IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA-A.D. 2011

CORAM: AKUFFO,(MS.)J.S.C,(PRESIDING)

DR. DATE-BAH,J.S.C.

ADINYIRA (MRS.),J.S.C.

GBADEGBE ,J.S.C.

AKOTO-BAMFO (MRS.),J.S.C.

CIVILMOTION
NO.J5/34/2011

2ND NOVEMBER,2011

THE REPUBLIC

VRS.

HIGH COURT (COMM. DIV.), ACCRA

EX-PARTE:THE ATTORNEY GENERAL } APPLICANT

OF GHANA

1. BALKAN ENERGY GHANA LIMITED }
2. BALKAN ENERGY LLC } INTERESTED
3. MR. PHILIP DAVID ELDERS } PARTIES

R U L I N G

SOPHIA A. B. AKUFFO, JSC;

Article 181 of the Constitution provides, in part, as follows:-

> **"(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) ....**
>
> **(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...."**

This is an application invoking the supervisory jurisdiction of the Court for the following reliefs:-

> "i. a declaration that the failure of the High Court (Commercial Division) to refer the constitutional issues arising in Suit No. BDC 32/2010 ... to the Supreme Court

is a breach of article 130 of the 1992 Constitution of Ghana...."

ii. a declaration that each of the power purchase agreement between the Government of Ghana and Balkan Energy (Ghana) Limited dated 27th July 2007 ('PPA') and the arbitration agreement contained therein, being an international business transaction, neither is enforceable Parliamentary approval not having been obtained.

iii. any further or other relief...."

Taking into account the nature of the application, this Court can, at this juncture, deal properly with the first relief only since the 2nd relief presupposes the Court's positive disposition of the 1st relief. And since the 2nd relief raises a more in-depth consideration of the substantive claim that came before the High Court, we may not simply deal with it as though it were merely a consequential relief necessarily flowing from our disposition on the 1st relief. In the circumstances of this matter, we must in the interest of justice make haste somewhat slowly.

Article 130 of the Constitution stipulates that:-

> **"(1) Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in -**
>
> > **(a) all matters relating to the enforcement or interpretation of this Constitution; and**
> >
> > **(b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution.**

> **(2) Where an issue that relates to a matter or question referred to in clause (1) of this article arises in any proceedings in a court other than the Supreme Court, that court shall stay the proceedings and refer the question of law involved to the Supreme Court for determination; and the court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court.**

The application is, therefore, of a very narrow compass, and indeed, the only issue we need to determine herein is whether or not the learned High Court Judge should have stayed proceedings as prayed by the Honourable Attorney General and referred to this Court for determination the question of whether or not, on a true and proper interpretation of Article 181(5) (supra), the power purchase agreement (and the arbitration clause therein) in issue in the matter before it constitutes an international business transaction.

In disposing of the application for stay of proceedings and referral of the said question to this Court, the learned High Court Judge reviewed various decisions by this Court concerning the circumstances under which the High Court is required to proceed as prayed by the Attorney General and concluded that:-

> *"In my view, the application by the Plaintiff/Applicant for an order for referral of the very questions already determined by the Supreme Court is at variance with the benign advance heralded by the decision in Agyekum vrs. Boadi, and carried forward by the decision in the 'Anane case'.*

According to the learned High Court Judge, the constitutional provision the Attorney General sought to have referred to the Supreme Court for interpretation had already been interpreted by the Court in **Attorney General v. Faroe Atlantic Co. Ltd [2005-2006] SCGLR 271**. Consequently, according to his Lordship, on the authority of cases such as **Republic v. Special Tribunal, Ex Parte**

Akosah [1980] GLR, 592, **Agyekum v. Boadi [2000] SCGLR, 282**, **the Republic v. High Court (Fast Track Division) Accra**, **Ex Parte Electoral Commission (Mettle-Nunoo and others: Interested Parties)[2005-2006] SCGLR, 514**, and **the Republic v. High Court (Fast Track Division) Accra, Ex Parte Commission on Human Rights and Administrative Justice (Richard Anane: Interested Party), [2007-2008] SCGLR 213**, there could not be any genuine controversy concerning the meaning of Article 181(5) and, consequently, there was no need for referring any question concerning its interpretation to the Supreme Court. One cannot fault the learned Judge's analysis of the purport of the abovementioned cases and we certainly do not desire to whittle away any benign benefits derivable from the cases of Agyekum v. Boadi and Ex Parte Commission on Human Rights and Administrative Justice. In our view, however, his Lordship completely missed the mark when he failed to apply the admonition afforded by the decision in Ex Parte Electoral Commission (supra) and favourably mentioned in Ex Parte Commission on Human Rights and Administrative Justice (supra) that:-

> **"...the trial court should not presume there is no issue of interpretation; it will be a safer course of action for the trial court to refer the matter to the Supreme Court rather than assume there is no real issue of interpretation, or that his or her view of the constitutional provision is more likely to be correct than that of five or seven Supreme Court Justices put together."**

At the core of the Attorney General's application for referral lies the fact that, whilst in the abovementioned case of Attorney General v. Faroe Atlantic Company Limited, the agreement in question was between the Government of Ghana and a foreign company, in the matter before the High Court in Suit No. BDC 32/2010, the agreement in question was between the Government of Ghana and a company

incorporated in Ghana but wholly owned by a foreign company and, as contended by the Attorney General, controlled by persons outside Ghana. Clearly, the parties were in disagreement as to whether, within the meaning of Article 181(5), the agreement was an international business transaction, and therefore should have been first laid before Parliament. In other words, the scope of a provision of the Constitution had come into contention and this necessitated further interpretation of article 181(5), to settle once and for all the question raised. In such circumstances, the best course of action (indeed the only lawful course of action), for the learned Judge, was to refer the issue to the Supreme Court in compliance with Article 130(2), to avoid the usurpation of this Court's exclusive interpretative jurisdiction.

According to the Merriam-Webster Dictionary of Law (1996) to interpret is to explain the meaning of something in order to determine intent. For the purposes of interpretation, 'intent' more often than not also includes scope. Now, in Attorney General v. Faroe Atlantic Co. Ltd (supra), this Court expounded the meaning of the expression '*an international business or economic transaction* to which the Government is a party', as used in article 181 (5), within a particular context, i.e., an agreement between the Government and a foreign company. Where, in a subsequent matter, a party contends that the scope of the provision is broader and covers an agreement between the Government and a domestic party of a certain type, then the intent and scope of the provision once again falls to be determined; not by the High Court, but by the constitutionally clothed court, the Supreme Court. The matter is not merely one of applying the provisions of article 181(5) in accordance with and along the lines of the previous interpretation.

For the foregoing reasons, we rule that the High Court should have referred to the Supreme Court the question raised in the proceedings before him concerning Article 181(5). Having refused to do so, the

learned judge usurped the jurisdiction of this Court and breached the Constitution and accordingly, we grant to the Applicant herein the first relief claimed and hereby declare that the failure of the High Court (Commercial Division) to refer to this Court for interpretation, pursuant to article 130(2), the question of whether or not the power purchase agreement dated 27th July 2007, between the Government of Ghana and the 1st Interested Party, as well as the arbitration agreement contained therein, constitute 'an international business transaction' within the meaning of Article 181(5) of the Constitution, amounts to a breach of the Constitution.

Now, as was made patently clear in the abovementioned case of Ex Parte Electoral Commission, the remedies available to the Supreme Court, when exercising its supervisory jurisdiction under Article 132, are not limited to the issuing of the conventional writs of certiorari, mandamus, prohibition, etc. We also have the power to issue orders and directions as shall be necessary to prevent illegalities, failure of justice and needless delays in the administration of justice, 'for the purpose of enforcing or securing the enforcement' of our supervisory power. Additionally, under Article 129(4):-

> **"For the purposes of hearing and determining a matter within its jurisdiction and the amendment, execution or the enforcement of a judgement or order made on any matter, and for the purposes of any other authority, expressly or by necessary implication given to the Supreme Court by this Constitution or any other law, the Supreme Court shall have all the powers, authority and Jurisdiction vested in any court established by this Constitution or any other law."**

Consequently, in order to expedite the determination of the constitutional question at stake, we hereby refer to this Court the following questions:-

1. Whether or not the Power Purchase Agreement dated 27th July 2007 between the Government of Ghana and Balkan Energy (Ghana) Limited constitutes an international business transaction within the meaning of Article 181(5) of the Constitution.
2. Whether or not the arbitration provisions contained in clause 22.2 of the Power Purchase Agreement dated 27th July 2007 between the Government of Ghana and Balkan Energy (Ghana) Limited constitutes an international business transaction within the meaning of Article 181(5) of the Constitution.

[SGD] S. A, B. AKUFFO (MS.)
JUSTICE OF THE SUPREME COURT

[SGD] DR. S. K. DATE-BAH
JUSTICE OF THE SUPREME COURT

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

THE ATTORNEY – GENERAL IN PERSON, WITH THE SOLICITOR GENERAL, NAANA DONTOH, CSA AND GRACE AWOOL SSA FOR THE APPLICANT.

MR. ACE ANKOMAH, WITH ESTHER D. AGBESI FOR THE INTERESTED PARTIES.