**IN THE SUPERIOR COURT OF JUDICATURE**
**IN THE SUPREME COURT**
**ACCRA-GHANA**

**CORAM: ATUGUBA, JSC (PRESIDING)**
**ANSAH, JSC**
**BAFFOE-BONNIE, JSC**
**ARYEETEY, JSC**
**GBADEGBE, JSC**

**CIVIL APPEAL**
**NO.J4/23/2007**
**24TH FEBRUARY, 2010**

**DAASEBRE NANA OSEI BONSU II**
**[@ ST. OSWALD GYIMAH-KESSIE] ... PLAINTIFF/APPELLANT/ RESPONDENT**

**VRS**

1. **AKWASI MENSAH**
2. **BEN EPHSON** ... **DEFENDANTS/RESPONDENTS/ APPELLANTS**
3. **THE DAILY DISPATCH**
4. **ALLIED NEWS LIMITED**

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**J U D G M E N T**

**GBADEGBE, JSC:-**

On 9th April 2003, the Daily Dispatch published an article of and concerning the respondent that had the following headline: "Mamponghene in 264 million cedis fraud". Following the said publication, the respondent on 22 April 2003, caused the writ of civil summons herein to issue against the appellants before the High Court, Accra claiming

general and special damages for the "false and malicious publication" and an order of injunction restraining the appellants, their agents and workmen from continuing to publish the said materials of him. The action proceeded to trial at the end of which the learned trial judge of the High Court dismissed all the reliefs sought in the action. The respondent being aggrieved and dissatisfied with the delivery of the trial court launched an appeal therefrom to the Court of Appeal. The Court of Appeal after hearing the parties reversed the decision of the trial court and allowed the claims indorsed on the writ of summons herein including damages in the sum of one thousand Ghana cedis. The instant proceedings arise as a result of an appeal lodged from the decision of the Court of Appeal by the appellants to this court.

We think that the facts giving rise to the action herein have been sufficiently stated in the judgments of the trial court and the Court of Appeal and as such we desire not to spend any further time on it in this delivery which raises purely for our consideration whether on the admitted facts, the judgment that is on appeal to us was right? In our view having regard to the nature of the publication, the respondent was wounded in his self esteem and therefore the question that we have to decide is whether the defence of fair comment, which was one of the two defences raised by the appellants to the claim in the trial court was well made out? We are of the opinion that although the trial court and the Court of Appeal considered the effect of the appellants statement of defence as raising before it a plea of justification, a careful study of the relevant pleadings contained in paragraphs 8, 10 and 11 of the statement of defence only raise the pleas of qualified privilege and fair comment. See: (1) **SUTHERLAND** v **STOPES** [**1925**] **AC 47**; (2) **JONES** v **KELTON** [**1963**] **3 All** ER **952 at 956**; (3) **LONDON ARTISTS LTD** v **LITTLER** [**1969**] **3 All ER 193**.These cases discuss the misconception as to the nature of the plea that is raised in the relevant paragraphs of the appellants' statement of defence earlier on referred to in the course of this delivery. This form of pleading is also referred to as the "rolled- up plea". For precedents on this, see Atkin's Court Forms, Volume 25(2nd Edition, Forms 58-61). The cases show that the averment that the facts were truly stated is merely to lay the necessary basis for the defence on the ground of fair comment. This averment is quite different from a plea of justification of a libel on the ground of truth, under which defendant has to prove not only that the facts are truly stated but also that any comments upon them are correct.

For a precedent of a pleading in justification see Form 63 of Atkin's Court Forms, Volume 25(2nd Edition.) In the form in which the plea existed before the coming into being of the High Court Civil Procedure Rules), 2004, CI 47 it did not require defendants to give any particulars of it. Today, however by virtue of Order 57 rule 3, the defendant is required to give particulars of which of the words are facts and which are comment. We think that with this new rule the defendant has simply to plead the plea of fair comment. It appears that with this new rule the "rolled-up plea" has become obsolete; there being nothing to be gained by it. See: **LORD** v **SUNDAY TELEGRAPH** [**1970**] **3 All ER 504** at **506**-**507 per Lord Denning M.R**.Having regard to the fact that the statement of defence of the appellants, raised only the pleas of fair comment and qualified privilege, we shall in considering the appeal herein limit ourselves to the effect of the said pleas only. In our opinion, should the question that we have raised regarding the plea of fair comment succeed it would be sufficient to dispose of the appeal in which case no useful purpose would be served by proceeding to consider the plea of qualified privilege. See: **SLIM** v **DAILY TELEGRAPH AND ANOTHER** [**1968**] **1 All ER 497**.For the said plea to be good, however, the appellants must not have acted maliciously. See: **THOMAS** v **BRADBURY**, **AGNEW & CO**. **LTD** [**1906**] **2KB 627 at 642**.

But before considering the effect of that defence, there is one matter of substance raised by the respondent that we must turn our attention to. It relates to the question of the competency of the instant appeal. It was contended on his behalf that since the heading of the process that initiated the proceedings herein used the words " IN THE COURT OF APPEAL" instead of " IN THE SUPREME COURT" the appeal was improperly constituted and accordingly it should be dismissed in limine. We note regarding this point, which was contained in the respondent's statement of case that the appellant chose quite strangely in our view not to respond to it. We have patiently considered the issue regarding the description of the court in the notice of appeal and attended to the considerable submissions urged on us by learned counsel for the respondent and have come to the view that notwithstanding the said irregularity the process that initiated the appeal herein substantively raises for our determination by way of judicial correction the questions that turn on the appeal herein. We think that a careful examination of the notice of appeal that initiated the instant proceedings dated

18 July 2007 sought from this court and not the Court of Appeal a rehearing of the matter herein and as such substantively there was filed an appeal that was lodged from the decision of the Court of Appeal that we must inquire into in order to do substantial justice to the parties unblinded by strict adherence to technicalities. While hoping that this would not be construed as a relaxation of the rules, we observe that leaned counsel for the appellants should have exercised greater care in settling the notice of appeal in the matter herein.

We now turn to consider the appellants' plea of fair comment. There is in our opinion no conflict of authority that in a case such as this where the words complained of by the respondent as having been published of and concerning him are defamatory, a successful plea of fair comment relieves the publisher from liability. See: **BENNEH** v **NEW TIMES CORPORATION** [**1982**-**83**] **G**.**L**.**R**.**302**. To succeed, a party who raises the said defence must show that the publication was just an expression by him of a mere opinion and not assertions of fact. Whether the words complained of were reasonably understood as a comment or a statement of fact is determinable from the context of the publication. See: **TURNER** v **METRO** –**GOLDWYN MAYER PICTURES LTD** [**1950**]**1 All ER 449 at 461**. Additionally, he must show that the publication was on a matter of public interest based on facts that were in existence before the publication was made. See: **SOUTH HETTON COAL LTD** v **NORTH**-**EASTERN NEWS ASSOCIATION LTD** [**1894**]**1QB 133 at 141**, **143**.,(2) **COHEN** V **DAILY TELEGRAPH** [**1968**] **2 All ER 407**

From the evidence adduced in the trial court the basic facts that were published by the appellants were contained in a petition addressed to the Asantehene.We think that the finding of the learned trial judge to that effect is amply supported by the admitted evidence. The next matter to consider is whether the publication complained of was just a mere expression of an opinion. The said question receives an affirmative answer; for in our opinion the headline of the story and its opening paragraph are the only matters that are not factual representations of matters that were already pending before the Asantehene. The comments are contained in the following words;

"Mamponghene in ¢264m fraud; the Asantehene and occupant of the Golden Stool, Otumfuo Osei Tutu II, has a difficult task before him. He has before him, an eight-page

petition against the occupant of the Silver Stool, the Mamponghene, Nana Osei Bonsu II. The petition, alleging gross injustice and fraud, has 25 pages of attachments including a note signed by the Mamponghene, acknowledging receipt of 30,000, the equivalent of over ¢264 million, as consideration for nominating one Mrs. Rosina Mensah as Queen mother of Asante Mampong. For doubting Thomases, the signed note acknowledging the receipt of 30,000 is scanned on the back page,"

Then comes up for our consideration the question whether the matters contained in the publication were of public interest? The parties before us have taken rival positions on this. While the appellants contended that the substance of the publication was of public interest, the respondent quite naturally being the person of whom it was published contended otherwise.

There is no exhaustive definition of what constitutes "public interest" for the purpose of the plea of fair comment and is thus a matter in all cases to be decided by the judge.We think that having regard to the position that the respondent occupies what affects him must be of concern and public interest not only to his subjects but the public at large and reject any assertion to the contrary as was urged on behalf of the respondent in these proceedings. Indeed in the case of **NSIAH** V **AMEYAW 11** [**1994-95**] **GBR 583** , the Court of Appeal expressed the opinion that once a person becomes a chief his life is subject to the expectations of the stool and his subjects. In our opinion, at the date of the publication on which this action is planked, the respondent occupied a position not only in his traditional area that was of concern and interest to his subjects and to Asanteman but taking into account the other positions that he held he was a huge public figure in respect of whom issues that affected him particularly matters that had been raised against him by his subjects and pending before the occupant of the golden stool, the Asantehene for determination touching and concerning his traditional office cannot be ignored by the public at large.

Regarding the subject matter of the petition that was pending before the Asantehene, it was urged on behalf of the respondent that in exercising his functions in the resolution of disputes the Asantehene does not have the attributes of a court that is established by law and as such matters pending before him cannot be brought into the public domain. We make no accession to that contention and think that our courts must

by their decisions give recognition to institutions and procedures that are part of our existence such as customary arbitration and mediation that are continually held by our chiefs and note in particular the practice whereby issues involving our chiefs may be referred to other chiefs or those higher than them for settlement. In his book "**CHIEFTANCY IN GHANA**", BROBBEY described this function at page 35 as "adjudicatory functions" of which he observed as follows:

**"The adjudicatory functions engage the chief in the determination of private disputes that are sent before him, including breaches of certain customs or taboos……"**

And indeed our courts have always recognized such settlements and or determinations although they were not held by courts strictly so called. We are of the thinking that the fact that such matters are handled by bodies and or institutions that are not formal in their operation should not detract from the useful role that they play in maintaining social cohesion and indeed in the legal system. To accede to the urging that merely because they are not conducted before courts issues touching and concerning them cannot be in the public interest is too shy away from the truth.

We are of the view that at the time the publication was made the facts on which it was made were already in the public domain by virtue of the petition to the Asantehene; therefore there was a legitimate public concern or interest in its publication. As noted earlier on in this judgment regarding the publication beyond the heading and the opening paragraph that are comments the rest of the publication are repetitions of the substance of the petition that was pending before the Asantehene. In our opinion, in publishing those words the appellants did not expand the scope of the factual matters contained in the petition. This then leads us to the consideration of whether the publication was actuated by malice.

We have after a careful consideration of the entire evidence at our disposal that is contained in the record of proceedings come to the same conclusion as was reached by the learned trial judge of the High Court that the appellants acted honestly in expressing their opinion on a subject of public interest and do not think that the allegation of malice is borne out by the evidence. We think that on the facts on which

the comment was based the comments were fair and not mere abuse or invective From the existing facts contained in the petition together with the attachments, we are unable to come to the view that the said comments were published dishonestly for the purpose of injuring the respondent. Having decided the question of malice and fair comment in favour of the appellants the case against them crumbles. As we bring these proceedings to a close, we wish to refer to the following pronouncement of Lord Denning M.R. in the case of **SLIM** v **DAILY TELEGRAPH (supra)** at page 503:

**"In considering a plea of fair comment, it is not correct to canvass all the various imputations which different readers may put on the words. The important thing is to determine whether or not the writer was actuated by malice. If he was an honest man expressing his genuine opinion on a subject of public interest, then no matter that his words conveyed derogatory imputations; no matter that his opinion was wrong or exaggerated or prejudiced; and no matter that it was badly expressed so that other people read all sorts of innuendoes into it; nevertheless, he has a good defence of fair comment. His honesty is the cardinal test. He must honestly express his real view. So long as he does this, he has nothing to fear, even though other people may read more into it,.....I stress this because the right of fair comment is one of the essential elements which make up our freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements."**

These words were spoken several years ago but appear to be relevant to us today in Ghana. By Article 21 of the 1992 Constitution, we have been guaranteed the right to "freedom of speech and expression which shall include freedom of the press and other media. " We think that our decisions must bear out the duty to ensure that the provision of these fundamental human rights and freedoms are not in vain by giving meaning and teeth to them in order to better ensure for ourselves their preservation and protection. For these reasons, we think that the Court of Appeal erred by its decision of 13 July 2007 when it reversed the judgment of the trial court. We think that the decision of the High Court is amply supported by the evidence. It being so, we allow the appeal herein and proceed to set aside the decision of the Court of Appeal

and substitute therefore a decision dismissing the respondent's claim as formulated in the writ of summons herein.

S. N. GBADEGBE
JUSTICE OF THE SUPREME COURT

W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

J. ANSAH
JUSTICE OF THE SUPREME COURT

P. BAFFOE-BONNIE
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