IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: PWAMANG JSC (PRESIDING)
DORDZIE (MRS.) JSC
TORKORNOO (MRS.) JSC
PROF. MENSA-BONSU (MRS.) JSC
KULENDI JSC

CIVIL APPEAL
NO. J4/51/2021

15TH JUNE, 2022

THE REPUBLIC

VRS

1. SOCIAL SECURITY AND NATIONAL INSURANCE TRUST	**.....**	**1ST RESPONDENT/RESPONDENT/ RESPONDENT**
2. ATTORNEY–GENERAL	**.....**	**2ND RESPONDENT/RESPONDENT/ RESPONDENT**
EX-PARTE ERNEST THOMPSON	**.....**	**APPLICANT/APPELLANT/APPELLANT**

TORKORNOO (MRS.) JSC:-

Background to the case

Article 141 of the 1992 Constitution reads:

Supervisory jurisdiction of the High Court

141 The High Court shall have supervisory jurisdiction over all lower courts and any lower adjudicating authority; and may, in the exercise of that jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its supervisory powers.

Rule 55 (1) of the High Court (Civil Procedure) Rules CI 47 also provides:

Order 55 – Application for Judicial Review

Cases appropriate for application for judicial review

1. An application for
   a) an order in the nature of *mandamus*, prohibition, c*ertiorar*i or *quo warranto*; or
   b) an injunction restraining a person from acting in any public office in which the person is not entitled to act; or
   c) any other injunction,

   shall be made by way of an application for judicial review to the High Court.

Pursuant to the two provisions set out above, the Interested Party/Appellant/Appellant (referred to hereafter as Appellant) applied to the High Court to quash by an order of Certiorari two documents issued by the 1stRespondent Trust.

According to the case of the appellant, the 1st Respondent had entered into contract with two businesses to provide an integrated electric resource for the operations of the business of the 1st Respondent between November 2012 and 2016. It was called the Operational Business Suite (OBS).

The Appellant was appointed as the Director General of the 1st Respondent Trust in May 2013, some months after the contract was signed. In February 2017, his employment as the director general of the 1st Respondent was terminated. He was therefore the chief executive of the 1st Respondent during the period of operationalization of the OBS.

According to appellant, he was invited by the Economic and Organized Crime Office (EOCO) to assist with investigations into the implementation of the OBS. He received a letter from EOCO (attached as exhibit ET1 to the affidavit in support of the application) titled SPECIAL AUDIT REPORT ON OPERATIONAL BUSINESS SUITE (OBS) PROJECT FOR THE PERIOD NOVEMBER 2012. Exhibit ET1 was short and stated:

'*We write to you to obtain your comments on the following observations of the above mentioned subject matter*'.

The subject matter for his comments was attached as Exhibit ET2. Appellant provided his responses to the material contained in exhibit ET2 which was tendered and attached to his application as exhibit ET3.

Appellant was later charged with various criminal offences in relation to the OBS, and he tendered and attached the charge sheet as exhibit ET4. It is his case that in the course of the prosecution process, he was given as part of the documentation that the prosecution intended to rely on to prosecute him, the two documents that he prayed the high court to exercise judicial review over. He attached them to his application as exhibits ET5 and ET6.

The cover memo to Exhibit ET5 described it also as '*SPECIAL AUDIT REPORT ON OPERATIONAL BUSINESS SUITE (OBS) PROJECT FOR THE PERIOD NOVEMBER 2012'*. It is a detailed audit report.

Exhibit ET6 is titled '*SUPPLEMENTARY REPORT ON THE SPECIAL AUDIT REPORT ON OPERATIONAL BUSINESS SUITE (OBS) PROJECT FOR THE PERIOD NOVEMBER 2012*'.

According to the case submitted by the appellant, until his prosecution, he had not seen a copy of ET5 or ET6. He said that '*unknown to him, and without giving him a hearing, the 1st Respondent had conducted an audit and prepared an audit report with the same title as exhibit 'ET1' which is the 25 (twenty five) page document which EOCO sent to me for my comments*'. According to him, exhibit ET5 is radically different from exhibit

ET2 in that it is a complete audit report numbering 101 pages together with supporting documents.

He submitted to the high court that this audit report made adverse findings of a criminal nature against him and recommendations in respect of the adverse findings.It is his case that that the failure of the auditor to contact him or to give him a hearing before arriving at adverse findings and recommendations against him, only for him to be charged with criminal offences on the basis of audit reports that he had not seen before, constitutes a violation of his fundamental human rights guaranteed under Article 23 of the Constitution. He urged that it is a legal right for an auditee to be given the opportunity of being heard before a final audit report is issued, and that from records available and attached as exhibit ET7, 1st Respondent had given another auditee the opportunity to be heard on an audit involving that company.

Regarding exhibit ET6, he alleged that though it purports to comment on his earlier response sent to EOCO (exhibit ET3), it included new issues that did not form part of exhibit ET2, which new issues constituted adverse findings against him though he had not been given an opportunity to be heard on that new issue. The new issue was that he should be required to provide copies of board approval for a change request of US9,536,652.20 (nine million five hundred and thirty six thousand, six hundred and fifty two United States dollars, fifty cents) that was made to the OBS contract.

His grounds for seeking the Order of Certiorari therefore were that:

a) 1st Respondent refused to give him a hearing before preparing exhibits "ET5" and "ET6" and that refusal to hear him before preparing and concluding the audit report is contrary to the rule of natural justice that requires that he should have been given a hearing before a decision was given against him.
b) The failure by 1st Respondent to give him a hearing before making the adverse findings against him renders the recommendations and adverse findings against him null and void.

c) 2nd Respondent, altogether aware that he was not given a hearing before the adverse findings contained in the audit report (exhibit "ET5") and supplementary audit report (exhibit "ET6") were made, has proceeded to act on same and has circulated and, distributed these two (2) reports, and act which is unlawful.

On prohibitory injunction, his grounds for seeking the order are that:

d) The recommendations and adverse findings made against him in the reports, "SPECIAL AUDIT REPORT ON THE OPERATIONAL BUSINESS SUITE (OBS) PROJECT" together with "THE SUPPLEMENTARY REPORT ON THE SPECIAL BUSINESS SUITE (OBS) PROJECT FOR THE PERIOD NOVEMBER 2012 – MAY 2017" being null and void by virtue of the breach of the rules of natural justice and more especially breach of the *audi alteram partem* rule, the presentation, circulation, tendering, acting and or usage of same in any shape or form by 1st and 2nd Respondents is unlawful.

The Reliefs sought by the Appellant are

a. An Order of Certiorari directed at 1st and 2nd Respondents to bring up to the Honorable Court for the purpose of being quashed the the Special Audit Report on the Operational Business Suite (OBS) project for the period November 2012-May 2017.
b. An Order of Certiorari directed at 1st and 2nd Respondents to bring up to this Honorable Court for the purpose of being quashed the supplementary report on the Special Audit Report on the Operational Business Suite (OBS) project fort the period November 2012-May 2017.

c. An Order of prohibitory injunction restraining 1st and 2nd Respondents from presenting, circulating, tendering, acting, and or using the said Special Audit Report on the Operational Business Suite (OBS) project for the period November 2012 – May 2017 and the said supplementary report on the Special Audit Report

on the Operational Business Suite (OBS) project for the period November 2012 – May 2017.

The Appellant's case in the high court

The appellant presented that the courts have always held that it would employ the remedy of certiorari as a tool in aid of justice to correct defects in administrative, quasi-judicial and judicial decisions. Such defects include acts that constitute breach of the rules of natural justice. He supported his arguments by citing several cases.

He cited the case of **Republic v High Court (Financial Division) Accra; Ex Parte Xenon Investment Co Limited (Financial Intelligence Centre, Interested Party) 2016-2017 GLR 244**as supporting the position that whenever a party is denied the opportunity to be heard prior to a decision being taken against him, that denial constitutes a breach of the rules of natural justice. He urged that it is also a violation of the constitutional directive to administrative bodies and officials to act fairly and reasonably and comply with the requirement imposed on them by law under Article 23 of the 1992 Constitution as determined by this court in **Awuni v West Africa Examinations Council [2003-2004]2 SCGLR 471**

Appellant alleged that the audit reports in ET5 and ET6 had made very damning and adverse findings against him and they ought to be quashed by certiorari order because the appellant was not given the opportunity to be heard before the two reports were prepared. He prayed the court to furtherrestrain the Respondents by injunction from presenting, circulating, tendering, and or acting on the basis of the two exhibits.

1st Respondent's response

The 1st Respondent denied all the legal positions urged by appellant and pointed out thatthe law required that an administrative body take a decision before a cause of action for judicial review may arise. 1st respondent urged that it had not taken any steps or decisions against the appellant on the basis of exhibit ET5. There is also no

evidence that 1st respondent had used exhibit ET5 for any purposes. There is therefore no decision or act of the 1st respondent which could be the subject of judicial review.

1st respondent went on to urge that it is EOCO, being an authorized body to conduct investigations on financial or economic loss to the state, that requested a copy of exhibit ET5 and the 1st Respondent had to cooperate as directed by **section 70** of the **Economic and Organized Crime Office Act, 2010 (Act 804)** by submitting same to EOCO. To the extent that EOCO sought the comments of the appellant on exhibit ET2,and the appellant provided the comments in the form of exhibit ET3, the audi alteram partem rule of natural justice that obligated the State to hear the appellant before any prosecution, had been complied with.

1st Respondent citedthe decision in **Republic v Ghana Railway Corporation Ex Parte Appiah & Another 1981 GLR 752 in**which the learned trial Judge Twumasi had this to say on page 758 of the report: *'the core idea implicit in the principle of natural justice: 'no one ought to be condemned unheard' is simply that a party must have reasonable notice of the case he has to meet and be given the opportunity to make his statement in explanation of any question and to answer any arguments put forward against it.'*. He reinforced this submission with reference to the decision of this court in **Awuku-Sao v Ghana Supply Co Ltd [2009] SCGLR 710**. The opinion of the court per Adinyira JSC was to first acknowledge the position that even in purely administrative actions, there is the constitutional obligation under Article 23 of the 1992 Constitution to act fairly and reasonably and to comply with requirements imposed by law. The court went on to affirm that where an audit had set out adverse findings against a chief executive, and there was no contract for the establishment of a disciplinary procedure that the decision maker (the board of directors in that case) was obliged to follow before dismissal on the basis of the adverse findings, what was essential for determination of the question whether the duty to abide by the rules of natural justice had been complied with, was simply an opportunity to the auditee to provide responses and comments on the adverse findings within the draft audit report.

That opportunity to react to the charges laid out against him in the draft audit report constituted a hearing that discharged the requirements of natural justice

2nd Respondent's response

2nd Respondent urged that the supervisory jurisdiction of the high court under article 141 is a very limited one. It said that the courts have jealously guarded against an invocation of the jurisdiction unless it was directed at errors which are so serious that they make the relevant decision or action a nullity. This would include decisions taken in excess of jurisdiction or without jurisdiction or valid authority.

Citing the decisions in **Republic v High Court (Financial Division) Accra; Ex Parte Xenon Investment Co** cited supra, and **Awuni v West African Examinations Council** cited supra,the 2nd Respondent agreed that it has always been understood that decisions taken in breach of principles of natural justice or denial of the right to natural justice constitute decisions taken without jurisdiction.

However, it was their submission that the legal position being submitted by appellant was not tenable because he had not been able to show any rule of law that obliges the 1st Respondent to invite him or give him an opportunity to be heard before an audit report is prepared and concluded.

Further, on a reading of all the cases cited by appellant to ground his application, it would be seen that the court's jurisdiction was invoked against decisions that affected the rights of the party who sought the court's intervention. However in the case of the appellant, the documents he sought the orders of certiorari against did not contain decisions that affect his rights.

The state also urged that where it could be shown that an opportunity to be heard had been given to a party, the courts held that that opportunity was enough to satisfy the audi alteram partem rule. This was the decision in **Awuku-Sao v Ghana Supply Co Ltd** cited supra**.**And by exhibit ET1, ET2 and ET3, the appellant had been given an

opportunity to be heard on exhibit ET5 before the commencement of the criminal prosecution that he was complaining about. The prosecution itself afforded a further opportunity to be heard on the audit reports.

Regarding the ability to make an input to the preparation of exhibit ET5, 2nd respondent submitted that being an internal audit report, and with the appellant out of the employ of the 1st respondent at the time that the report was being done, he could not have been invited to comment on the matters within the report.

It was also the submission of the 2nd respondent that auditors are experts, and their reports do not require the input of the subjects of the report. Being experts, the reports of auditors are not binding and may be accepted or rejected by the recipient of the reports, including a court. They cited the decision in **Feneku v John Teye [2001 – 2002] SCGLR 985 at 1004** in support of this principle of law

The 2nd respondent also urged that a distinction needed to be made between the use of an audit report in administrative action and the use of the same report in a criminal action when it came to the application of principles of natural justice. According to 2nd respondent, when the findings in an audit report forms the basis for any punitive measure taken by administrative officials or bodies against the subject of the report, he is required by the rules of natural justice to be given a hearing or opportunity to be heard before the punitive action is taken. This is the situation that formed the basis of the decision in the **Awuku-Sao** case. When the same report forms the basis of a criminal action, the commencement of the prosecution is not a punitive measure because the accused person is innocent until proven guilty. The prosecution process allows the auditee/accused person to provide their side of the story. The case of the appellant for both certiorari and prohibitory injunction was therefore misconceived.

Time for filing Application for Judicial Review

The Respondents also urged that the application for judicial review was incompetent becauseit was filed out of time. **Order 55 (3) (1) of CI 47** directs that an application for judicial review '*shall be made not later than six months from the date of the*

occurrence of the event giving grounds for making the application'. The appellant had been given exhibit ET1 and ET2 in 2017 and he filed the application in February 2019.

Appellant resisted these submissions on the lateness of filing the application by urging that he was seeking orders against exhibits ET5 and ET6 which were fundamentally different from exhibits ET2 and those two documents came to his attention in October 2018. The receipt of these two documents were the occurrence of the event giving grounds for making the application.

Decision of the High Court

The high court determined that the application was competent because the event on which the application was premised was the date that appellant first became aware of exhibit ET5. This was after October 2018 because exhibit ET5 was different from exhibit ET2 and there was no way the appellant could have known that exhibit ET2 was culled from exhibit ET5.

The learned trial judge agreed with appellant's submission that the application of the audi alteram partem rule of natural justice was cardinal to the description of any administrative action being deemed reasonable and fair, as stated in **Awuni v West African Examinations Council** cited supra

She however disagreed with the appellant on his case for stated reasons. It was the view of the trial judge that first, the position of the law was that the rules of natural justice are applicable to adjudicating tribunals and administrative bodies that make decisions affecting rights of other persons. She cited inter alia, the decision of this court in **Aboagye v Ghana Commercial Bank [2001 – 2002] SCGLR 797** in support of that position.

She emphasized that the rule applies only where a person is entitled to be heard because of a right they have. As such, where there is no right to be heard, there cannot be a breach of the right to be heard.

She noted that the plethora of cases cited by the parties all showed that some decision of sorts which had affected the rights of parties were taken prior to the submission of a case to court.

In the case of the **Awuku-Sao** case cited supra, thedismissal was the decision and action taken on the basis of the report. The **Awuku Sao** case therefore did not support a principle of law that persons subject to an audit report became entitled to a right to be heard on the report itself while it remained in draft form, without more. It was her considered opinion that '*there is no rule of law that mandates an affected person to be given an opportunity to comment on issues raised in the course of an auditing process*'.

In juxtaposing **Awuku Sao** with the current action, the evaluation of the trial court was that 1st respondent was not even in a position to have taken adecision affecting the appellant's rights because the appellant had left its employ by the time the report was submitted to the head of the institution. In the circumstances, the reports in exhibits ET5 and ET6 did not contain decisions, but opinions, and so they were not amenable to the orders of certiorari.

The trial judge also evaluated the two documents as not containing any sanctions against the applicant. She also noted that in any event, the 1st respondent did not have power to levy sanctions against the applicant, because, as already stated, he was out of its employment.

She held the two documents to be opinions of experts and standing on the decision in **Sasu v White Cross Insurance Co Ltd, 1960 GLR 4 at pages 5 and 6**thatan expert opinion does not relieve a judge from the responsibility of forming an opinion from the totality of evidence, she held that they were not binding even on the judge in the criminal trial. She refused the application.

FIRST APPEAL

The appellant appealed the decision of the high court on the primary ground that having found that the appellant was not given a hearing or opportunity to be heard on

the impugned exhibits ET5 and ET6 before the trial, the trial judge committed an error of law when she dismissed the application for certiorari and mandatory injunction.

Again, the trial judge had erred when she held that there is no rule of law that mandates that an affected person ought to be given an opportunity to comment on issues raised in the course of an audit. Third, having found that exhibits ET5 and ET6 contained adverse findings and recommendations against the appellant, her refusal to quash exhibits ET5 and ET6 and prohibit their use by Respondents was erroneous in law.

The court of appeal agreed with all the grounds for the decision of the trial court. In asking itself the nature of cases that merit the issue of a judicial review order, the court of appeal said on page 32 of their judgment that in their considered opinion, '*it is when the error apparent on the face of the record is so fundamentally flawed, or the error is so serious to have occasioned a grave miscarriage of justice, that its continued existence is an affront to the cause of justice. Like canker, that error must be dealt with swiftly*'

The court of appeal joined the trial court in concluding that the 1st respondent had not taken any step or decision against the appellant on the audit report. Thus, 1st respondent had taken no step that could be said to be in breach of the rules of natural justice. It was their opinion that neither the 1st respondent nor EOCO had violated the audi alteram partem rule and went on to say that even if the audit team breached the audi alteram partem rule at all, the mischief if any, was cured by the invitation from EOCO to the appellant to respond to the issues raised in the audit report.

The court of appeal endorsed the position that an audit report is merely an opinion expressed by an auditor and is not binding on any court of law. It also held that the audit team's findings in the report were neither an illegality (in breach of law),irrational (without reasonableness) nor were the team engaged in any procedural impropriety that ought to invite an order of certiorari to quash the audit reports. Neither was there a reason to accede to the call to issue an injunction order.

It dismissed the appeal. The appellant has appealed to the Supreme Court on the following grounds of appeal.

GROUNDS OF APPEAL TO THE SUPREME COURT

i. The learned Judges committed error of law when they refused to allow Appellant's appeal and held that 1st Respondent did not violate the *audi alteram partem* rule.

   Particulars of error of law

   a) 1st Respondent breached the *audi alterem partem* rule by not giving Appellant a hearing as required by law before it (1st Respondent) prepared and concluded exhibits ET5 and ET6.

ii. The learned Judges erred when they held that even if the *audi alterem partem* rule was breached, the mischief was cured by the Economic and Organized Crime Office (EOCO).

iii. The learned Judges erred by exempting auditors from the *audi alterem partem* rule.

iv. The learned Judges erred when they dismissed Appellant's appeal on the grounds that no decision had been taken against Appellant based on exhibits ET5 and ET6.

v. The learned Judges wrongly exercised their discretion by using irrelevant matters in dismissing the appeal.

vi. The judgment is against the weight of evidence.

Relief sought from the Supreme Court

i. The Judgment of the Court of Appeal dated the 29th day of July, 2020 dismissing Appellant's appeal should be set aside and Appellant's appeal granted.

Consideration

This decision is segregated into two parts. The first part deals with whether the judgment of the courts below were erroneous in law as reflected in grounds (i) to (iii) and the second part deals with whether the judgments were against the weight of factual evidence as covered by grounds (iv), (v) and (v)

Were the decisions erroneous in law?

It must be noted that appellant's primary allegation of error of law is that he ought to have been given a hearing '*as required by law before it (1st Respondent) prepared and concluded exhibits ET5 and ET6)'*. This is what has led him to urge that the judges erred when they '*exempted auditors from the audi alteram partem* rule.

So in essence, the appellant was inviting the courts to hold that if auditors qua auditors,fail to consult every party involved in the project or work that is audited or every party mentioned as having taken decisions in a work or project that is audited, they would have breached law, and those parties would be entitled to the remedy of certiorari to quash the audit report, and injunction to restrain the use of those reports.

Certiorari

The learned author Brobbey JSC in his book **The Law of Chieftaincy in Ghana incorporating Customary Arbitration, Contempt of Court, Judicial Review** ALP 2008 puts the position of the law when it comes to the special reliefs allowed by judicial review succinctly on page 574

'*An application for orders of judicial review is to correct errors of law and not errors of fact*'. It is apt to say that the orders of judicial review are instruments used to excise illegalities from the body of binding directions that are validated by law. Without a foundation of legality, and the presence of power to attach to the rights of any person, the law is not concerned to deal with documents or the words of people – whether experts or non-experts. So to the extent that the work of auditors constitute an examination of factual records to arrive at factual determinations, it cannot be right to

posit as a general principle, that auditors are bound to obtain the positions of persons whose work were considered during the preparation of an audit report.

And why would the courts not bother to abuse the remedy of judicial review to examine errors of fact, if such errors occur as part of the preparation of any document? Because errors of fact may easily be resolved without a recourse to court. The courts themselves do not have jurisdiction to interfere with the lives of citizens unless there has been disturbance of rights.

And I would venture to say that this is why the appellant had all the space to set out his responses to the findings culled out of exhibit ET5 that were sent to him in exhibit ET2. He was correcting the facts from his viewpoint!

So back to the outlay of the law, it is important to set out the known structure of the law in relation to when the courts may be invited to issue an order of certiorari to quash a document or decision.

First it must be a decision that has power to bind or affect rights, whether it emanates from a judicial, quasi-judicial or administrative office. In the present case, the audit report had no power to bind or affect the rights of anyone. It was issued as a fact finding review of the OBS project.

From the heading of exhibit ET5, it is a special audit report by the internal audit department of the 1st respondent as an institution **on a project** (emphasis mine) undertaken the 1st Respondent institution between November 2012 and May 2017. And it was addressed to the head of the institution, the Director General of the 1st Respondent for the 'attention and necessary action' of that person with executive authority. To the extent that it was a report addressed by an internal department to the head of an institution for his consideration, it carried no decision making weight, and does not pretend to.

The internal audit can at best be described as being in the nature of preliminary investigations, as evaluated by the trial judge. As articulated by Kpegah JSC in the

Awuni case (cited supra) on page 498 '…*It is a well-established principle of administrative law that preliminary investigations, like the comparison and scrutiny of the scripts of candidates is not subject to the principles of procedural fairness*'. It is only when a preliminary investigation has been completed and there is evidence available for a decision is to be taken thereon that could affect the rights of the subject individual or group , as in the Awuni case, that the rules of procedural fairness become applicable. To the extent that the internal audit report was not a document that took decisions on the rights of any person, including the appellant, it did not reach the threshold that required an invitation to persons affected by it to provide comments pertaining to findings against them. The head of institution to whom it was addressed could have simply ignored the report, and it is instructive that in the current case, the 1st Respondent itself is not alleged to be the decision maker behind the prosecution, but the Economic and Organized Crime Office.

Second, the decision, order or action ought to have emanated from judicial, quasi-judicial or administrative office within the public law realm. The courts will not allow the jurisdiction of judicial review to be invoked to control decisions or actions emanating from private contracts, or the decisions or actions of private persons or private bodies and institutions.

In Republic v Ghana Industrial Holding Corporation, Ex-Parte Amartey Kwei [1982-83] GLR 510, the government had issued a directive to GIHOC to dismiss unionized workers who went on strike. On praying for an order of certiorari to quash the directive of Government, the court aptly pointed to the plaintiffs on page 514 of the report that '*the order of certiorari was a means of controlling inferior courts and bodies having the legal authority to determine questions affecting the rights of subjects and having a duty to act judicially*.

On the facts of that case, the court pointed out that government was not required to act judicially when it gave those directives to the management of the first respondent corporation to dismiss its unionized staff because what it purportedly embarked on was an executive action.

Again on page 516of the report, the learned high court judge pointed out that the relationship between the workers and the first respondent corporation was one of an ordinary contractual relationship between master and servant. The prerogative remedies are not applied in a case of breach of contract. In **Ex Parte Amartey Kwei**, to the extent that the justiciable rights of the parties in issue, related to their contracts with GIHOC as a commercial entity, those rightscould not be extended to an edict issued by government.

In **Republic v High Court, Kumasi; Ex Parte Mobil Oil (Ghana) Ltd (Hagan Interested Party) 2005 – 2006 312,** this court had this to say:

'*The rules of natural justice are part of the broad area of public law known as administrative law. Administrative law is essentially designed to provide control over public administration. One of its objects is to correct misuse or abuse of public power. There is a special family of public law remedies when public law rights are infringed. These are principally certiorari, prohibition and mandamus. In such cases, judicial review is the appropriate procedure…in the instant case, there is no public law element in the dispute which can give rise to any entitlement to administrative law remedies*'.

This position was reiterated in the decision of this court in **Tema Deverlopment Corporation & Musah v Atta Baffuor [2005-2006] SCGLR** 121 , part of which I summarize here: '*to qualify or be susceptible to judicial review, the decision maker must be empowered by public law to make decisions that if validly made, would lead to administrative action or abstention from action by an authority endowed by law with executive powers, having one or other of the following consequences: either (a) altering rights or obligations of that person which were enforceable against him in private law*;

Third, the nature of decisions that would be amenable to the issue of orders of certiorari have been outlined over and over**. Tema Development Corporation & Musah v Atta Baffuor [2005-2006] cited supra** put out the broad contours as

established over the years as: '*the grounds upon which an administrative action would be subject to judicial review were illegality, irrationality and procedural impropriety*'

So did exhibits ET5 and ET6 contain decisions? The answer is a resounding no. The authors were internal auditors and employees in the internal audit department of the 1st respondent institution who were required to write a report. They took no decision, nor issued any orders capable of attaching the rights of appellant to warrant an application from him to quash the entire report reviewing a project of an institution because they did not consult him in the 'preparation and conclusion' of the report. The action of preparing the internal audit report without first consulting the appellant was not unreasonable, irrational, made without jurisdiction or in excess of jurisdiction.

From the shape of the law therefore, this suit that has travelled over three years and through three levels of court has absolutely no merits.

Whether the judgment of the two courts below are against the weight of evidence

Our opinion is that as much as the grounds of appealare not sustainable in law, they are equally unsustainable on the facts of this case.

It is important to first clarify that the ground of appealthat a judgment is against the weight of evidence requires an appellate court to delve into a fresh consideration of all the questions of facts and their import in law. As pointed out in **Attorney General v Faroe Atlantic Co. Ltd [2005-2006] SCGLR 271** by Wood JSC as she then was on page 307 and 308,when an appeal is based on the omnibus ground that the judgment is against the weight of evidence, the legal issues arising from the facts are to be considered within this general ground of appeal. This omnibus ground of appeal is one of law, because it means in essence is that having regard to the facts available, the conclusion reached, which invariably is the legal result drawn from the facts, is incorrect. This position was reiterated by
Benin JSC in **Owusu Domena v Amoah [2014-2015] 1 SCGLR 790** when he pointed out thatboth factual and legal arguments could be made in support of the

ground of appeal that the judgment is against the weight of evidence, where the legal arguments would help advance or facilitate a determination of the factual matters.

A simple evaluation of the facts on record shows that the appellant's case that exhibits ET5 and ET6 were substantially different from exhibit ET2, is actually not the state of the evidence. The state of facts proves that factually, the appellant was given full information of the fact finding review of the OBS suite through exhibit ET2 and he responded through exhibit ET3, and the distinction appellant seeks to draw between exhibits ET2 and 5 is therefore grossly misconceived.

Comparing Exhibit ET5 and E

When exhibit ET2 and ET5 are compared, the audit report from which EOCO obviously extracted the findings in exhibit ET2 can be nothing more than exhibit ET5. They bear the same name, and the material found in exhibit ET2 were all dealt with in exhibit ET5. Exhibit ET2 did not pretend to be a standalone audit report. Exhibit ET1, the covering letter on exhibit ET2, aptly described it as'observations' from the subject matter of a '*Special Audit Report on Operational Business Suite (OBS) Project for the period November 2012 –May 2017*. A casual reading confirms that it is a body of extracts of 'findings' taken from an audit report with that name, and so it is surprising that appellant will seem to urge that he believed that exhibit ET2 constituted the special audit report, just because the cover letter was headed as such.

Again, when exhibit ET5 is compared with exhibit ET2 that appellant had opportunity to comment on in exhibit ET3, it will be seen that there is no aspect of exhibit ET5 that referred to appellant that was left out in the issues submitted to him for his comments in exhibit ET2. It is therefore extremely curious why the appellant will drive this litigation alleging that exhibit ET5 had material that he never had the opportunity to comment on through what was submitted to him in exhibit ET2.

When casually studied, it will be seen that exhibit ET5 was structured insections thatidentified relevant parts of the OBS project, the cost of relevant parts of the project,

how those parts of the project were executed, the effect of the process used to execute it, recommendations on how to better manage projects in the future, and recommendations on steps that may be taken to correct any part of the project implemented in a defective manner, including recovering any money lost from the project.

On a painstaking reading of all the 32 sub sections of the executive summary of ET5, and 49 subsections on the main body of the report found over 109 pages, it will be seen that appellant is specifically mentioned just five times and in relation to five aspects of the project. All of these aspects of the project were submitted to appellant for his comments in exhibit ET2.

It would seem that to sustain the case that he was surprised by exhibit ET5, appellant has held on to the trial judge's reasons for dismissing the preliminary objection to the competency of the application, when she evaluated that exhibit ET5 is more detailed that exhibit ET2, and contained references such as the appellant giving an oral approval for the rate of GHS4.26 to US$1 to be used instead of the prevailing interbank exchange rate of GHS4.04, and approval of overpayment of GHS929,936.90 to the OBS vendor, which references are not found in exhibit ET2 among others.

My view is that the evidence in the records does not even sustain these observations of the trial judge that appellant latched on to. First,the covering letter referred to a special audit. The covering letter asked for the appellant to comment on 'observations' from the special audit. On the first page of Exhibit ET2, the appellant is informed that '*Below are the* ***findings of the review*** *for your* comments' (emphasis mine). It is after this that the specific findings are submitted to the appellant for his comments.

In the opening words of appellant himself in exhibit ET3, he revealed knowledge of the special audit and the source of the special audit. He states:

'*Your letter to me on the above subject matter refers. In the said letter you requested to have my comments on the observations made* ***by the auditors of SSNIT on the subject matter referred to in the above report****'* (emphasis mine)

So the appellant never displayed lack of knowledge of exhibit ET5 to warrant his usage of that position to commence an action in February 2019 after he had commented on observations and findings from the special audit in October 2017.

The references to appellant found in exhibit ET5 are identified and summarized below and compared with references to the same incidents in exhibit ET2. Where there is no reference to the same incident in exhibit ET2, though found in exhibit ET5, it is easy to see why, on the face of the records.

Overpayment

Exhibit ET2 5 reported that appellant is alleged to have approved overpayment to the vendors for the ICT Security Solution. This isfound in subsection 3.3 (c) on page 13 and 14 of exhibit ET5 (see pages 107 -108 of the Record of Appeal. Another aspect of this alleged over payment through a double contracting on security solutions had been earlier described on page 32 of exhibit ET5 (see page 126 of the record of appeal). It was reported therein that despite the provision of security solutions as part of the OBS main contract, the appellant wrote to seek single sourcing approval from the Public Procurement Agency for 1st Respondent to award another security system contract to Perfect Business Systems. The report goes on to state that on receipt of the approval, the contract was awarded **by the Procurement Manager** after approval by the PPA. It is this contract that resulted in the alleged overpayment of GHS12,673,280.18 to the OBS vendors.

On pages 59 to 61 of exhibit ET5 found on pages 153, 154 and 154 of the record of appeal, it will be noted that the comments of relevant managers being the payment certification manager, payment department manager, and procurement manager on how this overpayment occurred are set out.

ET2: This report on the alleged failure to comply with procurement approval limit in exhibit ET5 was presented to the appellant for his comment in the first finding set out on page 2 of exhibit ET2. Another finding set out on pages 7 and 8 of exhibit ET2 for the appellant's comment was in relation to the acquisition of additional security

solutions through sole sourcing. These are the findings that directly dealt with the alleged overpayment of GHS12,673,280.18.

Oral approval of higher than warranted exchange rate

Another reference to appellant in exhibit ET5 was that he orally approved an exchange rate higher than the prevailing exchange rate for payments to the vendors of the OBS suite during a Change request payment. This is in subsection 3.3 (b) of the Executive Summary found on page 107 of the Record of Appeal.

On page 152 of the record of appeal, more details concerning this incident are given. It is stated therein that '*there is no evidence that the Director General instructed anyone to use the rate of GHS4.26….There is the need to further investigate the circumstances surrounding the above as the individuals allege instructions were given through telephone conversations'*.

ET2: With the record from exhibit ET5 that there was a need to further investigate the circumstances of the oral approval, why would it be necessary for this matter to be referred to the appellant for his observations in exhibit ET2? This factual situation negates the appellant's case that there are references in exhibit ET5 to him that he was not confronted with in the preparation of exhibit ET5.

Unwarranted approval of payment in dollars

Another reference to appellant in exhibit ET5 is that he approvedpayment in dollars to be made to the Vendors for Change Order 7 at a time that the 1st Respondent did not have enough dollars in its account, which payment was thereafter made in Ghana cedis from the accounts of the 1st Respondent at a rate higher than the prevailing exchange rate, because the higher interest rate had been negotiated by the Vendor's bankers. This is found in subsection 3.3 (d) of exhibit ET5 and on page 108 -109 of the Record of Appeal.

On pages 62 of exhibit ET5 found on page 156 of the record of appeal, it will be noted that the comment of the payment department manager on how this overpayment occurred was set out.

ET2: Appellant was given an opportunity to comment on this in what was described as findings set out on pages 17 to 20 of exhibit ET2 which referred to the alleged over payment of US$ 9,536,652.50 for change requests that were not appropriately accounted for. This is the reason why I would say that the example of details not present in ET2 but found in exhibit ET5 is not supported by the evidence.

Indeed in exhibit ET2, more findings covering alleged improper payments emanating from change orders, change requests, training costs, service level agreement payments, consumables and other related payments leading to variance between the contract sum and actual sums paid were set out on pages 23 to 25 for the appellant's comments. These were more than adequate to prove that exhibit ET5 did not contain any details that appellant was not given an opportunity to set straight in exhibit ET3.

Approval for payment under Change Requests

Another reference to appellant in exhibit ET5 was that he approved payment for Change Requests in a sum higher than that authorized, and without submitting same to the Central Tender Review Committee for approval. See subsection 4.1 found on page 109 of the Record of Appeal.

This was reiterated in sub section 5.1.8 of the main body of the audit report found on page 119 of the Record of appeal.

ET2: This reference in exhibit ET2 is clearly covered by the findings covering alleged improper payments emanating from change orders, change requests, training costs, service level agreement payments, consumables and other related payments leading to variance between the contract sum and actual sums set out on pages 23 to 25 of exhibit ET2 described above.

Unwarranted approval for purchase of additional hardware

The last reference to appellant in exhibit ET5 was that he joined the General Manager of MIS to approve a request for the purchase of hardware in addition to hardware that had been earlier purchased for the Ist Respondent's Data Center. The audit comment was that this purchase of hardware should not have been recommended. This can be found on page 128 of the Record of Appeal.

ET2: Pages 3 of exhibit ET2 sought the appellant's comment on the procurement of two additional servers from Perfect Business Systems Ltd following a change in PBS's bid price after an earlier recommendation to purchase it from a more responsive bid from a different company had been given. On page 4 of exhibit ET2, request was also made for the appellant's comment in relation to deliverables under the OBS contract. Three findings set out on pages 8, 9 and 11 of exhibit ET2 for the appellant's comment also related to the acquisition of additional hardware outside of the main contract that ought to have been taken account of as part of the tender processes.

Aside from the above grounds from exhibit ET5 directly relatable to the findings that were presented to appellant in exhibit ET2, other findings in exhibit ET2 covered alleged backdating of the Service Level Agreements and lack of an escrow for the source code of the system paid for by the 1st Respondent. These were on pages 15 and 16 of exhibit ET2

Conclusion regarding the record on facts pertaining to exhibits ET2, ET3, ET5, ET6

It does not therefore take much to appreciate that exhibit ET2 covered all the issues that were detailed in exhibit ET5 as having been occasioned or affected by actions or decision of the appellant. The creators of exhibit ET2, were therefore obviously referring to matters set out in, and which they had extracted from exhibit ET5 when they wrote to appellant. And appellant knew this and stated an understanding of this in his opening words in exhibit ET3. He also had an opportunity to speak to all these issues in the answer he provided in exhibit ET3.

It is in this context that factually, there is no basis for the appellant's allegation that he was not given notice of the material set out in exhibit ET5 once he had the opportunity to read exhibit ET5 in October 2018. There was nothing new in exhibit ET5 that he had not had an opportunity to speak to in exhibit ET3 after being asked to comment on the findings in exhibit ET2.

EXHIBIT ET6

A cursory reading of exhibit ET 6 also shows that it I s not even a supplementary audit report as urged by the appellant. Though the covering letter is headed as 'SUPPLEMENTARY REPORT ON SPECIAL AUDIT REPORT ON OPERATIONAL BUSINESS SUITE (OBS) PROJECT FOR THE PERIOD NOVEMBER 2012 – MAY 2017', the content of the letter aptly describes what it is: the commentsof the 1st Respondent on '*the responses of the parties affected by the special audit of the OBS Project*'

It was the response that 1st Respondent itself, as an institutional subject of EOCO investigation, had to provide to the investigatory body after appellant and persons who responded to findings in the audit report had provided their answers. It contained nothing more than how 1st Respondent's officers who authored it, understood the responses provided by the parties who had been given opportunity to respond to the Special Audit Report – being exhibits ET2 and ET3.

On the factual level therefore, there is no basis for the appellant's allegation that he was not given notice of the material set out in exhibit ET6. His consultation and explanations were not needed to assist the 1st Respondent express itself on how it understood the responses of those EOCO had called on to speak to findings from ET5.

On the weight of the evidence, and contrary to the appellant's presentation, all the findings that he had been requested to comment on were directly extracted from exhibit ET5, and there was nothing new in exhibit ET5 that he had had no opportunity to speak to.

Second, exhibit ET5 did not constitute an official document from 1st Respondent institution that a court could make orders in relation to.

Third exhibit 6 was not a supplementary audit report but a response to an investigation enquiry. Nothing more, nothing less.

Since all these proceedings have been over the form in which the right to be heard ought to have been discharged, let me end by reiterating the principle affirmed in **Lagudah v Ghana Commercial Bank v Ghana Commercial Bank 2005 -2006 SCGLR 388,** and articulated clearly in **Republic v Ghana Railway Corporation Ex Parte Appiah & Another 1981 GLR 752** in these words: '*In dealing with the principles of natural justice, one always has to bear in mind that the principles are substantive, rather than procedural safeguards. Therefore the fact that a particular formal procedure is not adopted, does not of itself imply that the principle has not been applied in an appropriate cas*es' Grounds(iv), (v) and (vi) of the appeal are dismissed.

The appeal against the Judgment of the Court of Appeal dated 18th July, 2019 fails and is hereby dismissed.
Costs of GH₵ 5,000.00 is awarded against the Applicant/Appellant/Appellant in favour of the 1st Respondent/Respondent/Respondent.

G. TORKORNOO (MRS.)
(JUSTICE OF THE SUPREME COURT)

CONCURRING OPINION

PWAMANG JSC:-

My Lords, I read in draft the lucid opinion of the court read by my distinguished sister, Torkornoo, JSC and I concur with it. It is for future guidance that I decided to pen down these brief comments on a practice that is fast gaining ground in the High Court whereby persons seeking redress for complaints against administrative bodies make

reference to the supervisory jurisdiction of the High Court under article 141 of the Constitution, 1992.The supervisory jurisdiction of the High Court under our constitution is different from the High Court's jurisdiction for judicial review of administrative actions, which is also not exactly the same as article 23 on administrative justice. The applicant/appellant/appellant (the appellant) in his originating motion in the High Court stated that he was applying for judicial review pursuant to article 141 of the Constitution and he is not the first litigant to do so but it does not make it right.

The Constitution has separated the heads of jurisdiction of the High Court, just as it has done for the Supreme Court, and they are meant to be distinct. The particular jurisdiction of a court that is invoked by a claimant determines the procedure for commencing and prosecuting the action as well as the principles of law that would be applied in deciding the case. In **Republic v Ghana National Gas Co; Ex parte Kings City Development Co; Civil Appeal J4/61/2021,**in the unreported judgement dated 15th December, 2021, the Supreme Court observed as follows;

"Procedural law is a vital integral component of law as a whole. Its remit is the prescription of remedies, the regulation of the means by which persons who are aggrieved may seek redress and the manner in which court proceedings are to be conducted. In respect of certain matters, legal remedies and procedure are provided for in substantive statute or even in a constitutional text, for example, criminal offences and evidence. But, it is mostly by subsidiary legislation and the settled practices of the courts that the detailed rules of procedure for civil cases are provided for. As a major ***raison d'etre*** *of laws in any society is to ensure the orderly conduct of human affairs, judges have insisted perennially, that procedure rules must be observed strictly, except in special circumstances that are clearly stated. Consequently, the fact that a person has a claim which is judicially enforceable does not entitle her to walk into any court building or approach any judge and request for any form of remedy."*

In the instant case, the complaint of the appellant was about two audit reports produced by the 1st respondent, his former employer, that contained what he considered adverse statements concerning him and wanted the reports quashed. We

fail to see how the minimal references to the appellant in those reports is prejudicial to him but in his motion paper, he based his case mainly on the legal ground of the right to a hearing at common law and in his statement of case, he also relied on the provisions of article 23 of the Constitution. However, although a complaint of denial of the right to a hearing under the common law entitles an aggrieved person to invoke the supervisory jurisdiction or the judicial review jurisdiction of the High Court, the full scope of article 23is more than the right to hearing and a breach of the article ought, in my view, to be remedied by invoking the Human Rights enforcement jurisdiction of the High Court stated under article 33 of the Constitution.

The supervisory jurisdiction of the High Court is provided for in articles 141 and 162 (3) of the Constitution as follows;

SUPERVISORY JURISDICTION

141. The High Court shall have supervisory jurisdiction over all *lower courts and any lower adjudicating authority;* and may, in the exercise of that jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its supervisory powers.

162 (3). "supervisory jurisdiction" includes jurisdiction to issue writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto. (Emphasis supplied)

At common law, the High Court had always had supervisory jurisdiction over inferior courts and statutory bodies. Nevertheless, starting with the Constitution, 1969, in article 114 thereof, this jurisdiction has been expressly stated in our Constitutions. See; **Republic v. Terkperbiawe Divisional Council and Another; Ex parte Nene Korle II, [1972] 1 GLR 199**. However, it needs to be pointed out that although the supervisory jurisdiction of the High Court at common law started off from the Kings Bench courts as supervisory power over inferior courts and adjudicatory authorities, the jurisdiction evolved with time to include judicial control of administrative bodies. As governance institutions expanded in the twentieth century anda wide range of public

services were provided by government bureaucracies, this aspect of the common law supervisory jurisdiction of the High Court over administrative agencies enlarged and is now referred to more specifically as judicial review of administrative action. That notwithstanding, our constitutional texts in stating the range of the supervisory jurisdiction of the High Court stopped at lower courts and adjudicating authorities. Consequently, under article 141,the High Court's supervisory powers do not extend to administrative bodies. See **Republic v High Court, Denu; Ex parte Kumapley (Dzelu IV Interested Party) [2002-2004] SCGLR 719.**

Nonetheless, since the High Court at common law exercised jurisdiction of judicial review over administrative bodies as explained earlier, to the extent that the common law is part of the laws of Ghana (article 11) and the powers the Superior Courts had before the coming into force of the Constitution, 1992 were continued by article 126(2) of the Constitution, the High Court retains its power of judicial review over administrative bodies which it had at common law**.** See; **Republic v High Court, Accra; Ex parte CHRAJ (Addo) Interested Party) [2003-2004] SCGLR 312.**The above distinction is necessary to appreciate that the High Court in fact applies two separate jurisdictions when acting under article 141 and when it is exercising judicial review over an administrative body.

The traditional grounds at common law on which the High Court exercises supervisory jurisdiction over lower courts or tribunals have been stated in the decisions of judges as; want or excess of jurisdiction, breach of the rules of natural justice and error of law apparent on the face of the record. See **Republic v James Town Circuit Court; Ex parte Annor [1978] 453**.The grounds for judicial review of administrative action on the other hand were developed later by common law judges out of these principles for supervising inferior courts and tribunals. In *"Wade and Bradley; Constitutional and Administrative Law"*;**11th Ed by A.W. Bradly and Keith Ewing** at p. 608, the learned authors explained the evolution as follows; *"Since these [administrative] bodies were exercising statutory powers, disputes about the limits of their powers were settled by the courts, often but invariably by recourse to the prerogative writs. Thus the*

procedures of judicial control which originally checked the powers of inferior courts, were used to review the exercise of statutory powers first by local authorities and then by ministers of the Crown."

Accordingly, the grounds that have evolved for exercise of judicial review over administrative bodies are similar to those for supervisory jurisdiction over inferior court and they basically are; illegality, irrationality and procedural impropriety. See **Republic v High Court, Accra; Ex parte Chraj (supra)** and **Tema Development Corp v Atta Barfour & Anor [2005-2006] SCGLR 121.** Illegality as a ground for judicial review evolved from the doctrine of ultra vires and is very much like want or excess of jurisdiction and error of law. Then procedural impropriety can be compared with breach of the rules of natural justice. Despite this comparability of the grounds, the differences are very significant in law as, besides the terminology, the grounds stated for judicial review of administrative action are wider in scope than the traditional grounds for supervisory jurisdiction over inferior courts. Yet, parties sue in court and urge the grounds for supervisory jurisdiction over lower courts and adjudicatory authorities in a case where the grievance concerns some administrative action. The complexity is partly caused by the fact that the Rules of Court Committee, in making rules for the practice and procedure in the High Court for the supervisory and the judicial review jurisdictions, made one set of procedure rules, **Order 55** of the **High Court (Civil Procedure) Rules, 2004 (C.I.47),** to regulate the exercise of both jurisdictions. The Committee nevertheless headed the Order as "Applications For Judicial Review" but the rules apply, with the necessary modifications, where the High Court is exercising supervisory jurisdiction under article 141 and 162(3) of the Constitution. Hence, Rule 2(1) of Or 55 is as follows;

2. (1) On the hearing of an application for judicial review the High Court may make any of the following orders as the circumstances may require

(a) an order for prohibition, certiorari or mandamus;

(b) an order restraining a person from acting in any public office in which that person is not entitled to act;

(c) any other injunction;

(d) a declaration;

(e) payment of damages.

By article 162(3), all of the remedies stated above are equally obtainable in an application concerning a lower court or lower adjudicating authority. But, whereas any of the remedies listed in Rule 2(1) of Or 55 may be granted in a matter against an administrative body, injunction, declaration and payment of damages would hardly be granted in a case commenced under the Order involving a lower court or adjudicating body, which arises under supervisory jurisdiction. These three remedies are later additions to the supervisory powers of the High Court by judges specially for use in controlling administrative bodies and officials. At the beginning, it was Mandamus and *quo warranto* that made up the main arsenal of typical administrative law remedies targeted at administrative officials whilst certiorari and prohibition were the appropriate remedies for controlling lower courts and adjudicating bodies though they could be deployed against administrative authorities too. Because of the multiplicity, the close likeness and adaptability of some of these remedies for redress of a wide range of grievances, lawyers easily mixed them up when they sue in court. Similarly, judges, especially in our jurisdiction, in their judgments have not observed the distinction in terminology between the jurisdictions and the grounds on which either jurisdiction may be exercised but use and apply them interchangeably. This can be seen from the cases cited by the parties in their submissions which show that even in the practice in the Supreme Court, the grounds for exercise of that court's supervisory jurisdiction over the High Court and Court of Appeal are still not entirely devoid of references to grounds that typically relate to control of administrative bodies and officials.

Article 23 of the Constitution has added to the confusion in this area of our law. The article substantially codifies the grounds at common law for the exercise by the High

Court of the power of judicial review of administrative action and, to that extend, it corresponds with the common law jurisdiction of the High Court catered for in Or 55. This similarity explains why parties who invoke the High Court's power of judicial review of administrative action invariably rope in article 23. But, article 23 is contained in Chapter Five of the Constitution which is headed; FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS. The article is as follows;

ADMINISTRATIVE JUSTICE

23. 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.

Now, the Constitution in article 33 made specific provision for redress of grievances under Chapter Five of the Constitution, including article 23. It states that;

PROTECTION OF RIGHTS BY THE COURTS

33(1) Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, 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.

(2) The High Court may, under clause (1) of this article, issue such directions or orders or writs including rites or orders in the nature of herbs as corpus, certiorari, mandamus, prohibition, and quo warrant 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.

(3) A person aggrieved by a determination of the High Court may appeal to the Court of Appeal with the right of a further appeal to the Supreme Court.

(4) 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.

Pursuant to article 33(4), the Rules of Court Committee in 2004 made **Order 67 of C.I.47** which outlines the practice and procedure for seeking redress for breaches or threatened breaches of Human Rights and Freedoms in Chapter Five of the Constitution. The settled principle of law is, that where a statute has stated a specific manner for seeking redress for a particular grievance, then it is to that procedure that an aggrieved person must resort, unless an exception is applicable. See **Tularley v. Abaidoo [1962] 1 GLR 411(S.C.), Boyefio v. NTHC Properties Ltd [1996-97] SCGLR 531 at 546 and Aschkar v Karim [1972] 1 GLR 1 (C.A.).** Consequently, with the making of Or 67, the Constitution expects that actions for enforcement of article 23 would be brought in accordance with that Order.

From the above exposition, it is seen that our law has provided alternative causes of action in the High Court in relation to actions taken by administrative bodies; 1) common law judicial review of administrative action which may be pursued under Or 55 of C.I.47 and, 2) denial of administrative justice guaranteed in article 23 which may be pursued under Order 67 of C.I.47. In terms of time limitation to file an action, it is generally six months under either procedure but, the reliefs that may be granted under Order 67 Rule 8are stated in broader language and extend beyond but include the remedies in Rule 2(1) of Or 55. What must however be noted is, that where a party is proceeding under Or 55 and prays for any of the common law remedies, she may be constrained by the technical rules pertaining to the remedy and the discretionary nature of the prerogative writs or orders, since that is what the decisions of the courts say. In **Republic v Ghana National Gas Co; Ex parte Kings City Development Co (supra),** the applicant sought redress by way of mandamus to have compensation for compulsory acquisition of its land paid to it but the Supreme Court dismissed the application because the facts of the case did not fit into the settled principles for the grant of Mandamus.

When it comes to enforcement of Human Rights under the Constitution, the legal considerations differ and, to my mind, are more favourable to an aggrieved person than under the common law. Sophia Akuffo, JSC (as she then was) in **Awuni v WEAC [2003-2004] SCGLR 471,**when discussing the ambit of article 23 said at p. 514 as follows; *"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 and ill-will."*So, though the grounds on which a court would grant relief under article 23 include the grounds for judicial review at common law, the article definitely encompass more. Again, in **Awuni v WEAC (supra)** at p. 492 Kpegah, JSC noted that; *"…human rights cases are matters which must not only be given liberal considerations but must also be expeditiously determined. In such matters, therefore, a simple non-cumbersome but efficacious procedure must be adopted for its enforcement;"* In line with that, the procedure in Or 67 has been made simpler and makes for speedier adjudication than proceeding under Or 55. In the case of Awuni v WEAC, the plaintiffs sued to enforce their rights to administrative justice under article 23 but by then Or 67 had not been made so they came by writ of summons. That procedure was challenged but the Supreme Court dismissed the objection to the procedure because the Rules of Court Committee had by then not made rules pursuant to article 33(4) of the Constitution. That has now been done so that procedure must be followed.

Therefore, it seems to me that, the framework of our law in this area of Administrative Law is as follows; the supervisory jurisdiction of the High Court ought to be invoked only where the complaint is against a lower court or lower adjudicating authority, e.g. a judicial committee of house of chiefs. That will enable the case to be determined on the principles that have been stated in the several cases in relation to inferior courts and tribunals. The judicial review jurisdiction should be distinctly invoked in a case where

the grievance is against an administrative body. The court would then focus on the grounds for judicial control of administrative action i.e. illegality, irrationality and procedural impropriety, without limiting itself to the principles developed in cases about inferior courts and tribunals which are technical and narrow. Then, parties whose complaint is against administrative bodies and administrative officials but who rely on grounds that are broader than the settled grounds of illegality, irrationality and procedural impropriety, they could base their case on article 23. That would empower the court to take a more liberal view of the complaint and may give directions and orders not limited to the remedies in Or 55 rule 2(1). Keeping these jurisdictional boundaries separate and distinct in the presentation of suits challenging administrative action in the High Court would, hopefully, guide judges in our jurisdiction away from constantly confining their analysis within technical rules and principles of the common law evolved for inferior courts but which have been found unsuitable for controlling administrative bodies and officials wherefore more liberal alternatives have been developed both by judicial pronouncements and statute.

Unfortunately, in our jurisdiction we have not developed distinct jurisprudence on judicial review of administrative action, largely because most of the cases in that area of our law are argued on the principles for supervisory jurisdiction over inferior courts and the cases related thereto. That is what happened in this case too. The appellant presented his case praying for certiorari and injunction but whereas he could have come under the ground of procedural impropriety by the audit team, which is broader in scope, he premised his case on the right to a hearing at common law. Furthermore, he cited cases that were decided on narrow common law principles and that undermined his arguments since those cases also state that certiorari is discretionary and that what amounts to a hearing depends on the circumstances of each case. It is in this final appeal that he unsuccessfully attempted to also urge some of the grounds for judicial review of administrative action properly so called. The High Court and the Court of appeal determined the case mainly on whether the appellant's right to a hearing had been breached in the circumstances of the case and whether, on the decided cases, this

is an appropriate case for certiorari and we cannot fault them. They concluded that the appellant has not been prejudiced by the comments he is complaining about and we tend to agree with them. There is dearth of decided cases in our jurisdiction on the strict principles for review of administrative action and references were made to the few by the lawyers in their submissions before us. But in other common law jurisdictions, there is lot of litigation in this area of the law and there are many decisions that have expanded the rights of complainants against administrative bodies and officials that can be referred to for persuasive reasoning.

From the discussion above, it would be noticed that this case was not one for invocation of the jurisdiction of the High Court stated in article 141 since the appellant was not complaining against a lower court or lower adjudicating body. On the face of the processes and by the arguments, it was rather the common law judicial review jurisdiction of the High Court that was invoked with traditional grounds for supervisory jurisdiction heavily relied on. The reference to article 23 was basically in support of the common law right to a hearing. It is important for litigants and their legal advisors on matters pertaining to administrative bodies to watch carefully how they present their cases. Mixing up the causes of action, the legal grounds and the orders prayed for can embarrass the proceedings and compromise a party's chances of obtaining redress.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

A. M. A. DORDZIE (MRS.)
(JUSTICE OF THE SUPREME COURT)

PROF. H.J.A.N. MENSA-BONSU (MRS.)

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