IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA, A.D.2012

CORAM: DR. DATE-BAH,J.S.C (PRESIDING)

ANSAH, J.S.C.
ADINYIRA (MRS), J.S.C.
ANIN-YEBOAH, J.S.C.
BAFFOE-BONNIE, J.S.C.
GBADEGBE, J.S.C.
AKOTO-BAMFO (MRS.) J.S.C

WRIT No. J1/16/ 2012

19TH OCTOBER, 2012

BAFFOUR OSEI-AKOTO . . . PLAINTIFF

VRS.

THE ATTORNEY-GENERAL . . . DEFENDANT

J U D G M E N T

DR. DATE-BAH JSC:

This is the unanimous judgment of the Court. The basic issue raised in this case is whether when the Executive is authorised to issue an executive instrument under the enabling authority of a statute, the Executive is obliged to lay that executive instrument before Parliament before it can validly come into force. This Court held in *Amegatcher v Attorney-General* (SUIT NO J1/8/2012, judgment delivered on 26th July 2012) that Parliament had lawfully and constitutionally authorised the President to create districts by executive action. Section 1(2) of the Local Government Act, 1993 (Act 462) provides that:

> "(2) The President may, by executive instrument—
>
> (a) declare an area to be a district; and
>
> (b) assign a name to the district."

The contention of the plaintiff in this case is that the executive instrument by which the President declares any area within Ghana to be a district should be placed before Parliament, because it comes within the intendment of article 11(7) of the 1992 Constitution.

Article 11(7) states that:

> "(7) Any Order, Rule or Regulation made by a person or authority under a power conferred by this Constitution or any other law shall -
>
> (a) be laid before Parliament;

(b) be published in the Gazette on the day it is laid before Parliament; and

(c) come into force at the expiration of twenty-one sitting days after being so laid unless Parliament, before the expiration of the twenty-one days, annuls the Order, Rule or Regulation by the votes of not less than two thirds of all the members of Parliament."

The plaintiff contends that the Creation of Districts Instrument, 2011 (E.I. 80), the Creation of Municipalities Instrument, 2011 (E.I. 81) and the Declaration of Municipalities Instrument, 2011 (E.I. 82) which were made on 22nd November, 2011 and gazetted on the 25th November, 2011 were made in contravention of the above-quoted Article 11(7) of the 1992 Constitution and therefore should be declared null and void. The main issue in controversy is whether these executive instruments are in the nature of an "Order, Rule or Regulation" made by a person or authority under a power conferred by a law.

The plaintiff relies on the Interpretation Act, 2009 (Act 792) to sustain his argument. His contention is that the Constitution does not contain a definition of "Order, Rule or Regulation". He submits that there is an ambiguity as to the meaning of the phrase, as used in Article 11(7). There is thus justification for resorting to the Interpretation Act, 2009 to help ascertain the meaning of the phrase. The Memorandum to the Interpretation Bill, 2009 states as follows, in relation to Article 11(7) of the Constitution:

> "Each of these instruments would fall under the definition of *statutory instrument* or *statutory document* as specified in *clause 1* of the Bill. There are other instruments not mentioned under article 11 of the Constitution, such as Bye-Laws and Proclamations. The express mention of Orders, Regulations and Rules excludes, by necessary implication, the other statutory instruments or statutory documents not so mentioned. These instruments, therefore, do not fall within the ambit of article 11."

Seizing on this passage from the Memorandum, the plaintiff argues that the framers of the Interpretation Act, 2009 intended that the meaning of "statutory instrument" or "statutory document" should be the yardstick for determining the applicability of Article 11(7). A statutory instrument is defined in section 1 of the Interpretation Act, 2009 as: "an instrument made, whether directly or indirectly, under a power conferred by an Act of Parliament." He therefore concludes that an executive instrument is a statutory instrument and falls within the category of Orders, Regulations and Rules, within the intendment of article 11(7). Accordingly, E.I. 80, E.I. 81 and E.I. 82, being statutory instruments should have been laid before Parliament, in compliance with article 11(7).

This interpretation is not persuasive. For a start, section 10(2)(b) of the Interpretation Act, 2009 states merely as follows:

> "A Court may, where it considers the language of an enactment to be ambiguous or obscure, take cognizance of
>
> (a)…

(b) the explanatory memorandum as required by article 106 of the Constitution and the arrangement of sections which accompanied the Bill;".

The memorandum is thus merely an aid to interpretation and nothing in it is binding on this Court, as counsel for the plaintiff sought to argue. Thus this Court does not inexorably have to accept the plaintiff's argument (based on his reading of the Memorandum to the Interpretation Bill, 2009) that the E.I.s referred to above, being statutory instruments, but not being Bye-laws or Proclamations, must necessarily be construed to come within the ambit of article 11(7) of the 1992 Constitution.

There are sound reasons for this Court to exclude executive instruments from the ambit of the Order, Rule or Regulation referred to in article 11(7) of the Constitution. To begin with, the Interpretation Act, 2009, in section 1, defines an executive instrument as:

a) "an instrument specified by an Act of Parliament as an executive instrument; or
b) a statutory instrument which is of an administrative character or of an executive character and is not an instrument
    i. of a judicial character, or
    ii. of a legislative character;"

It is clear from this definition that executive instruments are not of a legislative character. Granted that this is so, what is the purpose to be served in placing this executive act before the legislature. It is clear from the context and spirit of the

Constitution that the framers could not have intended that executive instruments should be placed before Parliament in accordance with article 11(7).

Koranteng-Addow J. came to a similar conclusion in *Republic v Minister for the Interior; Ex parte Bombelli.* [1984-86] 1 GLR 204. Her Ladyship there said (at p. 211):

> "This is a convenient point to deal with the second ground of the application, ie whether EI 27 of 1980 passes the test in article 4 (7) of the Constitution, 1979. It is the mainstay of the application. Was the minister required to publish the order in the Gazette, and lay it before Parliament for 21 sitting days before the order became effective? Article (7) of the Constitution provides that "Any Orders, Rules or Regulations made by any person or authority under a power conferred in that behalf " shall be laid before parliament, etc. The question here is therefore whether the executive instrument ordering the deportation of the applicant is an instrument which should have been laid before Parliament to be effective. Although an "order", the question is whether it falls within the meaning of "Orders" as contemplated by article 4 (7) of the Constitution, 1979.
>
> Going by the wording of article 4 (7) one is tempted to think that such an order as the one issued by the minister for the deportation of the applicant falls within the "orders" covered by article 4 (7). On a closer look and proper interpretation of the sub-article it becomes obvious that such an order as the one issued by the minister falls outside the scope of article 4 (7). By the canon of interpretation, namely the principle of the rule noscitur a sociis one readily sees that the word "Orders" in article 4 (7) can only

mean "orders" in the form of rules and regulations - not a command such as the order issued by the minister. According to this rule of interpretation, a word takes its meaning from the company it keeps, and "orders" in article 4 (7) should be interpreted as "orders" such as rules and regulations. To fall within the definition of article 4 (7) an order must be a legislative order. Although a statutory instrument, an executive instrument is neither legislative nor an instrument of a judicial nature. Section 5 of the Statutory Instruments Act, 1959 (No 52 of 1959) defines executive instruments as "Statutory Instruments other than legislative instruments or instruments of a judicial character." Since executive instruments do not partake of the nature of rules and regulations I would think they fall outside the orders which are to be laid before Parliament before they become effective. It definitely cannot be in the public interest to publish it or lay before Parliament for 21 days. If such orders were to be published for 21 days then the minister cannot exercise that power in times of emergency."

Although Justice Korangteng Addow did express this view, she in the end referred the issue on which she had indicated her opinion to the Supreme Court for its authoritative interpretation. Her view was thus not finally authoritative, being the view of a High Court and being tentative, pending a binding determination by the Supreme Court. The view of the Supreme Court, if it expressed one, does not appear to have been reported. The view of Koranteng Addow J in the High Court is certainly not binding on this Court. Nevertheless, the opinion that she expressed was a sound one. The purpose for laying subsidiary legislation before Parliament is for it to mature into a binding enactment. This purpose is alien to an executive order. An executive order does not have legislative effect and

should not, therefore, in principle be laid before Parliament. The arguments of the plaintiff to the contrary have not persuaded us that this position of principle has been altered by any of the legal materials that he relies on. Accordingly, our interpretation of Article 11(7) of the 1992 Constitution is that it does not apply to executive instruments. Accordingly, the executive instruments impugned by the plaintiff are valid.

The arguments by which the plaintiff seeks to assert that article 11(7) of the 1992 Constitution applies to the impugned executive instruments manifests a dogged refusal to accept the *ratio decidendi* of *Amegatcher v Attorney-General (supra)*. In that case, this Court held that it was constitutional for Parliament to have chosen the option of conferring on the President the power to create districts by executive action. Given that decision by this Court, when the President creates districts, he is deploying the executive authority of the State; not a power of subsidiary legislation.

Thus the plaintiff refuses to accept legal reality when he contends as follows in his Supplementary Statement of Case (in paragraph 15):

> "…The Constitution of Ghana provides as follows:
>
> "*241.*
>
> *(1) For the purposes of local government, Ghana shall be deemed to have been divided into the districts in existence immediately before the coming into force of this Constitution.*

(2) Parliament may by law make provision for the redrawing of the boundaries of districts or for reconstituting the districts.

(3) Subject to this Constitution, a District Assembly shall be the highest political authority in the district, and shall have deliberative, legislative and executive powers."

Pursuant to this power assigned to Parliament to make provision by law for the redrawing of boundaries of districts and to reconstitute new districts, Parliament enacted the **Local Government Act, 1993 (Act 462)** which affirmed the constitutional measure of legalizing the districts in existence immediately before the coming into force of the Constitution, 1992 and also made provision for how new districts can be created. **Act 462** assigned the power to create new districts by subsidiary legislation, to the President."

The assertion in the last sentence is palpably incorrect. *Amegatcher v Attorney-General* did not hold that the President was to create new districts by subsidiary legislation, but rather by executive action duly authorised previously by Parliament. The plaintiff continues in his refusal to accept the authority of *Amegatcher* in the following vein (paragraph 16):

"It is our respectful submission that a true and proper construction of **Article 241** will reveal that basis for the existence of districts in the country is legal. The framers of the Constitution, undoubtedly aware of the fact that a district in Ghana will require some legal basis for its existence, constitutionally sanctioned in **Article 241** the division of the country into

districts and further made provision for how new districts can be created. Pursuant to this, **Act 462** was passed by Parliament and same accorded to the President the power to create new districts and redraw the boundaries of new districts by an executive instrument. Effectively, it is accurate to say that this power of His Excellency the President to create new districts, is an exercise by the executive of the power of subsidiary legislation."

Wrong again! The creation of districts by executive instruments issued by the President is not an exercise of the power of subsidiary legislation. It is rather the exercise of executive power, in contradistinction from the exercise of legislative power. This, with respect, is the erroneous analysis which has driven the plaintiff's persistence in maintaining that the impugned executive instruments should comply with the requirements of article 11(7). Executive instruments do not constitute subsidiary legislation, even though they are statutory instruments. As already noted, a statutory instrument is defined in section 1 of the Interpretation Act, 2009 as: "an instrument made, whether directly or indirectly, under a power conferred by an Act of Parliament." Executive instruments, clearly, fall within this definition. However, simply because executive instruments are statutory instruments does not mean they constitute subsidiary legislation. To be subsidiary legislation, they have to be of a legislative nature. The definition of an executive instrument in section 1 of the Interpretation Act, 2009 shows that it must not be of a legislative character. This simple truth is what makes fallacious the central assertion in the following passage from the plaintiff's Supplementary Statement of Case (paragraph 17):

> "Respectfully, to avoid an application of article 11(7) merely because the creation of districts is an executive act, will strike in absurdity. This will be so when account is taken of the fact that certain executive decisions of the President to the extent that it affects a majority of the people in this Republic, are enjoined to the Constitution to receive the sanction of **Article 11(7).** For example, even though the creation of regions under article 5 is a pure executive act as held in the seminal case of **Republic v High Court; Ex Parte Attorney-General (Titiriku I & Others Interested Party)** 2007-2008 SCGLR 665, the President is required to do so by a constitutional instrument which undoubtedly is laid before Parliament. The only difference is that the instrument by which the President creates new regions is characterized as a constitutional instrument, by virtue of its enactment pursuant to powers conferred on the President by the **Constitution, 1992.**"

The instrument by which the President exercises his power of creating new districts is expressly characterised in the statute that gives him that power as an executive instrument. Executive instruments, according to their definition in the Interpretation Act, 2009, are not of a legislative character. Therefore, for us, they do not have to comply with article 11(7) of the 1992 Constitution. It is thus not permissible for this Court to accept the invitation from the plaintiff to accord a differential treatment to particular kinds of executive instruments. All kinds of executive instruments are the means for implementing executive authority. There is no credible justification for requiring such instruments to be laid before Parliament, when they do not have a legislative character. A contextual and purposive interpretation of article 11(7) of the 1992 Constitution leads inevitably to the conclusion that it is intended to apply to instruments of a legislative nature.

The extent of the impact of executive action, which is highlighted in paragraph 17 of the plaintiff's Supplementary Statement of Case (*supra)*, is no justification for this court to transform the legal character of the action embodied in an executive instrument from executive to legislative. Accordingly, the plaintiff's arguments which contend that, in the interest of good governance, executive instruments which have a wide impact on the public should be submitted to the article 11(7) procedure are untenable.

In the result, we would dismiss the plaintiff's action as being without legal foundation. An executive instrument is not an "Order, Rule or Regulation" within the intendment of article 11(7) of the 1992 Constitution. Finally, there is need to state for the record that though the defendant was served, he chose not to file anything in response to the plaintiff's pleadings.

(SGD) DR. S. K. DATE-BAH

JUSTICE OF THE SUPREME COURT

(SGD) J. ANSAH

JUSTICE OF THE SUPREME COURT

(SGD) S. O. A. ADINYIRA (MRS.)

JUSTICE OF THE SUPREME COUR

(SGD) ANIN -YEBOAH

JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE- BONNIE

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