IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA AD 2013

CORAM: DR. DATE-BAH JSC (PRESIDING)

ANSAH JSC

ADINYIRA (MRS) JSC

OWUSU (MS) JSC

DOTSE JSC

ANIN YEBOAH JSC

BAFFOE-BONNIE JSC

GBADEGBE JSC

AKOTO-BAMFO (MRS) JSC

WRIT

No. JI/15/2012

14TH JUNE, 2013

MARTIN ALAMISI AMIDU - - - PLAINTIFF

VRS

1. THE ATTORNEY GENERAL - - - DEFENDANTS

2. WATERVILLE HOLDINGS (BVI) LTD

3. ALFRED AGBESI WOYOME

JUDGMENT

DR DATE-BAH JSC:

The facts

To the joy of the many lovers of soccer in Ghana, Ghana won,in July 2004,the right to host the 2008 African Cup of Nations football tournament, popularly known as CAN 2008. This case is about one of the consequences of Ghana's successful bid to host CAN 2008. As a result of winning the right to host CAN 2008, the Government of Ghana became obliged to rehabilitate football stadia and other sporting facilities in Ghana. In order to fulfill this obligation, it set in motion in January 2005 a procurement process for the award of appropriate contracts in accordance with the Public Procurement Act, 2003 (Act 663).

Vamed Engineering Gmbh & CO KG (referred to subsequently as 'Vamed') was one of the companies which submitted a tender for the award of a contract to rehabilitate the stadia specified by the Government of Ghana. Vamed became one of two companies which were shortlisted by the Government's evaluation committee. Meanwhile, by a letter dated 1st July 2005, Vamed purported to assign all its rights and obligations in the CAN 2008 stadia tender and another specified project to the second defendant. The second defendant, by an undated letter from Andrea Orlandi, a director of the company, to Vamed accepted this purported assignment.

The relevant Entity Tender Committee recommended Vamed/Waterville to the Central Tender Review Board for the award of the contract because its tender

was in their view the most competitive. The Central Tender Review Board on 5th August 2005 gave "concurrent approval for the award of the contract to Messrs VAMED Engineering." However, by a letter dated 22nd August 2005 addressed to the Managing-Director of Vamed, the Minister for Education,Youth and Sports purported to terminate the procurement process "due to the high commitments implied in the submissions, the inconclusive and the non-assuring nature of the financial submissions". The second defendant made several protests to Government in respect of this purported abrogation. It entered into negotiation with Government regarding the purported abrogation which resulted in a Memorandum of Understanding between them on 30th November 2005. The MOU stated that the Government would award the Ohene Djan and El Wak stadia project on a turnkey basis to the second defendant.

On 26th April, 2006 the Government of Ghana signed two separate but similar agreements with the second defendant for the rehabilitation of the Ohene Djan and El Wak stadia in Accra and the Baba Yara stadium in Kumasi, respectively. These two agreements both expressly specified conditions precedent to their coming into force. Clause 17 of the agreements stated as follows:

"17.1 This contract shall become effective at the date of the fulfillment of all of the following conditions:

17.1.1 Signing of the Contract by all Parties

- Signing of the Loan Agreement relating to the Contract by the Minister for Finance and Economic Planning.

- ❖ Rendering of a Legal Opinion by the Ministry of Finance and Approval of the Contract by the Cabinet and Parliament of the Republic of Ghana.

17.1.2 Confirmation by the bank holding the Escrow Account to the Contractor that the Escrow Account is established and credited with the total amount of the Contract Price according to Clause 5.

17.1.3 Effectiveness of the tripartite agreement to be concluded as per Clause 6.

17.1.4 Receipt by the Contractor of the advance payment referred to in Clause 6.1.

17.1.5 Receipt of the necessary approvals from Multilateral Investment Guarantee Agency (MIGA), Ex-Im Bank, USA and the Lender."

In spite of the fact that the agreements were thus not yet in force, the Government, on 6th February 2006, even before the formal signing of the agreements on 26th April, 2006, authorised the second defendant's accessto the sites of the stadia.The Deputy Minister of Education and Sports, by a letter dated 6th February 2006, informed the Managing-Director of Waterville, that is, the 2nd Defendant, that his Minister had "no objection to your moving to the construction sites to commence evacuation and demolition exercises for the rehabilitation and upgrading of the Accra, Kumasi and El-Wak stadia. By this notice, we are informing the authorities of the stadia and El-Wak to grant access to the construction teams for the agreed initial exercise." Thus, the second defendant commenced works involving the demolition of structures and the excavation and clearing of the sites. Subsequently, on 1st August 2006, the

Government terminated the agreements with the second defendant, by a letter of that date written by the Attorney-General. That letter referred to clause 17 of the Agreements (quoted above) and indicated that the second defendant was being given notice that "since the contracts did not receive approval from Cabinet in accordance with Clause 17 of the Contracts, the Contracts have never become effective."

By this letter, the Government of Ghana in effect walked away from the two agreements it had signed. It then entered into negotiations with the sub-contractors of the 2nd defendant, Micheletti and Co Ltd and Consar Ltd, to continue with the rehabilitation and refurbishment of the Ohene Djan, Baba Yara and El Wak stadia. The agreement reached with them was that Government would pay the sub-contractors the value of the work already executed by the 2nd defendant before the date of takeover by the sub–contractors of the work. The sub-contractors would then pay the 2nd defendant the value of the work it had undertaken. In his Statement of Case, the 1st defendant states as follows on this matter (in para 27):

> "As a result GoG instructed the Consultants for the Project, Building Industry Consultants Ltd. (BIC) to value the work done by the 2nd Defendant from the time of entry onto the date of the takeover by the sub-contractors. It was agreed that GoG will remit to the sub-contractors all the entitlements due the 2nd Defendant as certified by BIC for collection by the 2nd Defendant."

The value of the work previously undertaken by the 2nd defendant was thus duly certified by the consultants for the project, Building Industry Consultants Ltd (hereafter referred to as "BIC"). The Government of Ghana subsequently paid

for all the work certified by BIC, totaling some E22,365,624.40. This payment was problematic since it appears to have used a restitutionary route to bypass the legal consequences of an inchoate international business transaction to which the Government was a party, which had not yet been approved by Parliament in terms of article 181(5).

In spite of this, on 9th March, 2009, the 2nd defendant wrote relying on a clause in the 26th April 2006 contracts to claim fees and pre-financing costs for the initial construction works from the Government, instead of from their subcontractors, as agreed. The 1st defendant therefore embarked on discussions with the 2nd defendant on its claim. On 18th August 2009, the 3rd defendant wrote to the Government, asserting that the 2nd defendant's claim was grossly exaggerated and giving his opinion as to what was due from Government to the 2nd defendant. This letter is reproduced below because of its instructive contents. The letter is attached as Exh AG16 to the 1st defendant's Statement of Case.

Stanley-Marbell Plaza

Behind Hotel President

Adabraka

P.M.B.100, G.P.O

18/08/2009

The Hon. Minster

Ministry of Youth and Sports

Accra

CLAIM: CAN2008 STADIA CONSTRUCTION

It has come to my attention that the company Waterville BVI has taken the Government of Ghana to court for the payment of an aggregate sum of Euro 33 million and the Attorney General Department has withdrawn the case for settlement.

M-Powapak Ltd, Austro Invest Ltd. and Myself are interested parties and wish to state that the demand by Waterville BVI is grossly exaggerated.

I was the one who engineered the whole CAN 2008 concept, pursued it through with three (3) consecutive Ministers of the Sport Ministry/Department over the period.

I engineered the finances, which covered the construction of Stadia Hospitals, and Youth and Skills Training Centres to be built countrywide.

The Government at that time decided that the whole process should not be Supply Contract but should go into tender; and the consortium won the bid through painful processes. We subsequently had a concurrent approval from the National Procurement Authority.

Waterville BVI was leading the Consortium that won the contract and demolished part of the Accra Sports Stadium upon a written instruction to Waterville BVI from the then Minister of Education and Sports.

The Government later abruptly cancelled the bid illegally through a cabinet decision citing high cost which decision I challenged, by writing to all stakeholders including the National Procurement Authority.

Waterville BVI through my help then formed Micheletti Company Ltd. to handle the construction of the Accra Sports Stadium.

All along, the Government of Ghana's Consultants to the project was Building Industries Consultant (BIC).

Waterville BVI received some compensation from Micheletti and Co. and from Consar Ltd. (the main contractor for the Kumasi stadium). Austro Invest also received some form of compensation from Waterville BVI.

The claim by Waterville BVI should have been a joint claim by M-Powapak, Alfred Woyome, and Austro Invest. The quantum of Waterville BVI demand is far above what should have been the legitimate claim.

M-Powapak, Austro Invest, Alexandra Van-Cleef (Austro Invest Representative in the United States) and Alfred Woyome legitimate claim under this circumstance is Euro 6 million while Waterville claim should have been about Euro 5 million without interest, charges and damages.

It turned out that the Chinese who built the Essipong and Tamale Stadia were able to do so by using more than twice the approved bid price. They also used local commercial loans instead of the arranged soft loan from Bank Austria with the approval of the Paris Club, the World Bank, Multilateral Guarantee Agency of Washington DC, and the IMF, an arrangement I facilitated.

In conclusion, I ask that the negotiation between the Attorney General Department and Waterville BVI is ceased while I put forward the chronological evidence, carefully documented for your information and necessary action.

I use this opportunity to formally demand on my own behalf and on behalf of Austro Invest, M-Powapak, and Alexandra Van Cleef; the sum of Euro 6 million in lieu of the CAN 2008 stadia construction bid that was cancelled by the cabinet of the Government of Ghana illegally when it was clear that my consortium has

won and has started actual construction of some of the project and also fully in the middle of full mobilization to move to other sites.

Alfred Agbesi Woyome

Cc: Secretary to the President
Attorney General and Minister of Justice
Minister of Finance and Economic Planning".

From this letter, it emerges that the 3rd defendant had become a claimant against the Government of Ghana, although he was not a party to any of the agreements already mentioned in this account of the facts of this case. The legal basis, if any, for this claim is relevant to the jurisdiction of this Court in this matter, as will be explained below.

The solicitor of the 2nd defendant, Tetteh & Co, contradicted the 3rd defendant's claim by a letter dated 20th November 2009, attached to the 1st defendant's Statement of Case as Exh AG17. The text of that letter is also instructive and deserves to be reproduced. The letter addressed to the Honourable Attorney-General states as follows:

"Dear Madam

SETTLEMENT OF CLAIMS OF WATERVILLE HOLDINGS (BVI) FOR REHABILITATION OF OHENE DJAN, EL WAK AND BABA YARA STADIA

We write in response to your letter drawing attention to the claim of Mr. Woyome of M-Powapak ("Powapak") dated 28th August 2009, against the claims of Waterville Holdings BVI ("Waterville") being discussed for settlement.

Waterville did engage M-Powapak to provide Waterville with financial engineering services but the relationship was terminated by a Termination Agreement dated 25th November 2006, ("the Agreement"). Powapak's claims against Waterville were fully settled and acknowledged in the Agreement. Therefore neither Powapak nor Woyome has any claim against Waterville. A copy of the settlement agreement with Powapak is annexed.

We must add that the stadia contracts were contracted between Waterville and the Government of Ghana ("GoG"); neither Powapak nor Woyome was a party. It is therefore wrongful for Mr. Woyome or Powapak to make a claim in a contract of which neither is a party.

Mr. Woyome's allegation that Waterville's claim is illegitimate clearly betrays his limited knowledge and involvement in the construction works, and importantly, his motive to discredit the legitimate claim of Waterville to payment of pre-financed works. It is on record that work done by Waterville was certified by the Consultant. The certificates were issued pursuant to settlement negotiations initiated at the Castle, Osu a couple of years ago, and Waterville has been pressing its claims on GoG ever since. Mr. Woyome's emergence in the matter is belated and with no locus standi. The purported discredit of Waterville's claim betrays a motive to settle scores for matters unconcerned with the current negotiation.

Please find enclosed our response to Mr. Woyome's claim."

When the 3rd defendant's claim against the Government was not satisfied, he commenced an action against the Republic on 19th April 2010 intituled *Alfred Agbesi Woyome v Attorney-General & Anor* (Suit No. RPC/152/10) in the High

Court (Commercial Division), Accra. The original writ was twice amended. The endorsement on its final form, filed on 6th May 2010, was in the following terms:

a. "An order for payment of the sum of E44,259,009.48 or its cedi equivalent at the current forex bureau exchange rate representing cost of services rendered by Plaintiff for the Government of Ghana for procurement of facility in the sum of E1.106,470,587.00 for the construction of sports stadia, medical facilities, irradiation plant and tissue culture facilities between 2001 and 2006.
b. An order for payment of the sum of E11,600,289.44 being accrued interest on the sum of E44,259,009 from September 2006 up to April , 2010, at the rate of Eurobor 1 year plus three points.
c. Interest on the sum of E44,259,009.48 or its cedi equivalent at the current forex bureau at the rate Eurobor 1 year plus three points from May 1, 2010, up to and inclusive of date of final payment.
d. Costs, including Lawyers' fees."

Whilst negotiating with representatives of the Republic, the 3rd defendant obtained judgment in default of defence against the 1st defendant on this writ. Negotiations continued between the 1st defendant and the 3rd defendant which resulted in Terms of Settlement which were filed with the High Court on 4th June 2010. The Terms of Settlement were as follows:

"**WHEREAS:**

1. By a writ of summons and statement of claim filed at the Regis**try** of the High Court, Commercial Division, Accra, on 19th April, 2010, the Plaintiff sought against the Defendants the following reliefs:
    i. An order for the immediate payment of the sum of E41,811,480.59 being financial engineering cost owed Plaintiff by the Government of Ghana.
    ii. An order for payment of interest on the said sum from September 2006 till date of final payment.
    iii. General damages for inconvenience suffered by Plaintiff as a result of the long delay in paying him his fees.
    iv. Costs including solicitor's fees and filing fees.
2. By amended writ of summons filed on 4th and 6th May, 2010, the Plaintiff claimed against the Defendants as follows:
    i. An order for the payment of the sum of E44,259,009.48 or its cedi equivalent at the exchange rate representing cost of services rendered by Plaintiff for the Government of Ghana for procurement of facility in the sum of E106,470,587.00 for the construction of sports stadia facility, irradiation plant and tissue culture facilities between 2001 and 2006.
    ii. An order for payment of the sum of E11,600,289.44 being accrued interest on the sum of E44,259,009.48 from September 2006 up to April 2010 at the rate of Eurobor 1 year plus three points from May 2010 up to and inclusive of date of final payment.
    iii. Interest on the sum of E44,259,009.48 or its cedi equivalent at the current forex bureau at the Eurobor 1 year plus three points from May 2010 up and inclusive of date of final payment.

iv. Costs, including lawyers fees.

3. On 24th May, 2010, the High Court, Commercial Division, presided over by His Lordship Justice Tanko Amadu, entered final judgment against the Defendant for a total sum of GHc 105,565,548.24. The details of the judgment are as follows:

i. Judgement Debt E44,259,009.48 converted at GHc1.8894 to E1.00 - GHc83,622,961.38

ii. Interest at the rate of Eurobor 1 year plus three points from September 2006 to April 2010 E11,600,289.44 converted at GHc1.8894 to E1.00 - GHc21,917,586.86

iii. Costs - GHc 25,000.00

Total judgement debt inclusive of interest and costs - GHc105,565,548.24

1. Following negotiations of the judgment debt by the parties, the parties have agreed as follows:
   i. The Defendant shall pay to the Plaintiff the sum of GHc 51,283,480.59 representing the negotiated judgment debt as follows:
      a. Judgment debt - 41,811,480.59
      b. Interest - 9,447,000.00
      c. Costs - 25,000.00

ii. The Defendant shall pay to the Plaintiff the sum of GHc 51,283,480.59 by three (3) equal monthly installments in the sum of GHc 17,094,493.53 beginning June, 2010 and ending August 31, 2010 in full and final settlement of the judgment debt.

2. The terms of settlement shall be entered as Consent Judgment subject to the usual default clause.

DATED AT PEASAH-BOADU & CO, 3RD FLOOR, GULF HOUSE, AIRPORT WEST, ACCRA THIS 3RD DAY OF JUNE, 2010."

These terms of settlement were signed by both parties to the action in the presence of their counsel.

Subsequently, 1st defendant filed an application in the High Court to set aside these terms of settlement. The application was dismissed and the Court in the same ruling, in the view of the 1st defendant, "in an unprecedented 'indecent' haste"adopted the terms of settlement as a Consent Judgment, on the 9th of June, 2010.

The 1st defendant subsequently, on 28th July 2010, issued a writ seeking to set aside the consent judgment on the ground, *inter alia,* that it was procured by a mistake due to fraudulent misrepresentation by the 3rd defendant. The proceedings began by this writ are still in process.

Against the backdrop of the facts set out above, the Plaintiff has sued the defendants in this action invoking the original jurisdiction of this Court. The Plaintiff is a former Attorney-General who has declared that he seeks the public interest through this suit. His writ, originally issued on 22nd June 2012, was

amended pursuant to an order of this Court made on 11th April 2013. It seeks the following reliefs:

1. "A declaration that the Agreement entitled "Contract for the Rehabilitation (Design, Construction, Fixtures, Fittings and Equipment) of a 40,000 seating Capacity Baba Yara Sports Stadium in Kumasi, Ghana" entered into on 26th April 2006 between the Republic of Ghana and Waterville Holdings (BVI) Limited of P. O. Box 3444 Road Town Tortola, British Virgin Islands is an international business or economic transaction under Article 181 (5) of the 1992 Constitution that could only have become operative and binding on the Government of Ghana after being laid before and approved by Parliament.

2. A declaration that the Agreement entitled "Contract for the Rehabilitation (Design, Construction, Fixtures, Fittings and Equipment) of a 40,000 Seating Capacity Ohene Djan Sports Stadium and the Upgrading of the El Wak Stadium in Accra, Ghana" entered into on 26th April 2006 between the Republic of Ghana and Waterville Holdings (BVI) Limited of P. O. Box 3444 Road Town, Tortola, British Virgin Islands is an international business or economic transaction under Article 181 (5) of the 1992 Constitution that could only have become operative and binding on the Government of Ghana after being laid before and approved by Parliament.

3. A declaration that the two Agreements each dated 26th April 2006 as stated in reliefs (1) and (2) herein not having being laid before and approved by Parliament pursuant to Article 181 (5) of the 1992 Constitution is each inconsistent with and in contravention of the said Article 181 (5) of the

Constitution and consequently null, void and without operative effect whatsoever.

4. A declaration that a bridge financing agreement arising between the Republic of Ghana and the 2nd defendant, (Waterville Holding (BVI) Limited), pursuant to the two Agreements each dated 26th April 2006 is each a loan transaction within the meaning of Article 181 (3), (4) and (6) of the 1992 Constitution whose terms and conditions had to be further laid before Parliament and approved by a resolution of Parliament to be operative and binding on the Republic of Ghana.

5. A declaration that the conduct of the 1st Defendant in paying sums of money in Euros to the 2nd Defendant in purported pursuance of claims by the 2nd Defendant arising out of the said two Agreements each dated 26th April 2006 as stated in reliefs (1) and (2) herein is inconsistent with and in contravention of the letter and spirit of the 1992 Constitution, particularly Article 181 (5) thereof and is each accordingly null, void, and without effect whatsoever.

6. A declaration that all transactions and claims by the 3rd Defendant a Ghanaian citizen with one Austro-Invest Management of CH-6302 ZUG Untermuhli 6, Switzerland, (a foreign registered and wholly owned company liquidated on 26th July 2011) premised upon the said two Agreements between the Republic of Ghana and the 2nd Defendant, Waterville Holdings (BVI) Limited, constitute international business transactions within the meaning of Article 181(5) of the 1992 Constitution to be laid before and

approved by Parliament to become operative and binding on the Republic of Ghana.

7. A declaration that the transactions or any purported transaction between the 2nd Defendant, Waterville Holding (BVI) Limited, (a foreign registered and resident company), 3rd Defendant, a Ghanaian citizen, with Austro-Invest Management Limited (also a foreign registered and wholly owned company now liquidated), and the Government of Ghana to syndicate foreign loans and other financial assistances from foreign financial institutions and sources that financially encumbers the Republic of Ghana for the stadia projects, the subject matter of the two Agreements each dated 26th April 2006 aforementioned constitute an international business or economic transaction within the meaning of Article 181 (5) of the 1992 Constitution for the purposed the operability of the transactions.

8. A declaration that on a true and proper interpretation of Articles 181 (3), (4), (5), and (6) and the spirit of the 1992 Constitution the Republic of Ghana cannot incur liability for any foreign or international loan or expenses incidental to such foreign or international loan transactions without parliamentary approval of the transaction for it to be operative and binding on the Republic of Ghana.

9. A declaration that conduct of the 1st Defendant in paying or ordering the payment by the Republic of Ghana of claims raised by the 3rd Defendant with the said Austro-Invest premised upon a purported foreign or international financial engineering agreement arising out of the said aforementioned two

Agreements of 26th April 2006 and/or any other international business Agreement with the Government of Ghana which were never laid before or approved by Parliament is inconsistent with and in contravention of the letter and spirit of the Constitution, particularly Articles 181 (3), (4), (5), and (6) of the 1992 constitution thereof and are according null, void and without effect whatsoever.

10. A declaration that the High Court which purported to and assumed jurisdiction in an action commenced by the 3rd Defendant (as Plaintiff) on 19th April 2010 in Suit No. RPC/152/10 against the 1st Defendant claiming damages for breach of contract in an international business transaction contrary to Article 181 of the 1992 Constitution and entered judgment in default of defence against the 1st Defendant acted without jurisdiction: consequently those proceedings and others consequent thereupon of the said High Court are null, void, and without effect whatsoever.

11. A declaration that the conduct of the President of the Republic of Ghana in stating to the nation in an interview with Radio Gold on 23rd December 2011 that the two international business Agreements of 26th April 2006 and others incidental to it created liabilities for the Republic of Ghana for which the Government of Ghana had to pay to the 2nd Defendant, and 3rd Defendant with the said Austro-Invest as judgment debts are inconsistent with and in contravention of Article 181 of the 1992 Constitution and undermine efforts to defend the Constitution.

12. A declaration that the conduct of the 2nd Defendant in making a claim for and securing payment through mediation on an alleged breach of contract of the said two Agreements between the 2nd Defendant, (a wholly owned foreign registered and resident company) and the Government of Ghana dated 26th April 2006 when the 2nd Defendant knew that the said two Agreements were international business or economic transaction with loan components that had not been laid before and approved by Parliament under article 181 of the 1992 Constitution to become operative and enforceable is inconsistent with and in contravention of the Constitution.

13. A declaration that the conduct of the 3rd Defendant jointly with Austro Invest Management Ltd (a foreign registered and resident company subsequently liquidated abroad on 26th July 2011) in making claims upon and including the issuance of a Writ of Summons and Statement of Claim in Suit No. RPC/152/10 dated 19th April 2010 against the Government of Ghana with the written support of the 2nd Defendant and receiving payments thereto premised upon alleged breaches of the said two Agreements dated 26th April 2006 between the 2nd Defendant and the Government of Ghana when the 3rd Defendant with the said Austro Invest Management Ltd, and the 2nd Defendant knew that the said two Agreement were international business or economic transactions which had not been laid before and approved by Parliament to become operative and enforceable is inconsistent with and in contravention of article 181 of the 1992 Constitution.

14. An order directed at the 2nd and 3rd Defendants to refund to the Repubic of Ghana all sums of money paid to them severally or jointly upon or as a result

of the unconstitutional conduct of the 1st Defendant in purported pursuance of the two inoperative Agreements dated 26th April 2006 or any other unconstitutional Agreement as having been made and received by them in violation of Article 181 of the Constitution.

15. And for such further orders or directions that this Honourable Court may deem appropriate to give full effect or to enable effect to be given to the spirit and letter of the Constitution in this matter generally and particularly Articles 2 and 181 of the Constitution."

On the facts narrated above, it is the 1st defendant's contention that he/she did not have any contract with the 3rd defendant. However, the 3rd defendant in his letter of 18th February, 2010 (*supra)*claimed to have executed financial engineering in respect of the stadia projects with Austro-Invest, originally the 3rd defendant in this suit, which was later struck out, because it had been liquidated. The 1st defendant has pleaded that it never engaged the 3rd defendant contractually. It asserts that in spite of the 3rd defendant's claim to have played a central role in the activities that led to Ghana hosting CAN 2008, the 3rd defendant worked, not for the Government of Ghana, but exclusively as an agent of Vamed.

Matters relating to the enforcement or interpretation of the Constitution

Introduction: The Supreme Court's Original Jurisdiction

On the facts set out above, the initial issue which has to be determined by this Court is whether it has jurisdiction to entertain the plaintiff's suit, alongside the suit already launched by the 1st defendant against the 3rd defendant in the High

Court.In this determination, the words of Acquah JSC, as he then was, delivering the ruling of the Supreme Court in *Adumoa II v Adu Twum II* [2000] SCGLR 165 are helpful. He there said (at p. 167):

> "My Lords, the original jurisdiction vested in the Supreme Court under articles 2(1) and 130(1) of the 1992 Constitution to interpret and enforce the provisions of the Constitution is a special jurisdiction meant to be invoked in suits raising *genuine* or *real* issues of interpretation of a provision of the Constitution; or enforcement of a provision of the Constitution; or a question whether an enactment was made ultra vires Parliament or any other authority or person by law or under the Constitution: see *Gbedemah v Awoonor-Williams* (1969) 2 G & G 438; *Tait v Ghana Airways Corporation* (1970) 2 G & G 527; *Yiadom I v Amaniampong* [1981] GLR 3, SC; *Edusei v Attorney-General* [1996-97] SCGLR 1, on review *Edusei v Attorney-General (No.2),* CM 21/96, 22 April 1998, reported in [1998-99] SCGLR 753 AND *Republic v Special Tribunal; Ex parte Akosah* [1980] GLR 592, CA.
>
> This special jurisdiction is not meant to usurp or to be resorted to in place of any of the jurisdictions of a lower court. In other words, where our said jurisdiction has been invoked in an action which properly falls within a particular cause of action at a lower court, this court shall refuse to assume jurisdiction in that action, notwithstanding the fact that it has been presented as an interpretation or enforcement suit or both. For, a large number of actions which fall within specific causes can be presented in the form of interpretation or enforcement actions or both. For example, if someone goes to farm or commences building on another person's land, the latter can file a suit at the Supreme Court invoking its original jurisdiction for a declaration that the said entry unto his land constitutes an invasion of his right to his property under article 18 of the 1992 Constitution, damages for such violation, and an order to recover his property. But it is quite undisputed that such a suit is

really a land suit falling within the jurisdiction of the lower court with the authority to handle claims of the value of the land in dispute."

In this context, an issue that emerges strikingly for constitutional interpretation is the extent to which the nullity of international business or economic transactions in consequence of their non-compliance with article 181(5) of the 1992 Constitution affects restitutionary rights under the common law. To put the issue another way: if an agreement to perform certain acts comes within article 181(5), but has not yet been submitted to Parliament for its approval, is it lawful for the Executive to bypass the obligation of article 181(5) by requesting the acts contemplated under the contract to be performed by its partner anyway and then make payment to the partner under claims for restitution? In principle, it would appear to be clearly against public policy to allow such evasion by the Executive of its constitutional duty. Article 181(5) thus needs to be construed purposively to invalidate claims to restitution in such situations.

This dimension of this case is what brings it within the exclusive jurisdiction of this court under article 130 of the 1992 Constitution. The 2nd and 3rd defendants argue in their Statements of Case that since this Court has already interpreted article 181(5)of the 1992 Constitution in *The Attorney-General v Faroe Atlantic Co. Ltd.* [2005-2006] SCGLR 271 and *The Attorney-General v Balkan Energy Ghana Ltd. 2 ors*. Unreported, 16th May, 2012, it is unnecessary for it to assume jurisdiction in this case. They contend therefore that the right forum for this case is the High Court for it to apply the interpretation already put on the provision by the Supreme Court. However, it is clear from the facts set out above that the 3rd defendant does not admit to relying on any contractual provision in the two terminated contracts. So *Faroe Atlantic* and *Balkan Energy* are not directly in point. What is in issue is whether there is a penumbra effect

of article 181(5) such that rights and obligations which are devised to enable an evasion of the provision'sduty can equally be nullified. This is a task of constitutional interpretation for this court and not for the High Court.

Beyond interpreting whether there isa penumbra effect of article 181(5), this Court needs also to decide whether on the facts of this case the second and third defendants' rights come within the extended scope of article 181(5), if any.

The Basis for the 2nd and3rd Defendants' claims against Government and the relevance, if any, of Article 181(5) to them.

The basis of the alleged liability of Government to the 3rd defendant is quite opaque, given the nature of the action he initiated in the High Court. By the 3rd defendant's writ, filed by him as plaintiff on 6th May 2010, he claimed the following reliefs (repeated for convenience, although previously set out):

e. "An order for payment of the sum of E44,259,009.48 or its cedi equivalent at the current forex bureau exchange rate representing cost of services rendered by Plaintiff for the Government of Ghana for procurement of facility in the sum of E1.106,470,587.00 for the construction of sports stadia, medical facilities, irradiation plant and tissue culture facilities between 2001 and 2006.

f. An order for payment of the sum of E11,600,289.44 being accrued interest on the sum of E44,259,009 from September 2006 up to April , 2010, at the rate of Eurobor 1 year plus three points.

g. Interest on the sum of E44,259,009.48 or its cedi equivalent at the current forex bureau at the rate Eurobor 1 year plus three points from May 1, 2010, up to and inclusive of date of final payment.

h. Costs, including Lawyers' fees."

The reference in relief "a" to "the construction of sports stadia" suggests a relationship to the 2 terminated CAN 2008 stadia agreements. Given that clearly those agreements never became operative, the basis of the 3rd defendant's suit as plaintiff would have to be construed as one in restitution, unless he is relying on a different contract of which he has failed to provide the particulars. If he is relying on a different contract, then, of course, this Court would have no jurisdiction in this matter because there would be no issue of constitutional interpretation.The task would fall to the High Court to determine the existence or otherwise of the contract under which he is making his claim. If, however, the 3rd defendant is relying on a restitutionary claim related to the ineffective CAN 2008 stadia agreements, an issue arises as to the impact on such claim of article 181(5) of the 1992 Constitution which vests jurisdiction in this Court to interpret the provision in order to determine its scope.

The right to restitution may arise in relation to a "situation where the defendant has acquired a benefit from or by the act of the plaintiff". (See Goff & Jones, <u>The Law of Restitution</u> (6th ed., 2002) p. 175. "The plaintiff's ground of recovery may be that he was mistaken, that he was compelled to do what he did, that he acted out of necessity, that the consideration for his payment had wholly failed, or that thedefendant had freely accepted the services which he had rendered or the goods which he had delivered." (*Ibid.)* The last but one situation in this list of situations is what is relevant on the facts of this case. In other words, has the State (i.e. the 1st defendant) freely accepted services rendered by the 3rd

defendant? If so, does the Constitution permit the State to make payment for those services?

In his own Statement of Case, the 3rd defendant indicates clearly that he is not relying on the two terminated CAN 2008 agreements, but neither does he furnish sufficient evidence of an independent contract on which he relies. Assuming, without admitting, that the 3rd defendant's stance is supported by the facts upon which the litigation in the High Court is founded, there is thus a twilight area of contested liability which could be construed as either based on restitution, but linked to the ineffective rights under the terminated CAN 2008, or based on non-existent or fraudulent rights and therefore flawed. This twilight area of liability, to the extent that it relies on restitution, calls for constitutional interpretation to clarify the scope of article 181(5) of the 1992 Constitution in relation to rights which are not contractual but related to the contract rights nullified under that provision. To the extent that it is based on non-existent or fraudulent rights, it would be subject to the jurisdiction of the High Court, since it would not come within the exclusive original jurisdiction of this Court, which has been invoked by the Plaintiff's writ. If, contrary to the 3rd defendant's assertion in his Statement of Case, he is in fact relying on the ineffective agreements of 26th April, then again this would be a matter within the jurisdiction of the High Court, since it would not require further constitutional interpretation than the existing case law has already provided.

A careful analysis of the facts of this case is therefore necessary to determine this issue of jurisdiction. It has been shown before this Courtthat there is litigation, initiated by the 1st defendant, in the High Court relating to whether the 3rd defendant has any contract rights against the 1st defendant and whether he is guilty of fraudulent misrepresentation. That is where that litigation belongs and it

should not be replicated in this forum. This present action relates to the effect of article 181(5) of the 1992 Constitution and whether it has any applicability to the facts of this case.Also in issue is what consequential orders this Court may make, if it finds that article 181(5) has been infringed. This is the broad brush analytical framework for this case. Against that backdrop, let us now examine the case put forward by the Plaintiff.

The kernel of the Plaintiff's case is presented in an overview of his case contained in his Statement of Legal Arguments, filed on 8th April 2013. This is what it says:

> "The Plaintiff will demonstrate on the pleadings and exhibits that the 2nd and 3rd Defendants colluded and collaborated in a common cause after 20th April 2010 to unlawfully expropriate resources from the Government of Ghana under the guise of claims pursuant to the two Agreements dated 26th April 2006. After the 3rd Defendant's letters of 1 8th August 2009 and 18th February 2010 challenging the 2nd Defendant's petition to the 1st Defendant for further payments to the 2nd Defendant for breach of the two Agreements 26th April 2006 *(sic)*, the 3rd Defendant wrote a letter dated 19th April 2010 to the 2nd Defendant to confirm to the 1st Defendant that the financial structuring aspect which the 3rd Defendant was claiming in the 3rd Defendant's expanded petition of 18th February 2010 was part of the project for the consortium *(sic)* and rehabilitation of the stadia. It may be recalled that Tetteh & Co had on behalf of the 2nd Defendant disputed the claims and rights of the 3rd Defendant under the 26th April 2006 Agreements in a letter dated 20th November 2009. On 20th April 2010 the 2nd Defendant wrote directly to the 1st Defendant referring to the letter of the 3rd Defendant: "… dated 19th April 2010 by which he requested confirmation to your office about the financial structuring aspect as part of

the project for the consortium *(sic)* and rehabilitation of stadia in Ghana for CAN 2008." The 2nd Defendant as if under blackmail, then confirmed the demand of the 3rd Defendant to the 1st Defendant. (See exhibit "MAA annexed to the Statement of Case of the Plaintiff for the 2nd Defendants letter of 20th April 2010) *(sic)*. The 2nd Defendant and 3rd Defendant from then on made common cause by colluding, collaborating and starting to use Kofi Peasah-Boadu of Peasah-Boadu & Co. as their common lawyer in the mediation, and in the Writ and Statement of Claim filed in the High Court on 19th April 2010 against the Government of Ghana. The 1st Defendant personified by Hon. Mrs Betty Mould-Iddrisu with full knowledge as a statutory Member of the General Legal Council and leader of the Bar of Ghana that the conduct of the 2nd and 3rd Defendants and their Solicitor, Kofi Peasah-Boadu of Peasah-Boadu & Co, offended the Legal Profession (Professional Conduct and Etiquettes Rules), 1975 (L.I. 613) engaged them in unconstitutionally mediating and settling their claims against the Government contrary to Article 181 of the Constitution. The plaintiff will conclude by urging this Court in making consequential orders pursuant to Article 2(2) of this action to find that the conduct of the Defendants was each inconsistent with and in contravention of the Constitution and also to admonish the conduct of the Solicitors herein and refer same to the General Legal Council for abuse of the process and deceit of this Court."

The Plaintiff's Statement of Legal Arguments seeks to establish that the 3rd Defendant's claim for fees and interest embodied in his amended writof 6th May 2010 in fact arises from the two terminated agreements of 26th April 2006. Since those agreements never became legally enforceable contracts, it has to be inferred that, on his arguments, the obligations in issue come within the twilight

zone earlier referred to which require constitutional interpretation to determine whether the penumbra effect of article 181 makes them also unconstitutional. This Court has jurisdiction to determine whether restitutionary rights claimed in relation to the two terminated agreements are valid, in the light of article 181. In this connection, we think that a distinction should be made between the effect, on the one hand, of illegality of contract and, on the other hand, of unconstitutionality of contract on restitutionary rights.

In *City &Country Waste Ltd. v Accra Metropolitan Assembly* [2007-2008] 1 SCGLR 409(hereafter referred to as the *CCWL case*) this Court explained the common law approach to restitution in relation to illegal contracts as follows (at p. 435):

> "There is a long-standing approach in the English common law, dating back to the eighteenth and nineteenth centuries, according to which where a contract is found to be illegal, the benefits conferred under it are not recoverable. The decided cases have tended to deal with the recovery of money paid or property transferred under an illegal contract. But even this traditional English approach was subject to exceptions. The two main exceptions to the English general rule that a party cannot recover a benefit conferred on the other party under an illegal contract are: first, where the parties are not *in pari delicto;* and, second, where a party to an executory contract repents before performance."

In the *CCWL* case, the Supreme Court injected some flexibility into the received English common law rules. This is what the Court said (at p.436-7):

> "The next issue arising therefore is whether the Plaintiff is not *in pari delicto* with the Defendant according to the orthodox English authorities on the issue. A review of the English case law reveals that, in assessing the

fault of the parties, the law adopts a rather technical approach, according to which recovery is allowed only where a Plaintiff can demonstrate that he or she was induced to enter into the illegal contract by the fraud, duress or oppression of the other party; or that he or she was ignorant of a fact that rendered the contract illegal; or that he or she belonged to a vulnerable class protected by statute. By way of illustrating the last category, the words of Lord Mansfield in *Browning v Morris* (1778) 2 Cowp. 790 at 792, may be quoted:

> "Where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one, from their situation and condition being liable to be oppressed and imposed upon by the other; there, the parties are not *in pari delicto* and in furtherance of these statutes, the person injured after the transaction is finished and completed, may bring his action and defeat the contract."

We do not think that we ought in this Court to be constrained excessively by the weight of the English case law in finding a just outcome in this case. Rather, we are encouraged to develop Ghanaian law in this area by some of the ideas contained in the English Law Commission's Consultation Paper No. 154 on Illegal Transactions: The Effect of Illegality on Contracts and Trusts. This Consultative Paper, after an extensive and erudite review of the complex English law in the area, concludes as follows (at p. 91):

> "We have said that we believe that there is a continued need for some doctrine of illegality in relation to illegal contracts and that, in

certain circumstances, it is right that the law should deny the plaintiff his or her standard rights and remedies. However, we have also explained how, in some situations, we believe that the plaintiff is being unduly penalized by the present rules. This injustice would seem to be the inevitable result of the application of a strict set of rules to a wide variety of circumstances, including cases where the illegality involved may be minor, may be wholly or largely the fault of the defendant, or may be merely incidental to the contract in question. We consider that the best means of overcoming this injustice is to replace the present strict rules with a discretionary approach under which the courts would be able to take into account such relevant issues as the seriousness of the illegality involved, whether the plaintiff was aware of the illegality, and the purpose of the rule which renders the contract illegal. The adoption of some type of discretionary approach has the support of the vast majority of academic commentators in this area; and it is the approach which has been followed in those jurisdictions where legislation has been implemented. Moreover, we have not been able to devise a new enlightened regime of "rules" that would provide satisfactory answers to all disputes involving illegal contracts. In our view, a balancing of various factors is required so that, put quite simply, the law on illegal contracts does not lend itself to a regime of rules."

We have decided to adopt this structured discretionary approach to the resolution of issues arising from illegality of contracts. The approach is to be fleshed out on a case by case basis. On the facts of the present case, balancing the need to deny enforceability to the

> contract sued on by the Plaintiff against the need to prevent the unjust enrichment of the Defendant, and, considering that in relation to the Defendant's non-compliance with the statutory provisions binding on it, the Plaintiff was not *in pari delicto* in a broad sense, we have come to the conclusion that the Plaintiff must be paid reasonable compensation for the services it rendered to the Defendant."

Thus, even assuming that the 2nd and 3rd defendants are not *in pari delicto* with the 1st defendant in the breach of article 181, the fact that the norm breached is a constitutional provision, in contradistinction to breach of an ordinary statute, is a relevant consideration. Clearly there should be less room to award a restitutionary remedy where the breach is of a constitutional provision. A contract which breaches article 181(5) of the Constitution is null and void and therefore creates no rights. (See*The Attorney-General v Faroe Atlantic Co. Ltd.* [2005-2006] SCGLR 271 and *The Attorney-General v Balkan Energy Ghana Ltd. 2 ors*. Unreported, 16th May, 2012.) It should not be legitimate to evade this nullity by the grant of a restitutionary remedy. Although one accepts the cogency of the argument that there is need to avoid unjust enrichment to the State through its receipt of benefits it has not paid for, there is the higher order countervailing argument that the enforcement of the Constitution should not be undermined by allowing the State and its partners an avenue or opportunity for doing indirectly what it is constitutionally prohibited from doing directly. The supremacy of the Constitution in the hierarchy of legal norms in the legal system has to be preserved and jealously guarded. Thus the flexibility that the Supreme Court introduces in the *CCWL* case is to be exercised sparingly in the case of breaches of the Constitution. The requirement that international business contracts to which

the Government is a party should be approved by Parliament has a purpose and it should be made clear to Government and its partners that non-compliance with the requirement, directly or indirectly, will have consequences. We are accordingly inclined to the view that, where article 181(5) has been breached, a restitutionary remedy would be in conflict with the Constitution and therefore not available.

Having interpreted article 181(5) to cover restitutionary claims connected to contracts or agreements within the ambit of the provision, what this Court needs to do next is to analyse the facts of this case to establish whether the 2nd or 3rd defendant is the beneficiary of any such restitution. The invalidity of any such restitution would imply a duty to pay back whatever has been received pursuant to such restitution. On the other hand, if payments have been made to the 2nd or 3rd defendants under agreements other than the two dated 26th April 2006, which were terminated, issues relating to those payments would have to be determined in a forum other than this Court and in a different action, since they do not comewithin the issue of constitutional interpretation raised by the Plaintiff's writ.

Also submissions based on the assertion that the 3rd defendant had no contract with the Government of Ghana and therefore had no valid claims against the Government should be heard and determined by the High Court, and not by this Court, since they do not involve, according to the relevant case law, the interpretation or enforcement of the Constitution and do not therefore fall within the ambit of this Court's original exclusive jurisdiction under article 130(1) of the 1992 Constitution. For instance, the Plaintiff states in his Statement of Case at para 27 that:

> "The Plaintiff maintains that throughout the subsistence of the transactions between the 2nd Defendant, (Waterville Holdings (BVI) Limited), and the Government of Ghana, the 3rd and 4th Defendants were merely the agents of the 2nd Defendant and were not privy to the two contracts dated 26th April 2006 or any other contract."

This is a matter which should be heard and determined by the High Court and not this Court.

Factual Analysis and Its Impact on the Result of the Case

2nd Defendant

The Government's action in payingthe 2nd defendant for the work it didprior to the conclusion of the terminated 26th April agreements was unconstitutional, according to the analysis already set out above. According to the plaintiff's averment in his Statement of Case, verified by affidavit:

> "22. The Plaintiff says in addition that facts available to the Plaintiff indicate that consequent upon the abrogation of the two Agreements dated 26th April 2006, two Ghanaian companies who were sub-contractors of the 2nd Defendant, (Consar Limited, for the Kumasi projects, and Micheletti (Ghana) Limited, for the Accra stadia project) were awarded by the Government of Ghana the right to adopt, continue, and execute the works started by the 2nd Defendant and to reimburse the 2nd Defendant directly for expenses incurred for works already executed by the 2nd Defendant in anticipation of approval of the Agreements by Parliament."

This re-imbursement, as already indicated above in the narration of the facts of this case, was with funds provided by the Government of Ghana. The value of the work already executed was to be ascertained by the consultant to the project, BIC. The attitude of the Government of Ghana towards the restitutionary claim of the 2nd Defendant is made clear by the following passage from a report dated 16th December 2011 which was submitted to the President by the Deputy Attorney-General:

> "**The Waterville Holdings Mediation**
>
> On 26th April 2006, the Government of Ghana entered into two separate but similar agreements with Waterville Holdings for the rehabilation of the Accra, El Wak and Kumasi Sports Stadia for the MTN Africa Cup of Nations (Ghana 2008) football tournament.
>
> Waterville was the main contractor in both agreements with Micheletti and Consar acting as sub-contractors for Waterville. On 6th February 2006, before the formal signing of the agreements on 26th April 2006, the sites were handed over to Waterville, which commenced works involving demolition, excavation and clearing of the project.
>
> On 1st August 2006, however, the NPP administration unilaterally terminated the agreements and re-awarded them to the sub-contractors. At the time of the termination, Waterville had mobilized for work in all three stadia. Government then requested the consultants to the projects, Building Industry Consultants (BIC) Limited to value the work done by Waterville before the termination.

BIC prepared the valuations and issued its certificate on 23rd August 2006. The total value of the certificate amounted to:

- Accra Stadium E9,061,359.53
- El Wak Stadium E1,842,192.79
- Kumasi Stadium E9,587,691.05

Total **E20,491,448.37**

The certificates also included certain amounts designated as Project Engineering Fees which amounted to:

- Accra Stadium E1,663,722.01
- El Wak E 133,673.93
- Kumasi Stadium E3,348,070.20

Total E3,348,070.20

Subsequent to this, Waterville received payments of only E8,980,522.28 through Micheltti and Consar for its work on the three stadia. In a letter to Government dated 23rd December 2006, the Solicitors for Waterville indicated that it had been paying interest on the pre-finance loan for the work done and also interest accruing on account of the delay in payment. The NPP administration refused to negotiate or pay any compensation to Waterville after the Project Consultant had completed its valuation.

Numerous interventions and petitions by Waterville to the NPP government were ignored. In 2009,, its Solicitors approached the Attorney General for the payment of what was due it since 2006. On the basis of the valuation

conducted by BIC Limited, the AG concluded that there was no dispute regarding the certified claims by Waterville against the State and that certain monies were really owed Waterville.

Waterville also indicated that the one year liability period had lapsed and accordingly the 5% retention fee amounting to E504,626.16 for defect liability in respect of the three stadia should be paid to them.

These amounts, when added to the bills certified by BIC Ltd amounted to E21,569,946.71 less earlier payments made to Waterville. Accordingly, the amount due Waterville after all the deductions was E9.634,240.15. Waterville, however, made claims for sums due for loss of profit, mobilization and de-mobilization, interest since 2006 and damages.

Despite the undisputed and independently certified amount owed to Waterville the AG held a series of meetings with Waterville to negotiate the amount downward but no conclusions were reached. On 14 June 2010, the Solicitors for Waterville indicated that negotiations had failed and invoked the mediation provisions of the abrogated contract.

The claim for Waterville before the Mediator included the following:

- A declaration that the purported termination of the contract by the NPP administration was unlawful
- An order for the payment of E9,634,240.15 being balance due on works certified by BIC Limited
- Payment for the sum of E3,123,754.56 being accrued interest at the rate of eurobor plus 3 points as at June 2010

- Interest on the sum of E 9,634,240.15 at eurobor plus 3 points from 16 June 2006 till date of payment
- Payment of the sum of E13,426,261.28 being loss of profits occasioned by the termination
- Interest on the sum of E13,426,261.28 at eurobor plus 3 points from 16 June 2006 till date of payment
- Legal fees of E1,200,000.00
- General damages of E20,000,000.00 for breach of contract.

This was subsequently revised to a figure of E36,684,255.99. Following a series of mediation sessions, Waterville indicated that it was prepared to accept a sum of E32 million in full and final settlement of all claims against the GOG.

In October 2010, the Mediator recommended and it was accepted by both parties that the GOG pay a mediated sum of E25 million in full and final settlement of all claims by Waterville against the State. The NDC Government has since paid the E25 million to Waterville."

This is an extraordinary account of the State's view of its liability to the 2nd defendant. In our view, it was fundamentally erroneous in ignoring the effect of article 181(5) of the 1992 Constitution on the transaction. From the analysis earlier made of the penumbra effect of article 181(5), we would reaffirm that there is no liability of the State to the 2nd defendant. The 2nd defendant is thus obliged to return all monies paid to it pursuant to the transaction. The settlement, pursuant to which the monies were paid, was founded on an unconstitutional act and should be treated as null and void. It is obvious that the agreements of 26th April never became operative and even if they had become

effective they would have been null and void if not approved by Parliament. Equally, any restitutionary claims intended to achieve results similar to those contemplated by the provisions in the inoperative agreements of 26th April would be invalid. The Supreme Court has jurisdiction under article 2(2) of the 1992 Constitution to make a consequential order compelling the 2nd defendant to refund all monies paid to it in relation to the work that it did on the stadia.

The 2nd defendant, however, does not consider that it is under any such liability. Its case is that its Consortium won the international invitation for bidding and that it was awarded the contract. It argues that under the Public Procurement Act, 2003 (Act 663), the tendering process was completed and an application made to the Central Tender Review Board which gave concurrent approval by a letter dated 5th August, 2005. It is further the 2nd defendant's case that following this approval by the Central Tender Review Board, there was a continuing legally binding obligation on the Government, under section 65 of the Public Procurement Act, which provides an irrevocable procedure leading to a formal written procurement contract. The 2nd defendant further contends that neither the Minister of Education and Sports nor the Attorney-General had authority to cancel the tendering process. Accordingly, the assertion of administrative action in the letter of 22nd August 2005 was ultra vires and without legal effect. It asserts that the Minister with authority to terminate the process was the minister responsible for finance. The 2nd defendant makes the following further arguments in its Statement of Case:

> 27. "It is further submitted that it was the Government of Ghana which was required to obtain cabinet approval and also having submitted the contract to CTRB for concurrent approval, it sounds ill in the

mouth of the Government of Ghana to say it was unable to obtain cabinet approval for the award of the contract.

28. Besides, the Government of Ghana had authorized 2nd Defendant to prepare designs and also to take physical possession of the stadia, demolish structures and reconstruct the stadia when it well knew it had not obtained cabinet approval.
29. It is further submitted that 2nd Defendant could arrange the bridge financing only after the contract had been signed and therefore there cannot be any documentation as yet on the bridge financing.
30. The 2nd Defendant's finance was concessional and also contained a 15% pure grant. It was guaranteed by the World Bank, MIGA. The funding was coming from A+++through Bank Austria.
31. It is clear from the above that the 2nd Defendant does not emphatically accept the contents of the letter dated 22nd August, 2005, on the basis that it was not lawful under the Procurement Act, Act 663, or at all and also violates protocol signed between Ghana and its development partners like IMF, World Bank, World Trade Office and donor partners."

It is obvious that the 2nd defendant is in error as to the legal effect of the inchoate contracts embodied in the two stadia agreements. Without the satisfaction of their conditions precedent, they could not become enforceable contracts. That is trite law. Nothing in the Public Procurement Act, 2003 (Act 663) changes this basic common law position. In spite of this the Government and the 2nd defendant entered into a mediation process, based on the inchoate contracts, treating them as if they were in force. The result of that process was, as indicated in the Deputy Attorney-General's report quoted above, a settlement

which resulted in the payment of 25 million Euros in full and final settlement of the 2nd defendant's claim in October 2011.

The 2nd defendant justifies its claim on the basis that it was not based on the terminated contracts, but on *quantum meruit.* The following paragraphs from the 2nd defendant's Statement of Case are instructive:

> 65. "My Lords, the 2nd Defendant's claim was not based on enforcement of the two Agreements dated 26th April 2005. Neither did the Government of Ghana pay 2nd Defendant the sum of E 25 million pursuant to enforcement of the two Agreements aforesaid.
> 66. The Government of Ghana by a letter dated 6th February, 2006, authorized 2nd Defendant to execute certain works in connection with the three stadia.
> 67. In the course of execution of the works the Government, on August 1, 2006, terminated the two Agreements.
> 68. The 2nd Defendant applied to be paid the value of works executed up to the point of termination together with incidental expenses. The 2nd Defendant's claim was based on *quantum meruit."*

Later, the 2nddefendant restates this argument in paragraph 72 of its Statement of Case as follows:

> "2nd Defendant's claim derives its validity from work done and not in pursuance of the Agreements dated April 26, 2006."

As already explained earlier at considerable length, this *quantum meruit* claim falls within the penumbra of the obligation provided for in article 181(5) and is therefore invalid.

A further argument that the 2nd defendant puts forward to defeat the Plaintiff's action is to challenge his capacity to institute this action. It maintains that by Article 88(1) and (5) of the 1992 Constitution, the Plaintiff has no capacity to bring the present action. The steps in his argument are as follows: the Attorney-General, the first defendant herein, is the person clothed with authority under Article 88(5) to conduct all civil cases on behalf of the State. He has indeed brought action in the High Court against the 2nd and 3rd defendants, as already earlier narrated. The framers of the 1992 Constitution never intended that where the Attorney-General has initiated a civil action on behalf of the Republic at a court of competent jurisdiction, any citizen can maintain an action in respect of the same or substantially the same matter at the Supreme Court. The 2nd defendant accordingly submits that the Plaintiff's action is an abuse of the process of the Supreme Court. He further submits that the Plaintiff is seeking to usurp the authority of the Attorney-General.

The 2nd defendant's submissions on this issue of the Plaintiff's capacity are, with respect, ill-founded. The fact that the Attorney-General has brought a civil action on a particular issue cannot derogate from a citizen's right under Article 2(1) of the 1992 Constitution to seek a declaration and consequential orders from the Supreme Court in relation to the same issue if it involves any act or omission which the citizen alleges to be inconsistent with, or in contravention of, a provision in the Constitution. What is necessary for the citizen to do is to establish that he or she comes within the parameters laid down in Articles 2(1) and 130(1). If he or she does this, the mere fact that the Attorney-General is conducting litigation in the High Court which is linked to the subject-matter of his or her action will not ordinarily be a bar to the action.

3rd Defendant

The 3rd defendant, in his letter of 18th August 2009 which is quoted in full *(supra),* in effect admitted that he was not a party to the 26th April agreements. He wrote that: "The claim by Waterville BVI should have been a joint claim by M-Powapak, Alfred Woyome, and Austro Invest." A reasonable interpretation of this sentence is that the 3rd defendant's claim was merely to share in the rights of the 2nd defendant, who was the party to the agreements, although he had earlier claimed that:

> "I was the one who engineered the whole CAN 2008 concept, pursued it through with three (3) consecutive Ministers of the Sport Ministry/Department over the period.
>
> I engineered the finances, which covered the construction of Stadia Hospitals, and Youth and Skills Training Centres to be built countrywide."

The absence of evidence that the 3rd defendant was a party to the 26 April agreements has a significance for the jurisdiction of this Court over him in this case.It makes it difficult to accept the Plaintiff's contention that this Court should assume jurisdiction to interpret article 181(5) of the 1992 Constitution in relation to him also. The declarations sought by the Plaintiff relate to those agreements. Accordingly, sincethe 3rd defendantis not a party to the agreements, he would not be a proper subject of the jurisdiction of this court, unless he is the beneficiary of restitution that is within the penumbra effect of article 181(5) of the 1992 Constitution.

It has already been pointed out that the endorsement on the 3rd defendant's writ of summons against the 1st defendant, which resulted ultimately in the consent judgment against the State, is not explicit about the contractual or other legal basis pursuant to which it was brought.In response to this fact, the plaintiff has

made extended submissions aimed at establishing that the High Court should have declined jurisdiction over the writ on the ground that it lacked jurisdiction because of the failure of the 3rd defendant to endorse a cause of action on his writ. While this is an interesting argument, it is not one that this Court is obliged to consider under its original jurisdiction. In other words, it does not call for constitutional interpretation or enforcement, as this phrase has been interpreted in the case law.

It is the High Court which should determine the issues raised by the Plaintiff's Statement of Legal Argumentsin relation to the 3rd defendant. Those issues relate to whether there was any privity of contract between the 3rd defendant and the Government of Ghana; whether the 1st defendant's writ of 19th April 2010 in the High Court was based on the two terminated agreements or an independent financial engineering agreement; whether the 3rd defendant's writ against the 1st defendant was endorsed with any enforceable cause of action; etc. From the exhibits in this case, it is clear that those issues are already in controversy in the High Court, at the suit of the 1st defendant.The clarification and interpretation that we have made in this case about the scope of article 181(5) of the 1992 Constitution, together with the earlier interpretations made by this Court in *The Attorney-General v Faroe Atlantic Co. Ltd.* [2005-2006] SCGLR 271 and *The Attorney-General v Balkan Energy Ghana Ltd. 2 ors*. Unreported, 16th May, 2012, should assist the High Court in determining the matters which do not come within the ambit of the exclusive original jurisdiction of this Court under article 130(1) of the 1992 Constitution. There is no fresh issue for interpretation or enforcement that requires the invocation of this Court's original jurisdiction. It should be stressed that it is not optional for this Court to decide whether issues of constitutional interpretation already settled by *stare decisis* or issues relating to

privity of contract etc. should be dealt with by the High Court or by this Court. This is a jurisdictional issue and therefore unless the plaintiff is able to demonstrate that particular issues come within the exclusive original jurisdiction of this Court, this Court is obliged to decline jurisdiction. This Court's refusal of jurisdiction is, however, without prejudice to the merits of the plaintiff's case when it is put forward in the appropriate forum.

Our preferred *locus classicus* on the original jurisdiction of this Court, buttressing the position adopted above, remains the words of Anin JA, in *Republic v Special Tribunal; Ex parte Akosah* [1980] GLR 592 at 605, where he said of a previous provision *in pari materia* with the current provisions that:

> "From the foregoing dicta, we would conclude that an issue of enforcement or interpretation of a provision of the Constitution under article 118(1)(a) arises in any of the following eventualities:
>
> (a) where the words of the provision are imprecise or unclear or ambiguous. Put in another way, it arises if one party invites the court to declare that the words of the article have a double-meaning or are obscure or else mean something different from or more than what they say;
>
> (b) where the rival meanings have been placed by the litigants on the words of any provision of the Constitution;
>
> (c) where there is a conflict in the meaning and effect of two or more articles of the Constitution, and the question is raised as to which provision should prevail;
>
> (d) where on the face of the provisions, there is a conflict between the operation of particular institutions set up under the Constitution, and thereby raising problems of enforcement and of interpretation.
>
> On the other hand, there is no case of "enforcement or interpretation" where the language of the article of the Constitution is clear, precise and unambiguous. In such an eventuality, the aggrieved party may appeal in the usual way to a higher court against

> what he may consider to be an erroneous construction of those words; and he should certainly not invoke the Supreme Court's *original* jurisdiction under article 118. Again, where the submission made relates to no more than a proper application of the provisions of the Constitution to the facts in issue, this is a matter for the trial court to deal with; and no case for interpretation arises."

We think that, in this case, what is called for is an application by the High Court of the provisions of the Constitution to the facts relating to the 3rd defendant.

The 1st Defendant

The plaintiff's case against the 1st defendant is that the Attorney-General's conduct in handling the dispute with the 3rd defendant was inconsistent with and in contravention of Article 2(1)(b) of the 1992 Constitution. In his Statement of Legal Arguments, he makes the following argument in support of this contention:

> "The subsequent conduct of the 1st Defendant in failing or refusing to defend the Government of the Republic of Ghana against the unconstitutional settlement she reached with the 3rd Defendant when the 3rd Defendant commenced the unconstitutional action against the Government of Ghana on 19th April 2010 based solely upon that settlement and her letters to the Minister of Finance and Economic Planning dated 11th March 2010, 11th April 2010 and 29th April 2010 is conduct inconsistent with and in contravention of article 181 of the 1992 Constitution. That the 1st Defendant's conduct to contravene the Article 181 of 1992 Constitution in favour of the 3rd Defendant was purposeful and deliberate is demonstrated by the subsequent affidavit deposed to by Nerquaye-Tetteh, Chief State

Attorney, for and on behalf of the 1st Defendant Hon. Mrs. Mould-Iddrisu with her authority that there was indeed no contract between the 3rd Defendant and the Government of Ghana to warrant any settlement between the 1st Defendant on behalf of the Government of Ghana and the 3rd Defendant. In the ruling of the High Court dated 9th July 2010 refusing the 1st Defendant, then personified by Hon. Mrs Mould-Iddrisu's application to set aside the terms of her own unconstitutional settlement and adopting the terms of the settlement as the consent judgment of the parties in that suit, Justice I.O. Tanko Amadu quoted the supporting affidavit of the 1st Defendant deposed to by Samuel Nerquaye-Tetteh, Chief State Attorney, on behalf of the then Attorney General at paragraph 10 of the ruling as follows:

4. "That the failure of the Applicants to file a defence was not deliberate or in disrespect of the court but was due to an earlier position taken on the matter by the Applicants.
5. That the Applicants then were of the mistaken belief that there was no defence to the claim and therefore did not file a statement of defence.
6. That it has now come to the knowledge of the Applicants that there is a defence to the action.
9. Furthermore the terms of settlement stated an amount of GHc 51,283,480.59 instead of an amount of GHc41,811,480.59.

12. That in the circumstances, it is the prayer of the Applicant that they are granted leave to file their defence out of time to enable them defend the claim on the merits of the case."

In paragraph 29 of the ruling the learned High Court judge had this to say in respect of the Deputy Minister for Finance and Economic Planning's letter of 4th May 2005 exhibited to Samuel Nerquaye-Tetteh's affidavit deposed to on behalf of the Attorney General Hon. Mrs. Mould-Iddrisu as Exhibit 'AG':

> "29. I have no doubt in my mind that Exhibit 'AG 1' referred to in the affidavit of Samuel Nerquaye-Tetteh which is said to form the basis of the Defendant's new found defence to the Plaintiff's claim was in actual or constructive possession of the Defendant/Applicant before the terms of settlement was executed and before Exhibit 'AW1' attached to the Plaintiff/Respondent's affidavit was authorized. The Defendant/Applicant did not find Exhibit 'AG1' sufficiently weighty to constitute a defence to the action and cannot purport to seek to do so now as same will result in permitting piecemeal litigation…"

This Court may wish to take judicial notice of the fact that Exhibit 'AW1' referred to in the judgment is the 1st Defendant's own authorizing the Minister of Finance and Economic Planning to pay the 3rd Defendant which formed the basis of the 3rd Defendant's action of 19th April 2010 in the High Court. The Plaintiff submits that the

> determination of the 1st Defendant to disregard the decision of this Court in *Attorney General v Faroe Atlantic Co. Ltd.* [2005-2006] SCGLR 271 and the legitimate and constitutional opinion of her predecessor Hon. Joe Ghartey to abrogate the contract for failure to meet conditions precedent to present the Agreements to Parliament for approval showed her resolve to act in a manner inconsistent with and in contravention of the Constitution."

The Plaintiff's "charge" against the 1st defendant has far-reaching implications. What the Plaintiff is seeking to assert is that faulty judgment or negligence in the exercise of discretion by a Minister or public servant may be interpreted as unconstitutional conduct. Our view on this issue is not needed for the resolution of the case before us.This is because we do not find that any issue of interpretation or enforcement of article 181 of the Constitution arises in relation to the conduct of the 1st defendant which this Court needs to address under its original jurisdiction.The provisions of article 181 are clear enough, as interpreted by the cases decided by this Court. What is called for is for the clear provisions of the Constitution to be applied to the facts as they relate to the 1st Defendant. This aspect of the present case is a classic illustration of what Acquah JSC, as he then was, urged this Court not to do in *Adumuah II v Adu Twum II (supra)* in relation to this Court's special jurisdiction under article 130:

> "This special jurisdiction is not meant to usurp or to be resorted to in place of any of the jurisdictions of a lower court. In other words, where our said jurisdiction has been invoked in an action which properly falls within a particular cause of action at a lower court, this court shall refuse to assume jurisdiction in that action, notwithstanding the fact that it has been presented as an interpretation or enforcement suit or both. For, a large

number of actions which fall within specific causes can be presented in the form of interpretation or enforcement actions or both."

The Plaintiff's charge, accordingly, needs to be decided on by the High Court. Thus the jurisdictional analysis made above in relation to the 3rd defendant is equally applicable to the 1st Defendant.

Reliefs

In the result, we are unanimously of the view that this Court should grant the plaintiff some, but not all, of the reliefs he seeks. The reliefs to which he is entitled, in the light of the analysis of the law and facts set out above, are as follows:Reliefs 1, 2 and 3 endorsed on the writ are hereby granted. It is not necessary to grant Relief 4, since it is subsumed in the first 3 reliefs. Relief 12 is also granted. Relief 14 is granted to the extent that the order is directed at the 2nd defendant, requiring it to refund to the Republic of Ghana all sums of money paid to it in connection with the two inoperative Agreements dated 26th April 2006 and the work done on the stadia. Orders against the 3rd defendant, if any, will have to await determinations made in the High Court.Any other reliefs endorsed on the plaintiff's writ which are not specified above as having been granted are hereby denied, on jurisdictional grounds, without prejudice to any reliefs that the High Court may grant in the future.

The Plaintiff's Complaint about Named Lawyers

In the penultimate paragraph of the Plaintiff's Statement of Legal Arguments, he makes the following submission:

"The Plaintiff submits and urges this Court to determine that on the balance of probabilities the unconstitutional conduct of the Defendants and the Solicitor for the 2nd and 3rd Defendants, Kofi Peasah-Boadu of Peasah-Boadu & Co. were collusive, collaborate and a fraudulent misrepresentation that enable them to expropriate the resources of the sovereign people of Ghana contrary to Article 181 of the 1992 Constitution. The Plaintiff has also submitted and urges this Court to find that the conduct of the Solicitors for the 2nd and 3rd Defendant in this action in seeking Kofi Peasah-Boadu of Peasah-Boadu & Co. and O. Osafo Buabeng of Oseawuo Chambers & Co to suppress the fact that the 2nd Defendant received payment Micheletti & Co. Ltd. (*sic)* and Consar for works that they took over from the 2nd Defendant constitute an abuse of the process of this Court as an officer of the Court. The Plaintiff additionally submits and urges this Court to find that the Solicitors for the 3rd Defendant in this action, O. Osafo Buabeng of Oseawuo Chambers & Co, in seeking to suppress the fact that Bank Austria Creditanstalt A.G. withdrew from the loan and bridge financing transaction without making any resources available to the Government of Ghana under Article 181(3) and (4) of the Constitution was abusing the process of this Court as an officer of the Court. The Plaintiff submits that this Court has the power under Article 2(2) of the 1992 Constitution to make such orders as would address the unprofessional conduct of lawyers who plead and advocate cases before it and urges this Court to exercise its discretion in such a way as will prevent the future abuse of its process by legal practitioners contrary to the Legal Profession (Professional Conduct and Etiquette Rules), 1975 (L.I. 663)."

This complaint by the Plaintiff is hereby referred to the General Legal Council for consideration by its Disciplinary Committee. That Committee offers a preferable forum for the resolution of issues relating to the professional conduct of lawyers. The Plaintiff may accordingly pursue his complaint in that forum. The Registrar of this Court is hereby ordered to serve a copy of this judgment on the General Legal Council.

Conclusion

To sum up, the plaintiff's action succeeds in part and is dismissed in part. The plaintiff is to be commended for his public spiritedness which has fueled his meticulous and industrious presentation of this case. His diligence has enabled the ventilation of the important legal issues in this case.

(SGD) DR. S. K. DATE BAH

JUSTICE OF THE SUPREME COURT.

CONCURRING OPINION

ANSAH JSC;

I have had the benefit of reading the opinion of my learned brother Date-Bah JSC. And I agree with it entirely; I have nothing to add to it.

(SGD) J. ANSAH

JUSTICE OF THE SUPREME COURT.

CONCURRING OPINION

DOTSE JSC;

Even though I fully agree with the entire judgment delivered by my most respected brother Date-Bah JSC, and the conclusions reached in this epoch making decision, I feel constrained to add the following words of my own.

This is because, I am of the considered opinion that the time has indeed come for both practitioners of the Law, and my brethren in the lower courts to always take into consideration some pre commencement of legal proceeding requirements and rules of procedure in the law courts much more seriously than they had been doing.

As the facts of this case have already been masterfully stated, it is pointless for me to do so.

ROLE OF COUNSEL IN CONDUCTING CASES IN THE LAW COURTS

Even though the role of Counsel in representing his client is mainly to ensure that his client gets the best of legal representation within the scope of his instructions, there is a corresponding duty on counsel to ensure that his conduct is within the framework of standards of professional etiquette and conduct for Lawyers as stipulated in Rules made for that purpose as contained in section 23 of the Legal Profession Act, (1960) Act 32.

In this case for example, if learned counsel for all the Defendants had applied themselves diligently to the facts of this case, as has been beautifully narrated in the lead judgment, and also adverted themselves to certain critical exhibits, perhaps, just perhaps, they might have taken a different stance and given different professional legal advice.

For example, the letter written by the 3rd Defendant to the 1st Defendant, attached to these proceedings as Exhibit AG16 – (1st Defendants Statement of case) and also the letter of Tetteh & Co, then Solicitor for the 2nd Defendants which is attached to 1st Defendants statement of case as Exhibit AG17 are really instructive.

From the above, it would have become very clear to whoever was in charge of directing affairs at the 1st Defendants office, that the claims of the 2nd and 3rd Defendants against the Government of Ghana cannot hold water.

It is in this respect that I am of the considered opinion that, even though Lawyers owe a duty to their clients, they also in a wider sense owe a general duty to the country Ghana and to their consciences as well as to their professional Rules of etiquette and standard.

This is because from available documents and correspondence, there is a lot of documentary material to the effect that the 3rd Defendant in particular had no business or contract with the Government of Ghana. Indeed, counsel for the 3rd Defendant would have done himself a lot of good if he, whilst acting for the 3rd Defendant at the material time had interrogated the issues thoroughly, he would have realised that his client was not entitled to what they claimed in the High Court and obtained judgment for.

No doubt, learned counsel for the 3rd Defendant in the now infamous *"Woyome Payment Scandal"* in the trial High court, cleverly avoided acting for the 3rd Defendant in this court, but chose rather to act for the 2nd Defendant, whose

claims against the Government of Ghana were denied at the material time by the 3rd Defendant.

A perusal of exhibits AG 16 and AG 17 already referred to supra indicate quite clearly that the 2nd and 3rd Defendants after their initial disagreements about their entitlements, later entered into an alliance to create, loot and share the resources of this country as if a brigade had been set up for such an enterprise.

It is my respectful opinion that, no matter what the monetary attractions are, every counsel owes a duty to the ethics of the Legal Profession and to his own conscience to ensure that whatever claims are pursued on behalf of his client, are not only legitimate, lawful, just and legal, but reasonable under the circumstances of the case.

It is in this respect that I consider it worthwhile to refer to the unanimous decision of this court in the unreported consolidated case suit number J5/14/2013 -***Republic v High Court, Kumasi, Ex-parte Bank of Ghana, Mr. Kwesi Ammisah-Arthur & Franklin Belnye – Applicants , Rev. Rocher De-Graft Sefa and Ernest Kwasi Nyame Asiedu – Interested Parties and suit number*** **J5/15/2013** - ***Republic v High Court, Kumasi, Ex parte Bank of Ghana, Mr. Kwesi Ammisah-Arthur & Franklin Belnye – Applicants, Samuel Gyamfi & 693 Ors – Interested Parties –*** Coram: Wood (Mrs) C. J. Presiding, Dotse, Yeboah, Benin and Akamba JJSC, where the court expressed similar sentiments about the conduct of Lawyers of the Applicants (therein) Bank of Ghana which led to default judgment being granted against them

In view of the seriousness which this court attaches to this phenomenon which has crept into our legal practice, I would quote in extenso from the said Ruling as follows:

"Due to the gargantuan nature of the claims against the Applicants, one would have expected a much more diligent and fast approach towards the handling of the suit. We would be very much surprised, if the external Solicitors of the 1st Applicants is a one man chambers such that with his incapacitation, work in his office automatically came to a halt. Even if that is the situation, we expect the legal department of the applicants to have entered appearance in the meantime to ensure that the timelines provided under the rules of procedure are complied with.

We have taken time to delve into this matter because we are of the considered opinion that the time has indeed come for this court to comment on the manner in which legal representation of state and para-statal interests are handled in our law courts. The quality of legal representation of these institutions leaves much to be desired.

Professionals of whatever type engaged by those to whom their services are required, need to offer dedicated, committed and competent services to those who engage them. There is a saying that to whom much is given, much is expected. To have the privilege of being appointed as external Solicitors of the 1st Applicants is no mean responsibility but one that has to be discharged with diligence and competence.

Whilst we have not been happy with the quality of legal service that was rendered the 1st Applicants in the High Court which unfortunately led to the default judgment being granted against

them, we note with appreciation the sentiments which were expressed by the Court of Appeal in the case of *Agyeman v Ghana Railway and Ports Authority, Takoradi, (1969) CC 60*, where the court in expressing its disgust in the conduct of a Solicitor in the Public Service whose conduct led to the grant of default judgment against a public entity, commented thus:

"*We would like to make the point that lawyers engaged in the Public Service and who are called upon to represent public institutions in law suits have the responsibility to ensure that public funds are not improperly expended through their default, and that they must exhibit the same degree of diligence as is required of a private practitioner. There cannot be one standard of professional conduct for the lawyer in the public service and another for the lawyer in private practice."*

Under the circumstances of this case, there was absolutely no sound legal basis for the pursuit of the claims by the 2nd and 3rd Defendants against the Government of Ghana.

However, since I fully agree with the decision of my brother Date-Bah JSC not to grant the reliefs against the 3rd Defendant, basically because of jurisdictional reasons, I will echo his sentiments that once the matter is currently pending before other courts namely the Financial Division of the High Court and the Commercial Court, it is the expectation of this court that the principal actors in those cases would put up their best in the prosecution of those cases.

ROLE OF TRIAL COURTS IN ADJUDICATION OF CASES BEFORE THEM

The facts of this case disclose that, because of inaction on the part of the state's Lawyers, default judgment was entered in favour of the 3rd Defendant against the 1st Defendant and this later metamorphosed into a consent judgment.

The duty of a trial court Judge or Magistrate is to ensure that cases brought up before them are not only legitimate, but based on sound principles of law.

In other words a trial court must ensure that claims brought before them are legal, constitutional, and based on pleadings.

A trial Judge or Magistrate, is not to accept, hook, line or sinker claims brought before it on the basis that the defendants have not put up a defence.

For example, if a company should institute a claim against the Government of Ghana for failing to pay for 100 three- bedroom houses in Dansoman which they were contracted to build for the Government. If indeed, this writ has been served on the relevant state Agencies and yet no defence has been filed, it will be illogical and unreasonable for the trial court to proceed to grant judgment to the plaintiff company purely on account of its pleadings alone.

In circumstances like this, it will be perfectly legitimate for the trial court, to interrogate the issues such as examining the contracts if any, evidence of the 100 three unit bedrooms houses being built and the fact of the houses having been built to specification etc.

There should be no indecent haste on the part of a trial court to rush to deliver judgment on account of default of pleadings. This is because, this court has had occasion to comment on apparent collusion that sometimes exists between plaintiff's and defenant's. See unreported Supreme Court decision in Civil Appeal J4/23/2012 dated 6/6/2012 intitutled ***African Automobile – Appellant v The Attorney-General – Respondent*** where the President of this Court, Date-Bah JSC, in a unanimous decision of the court accepted and applauded the learned

trial judge who despite attempts by the respondents therein to accept that there was a binding contract concluded that no contract had been formed on the basis of Exhibit A – (that was the contract documents in that case) and both the Supreme Court and the Court of Appeal affirmed the decision of the trial Judge, Torkonoo J (Mrs) as she then was.

It is therefore important that, trial courts must be on the alert, to prevent cases where collusion can occur and ensure that they act as watchdogs not only of the public purse but also protective of the rights of any person who appears before them. The courts of law established under the constitution 1992 must not be used by anybody or group of persons to unlawfully or illegally enrich himself or themselves to the disadvantage of any person or the state.

Trial Courts must as a control measure always ensure that claims or endorsements in actions brought before them especially where default applications for judgment arise are scrutinized thoroughly to prevent collusion and or abuse of the judicial system.

In this regard, even an ex-parte application, though one sided ought to be scrutinized by the court and must be granted only if it satisfies the conditions lawfully and legally required to be proven or established.

ROLE OF PLAINTIFF

The role of the Plaintiff, a distinguished former Attorney-General of this country needs to be highly commended as was done in the lead judgment.

I will only add that, there is indeed the need for civil society organizations or groups to come to the assistance of such a plaintiff. This is because from the plethora of documents filed in this case, I reckon that the plaintiff has been put to a lot of expense in all attempt to protect the interests of the state.

It is really sad, that during the conduct of this case, not a single civil society group or lawyers came to the assistance of the plaintiff. On the contrary because of personal attractions, it is not difficult to know where the attention of those who ought to be interested in lay.

The plaintiff in my opinion must be highly commended for his vigilante role in protecting the wanton dissipation of the public purse.

Save for the above brief comments I fully agree with the judgment just delivered by my distinguished brother Date-Dah JSC.

(SGD) **J. V. M. DOTSE**

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) 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

PLAINTIFF APPEARS FOR HIMSELF.

MRS. DOROTHY AFRIYIE-ANSAH (CHIEF STATE ATTORNEY) FOR THE 1ST DEFENDANT .

KOFI PEASAH- BOADU (WITH HIM DORA OCQUAYE-NORTEY) FOR THE 2ND DEFENDANT.

OSAFO- BUABENG FOR THE 3RD DEFENDANT.