IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-GHANA

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

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

REFERENCE
No. J6/1/ 2012

15TH MARCH, 2013

ERNEST ADOFO & ORS. . . . PLAINTIFFS

VRS.

GHANA COCOA BOARD . . . DEFENDANTS

REASONS FOR RULING

DR. DATE-BAH JSC:

Asuman-Adu J. has, pursuant to Article 130 of the 1992 Constitution, referred the following issue to the Supreme Court for determination:

> "Whether in view of Articles 1(2), 12(1) and 24(3) and (4) of the 1992 Constitution of the Republic of Ghana, the application of PNDC Law 125 of 1985 to the retrenchment exercise in 1993 to 1994 by the defendant was unconstitutional and for that matter void".

On 5th March, 2013, this Court unanimously answered this question in the affirmative and indicated that its reasons for this decision would be filed later. Accordingly, there is set out below the said reasons.

The context for the determination of the issue referred is as follows. The issue statedby the learned High Court judge has arisen from two consolidated suits involving former employees of the Ghana Cocoa Board. The plaintiffs in one of the suits have claimed the following relief:

> "Payment of balances due them in respect of their being declared redundant between 1993-1994 together with interest at the Bank-lending rate up to date of payment."

The plaintiffs in the second suit have, in turn, claimed the following reliefs:

> "(1) An order directing the defendant to pay the Plaintifs their retrenchment portage at the current rate.
>
> (2) Damages for refusal to pay the said retrenchment on time.
>
> (3) Costs."

These suits are the consequence of action taken by the defendant in the suits, that is the Ghana Cocoa Board, under the authority of the Ghana Cocoa Board (Reorganisation and Indemnity) Law, 1985 (PNDCL 125). It is the plaintiffs' contention that the application of this Law to them after the entry into force of

the 1992 Constitution was unconstitutional since it infringed their fundamental human rights under article 24 of the 1992 Constitution.

Sections 1 to 4 of PNDCL 125 provide that:

1. (1) "Notwithstanding the provisions of any enactment and subject to the provisions of this Law, the Ghana Cocoa Board (referred to in this Law as "the Board") shall re-organise its establishment structure in such manner as it deems necessary to secure optimum efficiency of the Board.

   (2) The Board shall, in the discharge of its function under sub-section (1) of this section, have the power to terminate the employment of any employee of the Board on ground of redundancy.

2. Notwithstanding anything to the contrary in his contract of employment or any collective agreement applicable to him an employee of the Board whose employment is terminated under section 1 of this Law may be paid such severance award as the Board may determine subject to such terms and conditions as the Provisional National Defence Council may direct.
3. Notwithstanding anything to the contrary in his contract of employment or any collective agreement to him no redundancy award shall be granted to an employee of the Board whose employment is terminated under section 1 of this Law.
4. (1) Subject to the provisions of this Law, an employee of the Board whose employment is terminated under section 1 shall be paid such other terminal benefits as the Board may determine are due to him under the terms of his contract of employment or any collective agreement applicable to him, and the payment of such benefits shall be subject to such terms and conditions as the Provisional National Defence Council may direct.

(2) Any debt owed by any such employee to the Board shall be set off against any terminal benefits payable to him under subsection (1) of this section."

Given these statutory provisions and the plaintiffs' challenge of them, the issue has inevitably arisen whether the application of PNDC Law 125 by the defendant to a 1994 to 1995 retrenchment exercise that affected the plaintiffs was lawful and constitutional. Since at the time of the retrenchment, the 1992 Constitution was fully in force, they had to pass the constitutionality test.

The plaintiffs state the basis of their contest of the constitutionality of the retrenchment exercise in the following terms: By article 1(2) of the Constitution, the Constitution is the supreme law of Ghana and any other law found to be inconsistent with any of its provisions is to be held void to the extent of its inconsistency. In accordance with this fundamental constitutional principle, the plaintiffs rely on article 24(3) and 24(4) to sustain their argument of unconstitutionality. These two clauses of the said article provide as follows:

"(3) Every worker has the right to form or join a trade union of his choice for the protection of his economic and social interests.

(4) Restrictions shall not be placed on the exercise of the right conferred by clause (3) of this article except restrictions by law and reasonably in the interest of national security or public order or the protection of the rights and freedoms of others."

Clause 3 thus provides for the fundamental right of freedom of association in relation to trade unions and implicitly for the right to collective bargaining. These two rights are recognized by the International Labour Organisation as part of the minimum standards for workers' rights. Under article 2 of the ILO Convention No. 87 of 1948 ("Freedom of Association and protection of the right to organize")and article 2 of the ILO Convention No. 98 of 1949 ("The right to organize and collective bargaining") freedom to join a trade union is recognized as one of the fundamental rights of workers. In 1998, the International Labour Organisation

adopted its landmark *Declaration of Fundamental Principles and Rights at Work,* which covers freedom of association, forced labour, child labour and discrimination. The declaration states that:

> "All members, *even if they have not ratified the Conventions in question,* have an obligation arising from the very fact of membership in the Organization, to respect, to promote, and to realize, in good faithin accordance with the [ILO] Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining;…(d) the elimination of discrimination in respect of employment and occupation."

This court should accordingly not lightly allow those rights to be eroded, although clause (4) is a clawback provision which permits a derogation from those rights within the limits there specified. We are saying that, quite apart from the express language of article 24 of the 1992 Constitution, the international labour law context of the provision imposes a restraint on the extent of any derogation that this Court may construe from clauses (3) and (4) of article 24. It should be remembered that one of the directive principles of State policy contained in Chapter 6 of the Constitution (specifically in article 40) provides that:

> "In its dealings with other nations, the Government shall –
>
> …
>
> (c) promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means;
>
> (d) adhere to the principles enshrined in or as the case may be, the aims and ideals of –
>
> I. the Charter of the United Nations;
> II. the Charter of the Organisation of African Unity;
> III. the Commonwealth;

IV. the Treaty of the Economic Community of West African States; and
V. any other international organization of which Ghana is a member."

A necessary implication of the right embodied in clause 3 of article 24 is that the benefits of trade union membership should not be rendered nugatory by legislation. There is no point to a citizen of Ghana or a resident in Ghana being given a constitutional right to form or join a trade union of his choice if the results of his or her union's collective bargaining can be unilaterally set aside by the State or a state agency, under the authority of a statute, without available relief. A purposive interpretation of the clause should thus inevitably lead to the striking down of legislation that permits a State agency to set aside unilaterally provisions in a collective bargaining agreement and in an individual trade union member's contract. Sections 2 and 3 of the Ghana Cocoa Board (Re-Organisation and Indemnity) Law, 1985 (PNDCL 125) *supra* should thus be interpreted as being infringements of article 24(3) of the 1992 Constitution. We do not interpret them as coming within the scope of the derogations permitted by article 24(4) of the 1992 Constitution. The retrenchment exercise carried out by the defendant in these consolidated suits, under the authority of these provisions of PNDCL 125, was thus unconstitutional. This is why on 5th March, 2013, this Court unanimously answered the question referred to it byAsuman-Adu J. in the affirmative.

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

JUSTICE OF THE SUPREME COURT

(SGD) W. A. ATUGUBA

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) J. V. 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

JUSTICE OF THE SUPREME COURT

(SGD) V. AKOTO BAMFO (MRS)

JUSTICE OF THE SUPREME COURT

COUNSEL

PETER HAYIBOR AND S. K. KLAYSON FOR THE PLAINTIFFS.

AKWASI OPOKU FOR THE DEFENDANT.