IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, A.D.2012

CORAM: ATUGUBA, AG .C.J (PRESIDING)
AKUFFO (MS), J.S.C.
DR. DATE-BAH, JSC
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. J1/5/ 2012

17TH OCTOBER, 2012

CENTRE FOR PUBLIC INTEREST LAW **PLAINTIFF**

VRS

THE ATTORNEY-GENERAL **DEFENDANT**

J U D G M E N T

ATUGUBA, AG. C.J

The plaintiff by its writ claims as follows:

1. "A declaration that the President of the Republic of Ghana acted in breach of his constitutional obligations under article 40(a), 57(3), 58(1)-(4) and 73 of the Constitution

1992 of the Republic of Ghana when he caused to be submitted to the Parliament of the Republic of Ghana for approval the Agreement between the Republic of Ghana and the China Development Bank known as the Master Facility Agreement.

2. A declaration that the purported approval by the Parliament of the Republic of Ghana of the Agreement between the Republic of Ghana and the China Development Bank known as the Master Facility Agreement is of no effect, null and void to the extent that it was introduced in Parliament in breach of articles 57(3), 58(1)-(4) and 108 of the Constitution 1992 of the Republic of Ghana.
3. A declaration that having submitted to the Parliament of the Republic of Ghana for approval the Agreement between the Republic of Ghana and the China Development Bank known as the Master Facility Agreement in breach of articles 57(3), 58(1)-(4) and 108 of the Constitution 1992 of the Republic of Ghana as well as section 18(7) of the Petroleum Revenue Management Act, 2011 (Act 815) the President of the Republic of Ghana has acted in a manner prejudicial or inimical to the economy of the state and has accordingly violated article 69(1) (b) (ii) of the aforesaid Constitution.
4. A further declaration that the President of the Republic of Ghana acted in wilful violation of the oath of allegiance and the presidential oath set out in the Second Schedule and or is in wilful violation of article 58(2) of the Constitution 1992

of the Republic of Ghana when he caused to be submitted to the Parliament of the Republic of Ghana for approval the Agreement between the Republic of Ghana and the China Development Bank known as the Master Facility Agreement.

5. A declaration that having wilfully violated the oath of allegiance and the presidential oath set out in the Second Schedule and is in wilful violation of article 58(2) of the Constitution 1992 of the Republic of Ghana when he caused to be submitted to the Parliament of the Republic of Ghana for approval the Agreement between the Republic of Ghana and the China Development Bank known as the Master Facility Agreement.
6. An order of perpetual injunction restraining the Parliament of the Republic of Ghana from considering and approval the documents listed below subsequent to the purported approval of the Agreement between the Republic of Ghana and the China Development Bank known as the Master Facility Agreement;
    (i) The Offtaker Agreement.
    (ii) The Security being the Charge over Accounts Agreement.
    (iii) The Accounts Agreement.
    (iv) The Form of Subsidiary Agreement; and
    (v) The Five Party Agreement."

At the close of pleadings the following memorandum of issues was filed by the plaintiff, namely:

(i) "Whether or not the reliefs sought by plaintiff in his suit falls within the exclusive original jurisdictional of this Court?

(ii) Whether or not the Master Facility Agreement falls within the purview of article 73 of the 1992 Constitution?

(iii) Whether or not the requirement, as stipulated in the Master Facility Agreement that 60% of the money to be borrowed be used to hire Chinese Contractors is discriminatory?"

That filed by the defendant is as follows:

"Whether or not the Judiciary has the power to question the Executive's acts done within the ambit of its authority."

Although not covered by the memorandum of issues in quite the same way it was extensively argued that the plaintiff's action is premature as certain aspects of the impugned agreement have not yet been referred to Parliament. The contention fastened much on the word "done" in article 2 of the Constitution. However, it must always be borne in mind that the Constitution like any other statute means what the courts with competent jurisdiction hold it to mean, see *Chokolingo v. Attorney-General of Trinidad and Tobago* (1981) 1 All ER 244. In this case it is not disputed that the President has had the Master Agreement covering the loan submitted to Parliament and approved. It is a matter of course that the interconnecting agreements or steps would follow suit. This court entertains actions in respect of completed acts as well as quia timet actions, see *Kwakye v. Attorney-General* (1981) GLR 944 S. C. and *New Patriotic Party v. National Democratic Congress and Others* (2000) SCGLR

461. The aspects of this action castigated as premature are within the ambit of the quia timet principle, hence there is jurisdiction as to them.

The second issue is whether the Master Facility Agreement falls within the purview of article 73 of the 1992 Constitution? Article 73 is as follows:

"*INTERNATIONAL RELATIONS*

73. The Government of Ghana shall conduct its international affairs in consonance with the accepted principles of public international law and diplomacy in a manner consistent with the national interest of Ghana."

The parties haggle over a contention that the loan agreement in this case is a commercial transaction and not a treaty and that Article 73 deals with the latter only. This is a contention, at best, as to the letter and not the spirit of the legislation. However even in a book of History entitled, The History of Rome Up to the time of Julius Caesar, published in 1896 the authors at 502 chastise Clodius for following the letter of a law but violating its spirit, to the effect that certain essentials of life should be denied to a person who put a Roman to death, without trial when he sought to use it in vengeance against Cicero who saw to the execution of certain Roman citizens whom the Senate held were embarked on treason against the Roman State even though there was no trial.

It certainly cannot usefully be argued that the spirit of article 73 is that the President, when dealing with a matter that is not a treaty can discount the national interest. In any case article 1(1) covers such a situation. It is as follows:

> "1.(1) The Sovereignty of Ghana resides in the people of Ghana **in whose name and for whose welfare the powers of government are to be exercised** in the manner and within the limits laid down

in this Constitution." (e.s.) See also, *inter alia*,articles 40(a) and 58(1).

But I do not think that even the letter of that provision discounts the national interest unless a treaty is involved. In any event in this case the Master Facility Agreement's recitals to be presently quoted point to international affairs between Ghana and China. Accordingly the substantial question which should detain this court is the third and last of the plaintiff's issues: namely whether or not the requirement, as stipulated in the Master Facility Agreement that 60% of the money to be borrowed be used to hire Chinese Contractors is discriminatory.

In considering this issue it is important to bear in mind the following pleadings of the plaintiff:

> "2.6 The MFA has two recitals. The recitals set out what we would call the "reason" for the MFA. The first recital says that;
>
> > "(A) The Government of the People's Republic of China and the Government of the Republic of Ghana **are resolved to expand bilateral relations** through **harmonious, sustainable and win-win economic co-operation measures**, in line with the principles for the Forum on China-Africa Co-operation."
>
> 2.7 The second recital says that;
>
> > "(B) Lender seeks **to apply its financial support** as a means **to enhance bilateral economic and trade relations** between China and Ghana by extending "**commercial loans**" to the Borrower, to be applied by the Borrower on the terms and conditions set out in" the agreement."

The plaintiff's grievance is centred mainly on the proviso to clause 3.1 of the Master of Facility Agreement to the effect that::

> " PROVIDED THAT a minimum of 60 per cent of each of the Tranche A Facility and the Tranche B Facility shall be paid to **PRC Contractors.**"

The plaintiff contends in paragraphs 2.14 to 2.15 of its statement of case that this proviso has the effect of tying the hands of the Government of Ghana as to the best options available to it in terms of expending the money for the purpose for which it borrowed it. Particularly the Government of Ghana is thereby debarred from sourcing the best expertise for carrying out the areas of development for which the loan was contracted. Another perceived grievance is that all materials required will have to be purchased from China. Therefore 60% of the loan will mandatorily benefit Chinese citizens to the detriment of Ghana.

Obviously, if it is appreciated that the agreement is a commercial loan intended to benefit both sides in a win-win situation it must follow that a certain part of it must benefit China, even if exclusively and likewise a certain part of it must benefit Ghana even if exclusively. But as contended by the defendant the proviso complained of by the plaintiff does not require that 60% of the loan money be reserved unto Chinese citizens but unto Chinese contractors.

It is practically inconceivable that all materials inclusive of things like water, sand, stone etc will be purchased from China and the agreement does not so provide. Indeed the source of purchase of these materials is not covered by the agreement. This agreement does not exclude the hiring of Ghanaian or other expertise and it is inconceivable that no labour component in any constructional or other type of development project will come from Ghana. It

is in short impossible to contend that the proviso is meant to benefit Chinese citizens exclusively to the detriment of Ghana.

It must not be forgotten that the projects covered by the loan agreement are meant to be productive and self servicing. After the loan is serviced the residue of these development projects will definitely continue to benefit Ghana and no portion of such revenues is contracted for payment to China.

I have no knowledge of Economics as a science but common sense hints me that Ghana cannot readily generate an amount as colossal as $3 billion to fund needed development projects and if it is to accumulate such an amount of that grandeur its purchasing value would fall so much due to global inflationary trends that the margin of interest over 15 years charged on this loan by China would still be very much preferable and favourable to Ghana. In constitutional construction a court will consider the effect of changed circumstances and global trends relevant to the matter to be decided, see *Canada (Minister of Justice) v. Burns* (2001) 5 LRC 19, Canada, S.C.

Impeaching administrative discretion

The courts have expressed themselves in various terms concerning how judicial control over executive or administrative powers should be exercised. The Wednesbury principle of reasonableness, the deference principle, etc come into play. However I think that the 1992 Constitution has laid down its yardsticks in articles 1(1), 23, 36, 40 and 296 concerning this issue. Applying these principles and matching them against the facts sifted above, always bearing in mind that the separation of powers is intended to have effect on such matters as this, I conclude that the loan impugned here is constitutionally sustainable.

Violation of the Petroleum Revenue Management Act, 2011 (Act 815)

The plaintiff also charges that the President breached articles 57(3), 58(1)-(4) and 108 of the Constitution by the Chinese loan agreement to which he has made Ghana a party since Clause 3 of the Charge Over Accounts Agreement requires that our oil proceeds be charged for a period of 15 instead of a maximum of 10 years in terms of "Tranche A" thereof, contrary to section 18(7) of Act 815. A question arises whether an alleged breach of Act 815 is a matter within the Supreme Court's jurisdiction since it is an ordinary statute whereas our jurisdiction relates to the provisions of the Constitution. To the extent that the President is enjoined inter alia by article 57(1) to execute the laws of Ghana it is a constitutional duty imposed on him. At the same time if the President acts in violation of an ordinary statute his act, if done in his official capacity, can be challenged under the statute concerned by suing the Attorney-General. In such a situation the Practice Direction of this court would require the plaintiff to proceed first in the ordinary courts or else this Court may dismiss his action. However, where the issue arises out of the same agreement or act as here, I do not think it would be appropriate to hold the Practice Direction against him. But as the defendant has demonstrated in his statement of case, that charge is not borne out by the terms of the said agreement in that none of the said terms relates to the proceeds of Ghana's oil.

It is however necessary to emphasise that those parts of the plaintiff's claims and allegations that touch and concern matters which are grounds for the removal of a President from office are to say the least, mischievous and are hereby struck out. It is quite clear that a special procedure has been provided

as to them in article 69 and that should govern them. See *Ghana Bar Association v. Attorney-General (Abban Case)* (2003-2004) 1 SCGLR 250, *Okudjeto Ablakwa v. Attorney-General & Obetsebi-Lamptey* (2011) SCGLR 986.

The last issue is the defendant's issue as to "whether or not the Judiciary has the power to question the Executive's acts done within the ambit of its authority." I do not think that the formulation of this issue reflects its intendment. However, in so far as this issue has any truck with the doctrine of political question the answer is that no act whatsoever is outside the provisions of articles 1(1), 23, 36, 58(1) and 296 (subject to this court's construction to the contrary) aforesaid of the Constitution. This in effect is the conclusion reached by Dr. S.Y. Bimpong-Buta in his classic work The Role of the Supreme Court in the Development of Constitutional Law in Ghana at 143 to 168. The learned author's approval at 167 of his book of the views of Aikins JSC in *J.H. Mensah v. Attorney-General* (1996-97) SCGLR 320 at 326-327 when carefully considered has the same effect as what I have stated regarding this matter of political question.

For all the foregoing reasons I dismiss the plaintiff's action.

(SGD) W. A. ATUGUBA
ACTING CHIEF JUSTICE

CONCURRENT OPINION

DR. DATE-BAH JSC:

I agree that this action should be dismissed. I am in full concurrence with the lucid judgment just read by my brother the Acting Chief Justice. I wish, however, to add some general comments to supplement the lead judgment in this case. One of the issues arising from this case is the extent to which the courts should be the instrument for securing the accountability of the President for his executive acts in relation to an international economic transaction or loan transaction, assessed against imprecise accountability criteria such as the promotion and protection of the interests of Ghana (article 40(a) of the 1992 Constitution); observing the oath of allegiance and the presidential oath set out in the Second Schedule of the 1992 Constitution; and "accepted principles of public international law and diplomacy in a manner consistent with the national interest of Ghana" (article 73 of the 1992 Constitution) . The courts generally, and the Supreme Court in particular, will not necessarily be the best means, in all contexts, of securing accountability measured against such imprecise criteria. Political accountability measures, such as general elections, also have their role to play. The particular context will determine which accountability mechanisms have a comparative advantage. The courts would do well to give recognition to the political accountability measures which run parallel to the judicial modes of securing accountability.

A range of opinions may validly be held about what is in the national interest or what promotes and protects the interest of Ghana. If the courts allow themselves to be drawn too easily into making judgments on these matters, they could be sucked into the zone of party political policymaking and competition. This would be invidious. On the other hand, the courts cannot completely wash their hands of making determinations on the basis of these criteria, where there

is objective incontrovertible evidence on the basis of which a decision can be founded. Depending on the particularities of specific situations, the courts or the electorate may have a comparative advantage regarding reaching a judgment as to what is in the national interest or what promotes the interest of Ghana.

Judging the validity of the acts and contracts impugned by the plaintiff in this case raises this issue of comparative advantage. Should it be the Supreme Court or the electorate that determines whether the particular economic transaction entered into by the President is in the national interest and promotes the interest of Ghana? This, to my mind, is the central issue raised by this case. I am, however, in no way advocating a return to the nadir reached by the Supreme Court in *Re Akoto* [1961] GLR 523, when it said (*per* Korsah CJ,*)*, in relation to the President's declarations, pursuant to Article 13 of the 1960 Constitution, on assumption of office, that: "The declarations however impose on every President a moral obligation, and provide a political yardstick by which the conduct of the Head of State can be measured by the electorate. The people's remedy for any departure from the principles of the declaration, is through the use of the ballot box, and not through the courts."

What is in the national interest or promotes the interest of Ghana is justiciable (and is not a matter of mere moral obligation). However, firm evidence has to be produced before this court can legitimately invalidate executive acts as being in breach of such broad norms. This Court would also do well to recognize that it is possible to have a range of legitimate views as to what is in the national interest. In reaching a judgment on such issues, the Court should bear this consideration in mind in making its decisions. In other words, merely because a judge does not consider a particular transaction to be in the national interest, for example, should not result necessarily in its invalidation. The better test would be whether all reasonable observers would reach the same conclusion. The executive needs to be given some space to try out its political and economic judgment, even if this does not coincide with that of the judges. It is only if the

executive is reaching perverse decisions that the courts ought to intervene. Otherwise, the courts would end up in effect running an aspect of the executive power, which would be anathema to our system of government which has separation of powers at its root.

To put this thought in other words, there is danger in the Supreme Court displacing the electorate as the final arbiter of what contracts entered into by the Executive are in the national interest or promote the interest of Ghana. This danger should constantly be borne in mind by this Court. I am, however, satisfied that in this particular case, in reaching the decision announced by the Acting Chief Justice, we have borne this consideration in mind.

(SGD) DR. S. K. DATE-BAH
JUSTICE OF THE SUPREME COURT

(SGD) S. A. B. AKUFFO (MS.)
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) ANIN -YEBOAH
JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE - BONNIE

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

THADEUS SORY (WITH HIM CYNTHIA FRIMPOMAA) FOR THE PLAINTIFF.

SYLVESTER WILLIAMS (PRINCIPAL STATE ATTORNEY) FOR THE DEFENDANT.

.