacy is, whether, a reasonable person placed in the same position of the maker of the conversation had a reasonable expectation that his discussion would be held in confidence between himself and the counterpart with whom he was conversing."***

Learned Counsel further submitted that *"all reasonable members of society accept that "telephone conversations are generally private", and the applicant must be deemed to have had this position.*

Learned counsel supported his distinction between private and public conversation by reference to the case of ***Perk v United Kingdom [2003] 36 EHH R 41 and Halford v United Kingdom [1997] 24 EHH R 523***.

In these respects therefore, learned counsel for the applicant contended that where a person engages in a private conversation with a third party, the reasonable expectation is that, he expects privacy to be attached to it, and that any interference therewith should be in accordance with law, reference Article 18 (2) of the Constitution which provides as follows:-

> ***"No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others." Emphasis supplied***

Learned counsel therefore argued that it is only by judicial scrutiny that a private conversation can be interfered with. In support of this proposition, learned counsel referred to the case of **Max Mosly v News Group Newspapers Limited [2008] E WHC 1777 (QB)** where his **Lordship Justice Eady** observed thus,

> *"The law now affords protection to information in respect of which there is a reasonable expectation of privacy, even in circumstances where there is no pre-existing relationship giving rise of itself to an enforceable duty of confidence."*

On ground 2 of the notice of appeal, learned counsel for the Applicant argued that, granting without admitting that the Applicant's right to privacy had not been breached, she was still protected by the provisions of ***Article 21.*** This is because, the applicant has the constitutional guarantee of fundamental human rights of freedom of speech, expression and information and these could ***"only be curtailed in accordance with the procedure set out in article 21, i.e. by the enactment of a law which makes provision for the imposition of restrictions by order of a court, that are reasonably required in the interest of defence, public safety or public order."***

Out of abundance of caution, let us set out in full the provisions of article 21 (1) (a) (b) (c) and 4 (a) (b) and (c) respectively of the Constitution 1992.

(1) All persons shall have the right to –

(a) freedom of speech and expression, which shall include freedom of the press and other media;

(b) freedom of thought, conscience and belief, which shall include academic freedom;

(c) freedom to practice any religion and to manifest such practice;

(4) Nothing in, or done under the authority of, a law shall be held to be inconsistent with, or in contravention of, this article to the extent that the law in question makes provision-

(a) for the imposition of restrictions by order of a court, that are required in the interest of defence, public safety or public order, on the movement or residence within Ghana of any person; or

(b) for the imposition of restrictions, by order of a court, on the movement or residence within Ghana of any person either as a result of his having been found guilty of a criminal offence under the laws of Ghana or for the purposes of ensuring that he appears before a court at a later date for trial for a criminal offence or for proceedings relating to his extradition or lawful removal from Ghana; or

(c) for the imposition of restrictions that are reasonably required in the interest of defence, public safety, pubic health or the running of essential services, on the movement or residence within Ghana of any person or persons generally, or any class of persons;

except so far as that provision or, as the case may be, the thing done under the authority of that law is shown not to be reasonably justifiable in terms of the spirit of this Constitution. " Emphasis

Based on the above propositions, learned counsel invited this court to reject the Court of Appeal's reliance on *"inconvenience and cumbersomeness"* as an excuse to defeat the operation of law, let alone constitutional provisions. By reference to the Supreme Court case of ***Mensima & Others v Attorney-General & Others [1996-97] SCGLR 667*** Counsel reiterated the fact that the only instance where a constitutional provision can be rendered ineffective is where the instance is clearly spelt out in the Constitution itself. In the above case, the Supreme Court stated as follows:-.

> ***"But the exercise of that, like the individual's exercise of his fundamental rights and freedoms, must be exercised within the limits of the Constitution." Emphasis***

Counsel further argued that any restriction of the right to privacy must be sanctioned by the following:-

(a) A law which is necessary in a free and democratic society.

(b) That law must be for the public safety, or economic well being or for the protection of health or morals, or for the prevention of disorders or crime, or for the protection of the rights or freedoms of others."

Learned counsel therefore submitted that, once the respondents have not sought judicial scrutiny for the curtailment of the applicant's right, same must be deemed unconstitutional and unlawful as is demonstrated by reference to the constitutional provisions referred to supra.

Sub-Argument on Referral of Constitutional Issue to the Supreme Court

Learned counsel for the applicant, under this ground 2, made a sub argument to the effect that, the Court of Appeal should have referred to the Supreme Court for constitutional interpretation the requirement of judicial scrutiny in respect of article 18 (2).

According to the applicant, the statement by the Court of Appeal, to wit, "apart from this not being the intention of the makers of the Constitution it will be cumbersome and inconvenient" meant the Court of Appeal had made an excursion into an exclusive area reserved for only the Supreme Court.

In this respect, learned counsel submitted that the Court of Appeal, should have stayed their proceedings and referred same to this Court for constitutional interpretation. Reference article 130 (2) of the Constitution 1992.

Counsel accordingly referred to the following cases in support of his arguments:-

- **Republic v High Court (Fast Track Division) Accra, Ex-parte CHRAJ, (Richard Anane- Interested Party) [2007-2008] 1 SCGLR 213**, which clearly delineated the circumstances where a genuine case of interpretation or enforcement will be referred to the Supreme Court.

- **Agyeiwaa v P&T Corporation [2007-2008] 1 SCGLR 985** per Georgina Wood C.J where she stated emphatically as follows:-

  "courts are mandated to stay proceedings and refer matters of constitutional interpretation to the Supreme Court."

On grounds 3 and 4, learned counsel for the applicant contended that the statements made by her in the recorded conversation were matters of a public nature and also in exercise of her fundamental human rights as contained in Article 21 of the Constitution supra.

He further argued that, once the Managing Director of the respondent Bank, and the Respondents themselves had made public statements, and or had issued statements in the media on the restructuring exercise that was going on at the respondent Bank, the applicant also had a right and a public duty to express her contrary opinions.

In support of these propositions, learned counsel made reference to the following cases ***Woodward v Hutchins [1977] 1 WLR 760*** and **Lion** ***Laboratories Ltd v Evans [1985] 2 Q.B 526***.

These cases established the principle that it is lawful to disclose certain information for the public interest.

Finally on these two grounds 3 and 4, learned counsel argued that the court of Appeal was palpably wrong when they stated that ***"general principles of fundamental human rights enshrined in the Constitution 1992 have been excepted by the contract of employment entered into between the parties***."

Learned counsel concluded his arguments on this point emphatically by reiterating the fact that, it is unconstitutional for a citizen of Ghana to contract away the enjoyment of his or her fundamental human rights. He therefore prayed that the appeal be allowed on all these grounds.

RESPONDENTS SUBMISSION IN RESPONSE TO GROUNDS 1, 2, 3 AND 4 OF THE NOTICE OF APPEAL

Learned counsel for the Respondents, Mrs. Sylvia Cudjoe, on her part in response to the arguments in respect of grounds 1, 2, 3 and 4 argued as follows:-

GROUND 1

Learned counsel for Respondent anchored her submissions on the grounds that the Applicant had a duty as per her contract of employment not to,

(a) Breach her oath of secrecy in any area that the Respondent determines to be highly sensitive.

(b) Do any act which seriously tarnishes the image of the Bank

(c) Maliciously spreads false information or rumours

(d) Do any act which may bring the image of the Bank into disrepute.

Based on the above, learned counsel submitted that, the provisions in article 18 (2) of the Constitution actually stipulates that the rights to privacy may be interfered with ***"for the protection of the rights or freedoms of others".***

In this respect, learned counsel argued that the Court of Appeal was justified in upholding the learned trial Judge's finding that the release of the secretly recorded conversation to the Respondents did not amount to a violation of the Applicant's right to privacy.

Secondly, learned counsel argued that, the Applicant had herself intended the contents of the private conversation with the third party to be put in the public domain. This is evident in the request by the Applicant, to the said third party, (Nana Yaw) to investigate the allegations before bringing them into the public domain.

However, in my opinion it must be pointed out immediately that, a request by the Applicant, to the said third party to investigate before publishing same to the general public meant that the Applicant had taken the necessary precautionary measures for same to be verified. Also, most of the substantial matters put out in the recorded conversation had been published by the Respondents themselves to the public and these had been positively verified.

In this respect, the reliance by the Respondents, on cases such as ***Armar v Addoquaye [1971] 1 GLR pg. 109 and Ibrahim v Abubakari [2001 – 2002] 1 GLR 540*** which support the contention that ***"facts deposed to in pleadings if not specifically denied are deemed to be admitted"*** with respect cannot be applicable to the circumstances of this case. This is because, even though the Applicant did not deny the said averments, she was clear in her instructions to the third party to investigate before publication. Not having investigated same, the Applicant cannot be held liable for the said breach.

In any case, the materials were not published to the general public by the said third party.

GROUND 2

On this ground, learned counsel for the Respondents argued that, the Applicant's submission requiring judicial scrutiny before a person's fundamental human rights can be curtailed is *"cumbersome as it is inconvenient"* and is therefore impracticable.

Secondly, learned Counsel denied that the Applicant's reliance on the provisions of article 18 (2) of the Constitution applies under the circumstances of this case.

SUB-ARGUMENT ON THE ISSUE OF THE REFERRAL BY THE COURT OF APPEAL TO SUPREME COURT

On this point, learned counsel submitted that, since the words in article 18 (2) and 21 (1) and (4) of the Constitution are clear and unambiguous, it was not necessary for the court below to refer same to the Supreme Court. Learned Counsel also relied on the decision of this Court in the case of ***Republic v High Court, (Fast Track Division) Accra, Ex-parte CHRAJ, (Richard Anane – Interested Party)*** supra, to argue that where the words are clear and unambiguous, there is no need for a referral. She therefore requested for the dismissal of this ground of appeal as well.

GROUNDS 3 AND 4

The substance of the respondent's arguments under these grounds of appeal are basically that, since per article 12 (2) of the Constitution 1992, which states

> ***"Every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and freedom of the individual contained in this chapter but subject to respect for the rights and freedoms of others and for the public interest****." Emphasis*

It follows that, the respondent also, has rights that need to be protected. If we understand the arguments of learned counsel for Respondents properly, then it is to the

effect that, since their rights on the applicant in the contract of employment requires her to uphold the oath of secrecy and not to act in a way that tarnishes the image of the respondent bank had been breached by the applicant, the provisions of article 18 (2) cannot therefore avail her. This therefore meant that the Applicant was precluded from taking any action that would go contrary to this duty stemming out of the Constitution and her contract of employment.

ANALYSIS OF GROUNDS 1, 2, 3 AND 4

Have the respondents violated or breached the Applicant's rights under Article 18 (2) of the Constitution in terms of the facts and arguments of the respective counsel stated above? It is quite clear that the Applicant ***enjoys a constitutional right of non interference with the privacy of her home, property or correspondence or communication except in accordance with law and as was necessary in a free and democratic society…"*** emphasis

What should be noted is that, this is a constitutional provision, and pursuant to article 11 (1) (a) of the Constitution 1992, this provision takes pride of place before other laws.

However, it is the same Constitution which provides that these rights are subject to law. Which law, one may ask? It had been contended on behalf of the Respondent that the Applicant had breached the conditions of her employment contract, to wit the oath of secrecy, not to do any act to tarnish the image of the respondent bank etc. The question to ask therefore is this, is the employment contract of the applicant with the respondent, governed by law? The Applicant has argued that the phrase, *"except in accordance with law"* refers to judicial scrutiny.

Under the circumstances, it is worthwhile to consider what really an Oath of Secrecy entails.

Blacks Law Dictionary, Ninth Edition, by Bryan A. Garner, on page 176 describes "Oath" as follows:-

"A solemn declaration, accompanied by swearing to GOD or a revered person or thing that one's statement is true or that one will be bound to a promise." Emphasis

What this means is that, the person making the oath impliedly invites punishment if the statement is untrue **or the promise is broken. The legal effect of an oath is to subject the person to penalties for perjury if the statement is false or suffer the penalties when the promise is breached.**

On the other hand, secrecy is defined by the same learned authors in the same book on page 1472 as follows:-

> *"The state or quality of being concealed, especially from those who would be affected by the concealment, or thing that is hidden."*
>
> *Secret, a noun is also defined on the same page as **"something that is kept from the knowledge of others or shared only with those concerned**.*
>
> *In sum therefore, oath of secrecy can be described as "**an undertaking or promise to conceal information in the course of one's work to unauthorised persons, in breach of which penalties might be applied**."*

Under these circumstances, the Applicant will be deemed to have breached the oath of secrecy that she entered into with her employers, the respondents herein.

However, it must be noted that, the applicant has called in aid the provisions of article 18 (2) and 21 (1) and (4) whilst the respondents have relied on article 12 (2) of the Constitution respectively.

What should be noted is that, pursuant to articles 11 (1) of the Constitution, all provisions of the Constitution take precedence over all laws, regulations, orders rules etc. enacted by Parliament or under power or authority conferred by the Constitution on Parliament.

In that scenario, what then are the rights of the Applicant under and by virtue of articles 18 (2), 21 (1) & (4) and 12 (2) of the Constitution?

There is no doubt that article 12 (2) confers on the applicant the constitutional right to the enjoyment of all the constitutional provisions on fundamental human rights and freedoms subject only to the respect for the rights and freedoms of others and for the public interest.

There is also no doubt that the applicant is entitled to the constitutional protections contained in articles 18 (2) and 21 (1) and (4) of the Constitution but subject to the restrictions provided therein.

The crux of the matter is that, who determines whether what the applicant has done constitutes a breach of her oath of secrecy under the terms of employment and whether these have been overtaken by constitutional exceptions therein contained or not? In otherwords, can the respondents unilaterally decide that the applicant has violated the constitutional exceptions therein contained in article 12 (2), 18 (2) and 21 (1) and (4) of the Constitution such that she loses the protection afforded her under those provisions?

There is a school of thought, that under the above constitutional provisions, some of the rights of the applicant on privacy can be curtailed and or interfered with, without necessarily resorting to a judicial scrutiny. It is further argued that the involvement of the courts will be cumbersome and inconvenient.

Even though this view looks attractive, it is not convincing as it has the tendency of whittling away the rights of individuals as guaranteed under the Constitutional provisions.

The Preamble to the Constitution 1992, especially it's **affirmation** and **commitment** states as follows:

> *"Freedom, Justice, Probity and Accountability the principle that all powers of Government spring from the sovereign will of the people, The Principle of Universal Adult suffrage,* ***The Rule of law, The protection and preservation of***

Fundamental Human Rights and Freedoms, Unity and Stability for our Nation,

Do Hereby Adopt, Enact and Give to ourselves the Constitution." Emphasis

Taking the above declarations into consideration, our views are emboldened in deciding that the reference to the phrase ***"in accordance with law"*** in article 18 (2) can only be a reference to a prior judicial endorsement. We are not prepared to accept any arbitrary and or unilateral curtailment of the rights of individuals in this enjoyment of the said rights without judicial activism.

In the light of the above analysis, we are of the considered view that, much as the secret recording between the applicant and the third party (Nana Yaw) and the disclosures that have been brought out may amount to a breach of the applicant's oath of secrecy, it is only by a judicial scrutiny that the said action can be said to be in violation and breach of article 18 (2) of the Constitution.

We are also of the considered view that, the Court of Appeal was wrong in holding that it will be cumbersome and inconvenient for the courts to make a determination on a case by case basis. It is for this reason that the Courts have been established under the Constitution with the hopes and aspirations espoused in the Preamble as referred to supra.

We will therefore hold and rule that the court below also erred in deciding to the contrary that the applicant's right to privacy and others could be curtailed and interfered with, without recourse to judicial action.

Under the circumstances, we will further hold and rule that the courts below committed errors of law in deciding that the contract of employment between the applicant and respondents constitutes an exception to the general provisions of the protections of fundamental human rights. This if acceded to will create super humans of employers over employees.

On ground 4, even though dealt with supra, our closing remarks are that, whilst recognizing the applicant's rights to comment on national/public issues, these rights must be exercised in terms of her engagement. To us, she acted within her rights as enshrined in the constitutional guarantees of freedom of speech and comment on matters of public concern.

Finally, the respondents, being a public entity must come under public scrutiny, and they themselves had already put out the information to the public.

In view of the meaning of what an *"oath of secrecy"* means, or better put, what *"secrecy"* entails, then under these circumstances, the conduct of the Applicant is deemed not to have been in breach of this oath of secrecy since the matters were already in the public domain.

In any case, the Applicant in our opinion has a right and duty under the Constitution to talk about affairs of the Respondents who are a public institution.

In coming to the conclusions we have come to, we are not unaware of the requirements in Section 51 (2) of the Evidence Act 1975, NRCD 323 which stipulates that *"all relevant evidence is admissible except as otherwise provided by an enactment."*

However, these are all subject to the constitutional provisions referred to supra.

Under the circumstances, we hold that the delivery of the secret recorded conversation between the Applicant and Respondent amounted to a breach of the Applicant's right to privacy as provided for in article 18 (2).

Secondly, having held that it is only by a judicial scrutiny that the conduct of the applicant can be held to have amounted to a breach of her oath of secrecy, and other breaches if any, the unilateral decision by the respondents renders any such decision null and void.

GROUND 2

It should be noted that, part of the issues arising from this ground of appeal have already been dealt with in ground 1 supra.

We will therefore confine myself to the determination of the ***Referral issue.***

It is provided in article 130 (1) (a) of the Constitution 1992 that, it is the Supreme Court that has exclusive original jurisdiction in all matters relating to enforcement or interpretation of the Constitution, and by article 130 (2) all courts lower to the Supreme Court shall stay proceedings and refer matters of constitutional interpretation to this court. Out of abundance of caution, this is what articles 130 (1) (a) and (2) of the Constitution 1992 provide:-

> (1) Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in -
>
> **(a) all matters relating to the enforcement or interpretation of this Constitution; and**

(2) Where an issue that relates to a matter or question referred to in clause (1) of this article arises in any proceedings in a court other than the Supreme Court, that court shall stay the proceedings and refer the question of law involved to the Supreme Court for determination; and the court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court". Emphasis

Per the decision of the Supreme Court, in the ***Republic v High Court, (Fast Track Division) Accra, Ex-parte Commission on Human Rights and Administrative Justice (Richard Anane – Interested Party)*** supra, where the Court held as follows:-

> "The Supreme Court's interpretive decision on the question when it could be said that a genuine or real interpretative issue had arisen, should be obtained inter alia (a) where the words of the provision were imprecise and unclear or ambiguous…"

In otherwords, it would arise if one party were to invite the court to declare that the words of the article had a double meaning or were obscure or else meant something different from what they said, and (b) where rival meanings had been placed by the litigants on the words of any provision of the Constitution. However, if there was an existing precedent on the matter because the issue raised had gone through the crucible of authoritative judicial interpretation, it could not in the absence of some very compelling reasons, be said there was a genuine disputation about the correct interpretation of those provisions."

The court therefore affirmed the following decisions:-

- **Republic v Special Tribunal Ex-parte Akosah [1980] GLR 592, CA and**

- **Republic v High Court (Fast Track Division) Accra, Ex-parte Electoral Commission (Mettle-Nunoo & Others – Interested Parties) [2005-2006] SCGLR 514 at 541**

Were there any ambiguities in the constitutional provisions upon which reference and arguments were made?

Articles 12 (2) 18 (2) and 21 (1) (a) and (4) of the Constitution at a first glance admits of no complexity and ambiguity whatsoever. However, if one critically considers the context in which these articles were being relied upon to show justification for the various contrary opinions, then our view of the matter is that, the articles would admit of ambiguity in the context in which they have been used. Thus, as the Ex-parte CHRAJ case clearly indicates, it is not every question of interpretation of a provision of the Constitution that needs to be referred to the Supreme Court for interpretation.

However, taking a cue from these cases, we will rely on Wood C.J's statement in the Ex-parte CHRAJ case where she stated emphatically as follows:-

"In the instant case, I had little difficulty in concluding that the action at the High Court, raised a genuine interpretative issue, given the nature

of the action, the rival and irreconcilable interpretations placed on the crucial word "complaints" in terms of article 218 (a) of the Constitution and the fact also that there is no prior judicial pronouncement by this court on the matter."

See also the following cases which support the above propositions

- **Awoonor-Williams v Gbedemah (1970) CC 18**
- **Republic v Asiamah [1971] 2 GLR 479 S.C**
- **Republic v Maikankan [1971] 2 GLR 473 at 478, S. C per Bannerman C. J.**
- **Tait v Ghana Airways Corporation 2 G & G 527 and**
- **Aduamoa II v Adu Twum II [2000] SCGLR 165**

Applying the above principle to the circumstances of the instant case suggests quite clearly that since there were rival and irreconcilable interpretations placed on the meanings ascribed to the phrases in articles 12 (2) 18 (2) and 21 (1) and (4) of the Constitution as used in the context referred to supra, and also because there appears to be no authoritative judicial pronouncement by this court on the meaning of these provisions as used in the particular contexts, the proper and correct exercise of judicial discretion in line with sound judicial pronouncement in tune with article 130 (1) and (2) of the Constitution should have been to have referred the matter to this court, and stayed any further action to await it's outcome.

Not having done so, we are of the opinion that, the trial courts erred, particularly the Court of Appeal. This is because, to us the Court of Appeal itself recognised the interpretive nature of the provisions therein contained, but unilaterally concluded that it would be cumbersome and inconvenient. This is unacceptable. The failure to refer the interpretation to this court is therefore fatal and in our view the appeal will also be allowed on this sub-argument as well.

GROUNDS 3 & 4

The issues raised in these grounds have already been resolved with the determination of those raised in ground 1 supra, and therefore does not call for any separate resolution.

GROUNDS 5, 6 AND 8

The court below erred in failing to recognize that the respondent/respondent/respondent had failed to comply with the procedure laid down in its own Human Resource Policy Manual for interdiction or suspension, by punishing the appellant with suspension and withholding of half of her salary, even before setting up a disciplinary committee and the applicant had been properly heard.

The Court erred in rejecting the submissions of the applicant/appellant/appellant that the conduct of the respondent/respondent/respondent was tainted by prejudice, bias and in violation of article 23 of the Constitution.

The court erred in holding that the applicant/appellant/appellant failed to avail himself of the opportunity to offer a defence at the disciplinary committee set up after the appellant had already been punished.

Arguments of the Applicant

The Applicant's incisive arguments on these grounds have been anchored on the facts that, the traditional common law perspective that an employer may terminate the contract of employment of an employee merely by the provision of notice for a requisite period did not apply to this case since there was a laid down procedure in the Human Resource Manual by which an employee's employment could be terminated reference exhibit I, ADB HR Policy Manual, and this cannot be overemphasised.

The Applicant reiterated this view by explaining that, the procedure adopted by the respondents in suspending and reducing her salary by half, meant that the respondent among other acts of conduct had already concluded the matter before the commencement of disciplinary proceedings against her. Other acts are exemplified in the contents of the letter of suspension dated 10th August 2011 which the respondents wrote to the Applicant and which was produced by the Applicant and reads in part as follows:-

> ***"On 8th August 2011 a recorded conversation was played back in your presence and to your hearing and the hearing of other officials of the bank. After the replay, you admitted that the voice recording was yours and you accepted responsibility for the vulgar, intemperate and abusive language in the recording. In particular, your insults were directed at the person of the Managing Director of the Bank. Not only were the words uttered by you vulgar and malicious but also criminal and defamatory… In all these your behaviour amounts to willful and gross misconduct, a breach of the oath of secrecy and reflects on your integrity as an officer of the bank contrary to the Bank's Human Resource Policy and Manual". Emphasis***

This was the letter which requested the Applicant to show cause why disciplinary action should not be taken against her and by that she was requested to submit written response to the allegations within seven days.

The said letter was concluded in the following terms:-

> ***"In accordance with the policy of the bank, you are suspended from office with immediate effect pending the completion of the disciplinary process. Whilst on suspension you will be paid a half salary.***
>
> ***Signed Akwelley A. Bulley" Emphasis***

We have also perused the Respondents HR Policy Manual exhibit I, and we are convinced that the procedure the Respondents adopted in suspending her, with half salary is contrary to the HR Policy Manual.

There are dismissible offences that have been listed in this Manual, and out of the eighteen of such offences, the only ground which comes closest to what the Applicant has been alleged to have done is couched as follows:-

(i) Breach of oath of secrecy in an area the Bank determines to be highly sensitive."

Under Terminations, the Manual for example states in

(a) malicious spreading of false information/rumour

The manual has also stated quite clearly who has disciplinary powers in the bank and the procedure by which this is to be applied. These are:-

(a) Issue of a written query to staff

(b) Response of query and query itself referred to Staff Disciplinary Committee

(c) The composition of Staff Disciplinary Committee is management's prerogative.

(d) Findings and recommendations of the staff disciplinary committee are laid before management.

(e) Management recommends appropriate sanctions to be applied.

It is to be noted that, reduction in salary as was done to the Applicant by the reduction of her salary by half is **one of the sanctions that can only be applied after the completion of the disciplinary hearings**.

It is in respect of the above that learned counsel for the Applicant rightly in our view relied on the decision in the case of ***Kobi & Others v Ghana Manganese Co. Limited [2007-2008] 2 SCGLR 771***, which states per Ansah JSC that:-

"The right to terminate is dependent on the terms of the contract and must be exercised in accordance therewith."

The Applicant therefore concluded her submissions on the grounds that from all the available evidence on record, what is evident is that, she was pronounced liable, dealt with and punished even before the disciplinary proceedings were commenced against her.

This according to the Applicant is a clear case of bias, and prejudice, and is therefore in breach of article 23 of the Constitution which requires that the respondents act fairly and reasonably.

ARGUMENTS BY RESPONDENTS

The arguments of substance put out by the Respondents are to the effect that they fully complied with their HR Policy Manual by first inviting the Applicant to meet with the Board, then suspended her during the disciplinary proceedings and then finally terminated her appointment after the final report was submitted.

The respondents therefore argued that they did not flout their own HR policy Manual on disciplinary proceedings as was contended by applicant.

ANALYSIS AND CONCLUSION ON GROUNDS 5, 6 AND 8

Having apprized ourselves with the facts, law and the erudite submissions of both learned counsel on these grounds of appeal, we are of the considered opinion that the appeal must be allowed on these grounds.

This is so because it is clear from the contents of the Respondents letter dated 10th August 2011 that the Respondents exhibited strong bias and prejudice against the Applicant at the inception of the case without hearing her side of the matter.

It has already been stated that, under Article 23, of the Constitution, administrative bodies and tribunals are requested to act fairly and reasonably. Indeed, the rules of

natural justice also require that a person must be given an opportunity to be heard before a decision is made affecting her rights. Quite clearly, the facts in this case establish that, the Respondents highest decision making body, the Board, before which the Applicant was hurriedly arranged, had made up their mind to deal ruthlessly with the Applicant with recklessness, before the commencement of hearing.

This was evident in their wording of the suspension letter and reduction of half of her salary even before the applicant was heard. On the issue of prejudice, bias and what constitutes its essential features and characteristics the following cases are on point

- **Sallah v Attorney-General (1970) CC. 55, Supreme Court, 20/4/1970**
- **Republic v Constitutional Committee Chairman, Ex-parte Barimah II [1968] GLR 1050**
- **Republic v High Court Denu, Exparte Agbesi Awusu II (No. 2) (Nyonyo Agboada Sri III – Interested Party)** which all have determined the following ingredients of bias which are applicable in this instance.

1. The test of bias is an objective and not a subjective test. What then will a reasonable person seized with all the facts in a given circumstance conclude that the decision made in a case was tainted by bias?

It is clear from the suspension letter that the respondents were biased against the applicant from the very inception of this case.

2. That there need not be actual bias.

Even though this need not be proven, in this instance, there was clear evidence of actual and apparent bias.

3. That there is a real likelihood of bias.

What else can one expect from such a conduct by management towards an employee, especially after they had exhibited their anger, and conclusions in the suspension letter referred to supra?

From all the above legal and factual considerations, we are satisfied that the courts below erred in failing to appreciate that the Respondent bank failed to comply with the procedure laid down in their own human resource policy manual for disciplinary measures. This is evident in their inflicting punishment on the Applicant even before setting up the Disciplinary Committee hearings.

By parity of reasoning, the conduct of the Respondents was therefore tainted by bias and prejudice and in breach of article 23 of the Constitution. We therefore declare as null and void the decision contained in the letter of the Respondents dated 13th February 2012.

We also uphold ground 8 of the grounds of appeal. Since this had already been dealt with, we will decline any further comments except to state as follows:-

The Applicant was actually denied the opportunity to defend herself because in the first place, the Respondents had made up their mind against the Applicant on the very first day.

Secondly, from all the surrounding circumstances, we are inclined to believe that the Applicant's lawyer actually made a submission on the admissibility of the secretly recorded conversation and for which a Ruling was reserved but never delivered. From the conduct of all the principal parties in this case, we are made to believe the veracity of the account of the Applicant and her Lawyer as opposed to those of the Respondents. The indecent haste with which the Respondents acted, clearly suggested that they had thrown all caution and decency to the winds and therefore cannot be believed.

The appeal therefore succeeds in all material particulars on grounds 5, 6 and 8.

GROUND 7

The learned judges fell into serious error in upholding the respondent/respondent/respondent's submission that the conversation in issue had defamed and disparaged it when there was no evidence to that effect led before the trial court.

ARGUMENTS FOR AND ON BEHALF OF APPLICANT

On this ground, learned counsel for the Applicant argued that the suit filed by the respondent was not one of defamation and that in cases of defamation, evidence was specifically led to establish the harm to reputation if any of the plaintiff. In such cases, there are various defences such as fair comment, qualified privilege, justification etc. that are recognised in law and may be pleaded and relied upon at the trial by the defendant.

Learned counsel also argued that since no court can find any publication defamatory of a person without clear evidence from persons who saw or read the publication deemed as defamatory, the same cannot be said in the instant case because there is absolutely no evidence to the effect that the said words have lowered the respondents in the eyes of reasonable members of society. Furthermore, it should be noted that the procedure for prosecuting a defamatory action is distinct from the prosecution of a human rights case, see Order 57 of the High Court (Civil Procedure) Rules. C.I. 47 which regulates defamatory suits.

Learned counsel for the Applicant therefore concluded his arguments by reiterating the fact that the matter before the court was not a matter concerning defamation but rather a human rights violation.

ARGUMENTS FOR AND ON BEHALF OF THE RESPONDENT

Learned counsel for the respondents on the other hand argued strenuously that since per their affidavit in opposition they had deposed to the fact that words uttered by the Applicant were false allegations on the mode of running the Bank which allegations were never denied, the said words constituted defamation. In support of this novel proposition,

learned counsel for the respondent referred to the case of ***Amoako v Takoradi Timber Limited [1982-83] GLR 69*** to buttress the point that the words and statements could be defamatory if reasonable men understood them in such a manner, such as in the instant case. According to her, the Court of Appeal was therefore right in holding so.

ANALYSIS

What has to be noted in this ground of appeal is that, defamation is a distinct head under the law of tort in which a plaintiff in a defamatory suit must establish the following three elements:-

1. That the words were defamatory,
2. That the words are referable to the claimant, or Plaintiff and
3. That the words were published (to at least one person other than the claimant) by the defendant

In Ghana, under the *High Court (Civil Procedure) Rules, C. I. 47* which regulates the conduct of civil litigation in the Circuit and High Courts, a defamation suit or action must follow the procedure set out in Order 57 thereof.

So far as the facts in this case are concerned, there is no record that at any point in time any evidence was led to establish any of the elements of defamation set out supra.

Furthermore, it is clear that it was the Applicant and not the Respondents who initiated the action in the trial High Court, and the Respondents did not file any counterclaim as they could not have even done so because of the human rights procedure that was adopted by the Applicant. As a result, the many defences that are usually available to a defendant in a defamation action could not have been raised and were infact not raised.

Under the circumstances, we are of the opinion and rightly so that, it is amply clear that the matters in the instant action have no semblance whatsoever to defamation but is a case of violation of the Applicant's fundamental human rights by the Respondents.

The Court of Appeal therefore greatly erred in holding that the words uttered by the Applicant had defamed the Respondent. This ground of appeal is also allowed.

CLOSING REMARKS

It should be noted that, in this world whatever goes up, comes down. This is a law of nature. Eventually, this protracted litigation between the Applicant and the Respondents, her former employers has come to an end. The appeal herein by the Applicant against the decision of the Court of Appeal, dated the 10th day of April, 2014 succeeds in part.

As we have already stated supra, the appropriate procedure after the Applicant's employment was terminated with the Respondents should have been an action commenced by the filing of a writ of summons and not one under article 33 (1) and (2) of the Constitution as regulated by order 67 rule 3 (1) (a) and (b) of C.I. 47.

This is because, the commencement of the action by a writ of summons would have afforded the Applicant an opportunity to have led evidence on what definitely appears to be her wrongful termination of employment and subject herself to cross-examination. That procedure would have entitled her for damages for wrongful termination under heads of claim in respected legal authorities such as:-

i. ***Nartey-Tokoli v VALCO [1987-88] 2 GLR 532***

ii. ***Hemans v GNTC [1978] GLR 4***

iii. ***G.C.MB v Agbettoh [1984-86] 1 GLR 122 just to mention a few.***

Be it as it may, the Applicant is entitled to the following reliefs as per her application filed pursuant to article 33 (1) and (2) of the Constitution.

1. Applicant is granted relief (i) in its entirety.

2. Out of abundance of caution reliefs (ii) (iii) and (iv) are refused.

3. The Applicant is granted GH¢100,000.00 damages under the violations of her rights arising from reliefs (i) and also reliefs (v) and (vi).

There will however be no consequential orders in view of the nature of the procedure used by the Applicant in this case as already amplified supra.

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

GBADEGBE, JSC:-

My Lords, I have given careful thought and consideration to the appeal before us and I am of the view that the procedural difficulties to the form and scope of the action herein, which was taken under Order 67 of the High Court (Civil Procedure) Rules for the enforcement or securing the enforcement of the provisions of the fundamental human rights and freedoms must yield to a substantive approach that enables us to determine the infractions of the right to privacy enshrined in article 18(2) of the Constitution. But before embarking on a substantive determination of the appeal, I wish to direct my attention to the procedural difficulties which are patent in the originating process filed in the trial court. These issues, which are of some importance relate to the form of the application and the nature of reliefs sought by the applicant. Although these matters have escaped the scrutiny of the two lower courts, I think that if for no reason at all, it is desirable that more than two decades after the coming into force of the Constitution of 1992 some guidance be given by the apex court regarding the proper procedure regarding applications under article 33 as regulated by Order 67 of CI 47. Accordingly, I wish to spend some time to express our views on the scope of Article 33 remedies as provided in Order 67 of the High Court (Civil Procedure) Rules, CI 47 of 2004.

By article 33 (1) and (2) of the Constitution of 1992, it is provided thus:

1. "Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or likely to be contravened in

relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress.

2. The High Court may, under clause (10 of this article, issue such directions or orders including writs or orders in the nature of *habeas corpus, certiorari, mandamus, prohibition, and quo warranto* as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions on the fundamental human rights and freedoms to the protection of which the person concerned is entitled."

In order to regulate the means whereby the substantive right to seek remedies in respect of the violation of fundamental human rights and freedoms provided in the Constitution, by clause 4 of article 33, it is further provided as follows:

4. "The Rules of Court Committee may make rules of court with respect to the practice and procedure of the Superior Courts for the purpose of this article."

In our view, the mode of redress created by article 33 as regulated by Order 67 of the High Court Rules relates to the bundle of rights and freedoms specified in Chapter 5 of the Constitution and in particular provided for in articles 12-30 of the constitution. Therefore, having limited the scope of article 33 remedies to those rights and freedoms contained in articles 12 – 30 of the 1992 Constitution, in its enjoyment persons who seek redress thereunder must observe the limitations placed on the right to redress by the careful and deliberate use of the words in article 33(1) of the constitution thus:

> "...... then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress."

In creating the right for redress in respect of violation of the specified rights and freedoms, the constitution acknowledges that other means of redress may be available to persons against violators and in order not to prejudice the utilization by persons of the other means of redress available to them at common law and or under particular statutory provisions specifically limited the remedies to be granted to persons who avail themselves of the constitutional provision only to contraventions of such rights and

freedoms. From this backdrop, it is clear that to be good, any application made under article 33 as subsequently regulated by the appropriate authority by virtue of the power conferred on it under clause 4 of article 33 by the making of specific provisions contained in Order 67 of the High Court (Civil Procedure) Rules, CI 47 of 2004, should be limited to matters that properly speaking arise only from violations of rights and freedoms contained in articles 12-30 of the Constitution. The effect of this is that when a person's rights and or freedoms "has been, is being or is likely to be contravened" as contained in article 33(1) of the constitution but that person takes no remedial action to obviate the contravention so that there is a new and or additional intervening cause of action that is redressible , for example at common law then in addition to the remedies available under article 33 the person who alleges the violation of a constitutional right in relation to him may pursue some other remedy being a remedy that is not derived solely from article 33.

I propose in this delivery by way of explaining the construction placed on the scope of article 33 remedies by considering the following example from an imaginary set of facts. Workers of company B have been discussing issues affecting the payment of taxes by their employer who is a known tax evader. Unknown to them, proceedings of the meeting were being recorded by some persons and submitted to their employer. The fact of the secret recordings of their meetings and their surrender to their employer was brought to their attention. Having heard of the violation of their right to privacy, the workers wait until they are served with a letter by which their contracts of employment were terminated on the ground of injurious matters spoken at the said meeting which are alleged to have undermined their obligation to the company as employees. The workers think that the secret recordings were not only in flagrant breach of article 18(2) of the constitution but that the mode of determining their contracts of employment was contrary to the collective bargaining agreement between them and the company. It is clear from the facts set out above that, the workers had a right at a time prior to the termination of their contracts to have applied to the court under article 33 for orders and or directions set out in the said article. In fact, had they acted timeously, it is probable that they could

have succeeded in obtaining an order against their employer such as an injunction to restrain them from seeking to act on the said secret recordings provided that they are able at the hearing to establish that their constitutional rights under article 18 (2) has been violated in relation to them.

It seems, however that by waiting too long and allowing their employer to terminate their contracts of employment, there is now a new and intervening cause of action in contract which is wider in scope that the remedies available to them under article 33. Should they opt to pursue the common law remedy of breach of contract, they can lead evidence of the constitutional infraction of their right to privacy as part of the events culminating in a wrongful termination of their employment contracts. On the other hand, if they opt to pursue their rights under article 33, then they are required by the nature of the rights conferred on them to limit whatever remedies they seek to the cause of action derived only from article 33 of the 1992 Constitution. This explains why the enabling article states that the pursuit of article 33 remedies is without prejudice to any other rights that they may have. Combining causes of action at common law such as certiorari, prohibition and mandamus in a claim based on article 33 recognises the fact that at substantive law remedies of the nature spelt out in article 33 (2) are available only against judicial and quasi-judicial bodies. The mere mention of those remedies was not intended to create new remedies against non-judicial bodies that were not existent previously and to construe the constitution as eroding the settled practice of courts and clear pronouncements of law regarding which bodies are amenable to those remedies is in my view taking too simplistic an approach to the true meaning of article 33. While the violation of the right to privacy is properly cognizable as an article 33 remedy, the termination is based on their contract of employment, and is a cause of action that exists under common law. The workers affected by the invasion or intrusion into their privacy right under article 18 (2) of the Constitution in pursuing the remedies available to them cannot seek a relief arising under the wrongful termination in an application filed under article 33. The remedy provided under article 33 has now been merged into a new cause

of action at common law which by the rules of procedure have to be commenced by a writ of summons.

Further to the above, all actions under article 33 are mandatorily required to have the Attorney- General as a party because of the fact that he occupies a unique position as the principal legal adviser to the government. See; article 88 of the constitution. This requirement is in conformity with the practice relating to all constitutional matters which are by law required to have the Attorney-General as a party. Claims filed under article 33 seeking the enforcement or securing the enforcement of any provision of the constitution raise constitutional issues but are ceded by the constitution to High Courts as provided for in article 130 (1) of the Constitution. In my opinion the requirement contained in Order 67 rule 2 (2) a copy of the application made under article 33 be served on the Attorney-General who is required by sub-rule 4 to file an affidavit in answer to the application. The presence of the Attorney- General in such actions reinforces the position that joining claims that do not derive from article 33 to such an application is not only incompetent but makes no sense as the Attorney-General would then, be required to respond in a matter in which the state has no interest, it being a pure matter of breach of contract. To allow claims other than those provided for under article 33 would have the unreasonable effect of having the Attorney-General meddle in private matters. For these reasons, reliefs (2), (3) and (4) are struck out as incompetent. The only remedies properly cognizable under article 33 to wit-reliefs (1), (v), and (VI) and in my opinion as reliefs (5) and (6) seek the same remedy of damages it is sufficient if an award is made in respect of only one such relief. Looking at respective formulation of the said monetary reliefs, I prefer that contained in relief (6) is related more purposively to the cause of action. See: Alhaji Ibrahim Abdulhamid v (1) Talal Akar, (2) Major G Ofochie, a decision of the Supreme Court of Nigeria in suit number 240/2001 dated 05 May 2006. Reference is made to the judgment of Akintola JSC in the Abdulhamid case (supra) when in the course of dealing with the scope of the enforcement of fundamental rights provisions contained in the 1979 Constitution, he observed as follows:

> “The next question to be resolved is whether the Appellant’s claim comes within the type that is enforceable in an infraction of fundamental right. The position of the law is that for a claim to qualify as falling under fundamental rights, it must be clear that the principal relief sought is the enforcement of or for securing the enforcement of a fundamental right and not, from the nature of the claim to redress a grievance that is ancillary to the principal relief which itself is not ipso fact a claim for the enforcement of a fundamental right. This, where the alleged breach of a fundamental right is ancillary or incidental to the substantive claim of the ordinary or civil or common law nature, it will be incompetent to constitute the claim as one for the enforcement of a fundamental right.”

Although the above decision is not binding on us, I am persuaded by the court’s approach in dealing with the scope of actions seeking to enforce or secure the enforcement of fundamental human rights in the equivalent provisions of the 1979 Constitution of Nigeria. In determining the competency of the action herein, we are required to look only at the reliefs which are sought by the applicant in the motion that originated the action herein under article 33 of the 1992 Constitution and Order 67 of the High Court Rules. A close examination of the reliefs sought compels me to the view that the principal relief is for the enforcement or securing the enforcement of the plaintiff’s right to privacy enshrined in article 18 (2) of the 1992 Constitution and accordingly those claims which are not derived from infractions of rights and freedoms specified in articles 12- 30 of the constitution but derived from the common law namely the claim by which the order of termination is sought to be quashed; the order of prohibition as well as a declaration as to the status of the purported termination are hereby struck out. As indicated in the lead judgment, we are in this appeal directing our attention only to the claims which touch and concern the contravention of the applicant’s right to privacy. In considering the applicant’s right to a monetary award, it is important that we caution ourselves that the provisions for the enforcement of fundamental human rights are designed to give teeth and meaning to the rights and freedoms and our courts must be innovative in crafting

remedies that would bring about attitudinal changes, which would enure to all in the enjoyment of those rights. Looked at in this context, it does not seem to me that merely awarding damages would bring about the clear constitutional intent of better enforcing or securing the enforcement of the rights contained in articles 12-30 of the 1992 Constitution. We should in future be directing our minds to making orders, and or directions that will make it abundantly clear to those who have no regard for the fundamental rights and freedoms that it does not pay to be a violator of those rights. As monetary awards have not been clearly specified in relation to infringements of the fundamental rights and freedoms, care should be taken in making such awards in order that constitutional tort actions do not come before us under the guise of article 33 of the 1992 Constitution. In my view, the power conferred on the High Court under article 33, which we have assumed by virtue of the appeal herein is to issue such directions or orders that are considered appropriate in enforcing or securing the enforcement of the fundamental rights and freedoms to which the award of a monetary relief does not appear to properly belong. But having regard to the nature of the violation and the time that the applicant chose to seek relief in the matter, we are left with no option than to apply the basic learning that damages may be awarded for the invasion of her right to privacy guaranteed under article 18(2) of the 1992 Constitution.

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

PWAMANG, JSC:-

My Lords, this is an appeal against the decision the Court of Appeal which upheld a ruling of the Human Rights Division of the High Court, Accra dismissing the case of the appellant. At the High Court, the applicant/appellant/appellant, herein referred to as appellant, relied substantially on her human rights as guaranteed under Articles 18(2) and 20(1) of the 1992 Constitution of Ghana to challenge the termination of her

employment by her employer, the respondent/respondent/respondent, herein referred to as respondent.

BACKGROUND AND FACTS OF CASE

The appellant was until 13th February, 2012 employed with the respondent bank as a Retail Performance Monitoring officer. On 8th August, 2011 the appellant was called to respondent Head Office for a meeting with the Board of Directors of the respondent bank. At that meeting an edited version of a recorded telephone conversation she had with one Nana Yaw Yeboah, a freelance journalist, some two months back was played to her listening. The conversation concerned affairs at the bank including a restructuring exercise, transfers of personnel and management of funds by the directors. In the conversation appellant requested the journalist to investigate the matters she had raised and put them out to the general public. Appellant admitted that the recording was her voice.

Two days after the meeting the appellant was handed a memorandum suspending her on grounds of wilful gross misconduct based on the information she had put out in the recorded telephone conversation. The memorandum requested her to show cause why disciplinary proceedings should not be instituted against her. On receipt of the memorandum appellant got her lawyer to write to the Chairman of respondent Board of Directors telling him that the recording that had been played to appellant was obtained in violation of provisions of the 1992 Constitution and could not be used as a basis to discipline appellant. As is normal of such letters, appellant's lawyer served notice that if the respondent instituted disciplinary proceedings on the basis of the recording they will engage in legal battle with the respondent.

The respondent did not budge so on 18th August, 2011 appellant filed an originating motion at the Human Rights Division of the High Court pursuant to Article 33(1) of the 1992 Constitution and Order 67 of the **High Court (Civil Procedure) Rules 2004, CI.47** seeking to stop the disciplinary proceedings that were being taken against her. She followed it up with an application for interlocutory injunction to restrain the

respondent from continuing with the disciplinary proceedings. That application was however refused. The appellant filed an interlocutory appeal at the Court of Appeal against the refusal by the High Court to grant the interlocutory injunction. The interlocutory appeal was dismissed by the Court of Appeal so the disciplinary proceedings were continued. Appellant and her lawyer appeared before the Disciplinary Committee of respondent for a hearing on the charge of gross misconduct against her. After the hearing the appointment of appellant was terminated by letter dated 13th February, 2012.

On 1st of March, 2012 appellant filed another originating motion against respondent at the Human Rights Division of the High Court pursuant to article 33(1) and Or 67 of C.I. 47 and it is this second motion that has resulted in the present appeal. The reliefs prayed for were as follows;

viii. "A declaration that the purported termination by Respondent of the Applicant's employment with the Respondent on the basis of comments made by the Applicant in a private telephone conversation between the Applicant and another person, and which was clandestinely recorded by the Respondent herein, is a gross infringement of the Applicant's fundamental human rights to the freedom of speech, expression, thought and opinion as well as the Applicant's rights to privacy guaranteed by the Constitution 1992, and therefore manifestly unlawful.

ix. A declaration that the purported termination of the Applicant's employment with the Respondent is in violation of the Applicant's right to a fair hearing.

x. An order of certiorari to bring in the decision of the Respondent herein purporting to terminate the Applicant's employment complained of in (i) above and quash same as being in violation of the Applicant's fundamental human rights guaranteed by the Constitution 1992.

xi. An order of prohibition directed at the Respondent herein forbidding it from instituting disciplinary proceedings against the Applicant herein on the strength of commentary made by Applicant herein in a telephone conversation between the Applicant and another person and who was surreptitiously recorded by the Respondent herein.

xii. Damages for breach of privacy

xiii. Damages for violation of the Applicant's fundamental human rights to the freedoms of speech, expression and opinion

xiv. Any other order (s) as to this honourable court may seem meet upon the grounds contained in the accompanying affidavit."

The motion was supported by an affidavit and a supplementary affidavit filed in response to the respondents' affidavit in opposition. Respondents also later filed a supplementary affidavit. Both parties attached documents in prove of the depositions in their affidavits. Notably absent from the documents attached by both parties is a transcript of the conversation that started this whole drama. The parties did not lead viva voce evidence so the case was determined on their affidavits and the documents attached as well as the written submissions of counsel.

My Lords before proceeding further I wish to address a fundamental issue of procedure that arises in this case on account of the jurisdiction of the High Court that was invoked by the appellant. The appellant brought her action pursuant to Or 67 of the High Court (Civil Procedure) Rules 2004 (C.I.47) which is headed "ENFORCEMENT OF FUNDAMENTAL HUMAN RIGHTS." Rule 1 thereof states as follows;

"Application for redress under article 33 of the Constitution

1. A person who seeks redress in respect of the enforcement of any fundamental human rights in relation to the person under article 33(1) of the Constitution shall submit an application to the High Court."

Article 33(1) provides as follows;

" Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been breached, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress."

Order 67 of C.I. 47 was made by the Rules of Court Committee in exercise of power given to it under article 33(4) which provides that;

" The Rules of Court Committee may make rules of court with respect to the practice and procedure of the Superior Courts for the purposes of this article."

My understanding of the scheme adopted by the Constitution for the enforcement of fundamental human rights is that a special jurisdiction was given to the High Court for that purpose. Article 33(1) makes it clear that the framers of the 1992 Constitution were aware that a breach of the human rights provisions of the Constitution may give rise to other causes of action in other areas of the law which afford some other relief to the aggrieved person. Nevertheless the constitution directed that special rules be made for the enforcement of the fundamental human rights of aggrieved persons and this has been done. The case at hand could have been dealt with under labour law as one of unlawful termination of employment and the provisions of the labour statutes and principles of the common law invoked for the grant of redress.

However, the appellant choose to seek redress under article 33(1) and that provision directs that the procedure in Or 67 be applied so she thereby limited herself to breaches of her fundamental human rights. She cannot under the procedure in Or 67 seek to raise issues that pertain to other causes of action that do not involve a genuine enforcement

of fundamental human rights. Article 33(1) by saying without prejudice to any other action that is lawfully available is deemed to exclude such other causes of action. The policy justification for such separation appears to be in line with the policy of the Constitution framers in article 130 where the Supreme Court is given a special jurisdiction for the enforcement jurisdiction of the Constitution. The jurisdiction of the High Court to determine those other causes of action added by the appellant to her action was not have properly invoked and the court ought not to have entertained them. I shall therefore in consideration of this appeal limit myself to the issues of alleged breaches of the fundamental human rights of the appellant only since she chose that avenue of redress.

DECISION OF THE HIGH COURT

The ruling of the High Court was delivered on 7th June, 2012. At page 307 of the Record the High Court judge stated as follows;

"In my view, this matter can best be determined under the following issues as set out

a. **Whether or not the telephone conversation was a private one such that its recording and subsequent delivery to the respondent would be a violation of the applicant's right to privacy. (emphasis mine).**
b. **Whether or not the matters discussed in the said telephone conversation were official__and so applicant could talk to anyone about them.(emphasis mine).**
c. **Whether or not the recording and playing of the telephone conversation by Nana Yaw and the respondent respectively is a violation of the applicant's freedom of speech, expression and information guaranteed under the Constitution.**
d. **Whether or not the applicant was given a hearing before the termination of her employment.**

Whether or not the termination of the applicant's employment was unlawful."

The trial judge proceeded to find against the appellant on all of the above issues and dismissed the action.

JUDGEMENT OF THE COURT OF APPEAL

Being dissatisfied with the decision of the Human Rights Court, appellant appealed to the Court of Appeal which by a unanimous decision dismissed her appeal. The Court of Appeal in their judgement stated as follows as pages 379 to 380 of the Record;

"Counsel for the appellant first argued that the appellant intended her conversation or correspondence to be private yet it was surreptitiously recorded and that the trial judge wrongly held it to be a public conversation. It is not the intention of the maker of a correspondence which determines whether it is private or public. It is the nature of the correspondence which makes it private or public……

The matters discussed by the appellant in her conversation with Nana Yaw Yeboah were therefore not a private conversation but a public one."

Basing on their view that the conversation was a public one, the Court of Appeal dismissed the appeal against the judgment of the High Court hence the present appeal.

GROUNDS OF APPEAL TO THE SUPREME COURT

In the appeal to this court the appellant has filed eight grounds of appeal all of them alleging errors of law on the part of the Court of Appeal as follows;

1. The court below erred in holding that the secret recording of the telephone conversation between the applicant/appellant/appellant, and, its subsequent delivery to the respondent/respondent/respondent did not amount to a breach of the appellant's right to privacy enshrined in the 1992 Constitution.

2. The Court below committed an error of law in holding that the applicant/appellant/appellant's right to privacy could be curtailed without recourse to a judicial action.

Particulars of error

c. The learned judges respectfully failed to note that the exceptions to the exercise of the right to privacy by a citizen spelt out in article 18 (2) of the Constitution enjoin a judicial scrutiny before same can be held to exist in any particular case;

d. The court used "inconvenience and cumbersomeness" of a court action as an excuse to defeat the effect of article 18 (2) of the Constitution.

9. The Court below committed a grave and fundamental error of law in holding that the contract of employment between the parties provide an exception to the general principles of fundamental human rights enshrined in the 1992 Constitution.

Particulars of error

d. The learned judges ignored the fact that a comment by a citizen of Ghana on any matter of public interest is in exercise of that citizen's rights to the freedoms of speech, expression and information enshrined in article 21 of the 1992 Constitution;

e. The Court below respectfully failed to appreciate that the restrictions on the exercise of the rights to freedoms of speech, expression and information are laid out in the Constitution itself and cannot be curtailed without recourse to them;

c. The Court after holding that the issues the subject matter of the secretly recorded tape were matters of public interest, erred in proceedings to hold that the principles of fundamental human rights in the 1992 Constitution have been excepted by the contract of employment entered into between the parties.

10. The court below erred in not recognizing that the views expressed by the applicant/appellant/appellant represented her opinion on matters of national/public importance and thus, not punishable.

11. The court below erred in failing to recognize that the respondent/respondent/respondent **had failed to comply with the procedure laid down in its own Human Resource Policy Manual for interdiction or suspension, by punishing the appellant with suspension and withholding of half of her salary, even before setting up a disciplinary committee and the applicant had been properly heard**. Emphasis

12. The Court erred in rejecting the submissions of the applicant/appellant/appellant that the conduct of the respondent/respondent/respondent **was tainted by prejudice, bias and in violation of article 23 of the Constitution.**

13. The learned judges fell into serious error in upholding the respondent/respondent/respondent's submission that the conversation in issue had defamed and disparaged it when there was no evidence to that effect led before the trial court.

14. The court erred in holding that the applicant/appellant/appellant failed to avail himself of the opportunity to offer a defence at the disciplinary committee set up after the appellant had already been punished.**"**

My Lords, when this appeal came on for hearing the we *suo moto* called on the lawyers of the parties to address it on the issue of whether having regard to the date the appellant became aware that her constitutional rights had been breached, the action she filed in the High Court on 1st March, 2012 was in conformity with the time provisions in Rule 3(1) of C.I. 47. This issue has been exhaustively addressed in the judgment of my worthy

Brother, Jones Dotse JSC and I have nothing useful to add save to say that the motion that commenced this case was filed within time and the action was properly constituted.

My Lords, in my view grounds 1, 2, 3 and 4 of the appeal that deal with alleged breaches of fundamental human rights of the appellant call for the interpretation of the provisions relied upon to determine their scope and applicability on the facts of this case.

PRINCIPLES OF INTERPRETATION OF THE HUMAN RIGHTS PROVISIONS OF THE 1992 CONSTITUTION.

The proper approach to interpreting the human rights provisions of the 1992 Constitution has been stated in a number of cases decided by this court. In **Ahumah-Ocansey V Electoral Commission; Centre for Human Rights & Civil Liberties (CHURCIL) V Attorney-General & Electoral Commission (Consolidated) [2010]SCGLR 575,** the venerable Georgina Wood CJ said as follows at page 597 of the Report;

"The correct approach to interpreting Constitutions generally and fundamental human rights provisions in particular, is clearly so well settled, it does not admit of any controversy. The jurisprudence of this court does show that these must be broadly, liberally, generously or expansively construed, in line with the spirit of the constitution, history, our aspirations, core values, principles, and with a view to promoting and enhancing human rights rather than derogating from it. This court has clearly moved away from the doctrinaire approach adopted years ago in the case of In re Akoto [1961] 2 GLR 523.

See also; Tuffuor v Attorney General [1980] GLR 637 at 647-648. A tall list of cases on enforcement of the human rights provisions of the Constitution was provided in the case of William Brown v Attorney –General [2010] SCGLR 183. In New Patriotic Party v Inspector –General of Police [1993-94] 459 at page 482 Bamford –Addo JSC observed that:

"…fundamental human rights are inalienable and can neither be derogated from or taken away by anyone or authority whatsoever. …This court is therefore not permitted to give

an interpretation which seeks to tamper in any way with the fundamental human rights but rather to see that they are respected and enforced."

Furthermore, article 33(5) of the Constitution enjoins us to construe the provisions dealing with Human Rights in a manner so as to include all genres of rights inherent in a democracy and intended to secure the freedom and the dignity of man. This can only be achieved if we adopt a liberal approach to interpreting the human rights provisions of the Constitution.

THE RIGHT TO PRIVACY OF COMMUNICATION.

In arguing her first ground of appeal, learned Counsel for appellant stated in her statement of case that the touchstone of privacy is whether the maker of the conversation had a reasonable expectation of privacy. As authority for this proposition he relied on the English cases of **Max Mosley v News Group Newspapers Ltd [2008] EWHC 1777 (QB), Woodward v Hutchins [1977] 1 WLR 760**, **Lion Laboratories Ltd v Evans [1985] 2 Q.B 526**. and the decision of the European Court on Human Rights in the case of **Halford v United Kingdom [1997] 24 EHHR 523**.

The doctrine of reasonable expectation of privacy it ought to be noted is an invention of English judges to deal with what could be said to be a lacuna in the common law which does not guarantee a general right to privacy. In the House of Lords case of **Wainwright** v **Home Office[2004] 2 AC 406** it was stated emphatically that there is no freestanding right to privacy at common law. That also is the case of the Federal Constitution of the United States of America whose Fourth Amendment provisions, though in substance relate to privacy rights, does not in plain words guarantee the right in the manner done in our Constitution, the Canadian Charter on Rights and Freedoms and the European Convention on Human Rights. Since we have an explicit constitutional provision guaranteeing the right to privacy one would have thought that was adequate to ground the appellant's case but her legal advisors thought otherwise and as the Ghanaian proverb says; too much meat does not spoil the soup. However, too much meat in some soups could give it an unintended taste. By partially basing her case on the common law doctrine

of reasonable expectation of privacy appellant caused the lower courts to deviate and they failed to properly apply article 18(2) of the Constitution to the facts of this case. Article 8 of the European Convention on Human Rights has a provision almost like our article 18(2) so it is the decisions of the European Court based on article 8 of the Convention referred to by the appellant's counsel that are of better persuasive value in this case.

Article 18 (2) of the Constitution 1992 which appellant relied on states as follows;

"No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of health or morals for the prevention of disorder or crime or for the protection of the rights or freedoms of others."

On the face of article 18(2), privacy is divided into a number of separate concepts but I noticed from the submissions in the statements of case of both counsel and in the judgements of the lower courts that the concepts of privacy are used interchangeably and in some instances the generic term 'privacy' is used giving the impression that the constitutional term privacy is synonymous with 'private' as in ordinary English language. There are other concepts of privacy that are not expressly mentioned in article 18(2) of our Constitution but which are generally recognised in all democracies as integral part of the right of privacy and they include information privacy. The bundle of rights under privacy of the home which is specifically mentioned in article 18(2) include private and family life privacy. There is no universal definition of the term "privacy" that covers all its concepts. Professor J Thomas McCarthy writing on; The Rights of Publicity and Privacy (2005) 5.59 University of Pennsylvania Law Review 477 at 479, noted as follows;

" *It is apparent that the word 'privacy' has proven to be a powerful rhetorical battle cry in a plethora of unrelated contexts…Like the emotive word 'freedom', 'privacy' means so*

many different things to so many different people that it has lost any precise legal connotation that it might once have had"

Privacy started as the right of an individual to be left alone (Warren&Brandeis 4 Havard Law Review 193-220 1890) but in modern constitutional law the term is given wider definitions. Ruth Gavison writing on; Privacy and the Limits of Law [1980] 89 Yale Law Journal 421 to 428 stated that "*there are three elements in privacy: secrecy, anonymity and solitude. It is a state that can be lost, either through the choice of the person in that state or through the action of another person."*

The right to privacy is very important for the development of the individual. In the Canadian Supreme Court case of **Vickery V Nova Scotia Supreme Court (Prothonotary) [1991] 1 S.C.R 671** Croy J expressed the importance of privacy as a right which;

"inheres in the basic dignity of the individual. This right is of intrinsic importance to the fulfilment of each person, both individually and as a member of society. Without privacy it is difficult for an individual to possess and retain a sense of self-worth or to maintain an independence of spirit and thought."

Present concerns about protection of privacy in Ghana and globally can be attributed in part to the tremendous advances in information and communication technology that have made it very easy to intercept, record, store, retrieve and send information about people without them being aware. Then there is also the exponential growth and proliferation of the media, particularly social media, which have a wide reach within very short time. Many countries have resorted to the passage of Personal Data Protection Acts to clarify the individual's rights that the law seeks to protect under the right to privacy and provide for conditions upon which there may be interference with privacy in the public interest. Ghana enacted the **Data Protection Act (Act 843)** in 2012 which seeks to protect the privacy of the individual and the processing of data concerning her.

The appellant's plaint in the High Court was that the conversation that the respondent relied upon to terminate her employment was obtained in breach of her right to privacy

of her communication. The provisions of Article 18(1) set out above do not limit the right of privacy to private communication and exempt public communication (whatever that means) yet the High Court as well as the Court of Appeal took the view that the conversation that the appellant had with the journalist was a public one so no right of privacy arose. By that reasoning the courts were focusing on the subject matter of the conversation but the substance of the case the appellant made in that respect was that the journalist was not entitled to disclose her identity as the source of the story without her consent since she has a right to anonymity. She also claimed a right to privacy of her communication and her right not to be recorded without her consent. Since the Constitution has not limited these privacy rights to only conversation on private matters it was wrong for the lower courts to so limit the appellant's rights. However, it would appear that the lower courts were led into that reasoning by the reliance on the doctrine of reasonable expectation of privacy and the decisions of English common law judges relied upon by the appellant. Those decisions were about personal live styles of the complainants and would not apply on the facts of this case as the lower courts held. The issue that has to be determined here is whether the disclosure of the identity of the appellant and the secret recording of the conversation by the journalist were breaches of appellant's rights to privacy.

In the Indian Supreme Court case of **PUCL V Union of India 1997** it was held that recording the telephone conversation both at home and business is an interference with privacy of private life. Also in **Peck V United Kingdom (supra)** the European Court of Human Rights interpreted privacy of private life provided for in article 8 of the Convention broadly by stating as follows;

"Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name, sexual orientation and sexual life are important elements of the personal sphere protected by Article 8. The Article also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world and it may include activities of a professional or business nature. ***There is, therefore, a zone of***

interaction of a person with others, even in a public context, which may fall within the scope of "private life" (emphasis supplied)*(P.G. and J.H. v. the United Kingdom, no. 44787/98, § 56, ECHR 2001-IX, with further references)."*

In my considered opinion the secret recoding of the appellant was a violation of her right to privacy of her private life. It is an intrusion into her private life beyond the extent that she had consented to because the individual should be free to determine the manner and extent of his relations with whoever she chooses to relate to. In fact, in the guidelines for media practitioners published by the National Media Commission, journalists are required to seek express consent before recording persons they talk to. Consequently, the recording of the appellant's conversation by Nana Yaw Yeboah without her consent constituted a violation of her right to the privacy of her private life. Secondly the disclosure of the conversation by Nana Yaw Yeboah to the respondent without the appellants consent was a breach of her right to privacy of her private life. It is however important to point out that interference with privacy of communication is a different concept defined in section 5 of **National Communication Regulations, 2003, LI 1719** and not applicable on the facts of this case**.**

Though in this case the appellant complains of the breach of her right to privacy the facts show that it was Nana Yaw who breached her rights and not the respondent. Therefore the only legitimate claim the appellant made against the respondent on this ground is that she made the respondent aware that the information that it got from Nana Yaw which it intended to use in the disciplinary proceedings against her was obtained in breach of her constitutional rights but it went ahead and used same to terminate her employment. The issue that arises between the parties here is whether the evidence obtained by Nana Yaw in breach of the appellant's fundamental rights ought to have been excluded in the disciplinary proceedings against her. The question of the exclusionary rule when it comes to proceedings in court involving evidence obtained in breach of constitutional rights is a vexed one that has been litigated upon in many democracies. The principles that are applicable in some jurisdictions differ depending on whether it is criminal or civil proceedings. For instance in the United States whereas the Federal

Supreme Court has held that generally evidence obtained in violation of a person's Constitutional rights ought to be excluded in criminal proceedings against him, such evidence is generally allowed in civil proceedings. See **Weeks v US 232, 383 34 S.Ct (1914) and US v Janis 428 US 433,447 (1976).** Under the provisions of the Canadian Charter on Rights and Freedoms, discretion is conferred on the court to determine whether to exclude such evidence. In Ghana there has been no authoritative decision on the matter and I would not like to prejudice it because the issue that confronts us here is different. We are here dealing with disciplinary proceedings embarked upon on the basis of a private contract of employment.

The respondent has argued strongly against the case that by using the recording made in breach the right to privacy of the appellant it erred. At page 4 of its statement of case it submitted as follows;

"It will be observed that the said article 18(2) of the 1992 Constitution by its wording does permit the interference with the right of privacy of an individual where it is necessary for the protection of the rights of others. Since it was the release of the said conversation by Nana Yaw to respondent(sic) which is the foundation of this whole dispute, the vital question thus becomes even if the said conversation was private, was its release necessary for the protection of the rights of the respondent(sic)?"

But apart from article 18(2) that talks of the protection of the rights of others there is also article 12 (2) which respondent also referred to in other parts of its statement of case.

Article 12 (2) are as follows;

(2) Every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed, or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this chapter but *subject to respect for the rights and freedoms of others and for the public interest."*(Emphasis supplied).

Article 12(2) encapsulates the age old saying that "the right to swing my fist ends where the other man's nose begins." Namely, there are no absolute rights even in a democracy, both between the individual and the state and between individuals themselves. The difficulty the appellant finds herself on the facts of this case is that respondent is counter accusing her that she acted in breach of its privacy to its organisational information which she swore to protect. So here we have a clash of rights and where a court finds itself in a situation like this, the appropriate approach is for the court to apply the balancing doctrine by weighing the rights of A against those of B to determine which one ought to prevail under the circumstances.

S.Y Bimpong-Buta in his book **"The Role of the Supreme Court in Development of Constitutional Law in Ghana" (2007)** at page 471 stated as follows; *"the need for resorting to a balancing exercise is called for by the provision in article 12(2) of the Constitution which states; Every person in Ghana…shall be entitled to the fundamental human rights and freedom of the individual…but subject to respect for the rights and freedom of others and for the public interest."*

In the case of **Republic** v **Tommy Thompson Books Ltd, Quarcoo&Coomson** [1996.97] SCGCR 804 Kpegah JSC said as follows at page 846;

"The denial of the balancing doctrine will place the individual outside society and make an island of him."

This court has had occasion to determine a number of cases involving balancing the rights of individual persons against the public interest which appeared to conflict. These cases include **Republic V Independent Media Corporation of Ghana (Radio Eye Case) [1996-97] SCGLR 258; Mensima V Attorney-General [1996-97] SCGLR 676; New Patriotic Party V Attorney-General (Ciba Case) [1997-97] SCGLR 729; and Republic V Tommy Thompson Books Ltd, Quarcoo & Coomson [1996-97] SCGLR 484 and [1996-97] SCGLR 804.** I have not been able to lay hands on any decision of this Court under the 1992 Constitution dealing with competing rights of parties not arising out of a statute but from a contract as we have in this case. I shall however

for purposes of comparative learning and persuasive effect make reference to cases from other jurisdictions decided on the basis of statutes that are *in pari materia* with our Constitutional provisions.

My Lords, as part of the balancing exercise the court ought in the circumstances of this case to consider whether respondent was rightfully entitled to the protection of its privacy having regard to the nature of the information it sought to protect from unauthorised disclosure. An employer has an inherent right to protection of its operations and maintenance of discipline, and this right is specifically guaranteed in **Section 8 (a) of the Labour Act, 2003 (Act 651).**

In the instant case the respondent bank, as part of its conditions of employment made its employees to subscribe to an oath to observe what respondent termed Staff Bond of Secrecy which can be found at P.74 of the Record of Appeal. I will quote the relevant parts;

"Introduction; To ensure that neither staff (temporary or full-time) nor ex-staff divulge any classified information, relating to the administration of the Bank without the express authority of the Managing Director, the designated representative of the Managing Director, or by compulsion of law.

(ii). The release of confidential information that staff receive through the course of their employment may have a significant impact on the Bank's ability to manage its affairs or maintain a perception of impartiality and integrity with its clients and the public.

Confidential information covered under bond includes;

(c) Salary

(d) Transactions, Proceedings and Decisions of Board of Directors."

I have considered the type of information the respondent seeks to protect in the portion of the conditions of service that I have quoted above and find it legitimate for respondent, a profit making bank, to seek to protect such information. Respondent is a bank that is operating in a very competitive industry and needs to take steps to survive such

competition. What is more, banking as a business thrives on confidentiality of information both about the customers of the bank and the bank itself. Where an employer in an effort to obtain facts necessary for him to protect his operations and maintain discipline breaches the rights of an employee whose conduct was subject matter of the wrongful conduct, then balance ought to tilt in favour of the employer.

In the case of **Kopke V Germany [2010] ECHR 172**5 the European Court of Human Rights dealt with a case similar to the instant one where a worker sought to exclude evidence obtained in breach of her privacy from being used in disciplinary proceedings against her. The facts of that case are that the applicant was a shop assistant whose employer had noticed irregularities in its accounts, which it suspected the applicant had manipulated. The employer hired a detective agency and initiated covert surveillance of the applicant and another employee over a period of two weeks. The applicant was summarily dismissed as a result. She appealed her dismissal, but having viewed the video material generated by the covert surveillance the German Labour Court concluded that the dismissal was justified in the circumstances. The applicant brought her case to the European Court of Human Rights arguing that Germany had failed to adequately protect her privacy at work.

The applicant considered that the covert video surveillance of her place of work without her knowledge and consent, the use of the video tapes as evidence in the proceedings before the labour courts and the courts' refusal to order the destruction of the tapes had seriously interfered with her right to privacy.

The Court held that the concept of private life extends to aspects relating to personal identity, such as a person's name or picture and it may include activities of a professional or business nature and may be concerned in measures effected outside a person's home or private premises. However on the facts of the case the court dismissed her action holding as follows;.

"Having regard to the foregoing, the Court concludes in the present case that there is nothing to indicate that the domestic authorities failed to strike a fair balance, within

their margin of appreciation, between the applicant's right to respect for her private life under Article 8 and both her employer's interest in the protection of its property rights and the public interest in the proper administration of justice."

Though decisions of other courts are not binding on us, the force of the reasoning in the above case commends itself to me.

After haven weighed carefully all the factors in support of the appellant's claim for the protection of her right to privacy and those in favour of respondent's rights including the terms of appellant's employment contract, I shall uphold the right of the respondent over that of the appellant. To hold otherwise will, in my opinion, unjustifiably limit the tools available to employers in their efforts at detecting activities of their employees that injure or undermine their operations.

I therefore dismiss Ground 1 of the Appeal, not because appellant's privacy was not breached as held by the Court of Appeal but on the ground that after weighing the appellant's right to privacy of her private life against the rights of the respondent in the specific circumstances of this case, I have no doubt in my mind that the respondent's rights ought to prevail.

However, as to whether the contents of what the appellant stated in her conversation with Nana Yaw are justifiable on other lawful grounds the oath of secrecy not withstanding, that is a matter to be addressed under other grounds of the appeal. After all the oaths of secrecy taken by bankers would yield in the face of a lawful court order and in the public interest.

CURTAILMENT OF PRIVACY OF COMMUNICATION WITHOUT PERMISSION OF A COURT.

Ground 2 of the appeal is couched as follows; " The court below committed an error of law in holding that the appellant's(sic) right to privacy could be curtailed without recourse to a judicial action."

In respect of this ground the appellant argued as follows in her statement of case page 22;

"It is respectfully submitted that in order to justify an interference with a person's communication, the attempt to interfere ought to be submitted to judicial scrutiny first, before that interference can be lawful. This is because the specific circumstances of what is in accord with law or necessary in a free and democratic society for public safety or the economic well-being of the country, or for the protection of health or morals, or for the prevention of disorder or crime or for the protection of the rights or freedom of others, as envisaged by Article 18(2), can only be determined by a court of law."

Article 18(2) which I reproduced above is in reference to actions of state agencies which may be permitted to violate the privacies protected in article18(2) in circumstances prescribed in a statute.The provision states that **'except in accordance with law and as may be necessary in a democracy for…'**

Article 18(2) does not provide for prior judicial fiat before interference with privacy but it is rather statutes made pursuant to the article that provide for prior court permission before state agencies can interfere with privacy. In Ghana if a police officer wants to intercept communication in the course of investigating an offence related to Narcotics, he is required to apply under **S. 27 of the Narcotics Drugs (Control, Enforcement and Sanctions) Act 1990 (Act 236)** to a magistrate for authorisation before he can wiretap the suspected person's telephone line or intercept his emails or postal letters. The police officer is required by the section to satisfy the magistrate with evidence on the reasonable suspicion upon which he requires the authorisation. Similarly under **SS.29 and 30 of the Security and Intelligence Agencies Act 1996 (Act 526)** an official of the security agencies who wants to intercept communication as part of investigations has to apply to a superior court judge for authorisation to do so.

However, it must be noted that interference with privacy may lawfully occur without prior judicial fiat where a person is caught in the act of committing a crime. Furthermore, the law in Ghana has provided for other instances where prior judicial permission for

interference with privacy is waived. Under **S. 8 of the Criminal Procedure Code, 1960 (Act 30)** and **S. 24 of the Narcotics Drugs (Control, Enforcement and Sanctions) Act (supra)** the police may conduct searches without warrant. It is therefore erroneous to contend that in all circumstances a persons right to privacy can never be interfered with except with prior judicial fiat.

In any event the instances discussed above where the law requires prior judicial clearance do not apply on the facts of this case. There is no public agency involved here and the respondent did not purport to exercise authority under any statute to interfere with appellant's constitutional rights. From its position in this case the respondent was acting to protect its rights so it is preposterous to argue that respondent should first have gone before a judge for permission to use the recording in question in terminating appellant's appointment. The constitution never said that and could never have intended such an absurd situation with respect to the actions of private persons that are not purported to derive from statutory authority. It is rather a person who alleges that his constitutional rights are about to be breached or have been breach who may proceed to the High Court under article 33(1) as the appellant did with her first application in this case. On the facts of this case no issue of prior judicial clearance before interference with privacy under article 18(2) arose so I dismiss ground 2 of the appeal.

EMPLOYEE FREE SPEECH ON MATTERS CONCERNING THE EMPLOYER

Next, I will deal with Grounds 3 and 4 of the Grounds of Appeal jointly since counsel for appellant argued them together. The two grounds involve one issue namely what is the scope of freedom of speech that an employee has regarding matters relating to her workplace. The subject of employee free speech is quite broad and covers issues of matters an employee may generally talk about while at the workplace, what he may freely talk about outside the workplace and what he can post on his social media pages. What we are dealing with in this appeal is what an employee is free to say about matters concerning her work and the legal principles here are not exactly the same as those applicable to the other aspects of employee free speech. I realise that Counsel for appellant coughed ground 3 of the appeal in even more general terms by referring to

"the general principles of fundamental human rights enshrined in the 1992 Constitution." The case made by appellant is with regard to her right to free speech in respect of matters about her employer and I intend to limit myself to that right.

In appellant's statement of case Counsel argued as follows at page 31;

"The essence of these grounds of appeal (3&4) is that assuming without admitting that the impugned secretly recorded conversation between the appellant and the third person was not protected by the right of privacy, the matters on the secret tape centred around a discussion on matters of national/public importance, and therefore, not punishable.

Further we would submit that the constitutional right to the freedom of speech, expression and information, especially on issues of public importance, is enjoyable by all citizens of Ghana, and the exercise of same cannot be taken away by a private contract of employment. Neither can an employer visit punishment on an employee for the exercise of an employee's right to comment on matters bothering on the national/public interest, even if it adversely affects the employer."

In answer to this argument the respondent submitted as follows in its statement of case at page 12;

"that whether or not the conversation is within the permissible exercise of the (sic) Appellant's right to freedom of speech, expression and indeed information must necessarily be determined by reference to her obligation to respect the rights and freedom of others. It is important that your Lordships keep this firmly in mind because it is obvious that the Appellant's approach in this matter is based on an erroneous view that the human rights of others are subservient to her own."

This submission by respondent cannot be faulted as I have already explained earlier in this judgement to the effect that a person's entitlement to the fundamental human rights and freedoms contained in the Constitution are subject to his respect for the rights and freedom of others.

Article 21(1) of the 1992 Constitution which appellant relied on provides as follows;

“21(1) all persons shall have the right to

- **(a) Freedom of speech and expression which shall include freedom of the press and other media.**
- **(b) Freedom of thought, conscience and belief which shall include academic freedom…”**

The right to free speech is a fundamental human right that has been guaranteed in our constitution and an employee’s enjoyment of the right to free speech cannot be unduly curtailed by her employer without justification. Consequently an employee is entitled to raise her constitutional right to free speech in defence of disciplinary action including termination of her employment by her employer. As I have already explained above, because the employer also has inherent right to protection of its operations and maintenance of discipline, a court is required to balance the conflicting rights by weighing the interest of protecting the employee’s right to free speech against the employer’s right to maintain its operations and discipline. As I already discussed under protection of privacy, the constitutional basis for the balancing exercise is the provisions of article 12(2) which state that the enjoyment of rights are subject to the rights of others and the public interest.

The subject of employee free speech about matters concerning his employer under the First Amendment of the United States Constitution, which is similar to our article 21(1), has been considered in numerous cases by their Supreme Court which also adopts the balancing exercise. One landmark decision of the U S Supreme Court on the subject is **Pickering V Board of Education 391 US 563.**

The facts of the case were that Marvin L. Pickering, a teacher in Township High School in Will County, Illinois, was dismissed from his position by the Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. Appellant's dismissal resulted from a determination by the Board, after a full hearing, that the publication of

the letter was 'detrimental to the efficient operation and administration of the schools of the district' and hence, under the relevant Illinois statute, that 'interests of the schools required his dismissal.

Pickering’s claim that his writing of the letter was protected by the First and Fourteenth Amendments was rejected. Appellant then sought review of the Board's action in the Circuit Court of Will County, which affirmed his dismissal on the ground that the determination that appellant's letter was detrimental to the interests of the school system was supported by substantial evidence and that the interests of the schools overruled appellant's First Amendment rights. On appeal, the Supreme Court of Illinois, two Justices dissenting, affirmed the judgment of the Circuit Court.

Pickering appealed to the Federal Supreme Court which held per John Marshall J(for the majority) as follows;

"To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court…..At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. ***The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."***

See also **Connick V Meyers 461 US 138 (1983).**

The Canadian case of **Haydon V Canada [2000] 2 FC. 82** concerned a reprimand that was administered to two drug evaluators within Health Canada because they had granted a media interview in which they criticized the drug approval process in their department.

Both employees had previously tried to raise, with their supervisors, their concerns about the safety of the drug approval process, particularly bovine growth hormones, but their concerns were not heeded. Eventually, they granted a television interview to publicly voice those concerns. Following that interview, both were reprimanded for breaching the duty of loyalty owed to their employer. One of the issues before the Court was whether the duty of loyalty was a reasonable and justifiable limit on an employee's freedom of expression guaranteed under the Canadian Charter on Human Rights. The Court concluded that the common law duty of loyalty is a reasonable limit on freedom of expression, within the meaning of section 1 of the Charter but that there are exceptions.

The Court then examined the circumstances of the two employees to decide if their public declarations fell within the exceptions to the duty of loyalty. The Court found that the issue of the safety of growth hormones was a "legitimate public concern requiring a public debate" and that "[t]he common law duty of loyalty does not impose unquestioning silence." The applicants therefore were successful in having the discipline administered against them revoked.

In the case of **Lion Laboratories Ltd v Evans [1985] 2 QB 536** the English appellate court discharged an injunction sought by the plaintiff to restrain former employees from publishing information about faults in intoximeters it manufactured and sold to the police who used them for testing alcohol limits in drivers. The information meant that some of the convictions based on readings of those intoximeters could have been wrongful and the Court of Appeal held that the public interest in the disclosure outweighed the plaintiff's right to confidentiality.

It will be noted that the cases cited above related to public employees but this is understandably so because the decisions were based on provisions that dealt with public authorities. For instance the US cases cited above were decided on the First Amendment of the US Constitution which provide as follows;

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of

the press, or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

But our Constitution enjoins observance of the fundamental human rights provisions by both state actors and private persons where they apply to them. Article 12(1) provides as follows;

"(1) The fundamental human rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agencies and, where applicable to them, by all natural and legal persons in Ghana, and shall be enforceable by the Courts as provided for in this Constitution.

Therefore in Ghana the principles for balancing the interests of the employee as against the worker will apply to private employment situations.

In the recent case of **Trusz V UBS Reality Investors Ltd (SC 19323**) delivered on October 13, 2015, the Supreme Court of the State of Connecticut held that the provisions of the First Article s.4 of the Constitution of the State of Connecticut affords a wider freedom of speech than the First Amendment of the Federal Constitution of the United States and would apply to private employers.

Consequently, in Ghana both private employees as well as public employees are entitled under article 20(1) of the 1992 Constitution to the protection of their free speech regarding matters of public interest in the workplace subject of course to the right of their employers to maintain discipline and protect their operations in appropriate circumstances.

Matters that will amount to legitimate public interest in the context of an employee making a speech about affairs of his employer would be matters that expose the employer's unlawful conduct such as tax evasion, official dishonesty or other deliberate wrong doing that threatens community/public welfare and public health and safety. If the

speech reflects a mere policy difference with the employer or matters of employee grievance at the workplace, such speech will not be protected.

My Lords, the question to be answered in this case is; has the appellant shown that the conversation she had with Nana Yaw Yeboah was addressing a matter of legitimate public concern? I answer this question in the affirmative. At paragraph 3 of appellant's affidavit in support of her motion in the High Court she deposed as follows;

"3. That as is deposed to in my original affidavit and confirmed by Respondent's own affidavit in opposition, the comments I made in the impugned telephone conversation secretly recorded without my consent were a representation of my views on the restructuring policy undertaken by the Respondent and how the financial resources of the Respondent (a state-owned bank) are being applied, particularly with regard to the payment of a colossal amount of Two Hundred and Twenty-Eight Thousand Ghana Cedis (GH₵228,000.00) in the year 2010 to the Managing Director as Christmas bonus."

From the above deposition the appellant exercised her free speech as to the prudent utilisation of resources of the bank which is owned by the people of Ghana since it is the Government of Ghana which is the shareholder. The public concern in the matters raised by appellant was made evident by respondent itself flooding the media with publications justifying whatever was happening at the bank. The oath of secrecy respondent made the appellant to swear to cannot be sacrosanct. It must yield in the face of justification rooted on constitutional provisions as the Constitution itself has provided for in article 12(2). In the circumstances I will allow the appeal on grounds 3 and 4.

Under grounds 5, 7 and 8 of the Appeal the appellant is seeking the enforcement of her contract of employment. However, as I have held above, the appellant having chosen the legal vehicle for redress of her grievances she cannot midway bring in matters that do not fit into her chosen vehicle.

My Lords, haven allowed the appeal on the ground that the appellant's speech on matters about her employer was justified on grounds of public concern, which I have explained in the body of the judgment, I do not intend to delay the court's time by considering in

detail the remaining ground of appeal. Suffice it to say that Article 23 of the Constitution refers to administrative official and administrative bodies but the relationship between the parties in this case was regulated by a contract of employment. Consequently there is no merit in ground 6 of the appeal which is grounded on article 23 so I dismiss same.

CONCLUSION

In effect, I allow the appeal in part and grant the appellant only relief (i), to the extent relating to appellant's right to free speech, and relief (vi) stated in her motion paper filed in the High Court. For the reasons explained above I dismiss the other relieves prayed for by the appellant. I have upheld the appellant's claim for damages for the breach of her fundamental right just as this court did in the case of **Awuni v WEAC (supra)**. In that case it was held that where it was found by the court that a party had violated constitutional rights damages are payable to discourage such conduct and assuage the feelings of the victim. On the facts of this case the respondent took a calculated risk and proceeded with the termination of the employment of the appellant despite the case she filed in court seeking to restrain them on ground that it would be in violation of her fundamental rights to do so. Under the circumstances damages of GHS100,000.00 are appropriate.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

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

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