IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2020

CORAM: YEBOAH, CJ (PRESIDING)
ANSAH, JSC
DOTSE, JSC
APPAU, JSC
PWAMANG, JSC
MARFUL-SAU, JSC
KOTEY, JSC

CIVIL MOTION
NO. J7/18/2019

14TH JANUARY, 2020

THE REPUBLIC

VRS

HIGH COURT, GENERAL JURISDICTION 6, ACCRA

EX PARTE: ATTORNEY-GENERAL ..... APPLICANT/RESPONDENT

EXTON CUBIC GROUP LIMITED ..... INTERESTED PARTY/APPLICANT

RULING

YEBOAH, CJ

My Lords, this application was heard on the 14/01/2020 when by a majority of five with two dissenting, we dismissed the application and reserved our reasons. The facts leading to this application for review appear not to be in dispute.

The applicant, Exton Cubic Group Limited, filed a motion for judicial review before His Lordship Justice Ackaah-Boafo at the High Court, Accra, to quash a decision of the Minister for Lands and Natural Resources dated the 4th of September 2019. The basis for invoking the High Court's jurisdiction for judicial review was that the Minister responsible for Lands and Natural Resources had interfered with the Applicant's mining concession activities in Kyekyewere, Mpasaaso and Kyereyase in the Ashanti Region. The applicant had contended that it had successfully applied for and obtained a mining lease for bauxite exploration from the Government of Ghana and the said Minister had unfairly written a letter purporting to cancel the lease the Government of Ghana had already granted. Injunctive reliefs were also sought from the court to restrain the Government of Ghana from interfering with the rights of the Applicant. Briefly, the High Court granted the application on the 8th of February 2019 in a lengthy ruling. The respondents to this review application, the Attorney-General, also resorted to Judicial Review in the nature of certiorari to quash the ruling of the High Court. The application filed in this court was granted on 31st of July 2019 and the said ruling of the High Court was quashed. In the orders made pursuant to the grant of certiorari, the court declared the lease for the bauxite exploration as pro tanto void and of no effect whatsoever.

The applicant on 30th of August 2019 filed this instant application to invoke this court's review jurisdiction to review part of the ruling of the 31/07/2019. The Respondent herein opposed the application and has raised procedural objections on the basis that the review jurisdiction is inappropriate as no convincing grounds has been canvased before us to review the decision of the ordinary bench.

In arguing the application, Mr. Osafo-Buabeng, learned counsel for the Applicant pressed on us virtually the same arguments which had been considered in the ruling of the ordinary bench. We think that in review applications extreme care should be taken

to avoid a situation whereby parties, especially the applicant, repeats the same arguments which the ordinary bench had already considered thereby inviting the review bench to sit on the application as if reviews are appeals.

It must be pointed out that reviews and appeals are in law conceptually different and the distinction should always be recognized as such. Appeal is an application to a higher (appellate) court to correct an error which may be legal or factual. In Ghana, all Civil Appeals are by way of rehearing and the appellate court may subject the whole record to review and may even make new findings of facts in deciding the appeal. Review application is very different and in the High Court it is heard by the same judge unless otherwise, due to prevailing circumstances it is impossible for the court to be so constituted by the same judge. In the Supreme Court, a review application is determined by an enhanced bench and the rules of court has determined the basis for it under rule 55 of CI 16. In reviews before the Supreme Court, we are limited to only the judgment and it would be in exceptional cases that this court may call for the record. Indeed, this is sparingly the case in reviews. This court has in several cases insisted that reviews are not appeals and should not be resorted to, to be allowed to reargue the appeal. It appears that several decided cases like Quartey v Central Services CO. Ltd [1996-97] SCGLR 398, Mechanical Lloyd v Nartey [1987 – 88] 2GLR 598, Afranie v Quarcoo [1992] 2 GLR 561 and more recently Arthur no.2 v Arthur No.2 [2013-2014] I SCGLR 569 re-stated the position of this court through our illustrious brother Dotse JSC, who, in trying to put an end to this long-standing problem stated the guidelines as follows:

"We are therefore constrained to send a note of caution to all those who apply for the review jurisdiction of this court in respect of rule 54(a) of CI 16 to be mindful of the following which we set out as a road map. It is neither an exhaustive list nor one that is cast in iron such that it cannot be varied depending upon the circumstances of each case.

i. In the first place, it must be established that the review application was filed within the timelines specified in rule 55 of C.I. 16.

ii. That there exists exceptional circumstances to warrant a consideration of the application.

iii. That these exceptional circumstances have led to some fundamental or basic error in the judgment of the ordinary bench.

iv. That these have resulted into miscarriage of justice simpliciter.

v. The review process should not be turned into another appeal against the decision of the ordinary bench.

It is only when the above conditions have been met to the satisfaction of the court that the court should seriously consider the merits of the application."

It is not in doubt that the application before this court was filed within the statutory period and it is therefore properly before us. The next hurdle for the applicant to surmount is the existence of exceptional circumstances. This is what the applicant must satisfy this court that it exists. In the view of the court, exceptional circumstances may differ in every review application. It, however, behoves an applicant to demonstrate that the existence of the exceptional circumstances has led to a fundamental or basic error which should be corrected. That explains why review applications which unearth jurisdictional errors are usually granted.

In this application, the so-called errors which learned counsel for the Applicant canvassed against the ruling of the ordinary bench, even if they are errors at all, are not errors which are fundamental or basic ones resulting in any miscarriage of justice in any manner or form apparent in the ruling.

Care must be taken when we are called upon to review decisions of the ordinary bench on the grounds that errors appear in the ruling or judgements. In this application, a careful reading of the ruling of the learned High Court judge reveals very clearly that he proceeded to catalogue several statutory infractions which were mandatory pre-conditions for granting the lease but were ignored by the applicant for no apparent reason(s) whatsoever.

As the learned judge himself formed the opinion that the lease suffers from statutory infractions, this court was baffled how the same learned judge allowed all those serious statutory infractions which were ignored to stand and delivered a ruling affirming the lease regardless of the infractions.

We have given serious thought to this application in view of its importance but we remind ourselves of what this court said in the case of Internal Revenue Services v Chapel Hill Ltd. [2010] 827 at 850 per Date-Bah JSC, thus:

"*I do not consider that this case deserves any lengthy treatment. I think that the applicant represents a classic case of a losing party seeking to re-argue its appeal under the garb of a review application. It is important that this Court should set its face against such endeavor in order to protect the integrity of the review process. This Court has reiterated times without number that the review jurisdiction of this Court is not an appellate jurisdiction, but a special one. Accordingly, an issue of law that has*

been canvassed before the bench of five and on which the court has made a determination cannot be revisited in a review application simply because the losing party does not agree with that determination. This unfortunately is in substance what the current application before this Court is."

If care is not taken, this court will always use the review jurisdiction to re-open the case as an appellate court and this should always be avoided.

We are satisfied that the applicant herein has not demonstrated in the least that the requirements in the Arthur No.2 case, supra have been satisfied in this application to warrant our invocation of this Court's review jurisdiction.

We accordingly refused to grant the application as unmeritorious for the above stated reasons.

ANIN YEBOAH
(CHIEF JUSTICE)

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

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

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

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

APPAU, JSC:-

This is a review application filed by the interested party/applicant, Exton Cubic Group Limited, praying this Court to review its previous decision dated 31st July 2019 in which it quashed an order of the High Court made in favour of the applicant dated 8th February, 2018. I have thoughtfully read the impugned decision of the ordinary bench of this Court per my worthy brother Marful Sau, JSC and have carefully noted the reasons behind the decision of the Court in quashing the ruling and orders of the High Court. Regrettably, however, I do not share the views and conclusions reached by my eminent brothers in that decision. I think the ordinary bench, with the greatest respect to the panel, committed a fundamental error, which occasioned gross miscarriage of justice, when it based its decision on an *obiter* finding of the trial High court made without jurisdiction.

I proceed, mindful of our firm position that a review application is not a second appeal and that certain criteria must be satisfied before invoking that jurisdiction. I am satisfied that the applicant's invitation to us to take a second look at our previous decision is not an attempt to have a second bite at the cherry. As my respected brother Pwamang, JSC has perfectly narrated in an opinion he is about to deliver, the facts of this case present a clear case that calls for the exercise of this Court's powers of review as provided for under article 133 of the Constitution, 1992 and rules 54 (a) and 56 (1) of the Rules of this Court, C.I. 16. I am in total agreement with the views excellently expressed in his ruling and should not have bothered myself to add anything to it since nothing substantial is missing from the views expressed in my brother's ruling. However, I wish to hammer on a few points to demonstrate the serious errors committed by the ordinary bench of this Court in its 31st July, 2019 decision, for which that decision must not be made to subsist but to be subjected to a review.

The matter before the trial High Court

On the 4th of September, 2017, the Minister for Mines and Natural Resources wrote a letter to the applicant revoking three Mining Leases acquired by the applicant in 2016.

The letter was headed: "PURPORTED GRANT OF THREE MINING LEASES DATED 29TH DECEMBER 2016" and the crux of it was that upon scrutiny of the processes leading to the grant of the Mining Leases, the Minister had observed non-compliance with statutory requirements for the grant of valid Mining Leases for which reason the Mining Leases granted to the applicant by the Government of Ghana were invalid and of no effect. By that letter, the Minister thereby revoked the said leases as *void ab initio*. The Minister said he acted on the strength or authority granted him by section 87 of the Minerals and Mining Act, 2006 [Act 703] (herein after referred to as the Act). Being aggrieved by that decision of the Minister, the applicant initiated an application for judicial review in the form of certiorari before the trial High court praying the court to quash the letter of the Minister. The Attorney-General opposed the application and raised objections to the competency of the application.

The reliefs or declarations sought by the applicant in brief were that:

i. *The Minister acted ultra vires his statutory powers when he revoked applicant's Mining Leases;*

ii. *The Minister's decision revoking applicant's Mining Leases was made in breach of the natural justice rule of audi alteram partem.*

iii. *The Minister's decision revoking applicant's Mining Leases was unreasonable as it contravened article 23 and 296 of the Constitution, 1992.*

The gravamen of applicant's case was that although the Minister had the power to suspend or cancel a Mining Lease or a mineral right, that power could only be exercised in accordance with the provisions of the Act; specifically sections 68 (1) and (2) and 69 (1) and (2) and regulation 200 (3) of L.I. 2176. The said provisions mandated that the affected holder of a Mining Lease or a mineral right be first given a written notice and one hundred and twenty (120) days to remedy the breaches complained of. However, the Minister failed to comply with this administrative procedure thereby breaching the statutory provisions and article 23 and 296 of the Constitution, 1992, which guarantee administrative fairness.

The decision of the trial High Court

The trial High Court found as a fact that the Minister did not comply with the statutory provisions contained in the Act. It also found that the Minister did not give the applicant a hearing before writing to revoke the three Mining Leases. Though the trial High court commented on the processes leading to the acquisition of the leases and therefore the mineral rights by the applicant which, in its view, were fraught with irregularities, it held that the Minister had no power or right to unilaterally revoke applicant's leases or mineral right without due process. The court condemned the Minister for failing to comply with mandatory provisions of the Act and went ahead to quash the letter.

The issue before the Supreme Court

When the trial High court quashed the Minister's letter, the respondent also applied to this Court, invoking our judicial review jurisdiction, to quash the trial High court's order made on 08/02/2018. The grounds upon which the respondent invoked our judicial review jurisdiction, inter alia were:

i. The High Court had no jurisdiction to enforce non-existent rights claimed under a purported mining lease which had not been ratified by Parliament in accordance with article 268 (1) of the Constitution and also had failed to comply with statutory provisions;

ii. The proceedings of the trial High court were void as same were in violation of Act 703; and

iii. The High court acted without jurisdiction when it heard and determined the applicant's suit in violation of the mandatorily prescribed provisions of section 27 of Act 703.

The decision of the Supreme Court

The ordinary bench of this Court, relying on the obiter findings of the trial High court that there were irregularities in the processes leading to the execution of applicant's leases, coupled with the fact that Parliament had not yet ratified the said leases, granted respondent's application and reversed the trial High court. The Court's contention was that, the trial court should have dismissed applicant's application to quash the Minister's letter as applicant had no mineral right to be protected. The basis of that holding was that since applicant's mining Leases had not received parliamentary ratification, they were not valid and therefore null and void. According to our brothers on the ordinary bench, after reaching the conclusion that the applicant herein had no mineral right, the High court committed an error of law apparent on the face of the record, when it proceeded to quash the letter written by the Minister to revoke the three leases executed in favour of the applicant.

By this decision, what the ordinary bench meant was that there was nothing wrong with the letter written by the Minister identified as "E1", which revoked, ex-parte, three leases executed between the applicant and the Government of Ghana because on the face of the documents before the court, the applicant had no mineral rights. This was what this Court, per Marful-Sau, JSC, said about the Minister's letter at page 15 of its ruling:

"The Minister's letter which was quashed by the trial court was an administrative measure he took to ensure that the constitution and relevant statutes regulating the grant of the three Mining Leases were complied with. As already observed in this ruling, the Minister's letter recited several infractions of the law committed by the Minerals' Commission in the course of granting the Mining Leases to the interested party. These irregularities were confirmed by the profound findings and holding of the trial court; that being the case, we are of the view that there was no legal basis for quashing the said letter. We think that the Minister, in exercising his oversight

responsibility was enjoined by law, to correct or prevent any wrong or infraction of the law by institutions or agencies under his administrative supervision". {Emphasis mine}

The Court went on; ***"The instant case is one for which the court should not have granted the order of certiorari, in view of the constitutional and statutory infractions committed leading to the grant of the three Mining Leases. Indeed, the trial High Court being a superior court had the inherent power, at the hearing of the application, to declare the three Mining Leases invalid in view of the illegalities that had occurred in the course of acquiring the leases".*** {Emphasis mine)

The ordinary bench, by the above statement, committed two fundamental errors. The first was its holding that the Minister's letter was an administrative measure he took to ensure that the constitution and relevant statutes regulating the grant of the three Mining Leases were complied with. The second was its conclusion that the trial High court confirmed the irregularities and made profound findings and holdings on same.

With regard to the first error, there is nothing on record to suggest in any way that the Minister's letter dated 4th September, 2017 was an administrative measure intended to regulate or sanitize the grant of the three Mining Leases that had already been granted to the applicant as the ordinary bench contended. The purpose of the letter was to revoke the mining rights acquired by the applicant with the acquisition of the three mining leases on grounds of 'nullity', but not to either regularize or sanitize the grant of the three leases. The letter did not request the applicant to rectify any breach or to regularize any lease.

I think there is the need to stress on what the Act says about a ***mineral right***, judging from the arguments advanced by the parties on that term and the holding of the ordinary bench on same. It must be emphasized that from the Act, the acquisition of a mineral right is not dependent on prior parliamentary ratification of either a Mining Lease or a Prospecting Licence, etc. According to section 111 of the Act, **'mineral**

right' means; ***"a reconnaissance licence, a prospecting licence, a mining lease, a restricted reconnaissance licence, a restricted prospecting licence or a restricted mining licence"***. A person or body which has been granted a Mining Lease by the Minister is a holder of a mineral right, from the definition under section 111 of the Act. A 'mineral right' is therefore a vested right that is acquired upon the grant of a licence or a Lease by the Minister. Under the law or the Act, the Minister can either suspend or cancel a mining lease or a mineral right on the basis of the provisions in the empowering Act. This power of the Minister to suspend or cancel either a mineral right or a mining lease is provided under sections 68 and 69 of the Act. The two sections provide:

68. Suspension and cancellation of a mineral right

(1) *The Minister on the recommendation of the Commission may suspend or cancel a mineral right if the holder*

(a) *fails to make a payment on the due date, whether due to the Republic or another person required by or under this Act,*

(b) *becomes insolvent or bankrupt, enters into an agreement or a scheme of composition with creditors, or takes advantage of an enactment for the benefit of debtors of the holder or goes in liquidation, except as part of a scheme for an arrangement or amalgamation,*

(c) *makes a statement to the Minister in connection with a mineral right which the holder knows or ought to have known is materially false, or*

(d) *for a reason becomes ineligible to apply for a mineral right under this Act.*

(2) *The Minister* ***shall****, before suspending or cancelling a mineral right under subsection (1), give notice to the holder and shall in the notice, require the holder to remedy a breach of the condition of the mineral right within a reasonable period, being not less than one hundred and twenty days in the case of a mining lease or restricted*

mining lease or sixty days in the case of another mineral right and where the breach cannot be remedied, to show cause to the reasonable satisfaction of the Minister why the mineral right should not be suspended or cancelled".

69. Suspension or cancellation of mining lease or restricted mining lease

***"(1)** Without limiting the scope of section 68, the Minister may on the recommendation of the Commission suspend or cancel a mining lease or a restricted mining lease if the holder has failed other than for a good cause, for a period of two years or more, to carry out any or a material part of the holder's programme or mineral operations.*

***(2)** The Minister shall before suspending or cancelling a mining lease give notice to the holder and shall in the notice, require the holder to remedy the breach within a reasonable period, being not less than one hundred and twenty days, and where the breach cannot be remedied, to show cause to the reasonable satisfaction of the Minister why the mining lease or restricted mining lease should not be suspended or cancelled."*

In the instant case, the respondents did not demonstrate in any way that before the Minister wrote Exhibit 'E1' to revoke the three mining leases of the applicant, the Minister did comply with the very law that empowered him to so act. Subsections (2) of both sections 68 and 69 are mandatory and the Minister was enjoined by law to comply with it; i.e. to give notice to the applicant of his intended action. His failure to comply with the provisions of the Act constituted a fundamental error as it amounted to; failure to comply with statute, for which his letter must not be made to stand as the trial High court rightly ruled. Apart from contravening the Act, the Minister again contravened articles 23 and 296 of the Constitution, 1992 when he failed to deal fairly with the applicant by not giving it a hearing. The ordinary bench therefore committed a grievous error when it concluded that because of alleged irregularities identified by the trial High Court judge in his ruling with regard to the acquisition of the three Mining leases, the applicant had not acquired any mining rights.

This was what the ordinary bench said: ***"From the discussions above, we find that the interested party had no mining rights in the three Mining Leases it purportedly acquired from the Minister for Lands and Natural Resources. The people of Ghana acting through their representatives in Parliament never ratified the three Mining Leases as required by the Constitution, thus denying the interested party any right in the said Leases. We shall conclude on ground (1) that the trial High Court committed error of law patent on the record, when he granted the certiorari application brought before it by the interested party herein."*** I strongly hold that the above decision of the ordinary bench is fundamentally flawed as it contravened our previous decision in the case of **MARGARET BANFUL v ATTORNEY-GENERAL; Writ No. J1/7/2016, dated 22/06/2017 (Unreported),** which became popularly known as the Gitmo 2 case. My brother Pwamang, JSC has dilated on this dichotomy of reasoning in these two similar cases and I do not find it worthwhile to add more.

The second fundamental error committed by the ordinary bench was its finding or conclusion that the trial High court made a profound finding that the applicant had no mining right because of statutory infractions and the fact that they had not received parliamentary ratification. It is unfortunate the highest court of the land came to this conclusion because, the trial High Court never made any such profound finding. Even if the trial High court made any such finding, it cannot be described as profound, but rather peripheral, if the ruling of the High court is considered as a whole. The undeniable fact is that the issue as to the validity or otherwise of the three Mining Leases was not an issue before the trial court. This being the case, the trial court was very cautious when it made inroads into that terrain knowing very well that it had no jurisdiction to do so. After going on a tirade as to the validity or otherwise of applicant's Mining Leases, which was not the *res* before him, the trial Judge pronounced himself as follows:

"Now, despite the opinion expressed on the lease and the lack of Parliamentary ratification it is important to reiterate that in so far as the

instant application is concerned, it is the legality or otherwise of the Minister's letter being Exhibit 'E1' which is at stake and not as indicated above, the collateral question which is the process that led to the signing of the mining leases. I am not called upon to pronounce judgment on how the lease was acquired in this application. The jurisdiction of this court in this matter is controlled by the nature by which it was invoked, which is by a judicial review and not a writ of summons or appeal. Under the latter two options, the circumstances of the acquisition would be properly investigated in a merits-based review where all the actors including the former Minister of Lands and Natural Resources and officials of the Minerals Commission could be heard. This is because even if my view is that the right thing was not done, I cannot impose my view without hearing from those who participated in the process in the instant application". {See page 39 of ruling}

The trial court did not end its caveat with the above words but continued as follows: ***"It is also important to note that even though I have found that based on the materials filed and presented in this application there is a clear case of non-compliance with statute; in the opinion of the court the respondent Minister herein is not clothed with the jurisdiction to determine the legality or otherwise of the lease. It is the preserve of a court of competent jurisdiction which ought to make the determination. I hold the respectful opinion that the structures of the state as set out in the Constitution ought to be respected at all times and therefore, judicial functions or legal adjudication should be the preserve of judges or, persons who are marked by legal training and they should be allowed to do what they are mandated to do through design or the rule of law. It is a fundamental rule from which I would not, for my part, sanction any departure. As it is, the Minister arrogated to himself the role of an adjudicator even if, as it seems, he legitimately believed that he was protecting and/or preserving the state's***

resources……In my respectful opinion, the Minister could not, by the stroke of a pen, declare as invalid the leases without due process".

With this caveat to its previous comments in its ruling as quoted above, how could the ordinary bench say that those comments made without jurisdiction, were profound findings of the trial court? From the plethora of legal authorities that my brother Pwamang, JSC digested in his ruling, it is quite clear that, what this Court places emphasis on in allowing review applications are:

(a) *Compelling and exceptional circumstances dictated by the interests of justice, and*

(b) *Exceptional circumstances where the demands of justice made the exercise extremely necessary to avoid irreparable damage.*

{See AMIDU (NO. 3) v ATTORNEY-GENERAL & 2 Others [2013-2014] SCGLR 606 at 617}

So long as the three leases were signed and executed by the Minister's predecessor, they were presumed to have been lawfully and officially executed until the contrary was established or determined in a merit based trial. The Minister could not, under any law, revoke the three leases on the grounds that they were a nullity because they contained irregularities, when there was no judicial declaration to that effect and again when he failed to accord the applicant opportunity to show cause why the said leases should not be cancelled as provided for under the law as quoted above.

Again, commenting on the *audi alteram partem* rule, a breach of which is also a ground for judicial review, the trial judge held: ***"I am not convinced that the applicant was given a hearing before the Minister made the impugned decision. Therefore, I have no difficulty in holding that the respondent fell into error in not giving hearing to the applicant. Again, I would add that even if the statute was not complied with, the applicant by signing the lease acquired a vested right and therefore it ought to have been heard. The lack of hearing is***

a breach of the audi alteram partem rule of the rule of natural justice." The High court judge could not be faulted on this holding as every indication points to the fact that the applicant was not given any hearing in anyway before the Minister wrote Exhibit 'E1' revoking applicants three leases.

The ordinary bench, in its decision, ignored all these important findings of the trial court with regard to the legal import of Exhibit 'E1' and relied mainly on the trial court's finding made obiter and without jurisdiction and concluded, albeit erroneously, that the applicant had no mineral rights notwithstanding the possession of the three Mining Leases. If the applicant had no mineral rights at the time the Minister wrote the letter (Exhibit 'E1'), then what was the purport of the letter? What was the Minister revoking?

Effect of the decision of the Ordinary Bench.

It is interesting to note that the decision of the ordinary bench did not touch on the legality or otherwise of Exhibit 'E1', i.e. the Minister's letter which revoked the three mining leases of the applicant without any due process. The Court did not say anything about the claim that Exhibit 'E1', (i.e. the letter) did not conform to statute and that it breached the mandatory provision, i.e. section 68 (2) of the Act. Whilst the ordinary bench, in its decision at page 15-16 stated: ***"The law as we have known it must be applied in all cases, with an objective of achieving justice and good governance in our constitutional dispensation"***, it proceeded to make a decision that goes contrary to that statement. The undeniable fact in this case is that the applicant went to the trial High court because the Minister (respondent) in issuing his letter (Exhibit 'E1'), failed to comply with articles 23 and 296 of the Constitution, 1992 and the provisions of Act 703. The charge was that the Minister, in writing to revoke applicant's leases without any previous query or warning, did not comply with due process and administrative fairness mechanisms contained in the laws, especially subsection (2) of section 68 of Act 703, regulation 200 (3) of L.I. 2176 and the right to be heard as enshrined under article 23 of our Constitution. Our brothers on the ordinary bench were silent on the constitutional and statutory breaches as rightly found by the

trial High court judge, but unfortunately were quick to hold that since the trial judge also found that the applicant's leases contained irregularities and also had not received parliamentary ratification at the time, he should have declared the leases null and void as the applicant thereby acquired no mining right and therefore had no right to be protected. Our brothers forgot to appreciate that the issue before the trial High Court had nothing to do with the validity or otherwise of applicant's three mining leases, the acquisition of which vested in him a mineral right by operation of law. The issue before the trial High court, rather, was about procedural impropriety on the part of the Minister in terminating the applicant's rights as a mining Lease holder and therefore a mineral right holder.

Clearly the impugned decision of the ordinary bench contravenes our earlier decision in **AWUNI v WAEC [2003-2004] 1 SCGLR 471** that, when a matter comes under article 23 of the Constitution, it is not the substance of the matter that is at stake but whether the procedural requirements have been complied with and it won't matter even if the person alleging a breach of right to administrative justice is guilty or has committed an illegality patent on the record. Article 23 of the Constitution, 1992 reads:

"**23**. **Administrative justice**

Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal".

Commenting on the import of article 23 of the Constitution in the *Awuni case* (supra), Sophia Akuffo, JSC (as she then was) opined as follows: ***"In my view, the scope of article 23 is such that there is no distinction made between acts done in exercise of ordinary administrative functions and quasi-judicial administrative functions. Where a body or officer has an administrative function to perform, the activity must be conducted with, and reflect the qualities of fairness, reasonableness and legal compliance. I will not venture***

to give a comprehensive definition of what is fair and reasonable, since these qualities are dictated by the circumstances in which the administrative function is performed. At the very least however, it includes probity, transparency, objectivity, opportunity to be heard, legal competence and absence of bias, caprice or ill-will. In particular, where, as in this case, the likely outcome of an administrative activity is of a penal nature, no matter how strong the suspicion of the commission of the offence, it is imperative that all affected persons be given reasonable notice of the allegations against them and reasonable opportunity to be heard, if the objective of article 23 is to be achieved".

The fact that the Minister, in the performance of his administrative functions failed to correctly apply the law (i.e. the Act) is depicted by the contents of his letter, in which he made reference to a wrong provision which did not apply to the applicant. The Minister said he was revoking the leases of the applicant upon the authority granted him by section 87 of the Act. Unfortunately for him, section 87 applies to only small scale mining but not applicant who is not a small scale miner. Section 87 of the Act empowers the Minister to revoke a licence granted under section 82 (1) of the Act which applies to small scale miners only. Section **81** of the Act reads: ***"Section 82 to 99 apply to small scale mining only".*** So clearly, the basis of the Minister's letter under contention was a non-sequitur. It had no basis or grinding and therefore had no force of law behind it. He relied on a provision of the law that was inapplicable to the applicant to unlawfully revoke applicant's leases.

Has the applicant satisfied the conditions for a review?

An exceptional circumstance is established where there is the appearance of denial or absence of justice. In the case of **ARTHUR (NO 2) v ARTHR (NO. 2) [2013-2014] SCGLR 569 at pp. 579-580** (also cited by my brother Pwamang, JSC), my respected brother Dotse, JSC set out what he described as the 'road map' for applicants invoking our review jurisdiction. One of the criteria in the road map was exceptional

circumstances that have led to some fundamental or basic error in the judgment of the ordinary bench and which has occasioned a miscarriage of justice. Here is a case where a Minister with oversight responsibilities over mining, from his own showing, derived his authority from a wrong law, to deprive the applicant who is a citizen of Ghana, of a constitutional and statutory right. If the highest court of the land has mistakenly ruled on a critical issue like the validity or otherwise of Leases lawfully executed between the applicant and the Government of Ghana on the basis of a non-positive finding by a trial court made without jurisdiction, and without the applicant being given any opportunity to defend the Leases, then what other option is open to the applicant to seek redress other than a review? There is the need to ask these few questions and demand answers:

1. What is the effect of the Court's opinion on the validity of applicant's three Mining Leases when that matter has never been brought before any court (including this Court) for determination on the merits?
2. Is the decision a ratio to the effect that any mining lease that has not received Parliamentary ratification is void and therefore a nullity?, or
3. Is the decision an obiter without any authority behind it to bind lower courts?
4. How would the public regard the decision?

In my view, the decision of the ordinary bench was made ***per incuriam*** and therefore amenable to judicial review. As the decision stands now, the applicant has no avenue to seek redress on the ex-parte pronouncement by the Court that his leases were void when he was not given any opportunity to defend them. There is no other option for him than this review option and that constitutes gross miscarriage of justice. Our review jurisdiction empowers us to ***"correct mistakes, misstatements and misapplications of the law"*** in our previous decisions as opined by Hayfron-Benjamin, JSC in **AFRANIE II v QUARCOO [1992-93] GBR 1451** and we should not shirk our responsibility in doing so now.

The Minister was performing an administrative or executive function when he addressed Exhibit 'E1' to the applicant. The law that empowered him to so act has a clear mandatory provision which states that before the Minister could write such a letter, he should first of all give notice to the applicant to remedy the breach complained of or where the breach could not be remedied, to show cause to the Minister's satisfaction why the mineral right should not be suspended or cancelled. The Minister did not comply with any of the mandatory requirements provided under the law but relied on an inapplicable provision of the law and went ahead to make a judicial pronouncement revoking applicant's Leases without giving it any opportunity to be heard. It was for this reason that the trial court granted applicants application. By this decision of the ordinary bench reversing the trial High Court, the Court has sanctioned an illegality. The decision has granted immunity to public/administrative officials from liability in the event where they act contrary to due process requirements of article 23 of the Constitution. It has also denied the applicant its constitutional right to administrative justice as well as statutory rights stipulated under section 68 (2) of Act 703 and regulation 200 (3) of L.I. 2176.

Based on the above analysis and the sound reasons advanced by my able brother Pwamang, JSC in his ruling, I am in agreement that the applicant has done more than what is necessary to win our sympathy in the grant of his review application. We shall be treading on dangerous grounds, as the highest court of the land, if we give blessing to an arbitrary act or conduct of an agent or officer of the State, as demonstrated by the Minister of Mines in his letter in contention, which is more of a judicial pronouncement than a regulatory measure. If we give blessing to such an arbitrary act by allowing the decision of the ordinary bench to stand, we would be reneging in our duties as the guardians of our laws. As the fountain of justice, we should exhibit genuine willingness for introspection so that where it becomes apparent or obvious that a fundamental error has occurred, we will be prepared to admit and correct it upon review. I hold the view that a fundamental error that occasioned gross miscarriage of justice, has occurred by our decision of 31st July, 2019. I will therefore grant the

application, reverse the decision of the ordinary bench and restore the decision of the trial High court which rightly quashed the letter of the Minister as constitutionally and statutorily defective.

Y. APPAU

(JUSTICE OF THE SUPREME COURT)

PWAMANG, JSC:-

My Lords, the applicant before us has invoked our review jurisdiction seeking a reversal of the ruling of the ordinary bench dated 31st July, 2019, by which ruling the court, in exercise of our supervisory jurisdiction, quashed the decision of the High Court, Accra which was in favour of the applicant.

Though decisions of the ordinary bench of the Supreme Court are final, the Constitution, 1992, nonetheless provided by Article 133 thereof that the court may review any decision made or given by it. This provision is a recognition of the fact that, while it is in the public interest that litigation should end at some point, the requirements of doing substantial justice demands that even final courts should be able to correct themselves since to err is human. However, in order not to undermine the finality of decisions of the ordinary bench of the apex court and also to prevent abuse of this review jurisdiction, only two grounds have been provided by Rule 54 of the **Supreme Court Rules, 1996 (C,I,16)** as the only ones upon which the review jurisdiction may be exercised. Rule 54 is as follows;

54. The Court may review any decision made or given by it on any of the following grounds-

(a) exceptional circumstances which have resulted in miscarriage of justice;

(b) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decision was given.

The instant application has been brought on the ground that exceptional circumstances exist in the case and the exceptional circumstances have resulted in a miscarriage of justice. But in construing exceptional circumstances, which same term was used in the enactments on the review jurisdiction of the Supreme Court that preceded C.I.16, the court has consistently kept narrow the situations that would amount to exceptional circumstances.

In **Quartey v Central Services Co. Ltd. [1996-97] SCGLR 398,** the Court stated the legal position of review applications as follows:

"A review jurisdiction is a special jurisdiction and not an Appellate jurisdiction, conferred on the court, and the court would exercise that special jurisdiction in favour of an Applicant only in exceptional circumstances. This implies that such an applicant should satisfy the court that there has been some fundamental or basic error which the court inadvertently committed in the course of considering it's judgment and which fundamental error has resulted in gross miscarriage of justice.

Earlier in **Ababio & Ors v Mensah [1989-90] 1 GLR 573** Per Taylor J.S.C. the Court stated the following as instances of exceptional circumstances;

(a) all cases of void orders come under the Mosi v. Bagyina principle and applicants affected by such orders are entitled ex debito justitiae to have the orders set aside. Lapse of time does not affect the right and indeed the court itself is entitled suo motu to set aside such orders when it has the opportunity to do so;

(b) all decisions of the Supreme Court given per incuriam by inadvertently overlooking a statute or a binding decided case which would have indicated a contrary decision in circumstances where the ratio decidendi does not support the decision and where there is no material which can be legally used as a ratio to support the said decision, are

candidates for the exercise of the review power if they have occasioned a miscarriage of justice; and

(c) any other Supreme Court decision having exceptional circumstances which demonstrably indicates [as in the instant case] that the said decision is not legally right and has actually occasioned a miscarriage of justice, is liable to be reviewed on the Fosuhene principle.

See also **Arthur (No.2) v Arthur (No.2) [2013-2014] 1 SCGLR 569 and Agyekum v Asakum Engineering and Construction Ltd [1992] 2 GLR 635. Afranie II v Quarcooo [1992] 2 GLR 561**

Stringent as these grounds are, in the unanimous judgment of the court in **Amidu v Attorney-General, Waterville & Woyome (No 2) [2012-2014] 1 SCGLR at page 654 Dotse JSC** quoted with approval the following passage from an article by S Y Bimpong-Buta on "the Supreme Court and the Power of Review" in **(1989-90) 17 RGL 210 at pages 210-211;**

"However, if the review jurisdiction of the Supreme Court is to serve as a genuine procedural mechanism which enables our Supreme court to correct and reverse a basic and fundamental error inadvertently committed, then their Lordships in the Supreme Court must (with the utmost respect) be prepared to admit that such a mistake had been made and graciously correct it when the golden opportunity offers itself as was the case in Ababio v Mensah.."

In fact, prior to that, in **Ribeiro v Ribeiro (No 2) [1989-90] 2 GLR 10 at 143 Francois JSC** had said as follows;

"Our attempts to halt the abuse of the review jurisdiction of this court by frowning upon attempts to turn the exercise into another avenue for appeal must be matched by an equally genuine willingness for introspection. And where a fundamental error has occurred, to be prepared to admit and correct it otherwise the exercise of review would

only amount to a confirmation of previous stand and the mere endorsement of a majority view."

My Lords, we are therefore required to critically and dispassionately examine the arguments of the applicant against the decision of the ordinary bench of this court and satisfy ourselves whether a basic and fundamental error was committed or not, and if so whether it has occasioned a miscarriage of justice.

The relevant facts of this case are quite straight forward. The applicant was granted three mining leases in December, 2016 by the Minister for Lands and Natural Resources who is so authorized by the **Minerals and Mining Act, 2006 (Act 708)**. In January, 2017 there was a change of government and the new Minister wrote a letter to the Applicant dated September, 4, 2017 to the effect that, upon assuming office as the new Minister he scrutinized the processes leading to the grant of the leases to the Applicant and observed that; 1) the processes did not comply with statutory requirements for grant of a mining lease, and 2) the leases had not been ratified by Parliament as required by the Constitution, therefore the leases are " invalid and of no effect" so he revoked them.

The Applicant, being aggrieved by the revocation of its leases, filed a Motion in the High Court against the Minister for Judicial Review praying the High Court to quash the letter of revocation on the grounds that; 1) It was not given a hearing on the matters alleged against it in the Minister's letter which it is entitled to on account of the provisions of Articles 23 and 296 of the Constitution, 1992, Section 68(1) of **Act 708**, Reg 200 of the **Minerals and Mining (Licensing) Regulations, 2012, (LI 2176)** and plain Natural Justice principles. In its affidavit in support of its Application in the High Court, the Applicant denied that there had been non-compliance with statutory provisions leading to the grant of the leases. 2) on absence of parliamentary ratification, the Applicant stated that it did not make the leases invalid and of no effect and, in any case, it was the responsibility of the Minister to submit the leases to Parliament for their consideration for ratification.

The High Court judge in his ruling held, that even assuming the grounds alleged by the Minister for revocation were established, the Minister does not have the jurisdiction to determine whether the leases are invalid and of no effect. That jurisdiction is conferred by the Constitution on the judiciary. He found as a fact, that the Minister did not accord the Applicant a hearing before revoking the leases and that it constituted a breach of the Applicant's right to administrative justice guaranteed by Articles 23 and 296 of the Constitution. The High Court judge accordingly quashed the letter of the Minister.

In the High Court, the Minister argued, that on the face of the documents before the court, it is a fact that the statutory processes required for a lease to be granted were not complied with in the case of the Mining Leases in question so he was right in revoking them. In his ruling, the judge answered this argument of the Minister by saying that since there is a denial of those matters, he needed to take evidence and hear both parties before he can make a finding whether the processes were complied with or not. He said his jurisdiction which had been invoked was for him to enforce Applicant's right to administrative justice and that jurisdiction, on the authority of several Supreme Court cases, did not involve a determination of the merits of the grounds that led the Minister to revoke the leases. Then in a surprising about-face, and a clear obiter, (the judge stated categorically in his ruling that it was not the main issue before him) the High Court judge commented on the documents that were on record and took the view, that; 1) there had been breaches of statutory requirements for the grant of mining leases, and 2) the absence of parliamentary ratification is fatal and creates no mining right in the Applicant. He stated that these observations not withstanding, the Applicant was entitled to a hearing and he would uphold that right by quashing the Minister's letter.

The Attorney-General, who represented the Minister in the High Court, felt dissatisfied with the quashing order of the High Court Judge and filed a Motion in the Supreme Court for certiorari to quash the quashing order of the High Court. The ordinary bench of the Court acceded to the prayer of the Attorney-General, not on the ground of want

or excess of jurisdiction on the part of the judge as she argued, but on the ground that the High Court judge committed an error of law patent on the face of the record.

This is what the ordinary bench stated at pages 14-15 of the ruling as amounting to a patent error of law.

"We are of the considered opinion that the three Mining Leases of the interested party were granted in violation of constitutional and statutory provisions as demonstrated in this ruling…..Clearly, therefore the interested party herein from the record had no mining right that was enforceable and the High Court judge was right when he found so in his ruling of 8th February 2018. However, on founding that the interested party had no mining right in law, it was wrong for the High Court to have purported to protect the very non-existent right. Indeed, having found that the interested party had no mining right, it was illogical and absurd for the same court to grant the certiorari application, which for all intents and purposes amounted to protecting the three Mining Leases with their illegalities. In the circumstances, we find that the High Court Judge seriously committed error of law patent on the record, which was very fundamental and the said ruling ought to quashed."

To begin with, the finding by the trial High Court that the leases were granted in violation of constitutional and statutory provisions was patently wrong and I will demonstrate that shortly from the record. Consequently, I am of the opinion that the ordinary bench by endorsing that finding committed a similar error so the foundation upon which they sought to base their power to grant the certiorari is non-existent. But before I discuss those findings which in reality go to the merits of the Minister's letter that originated this case, let me point out what, in my view, was a fundamental and basic error committed by the ordinary bench with regard to the supervisory jurisdiction of the Supreme Court conferred by Article 132 of the Constitution. This court's jurisdiction to quash a decision of a Superior Court on ground of error of law has been delineated in a number of case with the *locus classicus* being the case of **Republic v Court of Appeal; Ex parte Tsatsu Tsikata [2005-2006] SCGLR 612.** Incidentally,

the ordinary bench quoted this decision but in my view, they misapplied it. I hereby quote the relevant portion of Wood JSC's (as she then was) opinion;

"The clear thinking of this court is that, our supervisory jurisdiction under article 132 of the 1992 constitution, should be exercised only in those manifestly plain and obvious cases, where there are patent errors of law on the face of the record, which errors either go to jurisdiction or are so plain as to make the impugned decision a complete nullity."

She explained further that:

"...It stands to reason then that the error(s) of law as alleged must be fundamental, substantial, material, grave or so serious as to go to the root of the matter. A minor, trifling, inconsequential or unimportant error which does not go to the core or root of the decision complained of; or, stated differently, ***on which the decision does not turn*** *would not attract the courts supervisory jurisdiction."*

My Lords, it bears stating that a judge is said to have committed an error of law where the judge misconstrues an enactment, misunderstands a principle of law or misapplies an enactment or a principle of law in the course of coming to judgment in a case. The mere fact that a court comes to what is considered a wrong conclusion in a case does not, per se, amount to an error of law, not to talk of a serious one patent on the record. The error of law that may found certiorari is an error committed in respect of the legal basis provided by the court for its decision. What Wood, JSC must be understood to be saying in the above quoted passage, and that is the law, is, that it is not every patent error of law by a superior court that can found certiorari. If it is proved that a judge has committed a patent error of law, then the Supreme Court must go a step further to determine if the error goes to the jurisdiction of the court, if it does not, then is the error fundamental, substantial or does it go to the root of the impugned decision. Does the decision turn on that error?

I must say, with utmost diffidence to the ordinary bench, that in their ruling they did not point to any misconstruction or misapplication of any principle of law by the High Court judge. The judge said, in view of his jurisdiction that had been invoked, he was not called upon to determine the merits of the grounds set out in the letter of the Minister and that the issue for his determination was whether the Minister in the exercise of his powers breached the rights of the interested party to administrative justice. Did the judge err on this point of law? If he did that would amount to an error of law leading to his decision but since he did not, then there is no lawful ground for the ordinary bench to quash his ruling, only because he is said to have exercised a discretion and reached a conclusion which they would not have reached if they sat on the case in the High Court. In law, the principles upon which the exercise of discretion by a judge may be overturned by a higher court are well-settled and it is done through an appeal. See **Ballmoos v Mensah [1984-86] 1 GLR 724.** But, even on the facts of this case where the right to a hearing is claimed on the basis of provisions of the Constitution and statute, I doubt very much if upon the court finding that the Applicant was indeed not given a hearing, the High Court had a discretion to refuse to quash the letter of the Minister.

The second point is, that the root of the decision of the High Court judge in this case was his holding that, irrespective of whatever merits there may be in the allegations contained in the Minister's letter, the Applicant before him was entitled to be given a hearing on those allegation before the Minister revoked its leases. Is there any error of law in that regard? None at all and none was alleged by the Attorney-General. In fact, the High Court judge fortified his stand by reference to **Ex parte Salloum [2011] 1 SCGLR** 574 where Anin Yeboah, JSC (as he then was) said as follows;

"Equally so, if a party is denied his right to be heard, as in this case, it should constitute a fundamental error for the proceedings to be declared a nullity. The Courts in Ghana and elsewhere seriously frown upon breaches of the audi alteram partem rule to the extent that no matter the merits of the case, its denial is seen as a basic fundamental error which should nullify proceedings made pursuant to the denial."

From the above observations, it becomes plain that the ordinary bench in this case granted the certiorari to quash the ruling of the High Court by relying on a ground that is completely unknown to our law and is inconsistent with the binding precedents of this court. In so deciding, they committed a basic and fundamental error that ought to be corrected by review.

The High Court judge's comments on the merits of the grounds contained in the Minister's letter were made without jurisdiction as he wandered outside the issue that was placed before him for determination. In **Izenkwe v. Nnadozie (1953) 14 W.A.C.A. 361 at p. 363** the principle on the jurisdiction of a court in a case was stated thus:

"In the first place it is a fundamental principle that jurisdiction is determined by the plaintiff's demand and not by a defendant's answer which, as in this case, only disputes the existence of the claim, but does not alter or affect its nature. In other words, ordinarily it is the claim and not the defence which is to be looked at to determine the jurisdiction."

The Applicant went to the High Court to enforce its rights to administrative justice and the fact that the respondent in his answer said that what the Minister stated in his letter were true did not change the nature of the jurisdiction of the High Court that had been invoked. Where a court decides a question that has not been remitted to it then the court exceeds its jurisdiction and its decision on that question is a nullity. See **Anisminic v Foreign Compensations Commission [1969] 2 AC 147.** Therefore, the ordinary bench ought to have disregarded those comments by the judge which are null and void.

The ordinary bench appears to take the view that the High Court by quashing the revocation letter of the Minister, in essence, protected mining rights of the Applicant. This view of the ordinary bench is as if the High Court judge by his decision authorized the Applicant to go and carry on mining on the basis of the impugned leases. This position can only result from a mistaken reading of the ruling of the High Court,

because the judge specifically refused to grant the ancillary reliefs prayed for by the Applicant, including an injunction against the Minister, and stated that the grant of those reliefs would have had the effect of enabling the Applicant to carry out mining operations on the land covered by the leases.

It is a fundamental principle of law that where a decision is quashed by certiorari, the quashing does not necessarily decide anything on the merits but paves the way for another decision to be taken in compliance with due process. Therefore, the true import of the quashing of the letter of revocation by the High Court in this case was for the Minister, if he so desired, to give a hearing to the Applicant on the grounds alleged in his letter, and after the hearing, to take a fresh decision. That is what democracy, transparency and good governance are about, patiently going through due process before taking decisions that affect any person in the Republic. That is what this court said eloquently in **Awuni v West Africa Examinations Council [2003-2004] 1 SCGLR 471.** The High Court judge relied on this authority in upholding the constitutional and statutory rights of the Applicant but the ordinary bench appears to tell him he was wrong in this case. In my view, that is an inadvertent fundamental error committed by the ordinary bench and it needs to be corrected by review of their decision.

I now turn to the supposed finding that the Mining Leases were granted in violations of constitutional and statutory violations. In the first place, we need to be clear in our minds that there has not been an allegation that in granting the mining leases, any provision of the Constitution was violated. What is at stake in this case is that the leases have not received ratification by Parliament as required by Article 268 of the Constitution, which is a different question. Legally put, that question is; is a mining lease that is yet to receive parliamentary ratification invalid and of no effect? The Minister by his letter held that such a lease is invalid and of no effect. The High Court judge ruled that the Minister does not have authority to determine that question which is reserved by the Constitution for the Judiciary. I entirely agree with the High Court

judge, but I am quick to add that the Constitution has further reserved that question for only the Supreme Court to determine.

The High Court judge hazarded an answer himself though he knows he has no such jurisdiction, but he claimed that the Supreme Court on previous occasions determined similar questions so, by way of application of the Constitution (which is different from interpretation and enforcement) he was of the opinion that the absence of parliamentary ratification was fatal so the leases created no rights in the Applicant "as of now". When the High Court judge added "as of now" in his ruling, that defeated his statement that the absence of the ratification was fatal. But the truth of the matter is that, to my knowledge, the Supreme Court had not previously interpreted Article 268 of the Constitution, 1992 and no such decision of the Supreme Court on a provision that is ***in pari materia*** with the Article was referred to by the judge.

Interesting enough, the ordinary bench did not undertake an interpretative exercise in respect of Article 268 of the Constitution and consider previous binding decisions of the court on provisions *in pari material* with the article. It is most probably, that they reminded themselves that the constitutional interpretation and enforcement jurisdiction of the court had not been invoked. In fact, the settled practice of the court when its exclusive constitutional interpretation and enforcement jurisdiction is invoked is to constitute a panel of not less than seven members to hear and determine the case. That notwithstanding, by quashing the decision of the High Court and restoring the letter of the Minister, the ordinary bench appear to endorse the holding of the Minister that a miming lease that has not received ratification by Parliament is invalid, of no effect and void. That appears to be so because court said that, *"The people of Ghana acting through their representatives in Parliament never ratified the three Mining Leases as required by the Constitution, thus denying the interested party any right in the said leases."* In my understanding, this can only be an obiter and not a binding holding on the question whether a mining lease that has not received parliamentary rectification is invalid and of no effect.

Nonetheless, it appears that the High Court judge and the ordinary bench of the court assumed that the absence of parliamentary ratification made the mining leases of the Applicant to be void. There is a slight reference by the High Court judge to decisions of the Supreme Court on Article 181(5) of the Constitution. That reference was misplaced and if anything at all, those decisions to not say that failure to obtain parliamentary approval makes a transaction void. By Article 181(5) of the Constitution on international business transactions, the framers of the Constitution provided for the legal consequences that would follow absence of parliamentary approval. By Article 181(3), an international business transaction that does not receive parliamentary approval "shall not come into operation". In the **Waterville & Woyome case,** the declaration sought by Martin Amidu was that the impugned agreements were inoperative and that was the relief the court granted.

Where an enactment provides for a condition to be complied with in mandatory language without stating the legal consequences of non-compliance with the mandatory condition, it is up to a court with jurisdiction to construe the enactment and determine the legal consequences that shall flow from such non-compliance. See the House of Lords case of **R v Sonje and another [2005] 4 All ER 321.**

The case which states the Supreme Court's interpretation and enforcement of a provision of our Constitution that is *in pari materia* with Article 268 is **Margaret Banful v Attorney-General, Writ No. J1/7/2016, Judgment delivered on 22/6/2017;** In that case, the Supreme Court was invited to declare as null and void the international treaty on the Yemeni terror suspects that were sent to Ghana by the United States government (known as the Gitmo Two), and to order their repatriation by the government for the reason that the treaty on the basis of which they were brought into Ghana did not receive parliamentary ratification as required by Article 75(2) of the Constitution, 1992. The Court, upon a consideration of the relevant legal principles and the facts of the case, concluded that the treaty indeed required parliamentary ratification. But the Court did not declare the treaty null and void and order the repatriation of the Yameni nationals. Instead, the court gave the government of Ghana

three months within which it should have the treaty ratified by Parliament, failing which they were to be repatriated. The government did so, the treaty was ratified by Parliament and the Yamenis remained in Ghana. This precedent is ordinarily binding on the Supreme Court until the court departs from it.

Therefore, without such departure or an exercise of the interpretative and enforcement jurisdiction of the Supreme Court which distinguishes the case of ratification of mining leases from ratification of international treaties, the Supreme Court cannot hold that absence of ratification of a mining lease has the legal consequences of it being void. Therefore, in my humble opinion, the assumption by the ordinary bench that the Mining Leases in this case are invalid, of no effect and void constitutes a fundamental and basic error that has been committed since it is *per incuriam* the decision in the **Margaret Banful case.**

The fact of the matter is that, from the record before us, it is apparent that by conduct, the government of Ghana has not previously treated mining leases without parliamentary ratification as invalid and of no effect. In the letter that the Minerals Commission wrote to the Applicant, Exhibit 6 in the High Court, it requested the Applicant to ensure that it obtained operating permits from the Minerals Commission, EPA and the Forestry Commission before undertaking any activities or operations on the land. Nothing was said about Parliamentary ratification. Secondly, attached to the processes in this review application as Exhibit "D" is a writ of summons issued by SORY@LAW on behalf of Hon Alhassan Sayibu Suhuyini and Ernest Henry Norgbey, both Members of Ghana's Parliament, listing about 35 mining companies, including notable foreign mining companies such as Anglogold Ashanti and Newmont Ghana, which are alleged to have been mining for years on the basis of mining leases that have not received parliamentary ratification, yet the government of Ghana has not stopped them. That is the more reason why if the Minister for Lands and Natural Resources or any person genuinely wants to enforce Article 268 against the Applicant, an indigenous Ghanaian mining enterprise, this court must insist that the person properly invokes the

interpretative and enforcement jurisdiction of the Court so the Applicant can be properly heard on the question before the Court can pronounce on it.

Whereas in the **Margaret Banful** case this court directed that the Treaty be referred to Parliament for ratification, the ordinary bench in their ruling stated that the Applicant was required by Act 708 to submit certified copies of the Mining Leases to the Minister for onward transmission to Parliament but it failed to do so. From the record, we are not informed if the Minister, as required by Section 68(1) of Act 708, notified the Applicant of its failure to provide the certified copies and also if the Minister complained about that in his affidavit in the High Court. If he did, the question the Minister should answer is; if he did not have certified copies of the Mining Leases, what did he scrutinize and what leases did he purport to declare as invalid and of no effect? The Supreme Court ordinarily seeks to do substantial justice to all persons who appear before it and trivialities should not be allowed to defeat justice in the case of this Applicant.

Then there is the claim that there were breaches of statutory provisions leading to the grant of the mining leases. As I maintained earlier in this opinion, the merits of those claims are irrelevant and the comments of the High Court on them are a nullity. The particulars of the alleged violations were denied by the Applicant in the High Court. The High Court judge in his ruling correctly held that, by law, he is required to conduct a hearing in appropriate proceedings invoking his jurisdiction for that purpose before he can determine whether there were violations or not. Nonetheless, since the ordinary bench substantially based their decision on those allegation, I will make a brief comment on them. The High Court judge said there had been non-compliance with the time frames stated in the statutes for recommendations by the Minerals Commission and grant of mining lease by the Minister. The High Court judge was palpably wrong. If a statutes provides 60 days within which an action may be taken, if the action is taken on the second day, it does not breach the statute. The critical fact in this case was that, processes were gone through by the Applicant at Minerals Commission and Mining Leases were signed by the Minister for Lands and Natural Resources in its favour. In

that position, the law requires that the Applicant ought to be given a hearing before the Mining Leases are revoked.

In sum, I am of the considered opinion that, based on the fundamental and basic nature of the errors committed by the ordinary bench as pointed out above, there are exceptional circumstances in this case. The decision of the ordinary bench is inconsistent with binding precedent of the court on grounds for the exercise of our supervisory jurisdiction. The decision is also *per incuriam* our decision in the case of **Margaret Benful** supra on the legal status of an agreement that has not been ratified by parliament.

The question that remains is whether the Applicant has established that it has suffered miscarriage of justice. The errors pointed out and explained above have undoubtedly caused miscarriage of justice to the Applicant who has been wrongly denied right to a hearing which it is entitled to as guaranteed by the Constitution and recognized by binding decisions of this court. There can be no dispute on this aspect of the case.

The Attorney-General in opposing this application for review submitted that the Applicant has rehashed arguments that it made before the ordinary bench of the court but they did not find favour with them so there can be no basis for a review. This is the usual response of a party opposed to a review application but on previous occasions this court has reviewed decisions upon a realization that the ordinary bench did not sufficiently consider a matter that was raised before them thereby leading them to commit a basic and fundamental error.

In the review judgment of the Court in **Hanna Assi (No 2) v Gihoc (No 2) [2007-2008] 1 SCGLR 16,** the ordinary bench had rejected arguments by the Applicant that he was entitled to a declaration of title to land even though he did not claim such a relief by way of counterclaim. In granting the review, the review bench stated that the ordinary bench was mistaken in rejecting the argument so they reversed them and granted the declaration of title though same was not endorsed in a counter-claim. Then in **Amidu (No 2) v AG Waterville & Woyome (No) (supra**), the Applicant for

review argued that the ordinary bench did not critically read a statement of claim filed in the High Court that he attached to his affidavit and despite the fact that the third respondent argued that the document had all along been before the ordinary bench and they should be deemed to have taken it into account in coming to their decision, the review bench stated that an error had been committed on account of failure by the ordinary bench to properly read that statement of claim. At page 646 Dotse, JSC, who wrote the unanimous opinion of the court said as follows;

"It is within this remit that we find that the ordinary bench has committed an error in not critically linking the statement of claim of the third respondent to the opaque writ of summons."

Then at page 650 he further stated as follows;

…if the correct attribution of the pleaded facts had been made, perhaps, the conclusion reached by the court would have been different."

So, the fact that an argument had been previously made before the ordinary bench has never been a disqualifying factor restraining the court from exercising its power to review its decision and reverse itself. The critical consideration is whether there has been a basic and fundamental error that has occasioned a miscarriage of justice towards the applicant. As explained above, in my view, those conditions exist in this case and the Court ought to review the decision of the ordinary bench.

In Conclusion, I am of the firm view that the ordinary bench committed basic and fundamental errors in their ruling by deciding in a manner inconsistent with precedent that is binding on them and we ought to, in humility, review their ruling, set same aside and re-instate the High Court order quashing the Minister's Letter. The Application for review is accordingly granted.

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

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