IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA, A.D.2013

CORAM: ANSAH, J.S.C. (PRESIDING)

ADINYIRA (MRS), J.S.C.
OWUSU (MS.), J.S.C.
ANIN YEBOAH, J.S.C.
GBADEGBE, J.S.C.
AKOTO- BAMFO(MRS) J.S.C.
BENIN, J.S.C.

WRIT No. J1/7/ 2013
30TH APRIL, 2013

BERNARD ANBATAAYELA MORNAH . . . PLAINTIFF

VRS.

THE ATTORNEY-GENERAL . . . DEFENDANT

J U D G M E N T

BENIN, J.S.C:-

The plaintiff brought this action invoking the original jurisdiction of this court. The reliefs sought are:

i. A declaration that on a true and proper interpretation of Articles 133, 157, 93(2) and 11 of the 1992 Constitution, Rule 71B and a part of Rule 69C(5) of the Supreme Court (Amendment) Rules, 2012 (C.I.74) are unconstitutional and must be declared null and void and of no effect.

ii. Any consequential orders the Supreme Court may deem meet.

There are two clear and distinct reliefs. The first is by virtue of Rule 71B of C.I. 74 which amends part of the Supreme Court Rules, 1996 (C. I. 16) pertaining to review. The second is by virtue of Rule 69C(5) which prescribes days of sitting in Presidential Election petition.

Rule 71B provides:

No Review

Rule 55 does not apply to decision of the Court in respect of a petition presented to challenge the election of a President.

The said Rule 55 provides that '***An application for review shall be filed at the Registry of the Court not later than one month from the date of the decision sought to be reviewed.'***

In construing a part of an enactment, the court must have regard to the entire legislation, and also put the part under consideration in context of the legislation. Rule 55 falls under Part V of C.I. 16 under the heading REVIEW. The said Part V sets out the practice and procedure regulating the exercise of the court's review jurisdiction.

The scope of Rule 55 is restrictive in the context of the entire Part V, and the language is very clear and simple requiring no interpretation. It only sets the time frame within which an application may be brought for review. Counsel for the defendant got it partly right when he stated that ".....Rule 55 relates to the time for applying for review in the Supreme Court. This Rule has been

revoked by Rule 71B.....of C. I. 74." Thus, the reality is that Rule 71B of C. I. 74 having abolished Rule 55 in relation to Presidential Election petitions, it means no more than that when it comes to Presidential Election petitions there is no time limit within which a party may apply for review. This may sound unusual but, nonetheless, it's not illegal. Fixing of time within which a party may apply for review before the Supreme Court falls within the competence of the Rules of Court Committee under Article 64(3) as well as Article 133(1) of the Constitution.

To recap, the provision under consideration only sought to remove the time frame within which an application for review may be brought in Presidential Election petition. It does not purport to abolish the right of a party to apply for review and the court's review jurisdiction which is established by Article 133(1) of the Constitution. This is duly recognised under Part V of C.I.16, wherein the practice and procedure governing review in this court has been set down. Part of the opening sentence of Rule 54 is very significant to note. It reads: '***The Court may review any decision made or given by it***.....' This is a re-statement of Article 133(1) of the Constitution, and the right of review was thus kept intact. Whereas Rule 54 retains the court's right to review its own decision and a fortiori a party's right to apply for review, Rule 55 for its part removes any time limitation in Presidential Election petition.

The parties herein do not accept the foregoing as a true representation of the legislative intendment. In the plaintiff's view the heading 'No Review' gives a clear insight as to what the intention behind Rule 71B is, when one invokes in aid section 15 of the Interpretation Act, 2009 (Act 792). This provision states:

Titles placed at the head or beginning of a subdivision of an enactment and notes and references placed before the beginning of a provision are intended for convenience of reference only but may be used as an aid to construction of the enactment.

The extent to which a heading may be relied upon by a court in giving meaning to a particular provision, and what cautions a court may exercise in that regard have been set out in Halsbury's Laws of England (4th Edition) Reissue Vol. 44(1) para. 1411. Similar views have been expressed in Bennion on Statutory Interpretation, 5th edn., pp. 745-6. The renowned authors of these two works

just referred to are all agreed that it is not right to allow the plain literal meaning of the words used in an enactment to be overridden on account of the heading. I agree with this view if only because heading is useful as a quick guide if it flows from the actual text of the enactment. For that reason Bennion's criticism of the House of Lord's contrary decision in **Infabrics Ltd v. Jaytex Ltd. (1982) AC 1** is justified. In short, the plain, ordinary words used in an enactment cannot be replaced by reason of a heading.

Having stated the general principle with regard to heading as an aid in interpretation, what the defendant says will be considered at this stage. The defendant agrees with the plaintiff that Rule 55 effectively revoked the right of review in relation to Presidential Election petition, though for different reasons. In the defendant's view, Article 64(3) of the Constitution empowers the Rules of Court Committee "to prescribe the rules of court for the practice and procedure for election challenge of a President and this includes whether to provide for review of a decision given in a petition challenging the election of a President or not.....Shutting the door for a review in an election petition.....of a President cannot be a violation of Articles 133(1), 157, 93(2) and 11 of the Constitution, because the enabling power is derived from the Constitution itself."

To sum up, the plaintiff says that the heading truly expresses the intention of the lawmaker to do away with review in Presidential Election petition and he considers this as unconstitutional. For his part, the defendant says the Rules of Court Committee has the power to curtail the right of review by virtue of Article 64(3) of the Constitution in appropriate circumstances. Neither of these views is acceptable.

Review is a right which has been created by Article 133(1) of the 1992 Constitution. Indeed it is also part of what may be termed the court's continuing jurisdiction, to take another look at its own decision. It therefore gives a party a right to apply for review. It is common knowledge that jurisdiction or a right, once created, can only be taken away by way of clearly defined procedures by the appropriate legal body entrusted with that responsibility under the Constitution or other enabling law. In the instant case, the review provision under Article 133(1) can only be removed through a

constitutional amendment duly passed by an Act of Parliament under appropriate provisions of the Constitution.

Under Article 133(1) of the Constitution, the Rules of Court Committee was mandated to prescribe appropriate conditions and grounds for the exercise of this review jurisdiction. This it did by the enactment of Part V of C. I. 16. In the same vein, the Rules of Court Committee has been empowered under Article 64(3) of the Constitution to ***'make rules of court for the practice and procedure for petitions to the Supreme Court challenging the election of a President.'***

The operative words herein are 'practice and procedure'. This means no more than the rules that prescribe what steps to follow in order to have a right or duty judicially enforced. This is in contradistinction to the law that defines the specific rights or duties themselves. In his work titled Jurisprudence, the Glanville L. Williams edn., 10th edn. at p. 476, John Salmond states that "*so far as the administration of justice is concerned with the application of remedies to violated rights, we may say that the substantive law defines the remedy and the right, while the law of procedure defines the modes and conditions of the application of* one *to the other*." The same principle is affirmed by the author Edward E. Bryant in his work The Law of Pleading Under the Codes of Civil Procedure 2nd edn. pg 1 where he writes: "*The body of law consists of two parts, substantive and adjective law. The former prescribes those rules of civil conduct which declare the rights and duties of all who are subject to the law. The latter relates to the remedial agencies and procedure by which rights are maintained, their invasion redressed, and the methods by which such results are accomplished in judicial tribunals."*

There is this English Court of Appeal case which is relevant to this discussion. That is the case of **Safeway plc v. Tate (2001) T.L.R. 64.** The court held that the broad general power to reform the rules of practice and procedure conferred upon the Lord Chancellor by section 4 of the Civil Procedure Act 1997 did not enable consequential delegated legislation to repeal or amend primary legislation which embodied a fundamental, as opposed to a procedural, right such as trial by jury. Therefore the power to award summary judgment under rule 24.2 of the Civil Procedure Rules did not override the right to trial by jury in a defamation action provided by s. 69(1) of the Supreme Court Act of 1981.

See also **Malgar Ltd v. R.E Leach Engineering Ltd. (2000) T.L.R. 109 Ch. D.** where it was held that rules of court could not make substantive changes in the law of contempt.

Thus when the Rules of Court Committee was charged with the responsibility of enacting rules to regulate the conduct of the practice and procedure in Presidential election petition it meant the substantive laws were different from what the committee was empowered to do. The Committee was not empowered to amend the substantive law/s without express authorisation. One such substantive law in place is the right of review given to this court by virtue of Article 133(1) of the Constitution. Review is not a matter of mere procedure, but an important and substantial constitutional right. Any attempt to alter the right of review would be ultra vires the Committee's functions. And any attempt to remove the court's review jurisdiction or a party's right to apply for review except through an amendment following due procedure under the Constitution would be unconstitutional.

As earlier stated, Rule 55 only removed time limitation in applying for review in Presidential Election petition; it did not abolish the right to apply for review. It seems, therefore, that the heading to Rule 71B of C.I. 74 is misleading if not conflicting, as nothing in the rule itself suggests that the right of review in Presidential Election petition was being curtailed. If that was the intention, the entire Part V and more particularly Rule 54 would have been declared inapplicable to Presidential Election petition, not only Rule 55 which, as I said, is very restrictive to time only. The heading to Rule 71B does not offer any assistance in finding the legal meaning of the Rule.

In conclusion, it is held that Rule 71B did not curtail a party's right to apply for review of this court's decision or the court's right to review its own decision in a Presidential Election petition. Even at the risk of being repetitive, what Rule 71B has done is that in respect of Presidential Election petition it has sought to abolish the one month limitation period within which a party may apply to the court to review its decision. The right of a party to apply for review is not synonymous with time to apply, the former is a right given to a party within the jurisdiction of this court, which the Committee has no power to curtail; the latter is a matter of practice and/or procedure which the Committee is fully empowered to deal with. Rule 71B is thus constitutional.

Rule 71B failed to substitute another time frame for the right of review to be exercised in Presidential Election petition. However, time is of the essence in review applications in order to bring litigation to a close on ground of public policy. Rule 71B appears to be ineffectual because Part V of C.I. 16 applies to review in this court and it will equally apply entirely to review in Presidential Election petition, as it does not state or foreclose the category of cases to which it may apply, by the use of the expression 'the court may review **any** decision given by it' in Rule 54. (emphasis supplied)

The second relief sought is that a part of Rule 69C(5) of C.I.74 contradicts the Public Holidays Act (2001), Act 601 and Articles 157, 93 and 11 of the Constitution. The Rule in question forms part of the rules made to govern the practice and procedure in Presidential Election petitions. It provides that "***The Court shall sit from day to day, including Saturdays, Sundays, and public holidays."***

The plaintiff's case was that ".....Act 601 provides by implication in its sections 4, 5 and 6 that the courts of law may not open for business unless the President issues an Executive Instrument permitting same to happen. Indeed it is an offence to hold court on a public holiday without such an Executive Instrument....." The plaintiff also argued that Article 64(3) does not empower the Committee to pass a subordinate legislation that has the effect of abolishing a law duly passed by Parliament, a body that has constitutional mandate to pass law to regulate public holidays. He concluded thus: "To the extent that C.I.74 contradicts Act 601 and Articles 157, 93 and 11 of the 1992 Constitution, same must be declared unconstitutional, null and void and of no effect."

For the defendant, it was argued that "from the language of section 4 of Act 601, it is obvious that the Court mentioned in Rule 69C(5) of C. I. 74 is not among the type of businesses to be covered under Act 601. The Court, by the ejusdem generis rule, is not the type of business mentioned in section 4(1)."

For its full force and effect, I will reproduce section 4 of Act 601. It's under the heading: *Prohibition of business on public holidays*

and it provides:

4(1) Subject to sections 1, 3 and 6 and subsection (2) of this section, a person shall not open a shop for the purposes of selling or trading or engage in a business on a public holiday.

4(2) Subsection (1) does not apply to

(a) food or grocery shops;
(b) drug or pharmacy shops;
(c) licensed restaurants or hotels;
(d) local markets for sale of food or foodstuffs;
(e) premises licensed for sale of spirit, wine, and beer under the Liquor Licensing Act,1970 (Act 331)
(f) the running of an essential public service specified in subsection (3) of this section.

*4(3) For the purposes of paragraph (f) of subsection (2), "**essential public service"** means any of the following:*

(a) water supply services;
(b) electricity supply services;
(c) health and hospital services;
(d) sanitary services;
(e) air traffic and civil aviation control services;
(f) meteorological services;
(g) fire services;
(h) air transport services;
(i) supply and distribution of fuel, petrol, power and light;
(j) telecommunications services;
(k) public transport services.

The wording of section 4(1) is at the heart of this issue. An operator of a shop is prohibited from opening a shop in order to sell or trade on a public holiday. There is no dispute with that part. It is the purported prohibition of a person to engage in business on a public holiday which creates the problem at hand. Is the prohibition to engage in business related to shop operators, or does it extend to other kinds of business not being operated from a shop? The plaintiff offered no assistance in this regard but the defendant did. According to the defendant the court should apply the ejusdem generis rule and hold that the

words sell, trade and engage in business are all referable to 'shop'. Hence 'business' should not be given its natural meaning. As the defendant submitted, it is undeniable that "the Supreme Court does not open for the purposes of selling or trading." Counsel cited some authorities to buttress his argument. These are: **Jebeille v Norwich Union Fire Insurance Ltd. (1964) GLR 427 SC; Republic v High Court Accra; ex parte Ploetner, SC, 24th March 1986; digested in (1984-86) GLRD 99.**

The argument by the defendant is interesting and the authorities cited are germane to the argument. However, subsection (1) should not be read in isolation. Subsection (2)(f) exempts 'essential public services' from the prohibition imposed by subsection (1). Subsection (3) goes on to list the essential public services which are exempted from the prohibition. Even a cursory glance at this list in subsection (3) shows that they are not establishments or bodies which engage in selling or trading from shops. Take fire service, air traffic control or meteorological services as examples. The list thus puts one on the inquiry that subsection (1) goes beyond shop operators engaged in selling or trading.

The wording of section 4(1) should be critically examined in order to find its legal meaning. It says that a person shall not open a shop for the purposes of selling or trading or engage in business on a public holiday. The preposition 'of' precedes and controls the present participles 'selling or trading' which makes sense reading it; that is, 'a person shall not open a shop for the purpose of selling or trading.....on a public holiday'. The same cannot be said of the following expression 'engage in business'. The preposition 'of' cannot precede the verb 'engage'. Thus the sentence cannot be read as 'a person shall not open a shop for the purpose of..... engage in business'. It is thus clear that the expression 'engage in business' stands on its own and it makes sense. The lawmaker intended to identify two groups of persons who are prohibited from working on a public holiday. The first group is a person who operates a shop for the purpose of selling or trading and the second group is a person who engages in a business different from the first group. It is in this sense that the exemption granted the institutions listed in subsection (3) should be understood and appreciated. The lawmakers know that these establishments do not operate shops to sell and trade, yet they have been placed under

subsection (1) because they know it covers them under the expression 'no person shall.....engage in a business on a public holiday.'

Besides, one has to take a look at section 6 of Act 601. It provides: ***Where the President is satisfied that it is in the public interest to do so, the President may by executive instrument exempt a class of business or a particular*** **business from section 4 (1).** If one considers section 6 alongside the entire section 4 especially subsection (3), as well as section (5) it is clear that business as used in subsection (1) of section (4) includes individuals, public entities as well as corporate bodies other than those who sell or trade from shops. The President's power under section 6 extends to cover not just persons operating shops, whether private or public, whether corporate or individual but all persons so long as they engage in business.

Business is a wider term. The editors of Halsbury's Laws vol. 47 (4th edn) (2001 reissue) para. 6 say that it means ".....almost anything which is an occupation as distinguished from a pleasure. However, the term must be construed according to its context." In the same vein, Mason CJ stated in the case of **Re Australian Industrial Relations Commission; Ex parte Australian Transport Officers Federation (1990) 171 CLR 216** at 226 that ".....the word 'business' is notorious for taking its colour and its contents from its surroundings....."

In the context of sections 4, 5 and 6 of Act 601, business includes all those engaged in government or state or public duties officially. In my view the courts of Ghana, being the judicial arm of government, carry on part of state business. They will thus be caught by section 4(1) of Act 601.

Be that as it may, the courts in Ghana, like every other person within the territory of Ghana, are required by section 1 of Act 601 to observe the days set aside in the Schedule to the Act as statutory public holidays. Nobody is exempted from the observance of public holidays by virtue of section 1 of Act 601. Section 4(1) is subject to section 1, inter alia. Thus even if the courts are not covered by the provisions of section 4 they are nevertheless covered by section 1 of the Act.

The issue then is whether or not the Rules of Court Committee can enact legislation that prohibits the Supreme Court and for that matter any other

court from observing a statutory public holiday. Article 93(2) of the Constitution is clear that the legislative power of the country has been entrusted to Parliament, in accordance with the principle of separation of powers. It follows that when a law has been duly passed, subject to the Supreme Court's power to declare it as being invalid, it is only Parliament that can amend that law. Under Act 601 the power to permit an organisation to work on a public holiday other than those listed in section 4(3) has been vested in the President, by section 6. It may appear questionable or debatable that the power to permit the Supreme Court to engage in its official business on a public holiday has been entrusted to the President and not to the Chief Justice or Rules of Court Committee. But that is no reason not to respect the wisdom of the legislature as expressed in the enactment, as long as the law exists in the statute books. It is reminiscent of what Sir John Holt, an English Jurist and Chief Justice said in the case of **City of London v. Wood (1701), 12 Mod. 669 at 687** "----------an Act of Parliament can do no wrong, though it may do several things that look pretty odd------".

In conclusion, to the extent that Rule 69(C)(5) includes public holidays, it violates sections 1, 4(1) and 6 of Act 601 thereby exceeding the mandate given to the Rules of Court Committee under Article 64(3) of the Constitution and is in direct conflict with Article 93(2) of the Constitution and is thus void and of no effect.

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT.

(SGD) J. ANSAH

JUSTICE OF THE SUPREME COURT.

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

JUSTICE OF THE SUPREME COURT.

(SGD) R. C. OWUSU (MS)

JUSTICE OF THE SUPREME COURT.

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

(SGD) N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT.

(SGD) V. AKOTO BAMFO (MRS)

JUSTICE OF THE SUPREME COURT.

COUNSEL

BENSON NUTSUKPUI FOR THE PLAINTIFF.

SYLVESTER WILLIAMS (PSA) WITH HIM MRS. JULIANA ADDO- YOBO (SA) FOR THE DEFENDANT