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.
OWUSU (MS.), J.S.C
DOTSE, J.S.C
ANIN-YEBOAH, J.S.C.
BAFFOE-BONNIE, J.S.C
GBADEGBE, J.S.C

WRIT No. J1/10/ 2012

16TH JANUARY, 2013

FELIX KLOMEGA . . . PLAINTIFF

VRS.

1. **THE ATTORNEY-GENERAL . . . DEFENDANTS**
2. **GHANA PORTS AND HARBOURS AUTHORITY**
3. **MERIDIAN PORT HOLDINGS LIMITED**
4. **MERIDIAN PORT SERVICES LIMITED**

R U L I N G

DR DATE-BAH JSC:

The plaintiff issued a Writ on 23rd August 2011, invoking the original jurisdiction of this Court and claiming the following reliefs:

1. "A declaration that on a true and proper interpretation of article 181 of the Constitution the expression "government" in article 181 includes a state entity that possesses the characteristics of Second Defendant;

2. A declaration that on a true and proper interpretation of article 181 of the Constitution, the requirements in article 181 equally apply to a state entity such as Second Defendant, that enters into an international economic transaction;

3. A declaration that the Shareholder Agreement dated the 17th day of August 2004 and entered into between Second Defendant, and Third and Fourth Defendants, is an international business or economic transaction, and that the failure and or neglect to submit it to Parliament for approval renders it null, void and unenforceable pursuant to 181 of the 1992 Constitution;

4. A declaration that the Concession Agreement dated the 17th day of August 2004, and entered into between Second Defendant and Third and Fourth Defendants is an international business or economic transaction, and that

the failure and or neglect to submit it to Parliament for approval renders it null, void and unenforceable pursuant to 181 of the 1992 Constitution;

5. Any other consequential order (s) as this Honourable Court may deem fit."

The defendants, with the exception of the first defendant, have raised a preliminary objection to the jurisdiction of this Court in this matter. This Ruling is therefore on whether their preliminary objection should be sustained.

The material facts relied on by the Plaintiff in this case are as follows. The plaintiff is a citizen and taxpayer of Ghana, resident in Ghana, who wishes to ensure compliance with Article 181(5) of the 1992 Constitution. That provision states that: "(5) This article shall, with the necessary modifications by Parliament, apply to an international business or economic transaction to which the Government is a party as it applies to a loan."

Article 181 of the 1992 Constitution states, in full, that:

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> "(1) Parliament may, by a resolution supported by the votes of a majority of all the members of Parliament, authorise the Government to enter into an agreement for the granting of a loan out of any public fund or public account.

(2) An agreement entered into under clause (1) of this article shall be laid before Parliament and shall not come into operation unless it is approved by a resolution of Parliament.

(3) No loan shall be raised by the Government on behalf of itself or any other public institution or authority otherwise than by or under the authority of an Act of Parliament.

(4) An Act of Parliament enacted in accordance with clause (3) of this article shall provide -

(a) that the terms and conditions of a loan shall be laid before Parliament and shall not come into operation unless they have been approved by a resolution of Parliament; and

(b) that any moneys received in respect of that loan shall be paid into the Consolidated Fund and form part of that Fund or into some other public fund of Ghana either existing or created for the purposes of the loan.

(5) This article shall, with the necessary modifications by Parliament, apply to an international business or economic transaction to which the Government is a party as it applies to a loan.

(6) For the purposes of this article, "loan" includes any moneys lent or given to or by the Government on condition of return or repayment, and any other form of borrowing or lending in respect of which -

(a) moneys from the Consolidated Fund or any other public fund may be used for payment or repayment; or

(b) moneys from any fund by whatever name called, established for the purposes of payment or repayment whether directly or indirectly, may be used for payment or repayment.

(7) The Minister responsible for finance shall, at such times as Parliament may determine, present to Parliament any information concerning any discrepancies relating to -

(a) the granting of loans, their repayment and servicing;

(b) the payment into the Consolidated Fund or other public fund of moneys derived from loans raised on institutions outside Ghana."

The first defendant, the Attorney-General, is responsible for defending suits against the Republic. The plaintiff contends that the first defendant has the duty of protecting the interests of the Republic. The second defendant is a statutory corporation established under the Ghana Ports and Harbours Authority Act, 1986 (PNDCL 160). The third defendant is a company incorporated in England under the Companies Act 1985. The fourth defendant is a company registered under the Companies Act 1963 (Act 179). As at the date of its registration on 3rd December 2002, it had an authorized share capital of 100,000 ordinary shares,

2500 of which had been issued to and held by the Second Defendant. The plaintiff sets out in his Statement of Case several features of the Second Defendant which establish its character, in his view, as a public authority and therefore part of Government, within the meaning of Article 181(5) of the 1992 Constitution.

These include the following: the State may acquire property for the Second Defendant under the State Property and Contracts Act, 1960 (C.A. 6) and the State Lands Act, 1962 (Act 125); the second defendant's Director-General and members of its Board of Directors are appointed by the President of Ghana, in accordance with articles 70 and 195 respectively of the 1992 Constitution and are thus public servants; section 2 of the second defendant's establishment statute requires it to obey directions of a general nature issued by the President of Ghana; by its establishment statute, the second defendant obtains part of the finance for its operations from budget allocations and loans from the Government of Ghana; the second defendant's accounts are audited by the Auditor-General of Ghana and a copy of its annual report on its operations is laid before the Parliament of Ghana under sections 15 and 16 of its establishment statute. Furthermore, the second defendant is prohibited from undertaking certain activities except with the consent or approval of the Minister responsible for Transport and Communication. These include: borrowing money to support its operations, maintaining foreign accounts or disposing of land. The plaintiff also states that the second defendant, as part of its functions and powers under its establishment statute, levies port dues and rates and may, by legislative instrument, make rules for the guidance and conduct of port officers and other persons employed in its service. The plaintiff therefore asserts that the second

defendant, on account of its character as a public and regulatory agency of the State, is an instrument of the State and thus constitutes part of the public services of Ghana under article 190(1)(b) of the 1992 Constitution.

The plaintiff avers that the second and third defendants entered into a shareholders' agreement on 17th August 2004, relating to the fourth defendant, with the fourth defendant. The effect of this agreement was to make the second and third defendants the exclusive shareholders of the fourth defendant. On the same date of 17th August 2004, it is the averment of the plaintiff that the second defendant entered into a Concession Agreement with the fourth defendant by which the second defendant granted a concession to the fourth defendant to design, redesign, engineer and construct, as applicable, and then equip, operate, maintain, manage and repair the Container Terminal at Tema and provide facilities and services within a specified area of the Tema Port. This Concession was to last for 20 years.

The plaintiff contends that neither the Shareholders' Agreement nor the Concession has received Parliamentary approval under article 181(5) of the 1992 Constitution, although in his view they obviously constitute international economic transactions involving an agency of the Government.

The plaintiff considers that the facts of this case raise the following issues for determination by this Court:

1. "Whether and to what extent "Government" under article 181 (3) includes public authorities the cost of whose operations and debt obligations constitute a charge on the public accounts of Ghana;

2. Whether the Agreement entered into between Second and Third Defendants is an international business transaction within the meaning of article 181, and thus null, void and unenforceable for lacking parliamentary approval?; and

3. Whether the Concession entered into between Second and Fourth Defendants is an international business transaction within the meaning of article 181, and is thus null, void and unenforceable for lacking parliamentary authorization? ”

The plaintiff sums up his case as follows, in his conclusion to his Statement of Case:

“The outcome of this suit rests on the following arguments:

- By its establishment law, its pubic functions, levers of governmental control, source of funding and other tell-tale features of a governmental entity, First Defendant *(sic)* is a public/state/government entity which falls within the meaning of government under article 181 of the 1992 Constitution.

- The Agreement and Concession between First, Second and Third Defendants *(sic)*, by their nature, essential characteristics and other background international legal rules such as the Ghana-UK Bilateral

Investment Treaty of 1989, constitute transnational or international business or economic transactions.

- When the veil of incorporation of Third Defendant *(sic)* is lifted, Second Defendant *(sic)* emerges as its alter ego, and since Second Defendant *(sic)* is a foreign company contracting with First Defendant *(sic)*, a governmental entity, parliamentary authorization pursuant to article 181 was required for the validity of the transactions.

- The lack of parliamentary approval for the Agreement and Concession pursuant to article 181 makes these agreements void and unenforceable. "

It is in response to these arguments that all the defendants, except the first defendant, have raised a preliminary objection to this Court's jurisdiction. The first of the defendants to file a notice of intention to rely on a preliminary legal objection was the second defendant. In its notice filed on 12th October 2011, it stated the grounds of its objection as follows:

1. "The determination of the matters raised by the Plaintiff in his claim do not involve, or raise genuine issues of, interpretation of the Constitution 1992 under Article 130(1)(a);
2. The determination of the matters raised by the Plaintiff in his claim do not entail the invocation of the original enforcement

jurisdiction of the Supreme Court under Article 134(1)(a) of the Constitution 1992."

The second defendant, in its written submissions in support of these grounds of objection, argues that the word "Government", whose interpretation the plaintiff seeks, is defined in article 295 of the 1992 Constitution and therefore does not raise any genuine issue for interpretation. It asserts that the definition of "Government" in article 295 is not ambiguous. Accordingly, relying on the well-known authorities which have held that where a provision in the Constitution is not ambiguous, the original jurisdiction of this Court may not be invoked to interpret it, it submits that this is a case where the High Court has jurisdiction to apply the unambiguous meaning of "Government", without the intervention of the Supreme Court. In support of this argument, the second defendant cites: *Republic v Maikankan* [1971] 2GLR 473; *Republic v Special Tribunal; ex parte Forson* [1980] GLR 529; *Yiadom I v Amaniampong* [1981] GLR 3; *Patu Styles v Amoo-Lartey* [1984-86] GLR 138; *Republic v Special Tribunal, ex parte Akosah* [1980] GLR 592; *Ghana Bar Association v Attorney-General & Anor* [1995-96] 1 GLR 598; *Republic v High Court (Fast Track Division) Accra; Ex parte CHRAJ (Richard Anane Interested Party)* [2007-2008] SCGLR 213; *Aduamoah II v Twum II* [2000] SCGLR 165; and *Bimpong-Buta v General Legal Council* [2003-2004] SCGLR 1200.

The first defendant, that is, the Attorney-General, disagrees with the second defendant and has filed written submissions in response to the second defendant's submissions. He argues that the preliminary objection raised by the second defendant is made in bad faith and that it is frivolous, an abuse of the

process of this Court and calculated to delay the hearing of this suit. The first defendant draws attention to section 17(1) of the Ghana Ports and Harbours Authority Act, 1986 (PNDCL 160) which states as follows:

> "Subject to article 181 of the Constitution, the Authority may, with the approval of the Minister responsible for Finance, borrow money for the purposes of the performance of its functions under this Act."

The first defendant poses the question: "why will section 17(1) of PNDCL 160 subject the borrowing activity of the 2nd Defendant to article 181 of the Constitution if the 2nd Defendant is not one of the species of public corporations or institutions classified as Government or public institutions or authority under article 181(1)(3) and (5) of the Constitution?" The first defendant further argues that the definition of "government" in article 295 of the Constitution cannot be said to be unambiguous and clear. He contends that the second defendant's submissions on this issue, coupled with the plaintiff's reply to those submissions show clearly that they each place different interpretations on "Government" in the context of articles 181(1), (3) and (5) and 295 of the 1992 Constitution. This, in his view, shows that there is an ambiguity requiring the authoritative interpretation of this Court under its original jurisdiction. The first defendant, in consequence, poses the following question: "Does the 2nd Defendant fall within the expression "Government" as "an authority by which the executive authority of Ghana is duly exercised" under the Ghana Ports and Harbours Authority Act, 1986 (PNDCL 160) so as to bring the two agreements within the provision of article 181(5) of the Constitution?" He answers his own question thus: "This is the only Court that can make an authoritative determination of the matter after

examining the case of the Plaintiff and the statutory powers of the 2nd Defendant as a public corporation."

The third and fourth defendants also filed notices of preliminary objection to the jurisdiction of this Court in this case and rehearsed arguments similar to those put forward by the second defendant. The third defendant, for instance, puts its case thus:

> "What the Plaintiff ignores is that a critical condition precedent to invoking this Honourable Court's original jurisdiction is that the issues raised should be genuine and real, and not fanciful and contrived. Thus, where the issues raised are not genuine and real, a preliminary objection would lie to dismiss the matter. We respectfully submit that the Plaintiff has not raised any genuine or real constitutional question that requires interpretation, and as such the action should be dismissed."

The 1992 Constitution defines government as follows in article 295(1):

> "(1) In this Constitution, unless the context otherwise requires-
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> "government" means any authority by which the executive authority of Ghana is duly exercised;"

The definition thus deploys the notion of the "executive authority of Ghana". The meaning of this phrase is, to a degree, to be gleaned from article 58 of the Constitution, which provides as follows:

"58.

(1) The executive authority of Ghana shall vest in the President and shall be exercised in accordance with the provisions of this Constitution.

(2) The executive authority of Ghana shall extend to the execution and maintenance of this Constitution and all laws made under or continued in force by this Constitution.

(3) Subject to the provisions of this Constitution, the functions conferred on the President by clause (1) of this article may be exercised by him either directly or through officers subordinate to him.

(4) Except as otherwise provided in this Constitution or by a law not inconsistent with this Constitution, all executive acts of Government shall be expressed to be taken in the name of the President.

(5) A constitutional or statutory instrument or any other instrument made, issued or executed in the name of the President shall be authenticated by the signature of a Minister and the validity of any such instrument so authenticated shall not be called in question on the ground that it is not made, issued or executed by the President."

Similarly, section 61 of the Commonwealth Constitution of Australia defines executive power as follows:

"The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and

extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."

Finally, we would like to refer to the description of the executive function contained in a leading English textbook on constitutional and administrative law, namely O. Hood Phillips and Jackson, Constitutional and Administrative Law (Sweet & Maxwell, London, 2001, 8th Ed). At p. 11, it states that:

> "*The executive or administrative function* is the general and detailed carrying on of government according to law, including the framing of policy and the choice of the manner in which the law may be made to render that policy possible. In recent times, especially since the industrialization of most civilized countries, the scope of this function has become extremely wide. It now involves the provision and administration or regulation of a vast system of social services – public health, housing, assistance for the sick and unemployed, welfare of individual workers, education, transport and so on – as well as the supervision of defence, order and justice, and the finance required therefore, which were the original tasks of organized government."

The illustrations quoted above of the range of meanings that may be ascribed to the term "executive power", the phrase used in the definition of government in the 1992 Constitution, give us cause to conclude that the meaning of government in the Constitution calls for interpretation, in the context of the facts of this case. This implies that this Court has jurisdiction in this matter. The said illustrations demonstrate that the concept of "executive power" is a wide one and far from

free of ambiguity. It can be credibly argued that executive power can be exercised through statutory corporations. Accordingly, if government is any authority by which the executive authority of Ghana is duly exercised, government, depending upon the context, can include a statutory corporation. In this regard, we disagree with the contention of the third defendant that:

> "The Constitution then devotes its entire Chapter 8, to set out the bounds of executive authority in Ghana. There is nowhere in that portion of the Constitution, that the services rendered by the 2nd Defendant are mentioned as a part of the executive."

It does not follow from the failure to mention statutory corporations in Chapter 8 that they are to be excluded from the meaning of government, as defined in article 295. From the foregoing discussion, it is clear that we think a genuine issue of interpretation is raised on the facts of this case as to whether government, in the context of article 181, includes the parastatal sector.

We are deliberately refraining from pronouncing on whether "government" on the facts of this case actually includes statutory corporations. That is the issue that requires interpretation ultimately by this Court and so we have no intention of expressing a view on it now. It has to be borne in mind that, in constitutional interpretation, words are not inherently clear or unambiguous. It is their context which generates the possibility of different meanings being attached to them. Accordingly, it is their context which have the capacity to raise real issues for interpretation. In short, given the definition of "government" in the 1992 Constitution, we do not consider its meaning to be so clear as to exclude the possibility of it including statutory corporations, in the context of article 181.

Accordingly, in our view the preliminary objection raised by the second, third and fourth defendants should be dismissed.

(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) R. C. OWUSU (MS.)

JUSTICE OF THE SUPREME COURT

(SGD) J. V. M. DOTSE

JUSTICE OF THE SUPREME COURT

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