

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

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

CIVIL APPEAL NO.: H1/229/2020

DATED: 22ND DECEMBER, 2020

ZOOMLION GHANA LTD. - PLAINTIFF/APPELLANT
VRS
THE AUDITOR GENERAL - DEFENDANT/RESPONDENT

JUDGMENT

ACKAH-YENSU, JA

In this appeal against the judgment of the High Court (Financial and Economic Crime Division) Accra, delivered on 31st January 2020, the Appellant/Appellant (hereinafter to be referred to simply as “Appellant”) prays that the judgment of the court below, disallowing an amount of GH¢184,901,650.00 representing payments cumulatively made to the Appellant over the period 2007 to 2018 by the Ministry of Health through the National Health Insurance Authority and to surcharge the said amount on the Appellant

on the ground that the payments made to the Appellant failed to comply with due process of law, be set aside.

Pursuant to Article 187(7)(b) of the 1992 Constitution and Regulation 39 of the Financial Administration Regulations, 2004 (L.I. 1802), the Respondent/Respondent (also to be referred to simply as "Respondent") served various notices of specification and certification of disallowance and surcharge on various public officers and the Appellant. The Respondent notified the public officers who approved and authorized the various sums of money that he had disallowed the sums approved and authorized by them and was surcharging them with the specific sums of money certified as disallowed and surcharged on them. He then requested these public officers to refund the various sums of money into the Consolidated Fund within 14 days of the notice of disallowance and surcharge. At the same time, the Respondent also notified the Appellant of the disallowance and surcharge of the sum total of the various amounts disallowed and surcharged on the various public officers (i.e. GH¢184,901,650.00) who approved and authorized the various amounts and requested the Appellant to pay the total sum disallowed into the Consolidated Fund within 14 days. As aforesaid, the sole reason proffered by the Respondent, was that the payments, approved and authorized by the named public officers did not follow due process of law. In other words, the named public officer failed and or neglected to follow the legal rules and regulations governing the approval and authorization of payments by public officers.

Aggrieved by the decision of the Respondent to disallow and surcharge the sum of GH¢184,901,650.00 on it, the Appellant filed an appeal before the High Court against the said decision in accordance with Order 54A of the High Court (Civil Procedure) Rules, 2004 (C.I. 47) as amended. The Appellant prayed the High Court to set aside the entire findings resulting in the said disallowance and surcharge.

The High Court held that the Respondent had not established that the Appellant had defrauded the State. However, the learned High Court judge held that the Respondent gave the Appellant the opportunity to be heard before taking the decision to disallow the amount of GH¢184,901,650.00 and to surcharge the same on the Appellant, and that the Appellant had failed to make a case to warrant the grant of its appeal and accordingly dismissed the appeal.

It is against the said judgment that the instant appeal was brought.

When the appeal came up before us for hearing on 22nd October, 2020, this Court, in pursuance of Article 130(2) of the 1992 Constitution, referred a question provoked by the written submissions of the Parties to the appeal to wit: **“whether or not in the exercise of his function under article 187(7)(b)(i) of the Constitution the Auditor General can make a surcharge against a person other than a public offer”**, to the Supreme Court for interpretation.

In its Ruling dated 3rd December 2020, the Supreme Court attended to the question and directed this Court accordingly. The Supreme Court in its directive to this Court held *inter alia* that by virtue of the Judgment of the High Court (1st Appellate Court) which exonerated the Appellant of fraud in the transaction which gave rise to the exercise of the Respondent’s power under Article 187(7)(b) of the Constitution, and the High Court not having found the Appellant guilty or liable for any other wrong doing, the provision of Article 187(7)(b)(iii) will not apply to the Appellant.

Indeed, from the Ruling of the Supreme Court aforesaid, Counsel for Respondent had conceded that the provision of sub-clause b(i) of Article 187(7) of the Constitution, the

subject matter of the reference and (b)(ii) of the same Article 187(7) do not apply to the instant Appellant, it being a private entity which neither incurs nor authorizes expenditure from public funds.

Accordingly, the Appellant having been insulated from the effect of Article 187(7)(b)(i)(ii) and (iii) of the 1992 Constitution altogether, it follows that the disallowance and surcharge imposed on it by the Respondent which was affirmed by the High Court (the 1st Appellate Court) is unlawful as it is unconstitutional and cannot stand.

The net effect is that, this appeal succeeds, and it is hereby allowed. The notice of disallowance and surcharge of the sum of GH¢184,901,650.00 served on the Appellant at the instance of the Respondent and the demand for payment of same into the consolidated fund which was affirmed by the High Court are both hereby set aside.

(Sgd.)

BARBARA ACKAH-YENSU

(JUSTICE OF APPEAL)

(Sgd.)

MERLEY A. WOOD, J. A., I agree

MERLEY A. WOOD

(JUSTICE OF APPEAL)

(Sgd.)

OBENG-MANU JNR., J. A., I also agree

OBENG-MANU JNR.

(JUSTICE OF APPEAL)

COUNSEL:

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