IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT OF GHANA

ACCRA, 2013

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

DR. DATE-BAH J.S.C

ADINYIRA (MRS), J.S.C.

OWUSU (MS), J.S.C.

DOTSE, J.S.C

ANIN YEBOAH, J.S.C

BAFFOE BONNIE ,J.S.C

CIVIL MOTION

No.J5/24/2012

24th JANUARY,2013

THE REPUBLIC

-VRS-

HIGH COURT (FAST TRACK DIV.) ACCRA,

EX-PARTE; ATTORNEY GENERAL - - - APPLICANT

MADAM MAUD NONGO - - - INTERESTED PARTY

R U L I N G

DR. DATE-BAH JSC:

This case raises interesting constitutional issues going to the very heart of the principle of the rule of law, one of the bedrocks of the 1992 Constitution. The applicant's contention that public funds and government property cannot be attached in execution of judgment debts puts into issue the accountability of the State to persons who bring action before the courts. The current position regarding the liability of the State to ordinary people in Commonwealth jurisdictions has come about through statutory reform of the original common law position in order to adjust it to the demands of a modern state. The applicant's contention raises the issue whether the gains of this reform movement are to be lost to litigants before the Ghanaian courts.

At common law, originally, proceedings could be brought against the Crown for breach of contract or restitution of property only after obtaining a *fiat* from the Crown and through the procedure of the petition of right. Indeed, in tort, the Crown could not be sued at all, since "the King could do no wrong". By the Crown Proceedings Act 1947 of the United Kingdom, these two antiquated common law doctrines were abolished and the liability of the Crown was made as near as possible to that of a private citizen. This reform of abolishing the necessity for a *fiat* and a petition of right and the removal of the State's immunity from suit for tort made the State and all other legal persons equal before the law, at least in the formal sense. This is to be contrasted with the regime in many European States, where a different and separate system of administrative law governs the relations between the State and other legal persons. Indeed the common

subjection of the State and other legal persons to the same body of rules was viewed by Dicey as an important aspect of his conception of the rule of law.

The Crown Proceedings Act 1947 of the United Kingdom is mentioned here because it has exerted an influence on Ghanaian law as well. Article 293 of the 1992 Constitution, which deals with claims against the Government, clearly follows in the trail blazed by the Crown Proceedings Act, 1947. It provides as follows:

> "(1) Where a person has a claim against the Government, that claim may be enforced as of right by proceedings taken against the Government for that purpose without the grant of a fiat or the use of the process known as petition of right.
>
> (2) The Government shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject -
>
> (a) in respect of torts committed by its employees or agents;
>
> (b) in respect of a breach of duties which a person owes to his employees or agents at common law or under any other law by reason of being their employer; and
>
> (c) in respect of a breach of the duties at common law or under any other law attached to the ownership, occupation, possession or control of property.

(3) No proceedings shall lie against the Government by virtue of paragraph (a) of clause (2) of this article in respect of an act or omission of an employee or agent of the Government unless the act or omission would, apart from this article, have given rise to a cause of action in tort against that employee or his estate.

(4) Where the Government is bound by a statutory duty which is binding also upon persons other than the Government and its officers, the Government shall, in respect of a failure to comply with that duty, be subject to all liabilities in tort to which it would be so subject if the Government were a private person of full age and capacity.

(5) Where functions are conferred or imposed on an officer of the Government as such officer either by a rule of the common law or by statute and that officer commits tort while performing or purporting to perform those functions, the liabilities of the Government in respect of the tort shall be what they would have been if the function had been conferred or imposed solely by virtue of instructions lawfully given by the Government.

(6) No proceedings shall lie against the Government by virtue of this article in respect of -

> (a) anything done or omitted to be done by any person while discharging or purporting to discharge responsibilities of a judicial nature vested in him; or

(b) any act, neglect or default of an officer of the Government unless that officer-

(i) has been directly or indirectly appointed by the Government and was, at the material time, paid in respect of his duties as an officer of the Government wholly out of public funds or out of moneys provided by Parliament; or

(ii) was, at the material time, holding an office in respect of which the Public Services Commission certifies that the holder of that office would normally be so paid.

(7) Where the Government is subject to a liability by virtue of this article, the law relating to indemnity and contribution shall be enforceable-

(a) against the Government by an employee of the Government who is acting in the proper execution of his duties in respect of the liability or by any other person in respect of the liability to which that person is subject; or

(b) by the Government against any person other than an employee of the Government, in respect of the liability to which it is so subject, as if the Government were a private person of full age and capacity."

The applicant does not seek to challenge the possibility of the liability of the State under this Article. Rather, he asserts that, after a court has adjudged the State or Republic liable, the courts do not have the jurisdiction to make orders attaching public funds in execution of that judgment. Nevertheless, it should be said, in relation to the interpretation of the above constitutional provision, that it differs from the Crown Proceedings Act, 1947, in the sense that it did not make the liability of the Ghanaian State or Republic equivalent to its liability under the abolished and antiquated petition of right procedure. It provides *simpliciter*, in relatively absolute terms, that where a person has a claim against the Government, that claim may be enforced as of right by proceedings taken against the Government for that purpose. This implies that some of the common law case law thatlimited liability under the petition of right procedure is inapplicable in Ghana.

For instance, there was claimed to be a limitation on the liability of the Crown in relation to a contract dependent on a grant from Parliament. This limitation was extrapolated from dicta uttered in *Churchward v R* (1865) LR 1QB 173. In this case, Shee J. said (at pp. 209-210):

> "In the case of a contract with commissioners on behalf of the crown to make large payments of money during a series of years, I should have thought that the condition which clogs this covenant, though not expressed, must, on account of the notorious inability of the crown to contract unconditionally for such money payments in consideration of such services, have been implied in favour of the

> crown. The inconvenience suggested by Sir Hugh Cairns as likely to arise from so holding, were it necessary so to hold, could practically have no existence. When not so notified, the occurrence of the alleged inconvenience – such are known to be the justice and honour of parliament – is too improbable to induce any of the Queen's subjects to forego when the opportunity offers the advantages of a good government contract. It was beyond the power of the commissioners, as suppliant must have known, to contract on behalf of the crown, on any terms but those by which the covenant is restricted and fenced. I am of the opinion that the providing of funds by parliament is a condition precedent to it attaching. The most important department of the public service, however negligently or inefficiently conducted, would be above control of parliament were it otherwise."

Some have interpreted these words of SheeJ. as asserting that government contracts contain an implied term that they are conditional on Parliamentary appropriation of funds to enable their execution. The underlying policy rationale for this position is, as expressed by Shee J. above: "The most important department of the public service, however negligently or inefficiently conducted, would be above control of parliament were it otherwise." However, this rationale is refutable. The need for the executive branch of government to be subject to Parliamentary financial control does not necessarily imply that contractual obligations entered into by the executive without a Parliamentary appropriation should be viewed by the courts as invalid and void. Indeed,

in the same case, there were dicta by Cockburn CJ to a contrary effect, when he said (at p. 200):

> "I am very far, indeed, from saying, if by express terms, the Lords of the Admiralty had engaged, whether parliament found the funds or not, to employ Mr. Churchward to perform all these services, that then, whatever might be the inconvenience that might arise, such a contract would not have been binding; and I am very far from saying that in such a case a petition of right would not lie, where a public officer or the head of a department makes such a contract on the part of the crown, and then afterwards breaks it."

This difference of opinion as to whether a contract requiring a Parliamentary grant or appropriation is valid or enforceable without such grant or appropriation relates to an issue that is distinct from that around which the controversy in this case revolves. Nevertheless, the underlying policy issues are similar and that is why the judicial dicta above have been cited.

In the Australian case of *New South Wales v Bardolph* (1934) 52 CLR 455, the Australian High Court doubted the *dictum* of Shee J. *supra* and inclined towards the *dictum* by Cockburn CJ. It did so in holding that the Crown can validly and enforceably promise to pay money. Evatt J. said:

> "The judgment of Shee J. has always been accepted as determining the general constitutional principle. But it should be added that CockburnC.J. said [(1865) L.R. 1 QB at p. 201]:

"I agree that, if there had been no question as to the fund being supplied by Parliament, if the condition to pay had been absolute, or if there had been a fund applicable to the purpose, and this difficulty did not stand in the petitioner's way, and he had been throughout ready and willing to perform this contract, and had been prevented and hindered from rendering these services by the default of the Lords of the Admiralty, then he would have been in a position to enforce his right to remuneration."

It appears clear that the first part of this passage has not been acted upon by the Courts in the cases subsequently determined, and that, even where the contract to pay is in terms "absolute" and the contract fails to state that the fund has to be "supplied by Parliament," the Crown is still entitled to rely upon the implied condition mentioned by Shee J.

The second part of Cockburn'sC.J. statement, that, if there is a fund "applicable to the purpose" of meeting claims under the contract, the contractor may enforce his right to remuneration, has never, so far as I know, been questioned. Moreover, its correctness was assumed by the terms of the Crown's third plea in *Churchward's Case*[14] which denies that moneys were ever provided by Parliament "out of which the suppliant could be paid for the performance of the said contract.""

Evatt J's concluding view was that:

> "…I am satisfied that, in the absence of some controlling statutory provision, contracts are enforceable against the Crown if (a) the contract is entered into in the ordinary or necessary course of Government administration, (b) it is authorized by the responsible Ministers of the Crown, and (c) the payments which the contractor is seeking to recover are covered by or referable to a parliamentary grant for the class of service to which the contract relates. In my opinion, moreover, the failure of the plaintiff to prove (c) does not affect the validity of the contract in the sense that the Crown is regarded as stripped of its authority or capacity to enter into the contract. Under a constitution like that of **New South Wales** where the legislative and executive authority is not limited by reference to subject matter, the general capacity of the Crown to enter into a contract should be regarded from the same point of view as the capacity of the King would be by the Courts of common law. No doubt the King had special powers, privileges, immunities and prerogatives. But he never seems to have been regarded as being less powerful to enter into contracts than one of his subjects. The enforcement of such contracts is to be distinguished from their inherent validity."

The Australian High Court strains to uphold the validity of contracts involving payments of money from the public purse for the obvious reason of protecting the creditworthiness of the State in the interest of its citizens.

The issue in this present case does not relate to that of initial liability on the obligation sued on, but rather on whether after a judgment debt has been

awarded, an execution can be levied against funds of the State not specifically appropriated for the satisfaction of the judgment debt in question. The underlying policy issue is, however, similar to that tackled in *New South Wales v Bardolph.* It goes to the creditworthiness of the State.

In principle, the plain language meaning of article 293 should lead to the conclusion that the State or Republic should be subject to the execution of its funds, since the article does not provide for any legal impediment or defence, different from that available against private persons, to any claim by any legal person against the State or Republic . It will be recalled that article 293 states that where a person has a claim against the Government, that claim may be enforced as of right by proceedings taken against the Government for that purpose. This language is plain and expansive enough to include claims by way of execution against the government or the Republic. This interpretation is also purposive, since it serves the purpose of the reforms described at the beginning of this judgment in respect of the liability of the Crown or (derivatively) the Republic. That purpose was to make the liability of the Republic as near as possible to that of a private person.

However, the applicant argues otherwise. There is need, therefore, to assess his arguments to see whether this application must be sustained. The issue in controvery is a very important one since, as already noted, it goes to the credit of government. The creditworthiness of government in the marketplace would be seriously undermined if the applicant's contention were to be upheld. Nevertheless, the contention has to

examined to determine its validity. To enable that assessment, however, it is necessary to narrate the facts of this case.

The facts of this case are as follows: the applicant, the Attorney-General, has applied to invoke the supervisory jurisdiction of this Court to quash the decisions of the High Court (Fast Track Division), Accra, delivered by His Lordship Asiedu J. on 6th July 2012 and 6th August, 2012. The grounds of the application are that:

1. "The High Court erred when it granted an order directed at the Governor of the Bank of Ghana to release funds held in the name of the Ghana Fire Service.
2. The High Court does not have jurisdiction to attach public funds in satisfaction of a judgment debt."

Before these impugned decisions of the High Court, the interested party had obtained judgment on 8th June 2012 from the High Court (Fast Track Division) for an amount of GhC 749,791.62 and nominal damages of GhC 5,000.00, together with costs of GhC 5,000. This judgment debt was in respect of camouflage uniforms sold and delivered to the Ghana Fire Service.

The interested party filed entry of judgment on 13th June 2012, but failed to obtain a Registrar's certificate in accordance with section 15 of the State Proceedings Act, 1998 (Act 555). On 6th August 2012, the interested party obtained an order from the High Court (Fast Track Division) attaching the funds in the name of the Ghana Fire Service at the Bank of Ghana. In the meantime, on 6th July 2012, the applicant had filed a Notice of Appeal

against the High Court's judgment of 8th June 2012. On 6th July 2012, an application made for stay of execution of the High Court's judgment was refused by the High Court. The applicant repeated his application for stay of execution before the Court of Appeal. It was while this application was pending that the High Court granted a Garnishee Order Nisi and a Garnishee Order Absolute against the Ghana National Fire Service, ordering the Governor of the Bank of Ghana to pay the interested party/judgment creditor an amount of GhC 552,369.42 in satisfaction of the judgment debt obtained against the Ghana National Fire Service.

It is on these facts that the Attorney-General has brought this application to invoke the supervisory jurisdiction of this court to quash the Garnishee Orders Nisi and Absolute on the grounds already stated above.

In support of his application, the Honourable Attorney-General in his Statement of Case asserts boldly that:

> "It is our humble submission that the courts do not have jurisdiction to order payments from public funds generally and from the respective accounts aforesaid.
>
> The purported order of the High Court dated 6th August, 2012 ordering the Bank of Ghana to pay sums from held *(sic)* in the name of the Ghana Fire Service in satisfaction of the total judgment debt of: Five Hundred and Fifty-Two Thousand Three Hundred and Sixty-Nine Ghana Cedis and Forty-Two Pesewas ()GHC 552,369.42) is illegal and contrary to articles 177 and 178 of the 1992 Constitution of Ghana.

My Lords, all those accounts are public accounts and funds in them are public funds in terms of Articles 175, 176 and 178 of the 1992 Constitution of Ghana and the High Courts have no jurisdiction to order their attachment and order release of payment of funds from these public funds."

The Articles 177 and 178 referred to by the applicant read as follows:

"177.

(1) There shall be paid into the Contingency Fund moneys voted for the purpose by Parliament; and advances may be made from that Fund which are authorised by the committee responsible for financial measures in Parliament whenever that committee is satisfied that there has arisen an urgent or unforeseen need for expenditure for which no other provision exists to meet the need.

(2) Where an advance is made from the Contingency Fund a supplementary estimate shall be presented as soon as possible to Parliament for the purpose of replacing the amount so advanced.

178.

(1) No moneys shall be withdrawn from the Consolidated Fund except -

(a) to meet expenditure that is charged on that Fund by this Constitution or by an Act of Parliament; or

(b) where the issue of those moneys has been authorised -

(i) by an Appropriation Act; or

(ii) by a supplementary estimate approved by resolution of Parliament passed for the purpose; or

(iii) by an Act of Parliament enacted under article 179 of this Constituted; or

(iv) by rules or regulations made under an Act of Parliament in respect of trust moneys paid into the Consolidated Fund.

(2) No moneys shall be withdrawn from any public fund, other than the Consolidated Fund and the Contingency Fund, unless the issue of those moneys has been authorised by or under the authority of an Act of Parliament."

The applicant claims that the Financial Administration Act, 2003 (Act 654) reinforces his submission on this issue. He cites section 5(1) of the Act, which states that:

> "(1) In accordance with article 175 of the Constitution, the public funds of Ghana consist of the Consolidated Fund, Contingency Fund and such other funds as may be established by or under an Act of Parliament."

He also prays in aid section 13 of the same Act which provides that:

> "(1) A payment shall not be made out of the Consolidated Fund except as provided by article 178 of the Constitution.
>
> (2) A payment shall not be made in excess of the amount granted under an appropriation for any service.
>
> (3) The Minister may by legislative instrument prescribe for the approval of Parliament, procedures to be followed to make payments out of the Consolidated Fund in times of emergency."

The applicant argues that section 14 of theFinancial Administration Act, 2003 regulates the appropriation of public money and provides that when an appropriation for a Department is approved in accordance with article 179 of the Constitution, it shall be used only in accordance with the purpose described for it and within the limits set by its classification within the estimates of the Department. Only the Minister of Finance may authorize the reallocation of expenditure within the ambit of a Department's appropriation. Accordingly, the applicant submits that the courts do not have jurisdiction to vary the estimates of a government department by attaching the funds approved for it by Parliament for

specified objectives and enabling the payment of judgment debts out of these funds.

The applicant's argument as to jurisdiction is not tenable. The jurisdiction of the High Court is governed by article 140(1) of the 1992 Constitution, which provides that:

> "(1) The High Court shall, subject to the provisions of this Constitution, have jurisdiction in all matters and in particular, in civil and criminal matters and such original, appellate and other jurisdiction as may be conferred on it by this Constitution or any other law."

Although the jurisdiction thus conferred is expressed to be subject to the other provisions of the Constitution, it would not be reasonable to construe the provisions of Chapter 13 (on Finance) as abridging any aspect of the jurisdiction conferred on the High Court. Certainly, the provisions of the Financial Administration Act, 2003 cannot derogate from the jurisdiction conferred on the High Court.

It is reasonable to construe Chapter 13 of the Constitution as laying down the framework for the mobilization of finance and its expenditure by the State. It regulates the State's 'housekeeping', so to speak. It cannot reasonably be construed as prohibiting the expenditure of public funds for the satisfaction of judgment debts, because there has been no specific appropriation for such debts. The State's liability to other legal persons in respect of judgment debts cannot be made subject to the State's own

voluntary act of appropriating the necessary funds for their payment. That would render nugatory the liability to which the State is made subject in article 293 of the Constitution. The provisions of the Constitution governing voluntary expenditure of public funds could not have been intended to govern the extent of the jurisdiction of the High Court and thus the validity of its orders for the Republic to pay money. A High Court's order made within jurisdiction has to be obeyed by the Republic, even if it entails the expenditure of money beyond what is already authorized under Chapter 13 of the Constitution. In those circumstances, the Republic's duty is take the necessary steps to secure the authorization required under Chapter 13 to enable it to perform its obligation. An analogy from the situation with private persons would be helpful. If an individual is adjudged by the High Court to owe a particular sum of money, it cannot use the fact that it has not budgeted for that obligation as a defence to execution process levied against him or her. Similarly, the Republic should not be able to resist execution process simply because funds have not been authorized under Chapter 13 to satisfy the judgment debt. The judgment debt creates an obligation which it is the constitutional duty of the Republic to satisfy and hence it must comply with the necessary "housekeeping" rules in order to do so.

The interested party, in response to the applicant's submissions, argues that the nature of a garnishee order in Ghana is clearly spelt out in Order 47, r 1 of the High Court (Civil Procedure) Rules, 2004 (CI 47) and that the learned High Court judge was well within his jurisdiction when he made the

impugned orders and that nothing in the Constitution abridges the jurisdiction conferred on the High Court under CI 47.

Order 47, r 1 states:

> "**Attachment of debt due to judgment debtor**
>
> 1. (1) Where a person in this Order referred to as "the judgment creditor" has obtained a judgment or order for the payment of money by some other person referred to as "the judgment debtor" and the judgment or order is not for the payment of money into court, and another person within the jurisdiction, referred to as "the garnishee" is indebted to the judgment debtor, the Court may, subject to the provisions of this Order and of any enactment, order the garnishee to pay the judgment creditor the amount of any debt due or accruing to the judgment debtor from the garnishee, or as much of it as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings.
>
> (2) An order under this rule shall in the first instance be an order to show cause, and shall specify the time and place for further consideration of the matter, and in the mean time attach such debt as is mentioned in subrule (1), or as much of it as may be specified in the order, to satisfy the judgment or order mentioned in that subrule and the costs of the proceedings."

The interested party contends that rule 1 of Order 47 (*supra)* does not make any exception in respect of monies belonging to the Republic.

Accordingly, she urges that the burden is on the party affirming that garnishee orders cannot affect public funds to show that there exists an enactment that bars such orders. The interested party's argument is that the applicant's claim that the High Court has no jurisdiction to attach public funds can only succeed if he can establish that either the jurisdiction of the High Court is ousted by a provision of the 1992 Constitution which expressly or by necessary implication takes away the High Court's garnishee powers under Order 47 or there is a statute, in conformity with the Constitution, which, expressly or by necessary implication, takes away this jurisdiction. Her conclusion is that the applicant has not discharged his burden of demonstrating the existence of any enactment which ousts the High Court's jurisdiction. In our view, this argument is sound, subject only to the discussion below of the effect of section 15 of the State Proceedings Act, 1998 (Act 555).

Although the Attorney-General's application fails on the grounds inserted on his motion paper, there is a further ground on which it succeeds. That ground was urged on this Court during the oral argument of this application. That ground is based on section 15 of the State Proceedings Act, 1998 (Act 555) which provides as follows:

> **"Section 15—Satisfaction of Orders.**
>
> (1) Where in civil proceedings by or against the Republic or in connection with an arbitration to which the Republic is a party, an order including an order for costs is made by a court in favour of any person against—

(a) the Republic;

(b) a department of the Republic; or

(c) an employee of the Republic,

the court shall issue to the person a certificate containing particulars of the order on an application made by or on behalf of the person at any time after the expiration of twenty-one days from the date of the order where the order provides for the payment of costs and the costs are required to be taxed, at any time after the costs have been taxed, whichever is later.

(2) A copy of a certificate issued under this subsection (1) may be served by or on behalf of the person in whose favour the certificate is made—

(a) on the Accountant-General if the certificate contains an order for the payment of money; and

(b) on the Attorney-General in any other case.

(3) Where the order provides for the payment of an amount of money, the certificate shall specify the amount payable and the amount together with the interest on it shall be paid to the person entitled or the lawyer of that person."

There is no evidence that any such certificate was issued in this case. Accordingly, a statutory pre-condition to the interested party's right to

execution was not fulfilled on the facts of this case. That is fatal to the interested party's garnishee order, which therefore has to be quashed, on the ground that the learned High Court judge lacked jurisdiction to grant it. In this connection, the words of Archer JA, as he then was, in *Republic v District Magistrate, Accra; Ex parte Adio* [1972] 2 GLR 125 at p. 132-3 are pertinent:

> "In the present appeal, the Local Government Act, 1961, has given district courts exclusive original jurisdiction in all cases where a local authority wants to sell rateable property in order to defray rates overdue. The most important power vested in the court so far as the local authorities are concerned is the power to order sale or to permit the local authority to take possession. Under the provisions, the real question in these cases is "when can the city council go to court?" Can it go to the district court for an order when the statutory requirements have not been complied with? The answer is no. The power of the district court to order sale or to order possession is dependent on the statutory conditions. In other words, the assumption of jurisdiction to make one of the statutory orders depends on satisfactory evidence before the district court that the statutory provisions have been complied with. Whenever there is a proof of full compliance with the statutory provisions, there is a mandatory duty on the part of the court to make one of the orders specified in the Schedule. On the other hand, if the statutory requirements have not been complied with, the district court has no jurisdiction to make one of the two orders, because the court has no

discretion in the matter whether or not to make one of the orders. It is of vital importance to appreciate that when the term "excess of jurisdiction" is used, it may mean that from the inception of the case, the court has no jurisdiction whatsoever because the nature of the case or the value involved is beyond its jurisdiction. But it may also mean that although the court has jurisdiction to hear the case, the orders which the court can pronounce are restricted by statute. If an order is therefore beyond the powers of the court it is perfectly correct to say that it has exceeded its jurisdiction. I think it is in the light of the second meaning that the present appeal should be considered."

Applying the approach of Archer JA, we hold that the High Court exceeded its jurisdiction in this case, when it made garnishee orders, in the absence of the certificate required by section 15 of the State Proceedings Act, 1998. Accordingly, in our view the garnishee orders should be brought to this Court to be quashed and the same are hereby quashed. The application thus succeeds.

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

JUSTICE OF THE SUPREME COURT

(SGD) W. A. ATUGUBA

JUSTICE OF THE SUPREME COURT

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

JUSTICE OF THE SUPREME COURT

(SGD) R. C.. OWUSU (MS)

JUSTICE OF THE SUPREME COURT

(SGD) J. V. M. DOTSE

JUSTICE OF THE SUPREME COURT

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