IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT OF GHANA

ACCRA, AD 2016

CORAM: DOTSE, JSC (PRESIDING),

ANIN-YEBOAH, JSC

BAFFOE-BONNIE, JSC.

GBADEGBE, JSC.

AKOTO-BAMFO (MRS.),JSC

BENIN, JSC.

PWAMANG, JSC

WRIT NO.

J1/23/2015

28 JULY, 2016

X-TRA GOLD MINING LIMITED - PLAINTIFF

VRS.

ATTORNEY-GENERAL - DEFENDANT

JUDGMENT

BENIN, JSC

The facts of this case are quite straight forward but the Plaintiff introduced a lot of material that is irrelevant for the exercise of our jurisdiction for judicial review of legislation that has been properly invoked. Accordingly we shall trim the facts to those required for the purpose of determining the real issue before the court.

In 2009, the Parliament of Ghana passed into law the Fees and Charges (Miscellaneous Provisions) Act, 2009 (Act 793). It is a short piece of legislation with only three Sections as follows;

> **"Specified enactments**
>
> 1. For the enactments specified in the first column of the Schedule and in relation to the revenue items specified in the second column of the Schedule, there is substituted for the fees and charges specified in the third column of the Schedule, the fees and charges specified in the fourth column of the Schedule.
>
> **Transfer of power**
>
> 2. (1) The authority conferred under the enactments set out in the first column of the Schedule to determine fees and charges is hereby transferred to the Minister responsible for Finance and Economic Planning and accordingly those enactments are hereby amended.
>
> (2) The Minister for Finance and Economic Planning may by Legislative Instrument amend the Schedule to this Act."

Pursuant to Section 2(2) of Act 793, the Minister for Finance made the Fees and Charges (Amendment) Instrument, 2012 (L.I. 2191) and added the Office of the Administrator of Stool Lands Act, 1994

(Act 481) to the enactments covered by Act 793. He proceeded to determine and fix ground rent payable in respect of lands subject to a mineral right. The ground rent as fixed in L.I. 2191 was changed by the Minister for Finance in 2013 and 2014 by the making of L.I. 2206 and L.I. 2216 respectively. All the above Legislative Instruments were duly laid in parliament as required by Article 11(7) of the Constitution and came into force.

Basing itself on the above Legislative Instruments, the Office of the Administrator of Stool Lands calculated ground rent payable by plaintiff in respect of five mining leases it owns and served invoices on it. Plaintiff refused to pay the amounts claimed because, according to him, the Legislative Instruments made by the Minister for Finance were void as the authority given by Parliament to the Minister to amend Act 793 was unconstitutional. Plaintiff therefore brought the instant action for the following reliefs:

i. A declaration that on a true and proper construction or interpretation of Article 267(3) of the Constitution, the Office of the Administrator of Stool Lands has no legal power or authority under the 1992 Constitution, and the Office of the Administrator of Stool Lands Act 1994 (Act 481) to prescribe the annual ground rent payable by holders of mineral rights, commonly referred to as mining concessions granted over stool lands by the Government acting through the Minister for Lands and Natural Resources pursuant to the Mineral and Mining Act, 2006 (Act 703).
ii. A declaration that the purported grant of power and authority by Parliament to the Minister for Finance under sections 2(1) and (2) of the Fees and Charges (Miscellaneous Provisions) Act 2009 (Act 793) to amend the Schedule to the Act which authority, the said Minister purportedly exercised under the Fees and Charges (Amendment) Instrument 2012 (L.I. 2191), the Fees and Charges (Amendment) Instrument 2013 (L.I. 2206) and the Fees and Charges (Amendment) Instrument

2014 (L.I. 2216) to prescribe annual ground rent payable by holders of mining concessions granted over stool lands is inconsistent with and in contravention of articles 1(2), 11(1), 93(2), 106 and 267(3) of the 1992 Constitution as well as sections 23 of the Minerals and Mining Act 2006 (Act 703) and to that extent such grant of authority is ultra vires, null and void.

iii. A declaration that the purported exercise by the Minister for Finance of the authority and power purportedly conferred on him under section 2(2) of the Fees and Charges (Miscellaneous Provisions) Act 2009, (Act 793) to prescribe through the three Fees and Charges (Amendment) Instruments namely L.I. 2191 of 2012, L.I. 2206 of 2013 and L.I. 2216 of 2014 the annual ground rent payable by holders of mining concessions granted over stool lands is inconsistent with and in contravention of articles 1(2), 11(1), 93(2) and 267(3) of the 1992 Constitution as well as sections 23 of the Mineral and Mining Act, 2006 (Act 703) and to that extent the said prescriptions of annual ground rent by the Minister for Finance are ultra vires, null and void.

iv. A declaration that the conduct of officers of the Office of the Administrator of Stool Lands in relying on the said prescription by the Minister for Finance of annual ground rent payable by holders of mining concessions granted over Stool Lands in the said Fees and Charges (Amendment) Instruments, namely L.I. 2191 of 2012, L.I. 2206 of 2013 and L.I. 2216 of 2014 to raise invoices based on the said prescribed rents, serve same on the holders of mining concessions granted over stool lands, and demanding payment of such prescribed rents is also conduct that is inconsistent with and in contravention of articles 1(2), 11(1), 93(2) and 267 of the 1992 Constitution and to that extent such conduct is also ultra vires, null and void.

v. A declaration that the failure or omission of the Minister for Lands and Natural Resources to exercise the discretionary power and authority duly conferred upon him under section 23 of the Minerals and Mining Act, 2006 (Act 703) to prescribe by Legislative Instrument the annual ground rent payable by holders of mining concessions is failure or omission which is inconsistent with or is in contravention of the constitutional duties imposed on the said Minister as an Administrative Official or public officer pursuant to Articles 23 and 296(c) of the 1992 Constitution and to that extent such failure or omission on the part of the said Minister constitutes a fragrant violation of articles, 23 and 296(c) of the Constitution.

vi. An order declaring as null, void and of no effect the prescriptions by the Minister for Finance of annual ground rent GH₵36.50 per acre contained in the Fees and Charges (Amendment) Instrument 2012 (L.I. 2191), the Fees and Charges (Amendment) Instrument 2013 (L.I. 2206) as well as the prescription of GH₵15.00 per acre contained in the Fees and Charges Instrument 2014 (L.I. 2216) as having been made in contravention of articles 1(2), 11(1), 93(2), 106 and 267 of the 1992 Constitution.

vii. An order directing the Minister for Lands and Natural Resources to comply with the provisions of Articles 23 and 296(c) of the 1992 Constitution and power and authority to prescribe by Legislative Instrument the annual ground rent payable by holders of mining concessions granted by the Government over stool lands under the Minerals and Mining Act, 2007 (Act 703).

viii. Perpetual injunction against the Office of the Administrator of Stool Lands, its officers and agents or any person acting for or on their behalf from relying on the said Fees and Charges (Amendment) Instruments 2012 (L.I. 2191), 2013 (L.I. 2206) and 2014 (L.I. 2216) to demand or enforce against the plaintiff payment of the prescribed ground rent contained in the said

Instruments which prescriptions are inconsistent with and in contravention of articles 1(2), 11(1), 93(2), 106 and 267(3) of the 1992 Constitution.

ix. Any further or other consequential orders as shall be deemed meet by the Supreme Court.

The parties agreed on six issues for the court's determination. The first two were expressed in the alternative. The issues will be discussed seriatim.

Issue 1. Whether or not the Office of the Administrator of Stool Lands has authority and power under Article 267(2) of the 1992 Constitution to prescribe annual ground rent payable by holders of mineral rights granted over stool lands by the Minister for Lands and Natural Resources pursuant to the Minerals and Mining Act, 2006 (Act 703).

OR

Issue 2. Whether or not the Administrator of Stool Lands, being a head of department, can participate in the mandatory review exercise under Regulation 20 of the Financial Administration Regulations, 2004 (L. I. 1802) and, if so, whether such participation amounts to prescribing annual ground rent payable by mineral right holders and contravenes Article 267(2) of the 1992 Constitution.

Issues 1 and 2 have a common strand running through them and it is whether the Administrator of Stool Lands, hereafter called the Administrator, legally has any role to play in fixing annual ground rents for mineral rights granted over stool lands. This issue has arisen in respect of the functions assigned to the Administrator under Article 267(2) of the Constitution, 1992 which provides:

There shall be established the Office of the Administrator of Stool Lands which shall be responsible for

(a) the establishment of a stool land account for each stool into which shall be paid all rents, dues, royalties, revenues or other payments whether in the nature of income or capital from the stool lands;

(b) the collection of all such rents, dues, royalties, revenues or other payments whether in the nature of income or capital, and to account for them to the beneficiaries specified in clause (6) of this article; and

(c) the disbursement of such revenues as may be determined in accordance with clause (6) of this article.

The functions assigned to the Administrator are clear and not ambiguous and do not require any arguments. From these issues the plaintiff is clearly saying that the Administrator has exceeded his statutory functions by, either suo motu or in conjunction with others, fixing the rates payable by holders of mineral rights created over stool lands. But the facts do not support this assertion. The plaintiff's own case was that the Administrator wrote to demand payments in accordance with the rates determined by the Minister of Finance under various Legislative Instruments. The Administrator on his own accord did not fix the rates. Issue number 1 thus has no factual basis and is accordingly rejected.

In the alternative, parties set down issue 2 that the Administrator was part of a review team that recommended adjustments to the annual rates. This is contained in a letter purported to have been sent to the plaintiff by the Eastern Regional Office of the Administrator. This letter is found in paragraph 4.6 of the plaintiff's statement of case and it reads in relevant part thus:

".....the Office of the Administrator of Stool Land is part of a committee of technocrats and stakeholders including Chamber of Mines and Small Scale Miners working with the Ministry of Finance for a review of the current rate GH₵36.50 per acre per annum. We have been informed by our Head

Office that they have agreed on GH₵15.00 per acre for 2013 and 2014."

It is noted that this recommendation for a downward adjustment of the 2012 rate was acted upon by the Minister of Finance by L.I. 2206 of 2013 and L.I. 2216 of 2014. It is crystal clear from this letter and the issuance of the Legislative Instruments by the Minister of Finance that the Administrator, in conjunction with others, only plays an advisory role to the Minister of Finance. This does not derogate from his core functions as set out in article 267(2) of the 1992 Constitution. An advisory opinion is not binding on the Minister of Finance so it has no force of law. It is noted that participation in such committee work by the Administrator is purely administrative, which the Constitution is not required to spell out. It is an incident of the functions of the Administrator who is responsible for all royalties and other fees accruing to stool lands and this places him in the position to offer expert advice on matters pertaining to stool lands. The Minister of Finance who has acted under Act 793 to fix the rates may thus seek the advice of the Administrator, among other persons, in deciding on what rate to fix. The process of seeking advice before acting is purely administrative and is inherent in and derives from the power conferred by the statute, which also derives its source from the Constitution, 1992. This was one of the reasons why the setting up of a Constitutional Review Implementation Committee by the President of the Republic was held to be legal as same was purely an administrative body to help the President to carry out a constitutional function. That was in the case of PROFESSOR STEPHEN KWAKU ASARE VS. THE ATTORNEY-GENERAL; Writ No. J1/15/2015, dated 29th October 2015, unreported. Therefore the Administrator did not commit any violation of Article 267(2) of the Constitution by participating in the fee-fixing review process.

Issue 3. Whether or not the grant of power and authority by Parliament to the Minister for Finance under sections 2(1) and (2) of

the Fees and Charges (Miscellaneous Provisions) Act, 2009 (Act 793) to amend the Schedule to the Act is inconsistent with or in contravention of articles 1(2), 11(2), 93(2) and 267(3) of the 1992 Constitution and section 23 of the Minerals and Mining Act, 2006 (Act 793).

This issue questions Parliament's decision to confer on the Minister of Finance power and authority to amend the Schedule to the Act in question, namely Act 793, section 2 thereof, supra.

The issue throws up for discussion several important legal questions. In the first place, what is the status of a Schedule to an enactment? Is it legally permissible to amend a Schedule to an Act of Parliament by way of a Legislative Instrument and for that matter a subordinate legislation? To what extent, if at all, may Parliament delegate its power of legislation to another person? Has section 2 of Act 793 transferred the function of prescribing fees under section 23 of Act 703 to the Minister of Finance? Has Section 2 of Act 793 impliedly repealed section 23 of Act 703?

What then is a Schedule to an Act? Bennion on Statutory Interpretation, 5th edition, published by LexisNexis at page 721 says "A Schedule is an extension of the section which induces it. Material is put into a Schedule because it is too lengthy or because it forms a separate document (such as a treaty)." The learned author goes on to explain that it is a convenient way of incorporating part of the operative provisions of an Act in the form of a Schedule. And as further explained by Lord Wilberforce in the case of FLOOR v. DAVIS (INSPECTOR OF TAXES) (1980) 3 All ER 39, when speaking of the Finance Act of 1965, that a Schedule is a technique which Parliament employs to place most of the working and detailed provisions in the Act.

The upshot of the foregoing is that once the intent is clear the Schedule is part of the Act and must thus be construed as one whole document. In the case of A-G v. LAMPLOUGH (1878) 3 Ex. D

214 at 229 Brett LJ said that "***A Schedule in an Act is a mere question of drafting, a mere question of words. The Schedule is as much a part of the statute, and is as much an enactment as any other part.***"

See also these cases: FLOWER FREIGHT CO. LTD. v. HAMMOND (1963) 1 QB 275. R. v. LEGAL AID COMMITTEE NO. 1 (LONDON) LEGAL AID AREA; EX PARTE RONDEL (1967) 2 QB 482. METROPOLITAN POLICE COMMISSIONER v. CURRAN (1976) 1 WLR 87 HL.

Thus a Schedule forms an integral part of an Act. The next obvious question is whether a Schedule to an Act may be amended by subordinate or subsidiary legislation. The plaintiff is challenging the power conferred by Parliament on the Minister of Finance to amend the Schedule to Act 793 by Legislative Instrument as being inconsistent with and in contravention of articles 1(2), 11(1), 93(2) and 267(3) of the 1992 Constitution, as well as section 23 of Act 703. These constitutional provisions are:

1(2) The Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void.

11(1) The laws of Ghana shall comprise

(a) this Constitution;
(b) enactments made by or under the authority of the Parliament established by this Constitution;
(c) any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution;
(d) the existing law; and
(e) the common law.

93(2) Subject to the provisions of this Constitution, the legislative power of Ghana shall be vested in Parliament and shall be exercised in accordance with this Constitution.

267(3) There ahall be no disposition or development of any stool land unless the Regional Lands Commission of the region in which the land is situated has certified that the disposition or development is consistent with the development plan drawn up or approved by the planning authority for the area concerned.

It is clear that article 267(3) has no bearing on this case. The issue raised herein is one of revenue accruing to, and not disposition or development of, stool land. The relevant provision is article 93(2) of the Constitution which has vested Parliament with the legislative power of the state. Any Act of Parliament takes precedence over provisions in a subordinate legislation passed pursuant to an Act of Parliament; therefore any such subordinate legislation or provision thereof which is inconsistent with and in contravention of an Act of Parliament is void to the extent of the inconsistency. Parliament itself has the responsibility to pass Acts of Parliament, whereas subordinate legislation may be passed by other persons outside Parliament but must be laid before Parliament to give same legal validity. Thus an Act of Parliament may only be amended by another Act duly passed by Parliament. That is the general principle which ensures that Parliament's mandate under the principle of separation of powers is adhered to. Thus prima facie an Act of Parliament may not be amended by a subordinate legislation.

But this is not an invariable rule when it comes to the Schedule to an Act. The Schedule sometimes includes forms, or transitional provisions which remain in force until the main provisions in the Act may be brought into force, or an International Treaty whose terms may be renegotiated without reference to Parliament, or fees that may be charged by an institution or a person for some service

rendered to the public. In such instances it is possible for the parent Act to entrust the responsibility of revising the forms or fixing the fees to a body or person outside Parliament. For now let me refer to the view expressed by Justice G. P. Singh in his book Principles of Statutory Interpretation, 13th edition published in 2012 by LexisNexis at page 215. Whilst making reference to the 5th and 6th Schedules to the Constitution of India and also the 1st Schedule to the Code of Civil Procedure, 1908, the learned author and jurist said a Schedule may "**contain such rules and forms which can be suitably amended according to local or changing conditions by process simpler than the normal one required for amending other parts of the statute."**

In the specific case under consideration, Parliament entrusted the power to amend the Schedule in relation to fees and charges, to the Minister of Finance through the passage of Legislative Instrument. The revision of fees upwards or downwards is a constant thing. It is a revenue matter which the Constitution has entrusted to Parliament to raise. Thus only Parliament may authorize another person or body to act on its behalf. Such power has been entrusted to several bodies and persons to charge fees by subsidiary legislation and this process enables Parliament to exercise its oversight responsibility. Thus whether a Schedule to an Act may be amended by subsidiary legislation depends on the subject of the legislation and whether the power to amend has been expressly given by Parliament not being inconsistent with the legislative function conferred upon it by article 93(2) of the 1992 Constitution.

That brings us to a discussion on the extent of Parliamentary delegation of its legislative functions. In the case of JOHN AKPARIBO NDEBUGRE v. THE ATTORNEY-GENERAL & 2 ORS, Writ J1/05/2013 dated 20th April 2016, unreported, we had occasion to talk about this question. After examining cases from US Jurisprudence, we came to the conclusion that "***in view of the fact that it is almost impossible and impracticable for Parliament***

to oversee all the activities and functions that fall within its domain, it is appropriate that it delegates some of these functions which do not involve law-making to others to execute the policies it has set out, within the framework and the policy outlined in the law. This does not infringe the principle of separation of powers. Thus the principle of delegation is permissible if it does not infringe the power granted to Parliament to make laws for the country under article 93(2) of the Constitution."

We will refer to some cases decided by the US Supreme Court which are of persuasive influence. The first case is J.W. HAMPTON, Jr. & CO. v. UNITED STATES, 276 U.S.394 (1928). The President was empowered and directed by The Tariff Act of 1922 to increase or decrease duties imposed by the Act so as to equalize the differences which, upon investigation, he finds and ascertains between the costs of producing at home and in competing foreign countries the kinds of articles to which such duties apply. The Act laid down certain criteria to be taken into consideration in ascertaining the differences, fixed certain limits of change and made an investigation by the Tariff Commission, in aid of the President, a necessary preliminary to any proclamation changing the duties. The court held that the delegation was not unconstitutional and that a valid delegation must establish **"an intelligent principle to which the person or body authorized to take action is directed to conform.....The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made**." The court's view was that Congress had not delegated any authority or discretion as to what the law shall be, which would not be allowable, but had merely conferred an authority and discretion, to be exercised in the

execution of the law by Congress, and authorize the application of the congressional declaration, to enforce it by regulation equivalent to law.

The second case is YAKUS v. UNITED STATES, 321 U.S. 414 (1944). In this case, the plaintiff challenged provisions in the Emergency Price Control Act, which allowed the office of Price Administration to issue regulations fixing the maximum prices of commodities and rents. The Act declared that prices were to be fixed to effectuate the Act's policy of preventing wartime inflation, directed the Administrator to give consideration to prevailing prices and mandated that the prices set be "fair and equitable." The court held that the delegation did not involve an unconstitutional delegation to the Price Administrator of the legislative power of Congress to control commodity prices in time of war. This is what the court said: "***The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct- here the rule, with penal sanctions, that prices shall not be greater than those fixed by maximum price regulations which conform to standards and will tend to further the policy which Congress has established. These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, as ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective."***

On the contrary, the same court rejected Congressional delegation in the case of PANAMA REFINING CO. v. RYAN, 293 U.S. 388 (1935). The court invalidated a provision of the National Industrial Recovery Act, 1933 which delegated to the Executive the authority to prohibit the interstate transportation of oil violating state mandated production quotas. The court held that the vagueness of the statute did not sufficiently direct the Executive's action and therefore impermissibly delegated legislative discretion to the

President. See also SCHECTER POULTRY CORP. v. UNITED STATES, 295 U.S. 495 (1935).

When Parliament acts in excess of the power vested in it by Article 93(2) of the Constitution this court would intervene, so there is nothing like parliamentary sovereignty in the sense as known in Britain. See the case of OPREMREH v. ELECTORAL COMMISSION & ANOR. (2011) 2 SCGLR 1159, per Dotse JSC at 1174. The Indian case of JATINDRANATHGUPLA v. THE PROVINCE OF BAHIR (1949) FCR 595, presents another useful reference point. In that case the Governor of the Province of Bahir was given authority under an Act of Parliament to extend the operation of the Act with such modifications as may be specified. The Supreme Court of India in an Advisory Opinion and basing itself on a case that went on appeal before the Privy Council held that the provision giving authority to the Governor to extend the Act with modifications was ultra vires the power of the legislature. Kania C.J. said at page 620 of the report that: "*It was observed by their Lordships of the Privy Council in KING EMPEROR v. BEONARILALSAMA (1945) FCR 161 that; 'It is undoubtedly true that the Governor-General acting under s. 72 of Schedule LX must himself discharge the duty of legislation there cast on him, and cannot transfer it to other authorities.' That observation applies with equal force to cases of legislative authorities. They are not allowed to transfer to others the essential legislative function with which they are invested.....The distinction between the power to make the law which necessarily involves a discretion as to what it shall be and conferring discretion or authority as to its execution to be exercised under and in pursuance of the law is a true one and has to be made in all cases where such a question is raised. The provision which has been assailed, judged from the above test, comes within the ambit of delegated legislation and is thus an improper piece of legislation.*"

In the instant case Act 793, section 2 thereof entrusted the power to fix charges to the Minister responsible for Finance and Economic

Planning. The Act merely transferred that responsibility which hitherto existed under various enactments to the Minister of Finance. The policy underpinning this legislation is clear that the Minister of Finance should be solely responsible for fixing revenue charges which would otherwise have been done by several other persons or bodies. The underlying policy is also reflected in the memorandum accompanying the Bill that culminated in the passage of Act 793, which has been quoted below in this decision. The Act did not set the parameters to guide the Minister in fixing the charges. But the Constitution itself has in-built mechanism to guide a person in the exercise of authority based on discretion. Article 296 provides that:

Where in this Constitution or in any other law discretionary power is vested in any person or authority,

- ***(a) that discretionary power shall be deemed to imply a duty to be fair and candid;***
- ***(b) the exercise of the discretionary power shall not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and shall be in accordance with due process of law; and***
- ***(c) where the person or authority is not a Justice or other judicial officer, there shall be published by constitutional instrument or statutory instrument, Regulations that are not inconsistent with the provisions of this Constitution or that other law to govern the exercise of that discretionary power.***

Section 2 of Act 793 has invested the Minister of Finance with authority and discretion in respect of rates chargeable for certain issues. By the provisions of article 296 of the Constitution, a duty is cast on the Minister to act fairly and consult with stakeholders; the due process requirement and the duty not to act arbitrarily ensure fairness. He is also required to act by a Legislative Instrument in

each case to guarantee Parliamentary involvement. And once the Minister fixes the charge by way of a Legislative Instrument, it has the force of law amending the Schedule to the Act. So whether the Act empowers him to amend the Schedule of fees or not the action has that effect in law. This is permissible within the Constitutional framework for he would not be making any new law but would just be carrying out the function imposed upon him by law to fix the rates.

The next question is whether section 2 of Act 793 has transferred the function of prescribing fees under section 23 of Act 703 to the Minister of Finance. The said section 23 provides:

> ***(1)A holder of a mineral right shall pay an annual mineral right fee that may be prescribed.***
>
> ***(2)Payments of annual ground rent shall be made to the owner of the land or successors and assigns of the owner except in the case of annual ground rent in respect of mineral rights over stool lands, which shall be paid to the Office of the Administrator of Stool Lands, for application in accordance with the Office of Administrator of Stool Lands Act, 1994 (Act 481).***

This section should be read together with sections 111 and 110(1). Section 111 assigns the functions under the legislation to the Minister responsible for Mines and by section 110 the Minister is required to publish Regulations by way of a Legislative Instrument to carry into effect the functions assigned to him under the legislation. It means that the right to prescribe fees for holders of mineral rights over stool lands is the responsibility of the Minister responsible for Mines. But according to the parties herein this function has been transferred to the Minister of Finance by Act 793, section 2. Both Act 703 and Act 793 are the creatures of Parliament. Therefore Parliament would be perfectly justified in the exercise of its constitutional mandate in transferring the fixing of

charges for mineral rights to the Minister of Finance. But that intention must be clearly stated in the subsequent Act or by repealing the earlier provision expressly or impliedly. When the intention is clearly expressed that Act cannot be questioned by this court.

We first have to consider whether Act 793, being a subsequent legislation, could be said to have impliedly repealed section 23 of Act 703. The principle of implied repeal is well grounded in the law. "***It is well settled that the Court does not construe a later Act as repealing an earlier Act unless it is impossible to make the two Acts or the two sections of the Act stand together, i.e. if the section of the later Act can only be given a sensible meaning if it is treated as impliedly repealing the section of the earlier Act"....***per Farwell J. in In Re BERREY, LEWIS v. BERREY (1936) Ch. 274 at page 279.

The learned author Bennion in his book referred to above states the principle at page 304 thus: ***if a later Act makes contrary provision to an earlier, Parliament (though it has not said so) is taken to intend the earlier to be repealed.....The principle is a logical necessity, since two inconsistent laws cannot both be valid without contravening the principle of contradiction.***

According to A.L. Smith J., in the case of WEST HAM CHURCH WARDENS AND OVERSEERS v. FOURTH CITY MUTUAL BUILDING SOCIETY (1892) 1 QB 654 at 658, **"*The test of whether there has been a repeal by implication by subsequent legislation is this: are the provisions of a later Act so inconsistent with, or repugnant to, the provisions of an earlier Act that the two cannot stand together?"***

However, this principle raises only a rebuttable presumption that the subsequent legislation has repealed an earlier inconsistent one. It may be rebutted when for instance the maxim *'generalia specialibus non derogant'* is successfully raised. Counsel for the

plaintiff argued that Act 703 is a special legislation so the general provisions in Act 793 cannot override the provisions of Act 703. The applicable law is that where a general enactment covers a situation for which a specific provision has been made by an earlier enactment, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Therefore the earlier specific provision is not treated as impliedly repealed.

Act 703 makes elaborate provisions to govern operations in the minerals and mining industry and entrusts the responsibility of ensuring compliance with these provisions, including the fixing of fees, to the Minister responsible for Mines. On the other hand, Act 793 is a general provision which put together a number of enactments that dealt with fixing of fees and charges and entrusted future responsibility of fixing the charges to the Minister responsible for Finance and Economic Planning. Parliament excluded Act 703 from the enactments covered by Act 793. Their intention was very clear to exclude the provisions of Act 703 from the operation of Act 793 where the affected enactments were carefully set out. The principle of '*expressio unius est exclusio alterius*' is equally applicable. By excluding Act 703, Parliament's clear intention was that all the provisions of that Act should continue to apply. This principle will be addressed in a little detail later in this decision.

Issue 4. Whether or not all the three Fees and Charges Instruments made by the Minister for Finance pursuant to authority conferred under Act 793, namely L.I. 2191 of 2012, L.I. 2206 of 2013 and L.I. 2216 of 2014, are inconsistent with and in contravention of Articles 1(2), 11(1), 93(2) and 267(3) of the 1992 Constitution as well as section 23 of the Minerals and Mining Act, 2006 (Act 703).

In order to resolve this issue it is necessary to determine the extent of the power and discretion given to the Minister of Finance by Act 793. For emphasis section 2 of Act 793 is repeated. It provides:

(1) **The authority conferred** under the enactments set out in the first column of the Schedule **to determine fees and charges is hereby transferred** to the Minister responsible for Finance and Economic Planning and accordingly those enactments are hereby amended. (***emphasis supplied***)

(2) The Minister for Finance and Economic Planning may by Legislative Instrument amend the Schedule to this Act.

The two subsections must be read conjunctively. Subsection 1 makes it clear what power was given to the Minister; it is the power to determine fees and charges under the enactments listed in the first column of the Schedule. The same subsection transferred the authority granted to other persons to fix fees and charges in the listed enactments to the Minister of Finance; that is the extent of the authorization. Therefore when in the next subsection Parliament gave the Minister power to amend the Schedule, it was in reference to what he is empowered by subsection 1 to do and that is to fix the fees and charges in respect of the bodies listed in the first column of the Schedule. It did not empower the Minister to alter the list in the first column of the Schedule. Such authorization would amount to amending the main Act and that would be contrary to Article 93(2) of the Constitution, for the Minister would be legislating instead of Parliament. Adding to or subtracting from the list in the first column of the Schedule is a pure legislative function. Revising the fees and charges in respect of the bodies listed in the Schedule is an executive act carrying into effect the dictates of the legislation, which as pointed out has the force of law amending the Schedule.

This reasoning finds support from the explanatory memorandum to Act 793 which counsel for the defendant quoted in their statement of case. It provides:

'The authority to prescribe fees and charges in respect of sale of goods, services or licences and other matters is contained in various enactments. This Bill seeks to regulate those fees and charges under one enactment and for budgetary purposes, make it easier for the necessary changes to be made. Although certain fees are imposed by Legislative Instruments, these Legislative Instruments have not been referred to in the Schedule, rather the substantive laws under which the Legislative Instruments were made are stated in the first column of the Schedule. the reason for this is that the delegated authority of Parliament for subsidiary legislation to be made is found in the substantive Act.

Under clause 2 of the Bill <u>the authority to determine the fees and charges in the various enactments</u> is being transferred to the Minister responsible for Finance and Economic Planning.'

(emphasis supplied)

From this memorandum the intention of Parliament is made manifestly clear. It intended that the only given to the Minister responsible for Finance is to amend the Schedule when it fixes the fees and charges in respect of the various wnctments listed in the first column of the Schedule through its delegated power of passing subsidiary legislation.

In this connection it is necessary to refer to this court's decision in the case of MORNAH v. ATTORNEY-GENERAL (2013) SCGLR (Special Edition) 502 which both lawyers in this case relied on. Whereas the plaintiff believes the court in that case had made it clear that a substantive Act cannot be amended by subsidiary legislation, the defendant said this could be done by express

authorization. That case dealt with this court's review jurisdiction which the Rules of Court Committee had amended by subsidiary legislation but the court held it had no such power or authorization to do that. Counsel for the defendant was interested in the point the court made that the power to amend the substantive law could be exercised if it was expressly conferred by the Constitution or other enabling law. That is the true position of the law. The Constitution empowers only Parliament to amend substantive Acts. And the Constitution also enables Parliament to empower another person to perform certain tasks by way of subordinate legislation, for instance to fix fees and charges and thereby effectively amend part of an Act in order to carry into effect or execute the legislative action. That decision did not say that Parliament could on its own empower another person to legislate an amendment to a substantive law. It is strictly limited to subsidiary legislation which in some cases may have the effect of amending part of an Act, notably the Schedule. There is no law whereby Parliament could authorize the Rules of Court Committee to amend the review jurisdiction of this court which has been given by the Constitution. That decision should therefore be understood in context that whatever legislative function any person exercises must be duly authorized by the Constitution or Statute. Whatever it is there must be no infraction of the Constitution in order to render such authorization valid.

In the light of the foregoing, the Minister has no power under Act 793 to add to the list. Hence his inclusion of the Office of the Administrator of Stool Lands Act, (Act 481) was a clear breach of Article 93(2) of the Constitution. This is because he had effectively amended sections 1 and 2(1) of Act 793 by subordinate legislation when he was only authorized to amend the Schedule. He has also impliedly taken over the function given to the Minister of Mines under Act 703 through an implied repeal of section 23(1) of the said Act. And indeed such authorization could not even be given by Parliament which is under a duty to perform its task under the

Constitution. Consequently whilst L.I. 2291 of 2012, L.I. 2206 of 2013 and L.I. 2216 of 2014 are valid in so far as they seek to fix charges and fees in respect of the bodies listed in the first column of Act 793, they are inconsistent with the letter and spirit of Article 93(2) of the Constitution with regard to the inclusion of the Office of the Administrator of Stool Lands Act, Act 481 and to that extent only null and void. Indeed these LI's also run counter to section 2 of Act 793 as the Office of the Administrator of Stool Lands is not included in the Schedule thereto. As these LI's also have the effect of impliedly amending section 23(1) of Act 703 by assuming the power given to the Minister responsible for Mines it is legally wrong. The principle is that that when the new Act, in this case Act 793, contains a repealing section mentioning the Acts which it expressly repeals, the presumption against implied repeal of other laws becomes fortified on the principle *'expressio unius est exclusio alterius'*. In the words of Lord Blackburn in the case of GARNETT v. BRADLEY (1877-78) 3 App. Cas. 944 at 965 "***Inasmuch as there are certain statutes enumerated which are repealed, expressio unius est exclusio alterius, and accordingly those statutes and those alone are repealed....***" See also HEADLAND v. COSTER and Another (1905) 1 K.B. 219; In re CHANCE (1936) 1 Ch. 266 at 268.

Issue 5. Whether or not the power conferred on the Minister for Lands and Natural Resources under section 110(1) of the Minerals and Mining Act, 2006 (Act 703) has been transferred to the Minister of Finance under the Fees and Charges (Miscellaneous Provisions) Act, 2009 (Act 793).

From the earlier discussions we can conclude that there has been no such transfer of power. Section 110(1) of Act 703 provides that ***The Minister may, by legislative instrument, make Regulations for the purpose of giving effect to this Act.***

Briefly stated, a transfer of the power conferred on the Minister of Mines under section 110(1) of Act 703 could only be accomplished through an amendment, express or implied. Act 793 did not purport to amend section 110(1) of Act 703 in any manner especially having regard to the fact that all the functions assigned to the Minister responsible for Mines under Act 703 remain intact. There is nothing said in Act 793 which can even remotely be said to be a re-enactment of section 110(1) of Act 703.

Issue 6. Whether or not the failure or omission by the Minister for Lands and Natural Resources to exercise the discretionary power and authority conferred upon him under sections 23 and 110(1) of the Minerals and Mining Act, 2006 (Act 703) to prescribe annual ground rent payable by holders of mineral rights granted by Government over stool lands is conduct which violates Articles 23 and 296(c) of the 1992 Constitution.

Article 23 of the 1992 Constitution provides:

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.

Article 296(c) has been quoted earlier in this judgment. The Minister responsible for Mines has the right, to the exclusion of every other person, to prescribe annual ground rents for holders of mineral rights granted over stool lands since there is no implied repeal of section 23(1) of Act 703 by section 2 of Act 793. So by Articles 23 and 296 of the Constitution, the Minister responsible for Mines would have failed in his duty for not complying with the provisions of section 110(1) and 23(1) of Act 703.

It is observed that parties herein used the Minister for Lands and Natural Resources when making references in Act 703. It may be

that currently he is the Minister responsible for Mines, but it is appropriate at all times to refer to the Minister responsible for Mines as the right person to deal with matters under Act 703. That responsibility may be passed on to another Minister by the President as he pleases. Hence as section 111 of the said Act has given the responsibility for matters arising under the Act to the Minister responsible for Mines it should be addressed as such in all matters that pertain to the Act.

Conclusion

We dismiss relief 1 for the reason that the Administrator's role in the determination of the fees and charges pertaining to mineral and mining leases granted over stool lands was purely advisory.

Relief 2 is dismissed for the reason that the extent of Parliament's authorization was clear and did not extend beyond the enactments listed in the first column of the Schedule to Act 793.

Subject to our decision that the inclusion of the Office of the Administrator of Stool Lands Act, 1994, Act 481 in L.I. 2191 of 2012, L.I. 2206 of 2013 and L.I. 2216 of 2014, is ultra vires, unconstitutional, null and void, relief 3 is dismissed.

Relief 4 is dismissed for the reason that as public servants, the Administrator and the staff working in his office are bound by Article 23 of the 1992 Constitution to work with every law in force in the country that relates to their operations or which they are enjoined to apply.

For reasons advanced in this decision, reliefs 5, 6. 7 and 8 are granted.

The Minister responsible for Mines is hereby ordered to take steps to fix the fees and charges under sections 23 and 110(1) of the Minerals and Mining Act, 2006 (Act 703), including arrears, lest the

State and other legitimate beneficiaries should lose revenue that they are entitled to by law.

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT

(SGD) V. J. M. DOTSE

JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE-BONNIE

JUSTICE OF THE SUPREME COURT

(SGD) N. S. GBADEGBE

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