

**IN THE SUPERIOR COURT OF JUDICATURE**  
**IN THE COURT OF APPEAL**  
**ACCRA – GHANA**  
**AD – 2020**

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*CORAM: B. F. ACKAH-YENSU, JA (PRESIDING)*  
*MERLEY A. WOOD, JA*  
*OBENG-MANU JNR., JA*

**Appeal No.H1/229/2020**

Date: 29<sup>TH</sup> OCTOBER, 2020

**ZOOMLION GHANA LIMITED**  
**NMAI DZORN (NEAR UNIVERSITY FARM)**  
**BORTEYMAN, ACCRA**

}

**APPELLANT/**  
**APPELLANT**

**AND**

**THE AUDITOR GENERAL**  
**MINISTRIES, ACCRA**

}

**RESPONDENT/**  
**RESPONDENT**

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**REFERENCE TO THE SUPREME COURT BY CASE STATED**

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**B. ACKAH-YENSU, JA**

**INTRODUCTION**

Article 130 Clause 1 of the 1992 Constitution of the Republic of Ghana provides as follows:

***“130. Original jurisdiction of the Supreme Court***

***(1) Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in Article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in***

***(a) all matters relating to the enforcement or interpretation of this Constitution;***

***(b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution.”***

The jurisprudence on the legal effect of the constitutional provision above quoted has been firmly entrenched in countless decisions of the Supreme Court. The firm position of the Supreme Court is that the Supreme Court is the only forum exclusively established by the Constitution to determine every matter in which the constitutionality of an act or omission arises or is raised. For this reason Clause (2) of Article 130 goes on to direct as follows;

***“(2) Where an issue that relates to a matter or question***

***referred to in Clause (1) of this article arises in any proceedings in a court other than the Supreme Court, that court shall stay the proceedings and refer the question of law involved to the Supreme Court for determination and the Court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court.”***

In the case of **REPUBLIC VS. HIGH COURT (FAST TRACK DIVISION) ACCRA; EX-PARTE TERIWAJAH & KORBOE (REISS & CO (GHANA) LTD INTERESTED PARTY**

[2013-2014] 2 SCGLR 1247 when the question as to whether or not the High Court had interpreted the provisions of Article 107 arose, the Supreme Court speaking through Anin Yeboah JSC (*as he then was*) held that if the Learned High Court Judge had resorted to interpreting Article 107 (b), the Court, on the authorities of **REPUBLIC VS. HIGH COURT (COMMERCIAL DIVISION), ACCRA; EX-PARTE ATTORNEY-GENERAL (BALKAN ENERGY GHANA) LTD. & OTHERS INTERESTED PARTIES** [2011] 2 SCGLR 1183 AND **AGYEIWAA VS. P & T CORPORATION** [2007-2008] 2 SCGLR 985 would have intervened.

In the case of **RAPHAEL CUBAGEE VS. MICHAEL YEBOAH ASARE & OTHERS. Writ No J6/04/2017 dated the 28th day of February 2017**, the Supreme Court commended the District Court for seeking its guidance for an interpretation of Article 18(2) of the Constitution to determine its scope and whether the secret recording of a telephone conversation by a party to the conversation amounts to a breach of the Article, and inadmissible in evidence.

In so holding, Pwamang JSC reiterated the position of the law that it is only the Supreme Court which has been given exclusive jurisdiction to interpret the Constitution. This interpretation, the Court held, involves determining the scope of provisions and discovering the intent of the framers of the Constitution.

## **REFERENCE**

Rule 67 of the rules of the Supreme Court, 1996 (C.I. 16) sets out the manner for referring a cause or matter to the Supreme Court in instances where an issue relating to the enforcement or interpretation of the Constitution or the question as to whether an enactment was made in excess of the powers conferred on Parliament or any other

authority or person by law or under this Constitution arises in any proceedings in a court other than the Supreme Court.

Sub rule (1) of Rule 67 of C.I. 16 requires that all references to the Supreme Court *“for the determination of a question, cause or matter pursuant to a provision of the Constitution or of any other law shall be made by way of a case stated”* by the Court making the reference.

The case stated, as provided by Sub rule (2) of the same rule must contain, a summary of the action or matter before the Court from which the reference is made, the issue involved in the matter before the Court, the matter or question referred for determination by the Supreme Court, the findings of fact relevant to the matter or question referred to the Supreme Court, the arguments of Counsel, the ruling or decision of the Court below; and finally in cases where the reference, as in this case, is made under Clause (2) of Article 130 of the Constitution, a statement by the Court below that the determination of the constitutional matter or question is necessary to the determination of the action.

In **NARTEY V GATI [2010] SCGLR 745**, the Supreme Court unanimously held, giving an interpretative opinion on a reference from the trial magistrate Court, that it would be appropriate for the Supreme Court draw the attention of all courts, making a reference to the Supreme Court under Article 130(2) of the Constitution to the need to comply with rule 67 of the Supreme Court Rules, 1996 (C.I. 16). Consequently, it would be helpful, if courts referring cases stated to the Supreme Court for interpretation, would methodically attend to each of the items in the list set out in rule 67(2).

For the avoidance of doubt Rule 67(1) and (2) of C.I. 67 provides as follows;

**“67. Reference to the Court**

(1) *A reference to the Court for the determination of a*

*question, cause or matter pursuant to a provision of the Constitution or of any other law shall be made by way of a case stated by the Court below, or by the person or authority making the reference.*

(2) **A case stated under Sub rule (1) shall contain-**

(a) *a summary of the action or matter before the Court below or the person or the authority from which or from whom the reference is made;*

(b) *the issue involved in the matter before the Court below or that person or authority;*

(c) *the matter or question referred for determination by the Court;*

(d) *the findings of fact relevant to the matter or question referred to the Court;*

(e) *the arguments of counsel;*

(f) *the ruling or decision of the Court below or of that person or authority; and*

(g) *a statement by the Court below that the determination of the constitutional matter or question is necessary to the determination of the action, where the reference is made under Clause (2) of Article 130 of the Constitution."*

### **SUMMARY OF ACTION OR MATTER BEFORE THE COURT OF APPEAL**

The Appellant before this Court is a private company registered under the laws of the Republic of Ghana. The Respondent is the Auditor-General of the Republic of Ghana.

The Appellant invoked the appellate jurisdiction of the Court against the decision of the High Court dated the 31<sup>st</sup> day of January 2020. In its decision, the High Court refused an

appeal lodged by the Appellant against the Respondent's decision which disallowed an amount of GHC184,901,650.00 representing payments cumulatively made to the Respondent by the Ministry of Health through the National Health Insurance Authority.

Having disallowed the said payment, the Respondent surcharged the amount on the Appellant on the ground that the payments were made contrary to law in terms of Article 187 Clause 7(b)(i) of the Constitution which provides as follows;

- "187(7) In the performance of his functions under this Constitution or any other law the Auditor-General-*
- (b) may disallow any item of expenditure which is contrary to law and surcharge -*
- (i) the amount of any expenditure disallowed upon the person responsible for incurring or authorising the expenditure".*

In its appeal to the High Court challenging the Respondent's decision to disallow the payments made to the Appellant, the Appellant relied on three main grounds which are set out below;

- "a. The Respondent erred in its findings that the Appellant had been paid a total amount of GHC184,901,650.00 without due process and this has occasioned a grave miscarriage of justice.*
- b. The Respondent erred in its finding that the Appellant had, between the years 2007-2017, been paid an amount of GHC184,901,650.00 devoid of due process without affording or giving the Appellant the opportunity to respond thereto thereby breaching the audi aliteram*

*rule of natural justice and this has occasioned a grave miscarriage of justice.*

- c. *The Respondent's findings against the Appellant are not supported by the facts and supporting evidence."*

The High Court refused to set aside findings of the Respondent as prayed for by the Appellant in its appeal to the High Court. The Appellant therefore filed an appeal to this Court on the 6th day of February 2020.

### **ISSUES BEFORE THE COURT OF APPEAL**

In its Notice of Appeal, the Appellant initially relied on one main ground which is that the judgment of the learned High Court Judge confirming the disallowance and surcharge of GHC184,901,650.00 made by the Respondent against the Appellant cannot be supported by the evidence on record and same has occasioned a grave miscarriage of justice.

The Appellant indicated its intention of filing additional grounds of appeal on receipt of the record of proceedings. The Appellant subsequently filed additional grounds of appeal with leave of the Court. The Appellant filed three main grounds in addition to the earlier ground contained in the Notice of Appeal. These additional grounds are as follows:

- "a. By confirming the Respondent's decision to disallow and surcharge the sum of GHC184,901,650.00 on the Appellant, the learned Judge of the High Court erred fundamentally in law in assuming that the Respondent's power to disallow and surcharge expenditure may be applied to private persons.*

### **PARTICULARS.**

*Endorsing the Respondent's power to disallow and surcharge expenditure on private entities like the Appellant.*

- b. The enforcement of the learned High Court Judge's order of confirmation of the respondent's decision to disallow expenditure incurred and or authorized by public officers and to surcharge the expended sum of GHC184,901,650.00 on the appellant will unjustly enrich the State and occasion a grave miscarriage of justice.*
- c. The Respondent's decision to disallow expenditure authorized and or incurred by public officers and to surcharge the said expenditure on the appellant is unfair, unreasonable and a breach of Article 23 of the 1992 Constitution".*

The first additional ground of appeal raises a constitutional question relating to the constitutional powers of the Auditor-General under the 1992 Constitution of the Republic of Ghana.

In the said ground of appeal, the Appellant's contention essentially is that Auditor-General's constitutional mandate to audit all the: *"Public accounts of Ghana and of all public offices, including the Courts, the central and local government administrations, the Universities and public institutions of like nature, any public corporation or other body or organization established by an Act of Parliament"* as provided for in Article 187 Clause 2 of the Constitution, does not extend to private entities like the Appellant.

The Appellant's contention before the Court therefore in so far as this ground of appeal is concerned is that in the performance of his functions under the Constitution or any other law the Auditor-General cannot disallow any item of expenditure which is contrary to



law and surcharge, the amount of any expenditure disallowed upon a private person as the person responsible for incurring or authorising the expenditure in terms of his functions under the provisions of Article 187 Clause (7)(b)(i) of the Constitution.

### **MATTER REFERRED TO THE SUPREME COURT.**

The matter referred to the Supreme Court requires a determination of the proper meaning and scope of Article 187 Clause (7)(b)(i) of the Constitution and in particular the question whether or not in the exercise of his functions under Article 187(7)(b)(i) of the Constitution, the Auditor-General can make a surcharge against a person other than a public officer.

### **FINDINGS OF FACT RELEVANT TO THE MATTER**

In so far as this reference is concerned, the key findings of fact are enshrined in the constitutional provisions relevant to the determination of the question referred to the Supreme Court. These can be reduced to the following propositions;

- a. The Appellant is indeed a private person.*
- b. The Respondent is the Auditor-General of the Republic of Ghana.*
- c. The Respondent's constitutional functions as provided for in Article 187 requires and empowers him to audit all the "public accounts of Ghana and of all public offices, including the Courts, the central and local government administrations, the Universities and public institutions of like nature, any public corporation or other body or organisation established by an Act of Parliament".*
- d. In the performance of his functions, the Auditor-General is empowered to disallow any item of expenditure which is contrary to law and surcharge, the amount of any expenditure on the person responsible for incurring or authorising the expenditure.*

- e. *The operative words of “incurring or authorizing expenditure” are at the heart of the power conferred on the Auditor-General and are descriptive of persons to be surcharged. Can a private person incur expenditure or/and authorize expenditure?*

### **ARGUMENTS OF COUNSEL**

The Appellant’s argument is that in disallowing the amount and surcharging same on the Appellant, the Respondent exercised his constitutional powers under Article 187 Clause (7)(b) of the Constitution and justified disallowing the expenditure and surcharging same on the Appellant on the ground that the public officials who authorised the expenditure acted in breach of the Financial Administration Regulations of 2004 (L.I. 1802).

Referring to the provisions of Article 187 Clause (7) (b) of the Constitution, the Appellant argues that the said Article contemplates three categories of persons who may be liable to a surcharge of expenditure items that are contrary to law. These persons are;

- “a. persons responsible for incurring or authorizing the expenditure.*
- b. persons by whom sums of money ought to have been brought into account but which have not been duly brought into account; and*
- c. persons by whose negligence or misconduct a loss or deficiency of public funds has been incurred”.*

The Appellant then contends that the persons contemplated by the constitutional provision are those performing public expenditure functions and are responsible for the management of public funds for which reason the word “*person*” appearing in the

constitutional provision cannot extend to persons outside the category such as the Appellant.

The Respondent counters the Appellant's arguments with two main points. The first is that the Appellant relies on foreign decisions for purposes of interpreting the constitutional provisions relied on by the Appellant to argue that in the performance of his functions under the Constitution or any other law to carry out his audit functions, the Auditor-General cannot disallow any item of expenditure which is contrary to law and surcharge, the amount of such expenditure upon a private person as the person responsible for incurring or authorising the expenditure in terms of his functions under the provisions of Article 187 Clause (7)(b)(i) of the Constitution. The foreign authorities, the Respondent argues, are of no assistance for purposes of interpreting and determine the Auditor-General's constitutional functions.

Secondly, the Respondent relies on the decision of the Supreme Court in the case of **OCCUPY GHANA VS. ATTORNEY-GENERAL, WRIT NO J1/19/2016 dated the 14th day of June 2017** and argues that the said decision of the Supreme Court justifies the Auditor-General's power to disallow any item of expenditure which is contrary to law and surcharge, the amount of any expenditure disallowed upon a private person as the person responsible for incurring or authorising the expenditure in terms of his functions under the provisions of Article 187 Clause (7)(b)(i) of the Constitution.

In its reply to the Respondent's submission, Appellant argued that the joint memorandum of issues set down for arguments and determination were only two and neither had to do with whether or not the Auditor-General's powers of disallowance and surcharge equally applies to private entities and persons. The issues are as follows:

- “a. Whether or not the Auditor-General fully discharges his constitutional obligation simply by auditing and pointing out financial irregularities in the accounts of a public entity.*
- b. Whether or not the Auditor-General has an obligation to ensure that his powers of disallowance and surcharge duly exercised are complied with by the public entity or official directly affected by the Auditor-General's exercise of his power of disallowance and discharge.”*

In resolving the issues, the Supreme Court concluded thus:

*“In our opinion therefore, the mandate of the Auditor-General in exercising his constitutional obligations in article 187(2) of the Constitution does not end simply by the performance of same and issuing a report on the irregularities in the accounts of a public entity, but goes beyond it to include the powers of Disallowance and Surcharge which we will consider next”.*

And then:

*“From the above discussions, it is quite apparent that the Auditor-General has an obligation to ensure that his powers of disallowance and surcharge duly exercised by him under article 187(7)(b) of the Constitution are complied with by the public entity or officials directly affected by the exercise of his powers of surcharge and disallowance.”*

### **RULING OR DECISION OF THE COURT OF APPEAL**

The decision of the Court is to refer the question as to the proper meaning of Article 187 Clause (7)(b)(i) of the Constitution and in particular the question whether or not in the exercise of his functions under Article 187(7)(b)(i) of the Constitution, the Auditor-General can make a surcharge against a person other than a public officer.

The provisions of Article 130 Clause (1) of the Constitution places squarely within the exclusive jurisdiction of the Supreme Court, all questions relating to the interpretation of the Constitution.

In the case of **REPUBLIC VS. HIGH COURT (COMMERCIAL DIVISION) ACCRA; ATTORNEY-GENERAL (BALKAN ENERGY GHANA LTD & OTHERS INTERESTED PARTIES [2011]2 SCGLR 1183** the Supreme Court noted that in the course of disposing of an application for stay of proceedings and referral of the said question to the Supreme Court, the learned High Court Judge reviewed various decisions by the Supreme Court concerning the circumstances under which the High Court is required to refer a proceedings before the High Court for determination of an issue of constitutional interpretation which has arisen in the course of the proceedings before the High Court.

The Supreme Court observed that the Learned High Court Judge took the view that the constitutional provision the Attorney General sought to have referred to the Supreme Court for interpretation had already been interpreted by the Court in **ATTORNEY GENERAL VS. FAROE ATLANTIC CO. LTD [2005-2006] SCGLR 271**. Having so found the High Court referred to cases such as **REPUBLIC VS. SPECIAL TRIBUNAL, EX PARTE AKOSAH [1980] GLR, 592, AGYEKUM VS. BOADI [2000] SCGLR, 282, THE REPUBLIC VS. HIGH COURT (FAST TRACK DIVISION) ACCRA, EX-PARTE ELECTORAL COMMISSION (METTLE-NUNOO AND OTHERS: INTERESTED PARTIES) [2005-2006] SCGLR, 514, AND THE REPUBLIC VS. HIGH COURT (FAST TRACK DIVISION) ACCRA, EX PARTE COMMISSION ON HUMAN RIGHTS AND ADMINISTRATIVE JUSTICE (RICHARD ANANE: INTERESTED PARTY), [2007-2008] SCGLR 213**, and concluded that there could not be any genuine controversy concerning the meaning of Article 181(5) and, consequently, there was no need for referring any question concerning its interpretation to the Supreme Court.

The Supreme Court decided that without faulting the Learned Judge's analysis of the purport of the abovementioned cases, the High Court missed the mark when he failed to apply the admonition afforded by the decision in **EX-PARTE ELECTORAL COMMISSION** (supra) and favourably mentioned in **EX PARTE COMMISSION ON HUMAN RIGHTS AND ADMINISTRATIVE JUSTICE** [2011] 2 SCGLR 746 that:-

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

#### **NECESSITY FOR DETERMINATION OF THE ISSUE REFERRED**

The issue referred to the Supreme Court for determination has not been clearly decided by the Supreme Court in the exercise of its exclusive interpretative and enforcement jurisdictions under the Constitution.

Although the previous decision of the Supreme Court in the case of **OCCUPY GHANA VS. ATTORNEY-GENERAL**, Writ No J1/19/2016 dated the 14th day of June 2017 appears to affirm the position that in the discharge of the Auditor-General's constitutional power to disallow any item of expenditure which is contrary to law and surcharge, the amount of any expenditure disallowed on any person by whose negligence or misconduct a loss or deficiency of public funds has been incurred, the determination was not made in direct answer to the question that the issue referred to the Supreme Court provokes.

As aforesaid, the case of **REPUBLIC VS. HIGHCOURT (COMMERCIAL DIVISION) ACCRA; ATTORNEY-GENERAL (BALKAN ENERGY GHANA LTD. & OTHERS INTERESTED PARTIES** (supra) has clearly advised that all courts other than the Supreme Court, heed the admonition afforded by the decision in **EX PARTE ELECTORAL COMMISSION** (supra).

In this context, the constitutional responsibility of this Court to refer all matters where an issue that relates to the enforcement or interpretation of the Constitution to the Supreme Court for determination has been automatically triggered by the issue inherent in the first ground of the Appellant's appeal.

The determination of this constitutional question is of great significance to the outcome of the appeal before this Court because its determination decides whether or not the Court should even proceed to hear the appeal on its merits. The reason is that if the Supreme Court determines that in the performance of his functions under the Constitution or any other law the Auditor-General is empowered to disallow any item of expenditure which is contrary to law and surcharge, the amount of any expenditure disallowed upon any person including a private person like the Appellant, the Court may proceed to legitimately determine the appeal before the Court on its merits.

In the event however that the Supreme Court decides that in the performance of his functions under the Constitution or any other law the Auditor-General's constitutional mandate does not extend to disallowing items of expenditure which is contrary to law and surcharge, the amount of any expenditure disallowed upon private persons regardless of whether the loss or deficiency of public funds has been incurred as a result of the negligence or misconduct of the private person, then the appeal before the Court is automatically disposed of and there will be no need to consider the appeal on its merits.

For the reasons here stated, this Court hereby refers the question whether or not in the exercise of his functions under Article 187(7)(b)(i) of the Constitution, the Auditor-General can make a surcharge against a person other than a public officer.

*(Sgd.)*

***B. F. ACKAH-YENSU***

***(JUSTICE OF APPEAL)***

*(Sgd.)*

***MERLEY A. WOOD, JA***

***(JUSTICE OF APPEAL)***

*(Sgd.)*

***OBENG-MANU JNR., JA***

***(JUSTICE OF APPEAL)***







**COUNSEL:**

- OSAFO BUABENG WITH APPIAHENE OSEI AKOTO FOR APPELLANT/APPELLANT
  
- RICHARD AGBOTAME WITH ANITA DANKWAH & FRANCIS KOUSER FOR RESPONDENT/RESPONDENT