**IN THE SUPERIOR COURT OF JUDICATURE**

**IN THE SUPREME COURT**

**ACCRA - A.D. 2022**

**CORAM: PWAMANG JSC (PRESIDING)**

**DORDZIE (MRS.) JSC**

**TORKORNOO (MRS.) JSC**

**HONYENUGA JSC**

**KULENDI JSC**

**CIVIL MOTION**

**NO. J5/17/2022**

**9TH MARCH, 2022**

**THE REPUBLIC**

**VRS**

**COURT OF APPEAL, CAPE COAST ……. RESPONDENT**

**EX PARTE: JAMES GYAKYE QUAYSON ……. APPLICANT**

**AND**

**MICHAEL ANKOMAH-NIMFAH …….. 1ST INTERESTED PARTY**

**THE ELECTORAL COMMISSION …….. 2ND INTERESTED PARTY**

## RULING

**MAJORITY OPINION**

**KULENDI JSC:-**

**INTRODUCTION**

This is a motion on notice for an order of certiorari directed at the Court of Appeal, Cape Coast, to bring up to this Court, for the purposes of being quashed, the ruling of the Court dated 13th December, 2021 by which ruling, the Court of Appeal refused the Applicant's motion for a stay of proceedings and reference to this Court for the interpretation Article 94(2)(a) of the Constitution.

**BACKGROUND**

The Applicant was elected Member of Parliament for the Assin North Constituency on December 7th, 2020 and sworn in Parliament on 7th January, 2021. Upon the election of the Applicant as Member of Parliament for the constituency aforementioned, the 1st Interested Party petitioned the High Court, Cape Coast and contended that at the time of the filing of the nomination forms by the Applicant, the Applicant held Canadian citizenship in violation of Article 94[2][a] of the Constitution, Section 9(2)(a) of the Representation of the Peoples Act 1992 (PNDCL 284), and the Public Elections Regulations, 2020 [C.I. 127]. It was further contended before the High Court that at the time of the Parliamentary Elections in the Assin North Constituency, the Applicant was not qualified to contest as a candidate for the Assin North Constituency in accordance with the electoral laws for the time being in force. The 1st Interested Party therefore sought orders cancelling the parliamentary

elections and further orders prohibiting the Applicant from holding himself out as Member of Parliament for the Assin North Constituency and for the Electoral Commission to conduct fresh elections in the Assin North Constituency.

The High Court, on 28th July, 2021, delivered a 68-page judgment distilling the issues and granted the prayers of the 1st Interested Party and held in part as follows:

> "Therefore, it is the Court's ruling that by virtue of the clear and unambiguous provisions of the electoral laws for the time being in Ghana and in the face of the overwhelming available evidence, 1st Respondent herein was not qualified to contest as a Member of Parliament for the 2020 Parliamentary Elections organized by 2nd Respondent in the Assin North Constituency."

The High Court therefore cancelled the Parliamentary elections, perpetually restrained the Applicant from holding himself as Member of Parliament for the Assin North Constituency and further ordered that the Electoral Commission conduct fresh elections for the Constituency.

Aggrieved by the decision of the High Court, the Applicant filed an appeal to the Court of Appeal on 2nd August, 2021 and sought to set aside the judgment of the High Court on 12 grounds.

Appellant's ground 5 of appeal was that:

> *"e. The High Court erred in law, and acted out of jurisdiction, by not referring the interpretation of article 94(2) (a) of the 1992*

*Constitution to the Supreme Court having regard to the different interpretations of the parties in the suit;*

*Particulars of error of law pursuant to rule 8(4) of C. I. 19:*

*(i) The High Court wrongly assumed jurisdiction in breach of article 130(1) of the Constitution by purporting to enforce article 94(2)(a)thereof against the Appellant on the alleged grounds that he owed allegiance to Canada at the time of his nomination as a candidate for the 7th December, 2020 Parliamentary election;*

*(ii) The High Court breached article 130(2) of the Constitution when it determined the petition without first staying proceedings and referring article 94(2)(a) of the Constitution to the Supreme Court for interpretation."*

As evidenced from the notice of appeal, one of Applicant's grounds of appeal was that the High Court erred in not referring article 94(2)(a) of the Constitution to the Supreme Court for interpretation.

Before the pending appeal could be heard, the Applicant, on 2nd November, 2021, filed an application to the Court of Appeal for an order for stay of proceedings and for reference of article 94(2)(a) to this Court for interpretation. It is important to point out that, in its 12-paragraph affidavit in support of the motion, the Applicant failed or neglected to exhibit relevant documents such as the petition, the answer to petition and the decision of the High Court to the application.

The Court of Appeal, on 13th November, 2021, dismissed the application and held as follows:

> "Having regard however to the quite sketchy processes filed in this instant application, we fail to see how the Applicant expects this Court to make any proper determination as to whether any real and genuine issue for constitutional interpretation was properly raised before the court below and whether the court below fell into error when it refused to make a reference under Article 130 (2) of the Constitution. We have under the circumstances, struggled to find out from the scant processes filed in this instant application, the basis for the assertion that a real and genuine issue of constitutional interpretation has been raised in this case, which requires a reference to the Supreme Court. We have found none. We agree therefore with learned Counsel for the Respondent that this instant application is premature and ill-founded."

The Court of Appeal further held that the grant of the application would invariably mean upholding the Applicant's ground "e" of appeal, which is yet to be argued before the Court of Appeal.

Aggrieved by the ruling of the Court of Appeal, the Applicant seeks the intervention of this Court to exercise its supervisory jurisdiction to quash the ruling of the Court of Appeal in refusing to refer article 94(2)(a) of the Constitution to this Court for interpretation.

For the avoidance of doubt, and to properly contextualize this application, it is worthy of emphasis that the immediate trigger of this application is not the judgment of the High Court, Cape Coast dated 28th July, 2021 but the ruling of the Court of Appeal, Cape Coast dated 13th December, 2021 even though the original contentions over whether or not article 94(2)(a) evoke an interpretative issue originally cropped up in the former. Therefore, in determining this application, we are mindful not mislead ourselves into issues of the merits or otherwise of the substantive judgment of the High Court, Cape Coast which is the subject matter of a pending appeal. As such, the ruling sought to be quashed is the said ruling of the Court of Appeal, Cape Coast, dated 13th December, 2021 and not the said substantive judgment of the High Court, Cape Coast.

**GROUNDS OF APPLICATION**

The grounds upon which Applicant anchors the instant application are reproduced *verbatim* below:

(a) The Court of Appeal fundamentally erred in law in not appreciating that Article 130 of the Constitution required any matter relating to the enforcement or interpretation of the Constitution that "arises in any proceedings in a court other than the Supreme Court" to be referred to the Supreme Court for determination and in, therefore not referring article 94(2)(a) of the Constitution to the Supreme Court for interpretation and enforcement;

(b) The Court of Appeal fundamentally erred in law in basing its decision on the premise that the appeal itself is not ripe for hearing when Article 130 of the Constitution does not require such a premise;

(c) The ruling of the Court of Appeal was per incuriam the Supreme Court decisions in Republic v. High Court (Commercial Division), Accra; Ex Parte Attorney-General (Balkan Energy Ghana Ltd & Others Interested Parties) [2011] 2 SCGLR 1183 and Republic v. High Court (General Jurisdiction 6) Accra; Ex parte Zanetor Rawlings [2015-2016] 1 SCGLR 53;

(d) The ruling of the Court of Appeal was per incuriam Rule 21 of the Court of Appeal Rules, 1997 (C.I. 19);

(e) The Court of Appeal fundamentally erred in law in determining that the application for stay of proceedings and reference to the Supreme Court for interpretation and enforcement of Article 94(2)(a) of the Constitution was "premature and ill-founded";

(f) The Court of Appeal fundamentally erred in law in resting its decision on the fact that the application to stay proceedings and refer the matter to the Supreme Court did not have the judgment of the lower court attached to it when, at the hearing of the application, the Court of Appeal granted leave to Counsel for the Appellant to refer to, and quote passages from, the impugned judgment of the High Court which was part of the Record of Appeal that the Court of Appeal was seised with; and

(g) The Court fundamentally erred in law in deciding that the deposition in the affidavit of the Applicant, that on 6th January 2021 the trial court had refused an application to refer the matter of the interpretation of Article 94(2) to the Supreme Court, was not substantiated when the said deposition was not challenged by the Respondents to the application and is clear from the Record of Appeal which the Court of Appeal was already seised with."

**APPLICABLE LAW**

It is a well-settled and an entrenched principle of law that one of the grounds upon which the supervisory jurisdiction of the Supreme Court may be invoked is where there is a patent error law on the face of the record. His Lordship Dotse JSC in the case of **Republic v High Court, Kumasi: Ex-parte Bank of Ghana &Ors (Gyamfi & Others – Interested Parties) [2013-14] 1SCGLR 477** postulated the grounds of certiorari as follows:

> "It is well settled that certiorari was not concerned with the merits of the decision; *it was rather discretionary remedy which would be granted on grounds of excess or want of jurisdiction and or some beach of rules of natural justice;* ***or to correct a clear error of law apparent on the face of the record.***

This Court would quash decision made in error of law and which error is patent on the face of the record. In the case of **Republic v Court of Appeal, Ex-parte TsatsuTsikata [2005-2006] SCGLR 612.** This Court held as follows:

> "The clear thinking of this court is that, our supervisory jurisdiction under article 132 of the 1992 constitution, should be exercised only in those manifestly plain and obvious cases, where there are patent errors of law on the face of the record, which errors either go to jurisdiction or are so plain as to make the impugned decision a complete nullity."

See the cases of: **Republic v High Court, Accra Ex parte; Ghana Medical Association (Chris Arcmann-Akummey-Interested Party) [ 2012] 2 GLR 768; Republic v High**

**Court, Koforidua; Ex Parte Ansah-Out & Another (Koans Building Solutions Ltd; Interested Party) [2009] SCGLR 141; Republic vrs. Commission on Human Rights and Administrative Justice (Richard Anane- Interested Party) [2007-2008] SCGLR 213; Ex- Parte Electoral Commission (Mettle Nunoo & Others- Interested Parties) [2005-2006] SCGLR, 514; Ex parte Zanetor Rawlings [2015-2016] 1 SCGLR 53.**

In order to motivate the exercise of this Court's discretion under article 132 of the Constitution, the errors must be so patently and manifestly clear on the record to the point of crushing substantial justice. This presupposes that it is not every error of law that would warrant the invocation of the supervisory jurisdiction of this Court.

In assessing whether or not a case has been made for the exercise of our supervisory jurisdiction, this Court must be careful not to conduct an appellate hearing of the impugned decision. The mere fact that in the opinion of the supervisory court, the case ought to have been decided differently is not enough to use our supervisory powers to set same aside.

This court has on countless times bemoaned the needless abuse of its supervisory jurisdiction in cases. The learned and distinguished Justice Dotse JSC in the judgment of this Court dated 29th April, 2020 in Suit No.: J5/20/2019 entitled **Republic v. High Court(Commercial Division) Ex parte Environ Solutions (Ghana Stock Exchange) Interested Party** stated thus:

> "Despite the decisions referred to supra, the tendency to willfully abuse the scope of the exercise of this court's supervisory jurisdiction continued with relish. The Supreme Court however has not relented in its attempt to re-state and re-emphasise the essential principles upon which this Court's supervisory

jurisdiction will be invoked or directions given in appropriate cases to reflect the scope of Article 132 of the Constitution."

Again, in **Republic v High Court (Commercial Division) ex-parte The Trust Bank Limited[2009] SCGLR 164,**this court held as follows:-
"This court should endeavor not to backslide into excessive supervisory intervention over the High Court in relation to its errors of law. Appeals are better suited for resolving errors of law"

Be that as it may, this Court had earlier held in the case of **British Airways v. Attorney-General [1996-1997 SCGLR] 547,**per Her Ladyship Bamford-Addo (JSC) that this Court's supervisory jurisdiction should be exercised "in appropriate and deserving cases in the interest of justice."

It is with such caution we proceed to resolve the issues raised by the Applicant.

**RESOLUTION OF ISSUES**

The centrality of the case of the Applicant is that the Court of Appeal erred in law in failing to refer article 94(2)(a) of the Constitution to this Court for interpretation contrary to article 130 of the Constitution. Applicant contends that article 130 of the Constitution does not require that the pending appeal be ripe for hearing before a matter of constitutional interpretation may be referred to this Court for interpretation. The Appellant says that the ruling of the Court of Appeal is *per incuriam* having regards to the decisions in the cases of Republic v. High Court (Commercial Division), Accra; Ex Parte Attorney-General (Balkan Energy Ghana Ltd & Others Interested Parties) (2011] 2 SCGLR 1183 and Republic v. High Court (General Jurisdiction 6) Accra; Ex parte

Zanetor Rawlings [2015-2016] 1 SCGLR 53 and Rule 21 of the Court of Appeal Rules, 1997 (C.I. 19).

The Applicant also takes issue with the holding of the Court of Appeal that the application was premature and ill-founded and contends that same is also an error of law. The Applicant again takes issue with the holding of the Court of Appeal that it did not have a copy of the judgment of the lower court when in fact, the said judgment was part of the Record of Appeal and which judgment, the Court of Appeal had granted leave to Applicant's Counsel to make reference to. The Applicant contends that the Court of Appeal erred in holding that the Applicant failed to substantiate its deposition that the Trial Court had on 6th January, 2021, refused an application to refer article 94(2)(a) of the Constitution for interpretation when the said deposition was not challenged by the Respondent to the application.

As a preliminary comment, it is important to point out that the question of whether or not article 94(2)(a) of the Constitution evokes an interpretative issue that ought to have been referred to the Supreme Court by the High Court, is still pending in the substantive appeal before the Court of Appeal. Again, from the arguments of counsel and the processes filed before us, it is apparent that there is a pending writ in Suit No.: J1/11/2022, at the instance of the 1st Interested Party herein (therein the Plaintiff) seeking an interpretation of Article 94(2)(a) of the Constitution among other reliefs. In this present application, we shall do well to stay within the legal remits of our supervisory jurisdiction and avoid statements that may well prejudge or predetermine the pending issues before this Court and the Court of Appeal.

Again, we wish to state that whether or not the Applicant had earlier on 6th January, 2021, made an application before the trial High Court for reference of article 94(2)(a)

to this Court for interpretation was not the gravamen of the application before the Court of Appeal. Besides, there is no evidence that the Applicant appealed the decision of the trial court not to refer the matter for interpretation. The alleged ruling was given on 6th January, 2021 and the trial High Court subsequently delivered its judgment on 28th July, 2021. If indeed, the Applicant found fault with the refusal of the High Court to refer article 94(2)(a) to this court for interpretation, the Applicant could have appealed the said decision. It must be mentioned that the Court of Appeal exercises appellate jurisdiction only, and it is only where there is a valid appeal pending before it that parties may seek the auxiliary jurisdiction to determine preliminary or interlocutory issues pending the resolution of the substantive appeal. Such Preliminary or interlocutory applications must be anchored on the subsisting appeal. Matters unrelated to the substantive appeal cannot be legitimately anchored on the appeal for preliminary determination. In the instant case, the Applicant's legitimate appeal was what the Applicant filed on 2nd August, 2021 against the judgment of the High Court dated 28th July, 2021. Having filed an appeal against the High Court judgment of 28th July, 2021, the Applicant's application to the Court of Appeal for referral of a question of interpretation pending the final determination of the substantive appeal was with proper legal reference to his grounds of appeal. The deposition that the High Court, prior to its final judgment, refused an earlier application on 6th January, 2021 for reference of article 94(2)(a) to the Supreme Court, is therefore not a material deposition upon which the application before the Court of Appeal turned. In our view, any alleged error of the Court of Appeal, on the fact or otherwise of the High Court, having earlier refused an application for reference of questions of interpretation, would be a minor, trifling error unmeritorious of our supervisory intervention. The maxim: ***diminis non curat lex*** is applicable in the exercise of our supervisory jurisdiction. Her Ladyship Wood JSC (as she then was) in

the case ***Republic v Court of Appeal, ex-parte Tsatsu Tsikata [2005-2006] SCGLR 612***, puts the above principle as follows:

> *"...**A minor, trifling, inconsequential or unimportant error which does not go to the core or root of the decision complained of, or stated differently, on which the decision does not turn would not attract the court's supervisory jurisdiction**"*

It is our considered opinion that the ruling which is the subject matter of this present application did not turn on whether or not the High Court had earlier on 6th January, 2021 dismissed a similar application by the Applicant for the referral of an alleged question of interpretation to the Supreme Court.

Again, the contention by the Applicant in this application that the Court of Appeal was seised with the appeal, at the time of the application is not borne by the record before us. We have not sighted the evidence of the issuance of the Civil Form 6, which is the evidence, per Rule 21of the Court of Appeal Rules (C.I. 19) of the transmission of the Record of Appeal. Quite strangely, the Applicant, who avers before us that the Record of Appeal had at the time of the Application to the Court of Appeal, been transmitted, failed to exhibit a copy of the Form 6 to demonstrate the veracity of the averment.

In the case of ***Republic v High Court, (Human Rights Division), Accra, Ex-parte Akita [2010] SCGLR 374,*** the Supreme Court had occasion to pronounce on when the jurisdiction of the appellate court is invoked and noted thus:

*"It was well-settled that once the Civil Form 6 had been served on the trial High Court, that court no longer had jurisdiction over the case. At that point of the proceedings, the court with the appropriate jurisdiction would be the Court of Appeal. Since there was no doubt that the*

*Form 6 had been served on the trial court, that should have effectively ended its jurisdiction. The rule was not intended to prolong the jurisdiction of the trial Court which had been curtailed by the service of Form 6,* ***Republic v High Court; Ex-parte Evangelical Presbyterian Church of Ghana [1991] 1 GLR 323, SC****; and* ***Shardey v Adamtey; Shardey v Martey (Consolidated) [1972] 2 GLR 380, CA*** *cited."*

Ansah JSC concurring on the effect of rule 21 of CI 19 stated as follow. *"By this rule, i.e. rule 21, the High Court retains jurisdiction when the record is not ready for transmission or has for any reason not been transmitted to the Court of Appeal, with the corollary that as soon as it has been transmitted to the Court of Appeal, then its jurisdiction to entertain any application is curtailed except that whatever is meant for the Court of Appeal but was filed in the High Court must be forwarded to the latter court."*

See also, the judgment of this Court dated 22nd February, 2022 in Suit No.: J4/19/2016 entitled: **Broni and Another Vrs Kwakye and Others per** His Lordship Dotse JSC

The service of Civil Form 6is only evidence of the transmission of the Record of Appeal to the Registry of the Court of Appeal. It connotes the juncture of severance of jurisdiction on the appealed decision from the High Court. Service of Civil Form 6is not symmetrical to the empanelment of judges to hear the Appeal.

In any case, assuming without admitting that the Record of Appeal had indeed been transmitted to the Registry of the Court of Appeal, it would be presumptuous to contend that the panel constituted for hearing interlocutory applications before the Court of Appeal would be the same panel that would be constituted to determine the substantive appeal, for which reason even if the record of Appeal has been transmitted, the panel of judges who hears interlocutory matters would have

foreknowledge of entire record of appeal and be seised with the matters therein. It is therefore an unfair attack on the justices of the Court of Appeal to say that they were seised with the entire record of appeal and yet held the application 'premature'.

Moreover, when a party files an application, the rules enjoin him or her to, in appropriate cases, add a supporting affidavit duly sworn to on oath. He or she may attach all relevant documents on which he relies to the affidavit. The practice has evolved where Applicants indicate in their affidavit in support that they shall seek leave to refer to relevant documents already before the Court. This serves as sufficient notice to the opposing party or his counsel as well as the Court that the scope of the application may involve some other processes which counsel may seek leave to refer to while on his or her feet. Where an indication is given, that certain processes may be referred to, such processes do not become part of the proceedings of the day unless leave is actually sought, and the processes referred to in the course of moving the application. Every application is determined on the strength of the motion paper, supporting affidavit and documents annexed thereto. A court of law cannot act in aid of a party in our adversarial system of justice, by fishing for documents or introducing documents to support a party's case against his adversary. That would be tantamount to an "unbiased umpire" descending into the arena of conflict. It is therefore preposterous, to say the least, to suggest that if only the Court of Appeal had *suo motu* made references to a Record of Appeal which had been remitted to the Registry of the Court of Appeal, the Court would have been armed with enough documents substantiating an application and therefore grant same. We think this is an unjustifiable proposition which would amount to the Court embarking on fishing, *suo motto*, to supplement insufficiencies of an Applicant's case by bringing into consideration matters which are neither a part of the record before the Court, nor in respect of which leave has been granted to an applicant to refer to.

In the instant case, even if it can be said that the Court of Appeal was seized with the substantive appeal, we do not find that the Record of Appeal was before the Court in this application and moreover that leave was sought and granted to the Applicant to refer to any specific portion of the Record of Appeal to justify same to be said to be part of the proceedings for the application. From the record before us, no leave was sought to, and specific reference made to portions of the Record of Appeal. Therefore, the Court of Appeal was neither obligated nor reasonably expected to look for such portions of the Record in the interest of justice.

It has also been contended that Counsel for the Applicant sought leave of the Court of Appeal to refer to the judgment of the High Court in his submissions before the Court of Appeal which said judgment was part of the Record of Appeal, hence the Court of Appeal erred in holding that the Applicant failed to attach a copy of the judgment of the High Court. Fortunately, the Applicant attached the record of proceedings of the Court of Appeal for the 19th November, 2021 when the application was moved to the instant application as "Exhibit D". Nothing stops us from making an independent assessment of the Record of Proceedings to ascertain whether the said judgment was introduced to the proceedings of the Court of Appeal in a manner that the Court of Appeal may be said to have had sufficient knowledge or access to same.

From Exhibit D, it is apparent that counsel for the Applicant made reference to page 55 of the judgment of the High Court in his submissions before the Court of Appeal. However, the judgement was not a part of the processes filed and the record does not bear out the contention that leave leave was sought and granted to refer to same. The

record also does not bear out any indication that after the improper reference to the said judgment without the leave of the Court, a copy was provided to the Court.

The Applicant has also contended that, Article 130 of the Constitution does not require an appeal to be ripe for hearing before the Court of Appeal refers matters for constitutional interpretation to the Supreme Court. For a clearer analysis of the said contention, we wish to state the relevant provisions of the Constitution on reference to the Supreme Court for interpretation.

Article 130 of the Constitution States as follows:

130. ORIGINAL JURISDICTION OF 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; and

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

2. Where an issue that relates to a matter or question referred to in clause (1) of this article arises in any proceedings in a court other than the Supreme Court, that court shall stay the proceedings and refer the question of law involved to

the Supreme Court for determination; and the court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court."

This Court has, in the case of **Republic vrs. Maikankan (1971) 2 GLR 473**, held that it is only where in the determination of a claim before the lower court, there arises a real and genuine issue of interpretation, that the lower Court is obliged to stay proceedings and refer the said constitutional issue to the Supreme Court for determination.

At page 31 of his book, **"Reflections on the Supreme Court of Ghana",** the eminent Date-Bah JSC, quoted, with approval, the judgment of Justice Acquah in **Adumoah II vrs. Adu Twum II [2000]SCGLR 165 at page 167** where he said: "the original jurisdiction vested in the Supreme Court under article 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.***"

Because of the tendency of abuse of the reference jurisdiction of this Court, it is not in every case of an "alleged interpretative issue" that a lower court must stay proceedings and refer the alleged interpretative issue for determination. The Court must ascertain whether from the pleadings of the parties and the issues joined for determination in the suit, a genuine and real issue of interpretation of a provision of the Constitution arises.

To be able to determine whether the prayer for reference for interpretation is genuine, the Court must examine the pleadings of the parties as well as the issues

arising in the case. In the instant case, the Court of Appeal cannot be faulted for holding that the motion paper and bare 12 paragraph affidavit in support did not provide the Court of Appeal sufficient basis to make a proper determination whether a real and genuine case of interpretation arises.

Applicant has referred us to the decisions of this court in Republic v. High Court (Commercial Division), Accra; Ex Parte Attorney-General (Balkan Energy Ghana Ltd & Others Interested Parties)[2011] 2 SCGLR 1183 and Republic v. High Court (General Jurisdiction 6) Accra; Ex parte Zanetor Rawlings [2015-2016] 1 SCGLR 53, and contended that the ruling of Court of Appeal is per incuriam the two cases under reference. The Applicant's contention that the ruling is per incuriam the decision in the above cases was argued by the Applicant as follows:

"In the Balkan Energy case, the Supreme Court held that the failure by both the High Court and the Court of Appeal to refer the issue of the interpretation of article 181(5) of the Constitution to the Supreme Court was an error which led to the decisions of those lower courts being quashed. Referring to the failure of the High Court to make the reference to the Supreme Court, Sophia Akuffo JSC (as she then was) said at page 1191: "the learned judge usurped the jurisdiction of this court and breached the 1992 Constitution". In Republic v. High Court (General Jurisdiction 6) Accra; Ex parte Zanetor Rawlings [2015-2016] 1 SCGLR 53 the Supreme Court reversed the refusal of a High Court to refer the interpretation of article 94(1)(a) of the Constitution to the Supreme Court and made a reference to itself of the matter that arose for interpretation, namely article 94(1) of the Constitution."

The Applicant therefore prayed for this Court to refer the matter for interpretation of article 94(2)(a) of the Constitution to itself.

What the Applicant ignores in respect of the Balkan and the Ex Parte Zenator cases is that, these two cases did not postulate an automatic, uncensored reference to this Court of alleged questions of interpretation anytime a matter of constitutional interpretation is alleged to have arisen in a pending case before the lower court.

The Court in the Balkan Case recited the admonishment of the Court in the case of the Republic v. High Court (Fast Track Division) Accra, Ex Parte Electoral Commission (Mettle-Nunoo and others: Interested Parties)[2005-2006] SCGLR, 514 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."

In the instant case, the Court of Appeal did not rule that article 94(2)(a) of the Constitution does not give rise to any real or genuine issue of interpretation. It held that the processes before it were scanty and therefore the Court was unable to determine whether a real and genuine issue of interpretation arose in the appeal. We do not think such a stance can be regarded as an error of law apparent on the face of the record.

For purposes of academic exercise, let us imagine that indeed, the justices of the Court of Appeal were seised with the entire record of appeal and thus the statement on the failure of the Applicant to attach the relevant substantiating documents, were erroneous statements of facts, even then, we cannot lose sight of the other

fundamental ground that the Court of Appeal based its decision on, in dismissing the application.

That is, the fact that the Applicant by the said application was seeking a grant of the ground "e" of the grounds of appeal by way of interlocutory application. The concern of the Court of Appeal that the gravamen of the application for reference under article 130(2) and stay of proceedings being substantially the same as ground (e) of the appeal in the substantive appeal before the Court of Appeal, the grant of the application would overreach the said ground of appeal and render same otiose, is a genuine one. We do not think this is an error of law patent on the face of the record. The record rather bears truth of the remarks of the Court of Appeal.

It has been urged on us that, article 130 of the Constitution beckons referrals when a question or matter of constitutional interpretation ***"arises in any proceedings in a court other that the Supreme Court***..." Thus, the Court of Appeal ought to have referred to the matter to this Court for interpretation.

However, Article 130 does not impose a command that an automatic and unexamined referral be made at every mention or allegation of an interpretative issue in proceedings. Indeed, Article 130 enjoins an implied duty on the Court to ascertain whether having regard to the proceedings before it, a real and genuine question of interpretation arises to warrant a reference to the Supreme Court.

The duty imposed under article 130 (2) cannot be subordinated to the opinion or contentions of litigants. Even though other Courts are admonished to be more inclined to refer than not, they must still nevertheless reach an informed and judicious opinion whether an interpretative issue is evident before a referral to this

Court. In this regard, a mere agreement or consensus by parties that an interpretative issue arises in proceedings, should not of itself warrant and automatic referral to this Court or even by this Court to itself.

In the circumstances of this case, the Court of Appeal in ascertaining whether such an issue for interpretation is evident in the proceedings, was understandably disabled when it was not furnished with the Record of Appeal and consequently was right in its conclusion that the application for referral was premature.

In any event, in our preliminary comment, we have alluded to the pendency of a Suit No. J1/11/2022 between the same parties wherein an interpretation of article 94(2)(a) is sought among other reliefs. Having regard to terms of Rule 67 of the Supreme Court Civil Procedure Rules, C.I 16 which regulates the exercise of our jurisdiction in respect of references to this Court, we are of the considered opinion that this writ presents a more convenient and procedurally proper context for the adjudication of the issues that are entailed in the reference sought in this application. We see no reasonable exercise of our discretion under article 132 to make a referral unto ourselves in respect of a matter that is already the subject matter of a writ invoking our exclusive original jurisdiction under article 130 and between the same parties. Consequently, we are of the opinion that the issues in controversy in this application are already before this Court in a more appropriate form and it is therefore unnecessary, if not an abuse of process and time, to exercise our discretion and refer unto ourselves the very same issues that are the subject matter of Suit No. J1/11/2022 aforesaid, as prayed by the Applicant.

Further, we are of the considered opinion that the Court of Appeal was right when it concluded that at the stage in the proceedings when the application for referral was made to it, the entire record of appeal and the full facts that will assist the Court reach

an "informed opinion as to whether or not a real and genuine issue for constitutional interpretation arises in the appeal to enable them make a reference to the Supreme Court under the provisions of article 130(2) of the Constitution. We therefore find no justifiable reason to stay the proceedings in the Court of Appeal and to refer the issue of interpretation of article 94(2)(a) to this Court as prayed by the Applicant.

In conclusion, having carefully read and considered all the processes filed in this suit as well as submissions made by counsel for both the Applicant and the 1st Interested Party herein, it is our considered opinion that on the totality of the circumstances of this case, the Applicant has failed to demonstrate to this Court that the Court of Appeal in its ruling dated 13th December, 2021 committed any fundamental errors patent on the face of the record to warrant the exercise of our supervisory jurisdiction. The application is therefore unmeritorious and accordingly fails in its entirety.

**E. YONNY KULENDI**

**(JUSTICE OF THE SUPREME COURT)**

**TORKORNOO (MRS.) JSC:-**

I have had the opportunity to gratefully read the detailed rulings of my brother Kulendi and sister Dordzie JJSC. I agree to the reasons given for and the conclusions reached by both of them that the application for certiorari must be dismissed on the clear foundational premise that there were no fundamental errors of law in the 13th December 2021 ruling of the Court of Appeal, Cape-Coast. Neither was the decision per incuriam Rule 21 of the Court of Appeal Rules 1997 CI 19 or the Supreme Court decisions in **Republic v. High Court (Commercial Division), Accra; Ex Parte Attorney-General (Balkan Energy Ghana Ltd & others Interested Parties**) [2011] 2 SCGLR 1183 and

**Republic v High Court (General Jurisdiction 6) Accra; Ex parte Zenator Rawlings** [2015-2016] 1 SCGLR 53 as urged by Counsel for Applicant before us.

This opinion speaks to the second part of the application praying for stay of proceedings in the Court of Appeal, Cape Coast and for the reference to the Supreme Court for interpretation and enforcement of Article 94 (2) (a) of the 1992 Constitution. The opinion of my distinguished sister is that for the expeditious disposal of the question of interpretation which arose before the trial court but was not addressed and for the fact that both parties are ad idem on referring the question of the true meaning of article 94 (2) (a) of the 1992 Constitution to the Supreme Court for interpretation, the second leg of the applicant's relief is appropriate and so should be granted by this court. I must differ from this position for stated reasons.

**The Question for Reference**

**Is there a proper question to be referred for interpretation and enforcement arising from the record before us?**

I do not think so at all. The question that applicant wants this court to refer to itself to resolve is one that he urges arose from his oral arguments before the Court of Appeal. And that question is found in the certified true copy of the proceedings of 19th November 2021 before the court of appeal – the Respondent before us. These questions can be found in these words:

'It is our submission that the matters that arise for interpretation in respect of Art 94 {2} {a} are at the minimum the following

*{1} Whether the provision means it is the time the person is about to take the oath of allegiance as a member of parliament or when the person is declared as elected member of parliament or*

*whatever other time the Supreme Court determines is the operative time when the issue of allegiance has to be referred to*

*{2} Whether the determination of owing allegiance to a country other than Ghana requires reference to the law of that country other than Ghana to which it is claimed allegiance is owned (sic)*

*{3} Whether the question of owing allegiance to other country requires proof of facts showing allegiance to that other country*

My humble view is that these are not questions that this court can adopt as proper questions for interpretation of the constitutional provision. The questions are pregnant with different proposed premises, and present no concrete position by the Applicant himself on what the interpretation of Article 94 (2) (a) ought to be.

My view is that what constitutes sole allegiance to Ghana is a matter that must take critical nascence from a firm position taken by the Applicant which contradicts that taken by the Interested Party before the court, or that assumed by the trial judge, from the Judgement in issue. There must be a position on the proper import of Article 94 (2) (a) and a background case properly stated which allows this Court to set down for determination the required evaluation for interpretation and enforcement of the relevant constitutional, in this case Article 94 (2) (a). Without these positions, derived from either the record from the courts below, or the question as couched by the person or court referring the issue to this court, it is indeed inappropriate to submit that a reference for interpretation and enforcement of Article 94 (2) (a) arose out of the proceedings before the Court of Appeal that is the record before us.

**Questions of Fact and Issues of Law**

It will be noticed that Applicant's counsel faults the decision of the High Court on the ground that the court should have taken evidence and not determined the case on the basis that the facts of the case were uncontested. In the first ground of appeal before the Court of Appeal and Respondent herein, Applicant urges that the particulars of error of law arising out of the High Court decision include the violation of Section 1 (2) of (the Evidence Act) Act 323 which makes the determination of foreign law a question of fact to be proved by the leading of evidence. Applicant went on to state as part of the particulars of error of law that the High Court did not allow for proof of foreign law in the determination of the issue of whether or not the Applicant before us owed allegiance to a country other than Ghana. My understanding of these submissions is that the Applicant counsel is urging that there is a need to settle questions of facts and issues of law relating to the Applicant as part of the proper interpretation and enforcement of Article 94 (2) (a).

This second situation is why this application before us is not a proper vehicle for allowing a reference to this court of the craft of the constitutional interpretative question that Applicant counsel points out as having arisen from the oral arguments before the Court of Appeal sitting in cape-coast.

**Procedural Rules**

Procedural rules are set out by the Supreme Court Rules 1996 CI 16 on how references of constitutional matters by the lower courts to the Supreme Court ought to be supported. Rule 67 of C.I. 16 provides:

**PART VII – REFERENCES TO THE COURT**

*" 67 (1) A reference to the Court for the determination of any question, cause or matter pursuant to any provision of the Constitution or of any other law shall be 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) of this rule shall contain-*

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

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

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

*(d) any findings of fact relevant to the matter or question referred to the court*

*(e) the arguments of counsel, if any;*

*(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 a decision of the action, where the reference is made under clause(2) of article 130 of the Constitution."*

(emphasis mine)

The submissions of Counsel for Applicant examined in the evaluations above, reinforce why Rule 67 is a clearly well thought out rule to provide guidance not only to the lower court that makes a reference to this court for the interpretation and enforcement of a

Constitutional provision, but also to this Court on the critical material required to properly conduct that interpretation and enforcement function.

Indeed, the records before us inform us that a Writ has been issued in this court as an originating proceeding to compel an interpretation and enforcement of Article 94 (2) (a). If Applicant's urgings of the need for determination of questions of fact and issues of law are to be acceded to, such an originating proceeding would allow the statement of the competing cases of parties and the submission of affidavit evidence to assist in the resolution of whatever craft that the Court accepts the question for interpretation to be. Clearly, Rule 67 was crafted to ensure that whether or not a lower court does a reference or this court refers a constitutional interpretation question to itself on consideration of an application, it does so with the full record of the background material needed to settle not only the interpretative but also the enforcement duties of the court. For the above reasons, my considered view is that this court ought to exercise its discretion to dismiss rather than grant that second prayer, and allow the court constituted to address the Writ in question to determine the issue in controversy. I dismiss the application in entirety.

**G. TORKORNOO (MRS.)**

**(JUSTICE OF THE SUPREME COURT)**

**C. J. HONYENUGA**

**(JUSTICE OF THE SUPREME COURT)**

**DISSENTING OPINION**

**DORDZIE (MRS.) JSC:-**

**FACTS**

In the presidential and Parliamentary elections held in this country in December 2020 the applicant herein James Gyakye Quayson was elected as a Member of Parliament representing Assin North Constituency. On 30thDecember 2020, the 1stInterested Party herein filed a petition in the High Court Cape Coast challenging the validity of the applicant's selection as a member of parliament. On 28th July 2021, the High Court Cape Coast upheld the petition and declared his election null and void. The court further granted an order restraining the applicant from holding himself out as a member of parliament. The applicant aggrieved by the decision appealed against it in the Court of Appeal Cape Coast. The notice of Appeal is dated 30th July 2021. Subsequently on the 2nd of November 2021, the applicant filed a motion before the Court of Appeal Cape Coast praying the court to stay proceeding before it, and refer a constitutional question, which has arisen in the matter to the Supreme Court for interpretation. In a ruling dated 13th December 2021, The Court of Appeal refused the application. The said ruling is the subject matter of this application.

**The nature of the application**

Per a motion filed on the 21st of January 2022, the applicant invoked the supervisory jurisdiction of this court under Article 132 of the 1992 Constitution and Rule 61 (1) of the Supreme Court Rules, 1996 C. I. 16 as amended by C. I. 24. Seeking two prayers. 1) An order of certiorari to quash the ruling of the Court of Appeal dated 13th December 2021 and 2) An order staying the proceedings in the Court of Appeal Cape Coast in respect of the pending appeal; and the Supreme Court refer to itself the interpretation

and enforcement of Article 94 (2) (a) of the 1992 Constitution. The applicant prayed for any further or other orders and directions for the purpose of the court enforcing or securing the enforcement of its supervisory power.

**The grounds for the application**

The grounds for the application are set out as follows:

(a) The Court of Appeal fundamentally erred in law in not appreciating that Article 130 of the Constitution required any matter relating to the enforcement or interpretation of the Constitution that "arises in any proceedings in a court other than the Supreme Court" to be referred to the Supreme Court for determination and in, therefore not referring article 94(2) (a) of the Constitution to the Supreme Court for interpretation and enforcement.

(b) The Court of Appeal fundamentally erred in law in basing its decision on the premise that the appeal itself is not ripe for hearing when Article 130 of the Constitution does not require such a premise;

(c) The ruling of the Court of Appeal was per *incuriam* the Supreme Court decisions in **Republic v. High Court (Commercial Division), Accra; Ex Parte Attorney-General (Balkan Energy Ghana Ltd & others Interested Parties**) [2011] 2 SCGLR 1183 and **Republic v High Court (General Jurisdiction 6) Accra; Ex parte Zenator Rawlings** [2015-2016] 1 SCGLR 53;

(d) The ruling of the Court of Appeal was per *incuriam* Rule 21 of the Court of Appeal Rules, 1997 (C. I 19);

(e) The Court of Appeal fundamentally erred in law in determining that the application for stay of proceedings and reference to the Supreme Court for interpretation and enforcement of Article 94(2)(a) of the Constitution was "premature and ill-founded";

(f) The Court of Appeal fundamentally erred in resting its decision on the fact that the application to stay proceedings and refer the matter to the Supreme Court did not have the judgment of the lower court attached to it when, at the hearing of the application, the Court of Appeal granted leave to Counsel for the Appellant to refer to, and quote passages from, the impugned judgment of the High Court which was part of the Record of Appeal that the Court of Appeal was seized with; and

(g) The Court fundamentally erred in law in deciding that the deposition in the affidavit of the Applicant, that on 6th January 2021 the trial court had refused an application to refer the matter of the interpretation of Article 94 (2) to the Supreme Court, was not substantiated when the said deposition was not challenged by the respondents to the application and is clear from the Record of Appeal which the Court of Appeal was already seized with.

The impugned ruling of the Court of Appeal, Cape Coast is exhibited with the application as exhibit F. For clarity I will quote the relevant portions of the ruling that embody the reasoning of the Court of Appeal which led to the refusal of the application

*"We have carefully reviewed the processes filed in support of the instant application brought under the provisions of Article 130 (2) of the 1992 Constitution for stay of proceedings and a reference to the Supreme Court for constitutional interpretation of Article 94(2) (a) of the 1992*

*Constitution. We have also given thoughtful consideration to the oral submissions forcefully urged on us by the learned Counsel for the parties in this case.*

*We have no doubt that under the provisions of Article 130(2) of the Constitution, all lower courts before whom arises an issue for the interpretation and enforcement of a constitutional provision are required to stay proceedings and make a reference to the Supreme Court for that question of law to be determined.*
*Article 130 (2) provides 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 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"*

*Now it is not in doubt that the relevant proceedings with which we are concerned in this case relates principally to an appeal that has been filed against a judgment of the High Court, Cape Coast dated the 28th of July 2021.*

*However, even though we are informed that the record of appeal has been duly transmitted to this Court and Form 6 issued, the appeal itself does not appear to be ripe for hearing as Written Submissions have not been filed by the Parties nor has any scheduled date been fixed for the entire record of appeal itself to be placed before us for hearing.*

*At this stage of the proceedings therefore we cannot be fully acquainted with the full facts contained in the entire record of appeal to assist us make an informed opinion as to whether or not a real and genuine issue for constitutional interpretation arises in this appeal, to enable us*

*make a reference to the Supreme Court under the provisions of Article 130(2) of the Constitution.*

*Interestingly, even though the Applicant made reference to a Ruling dated the 6th of January, 2021 by which the trial court refused an application to refer the matter of interpretation of Article 94(2) (a) of the 1992 Constitution to the Supreme Court, the Applicant failed to substantiate this very material assertion with any processes from the record of proceedings before the lower court. The Applicant did not attach to this instant application, a copy of the said Ruling dated the 6th of January, 2021 nor even more importantly, a copy of the judgment of the trial court, the subject matter of this instant appeal.*

*It must be emphasized that cases like* ***Republic vrs. Maikankan (1971) 2 GLR 473,*** *insist that it is only where in the determination of a claim before the lower court, there arises a real and genuine issue of interpretation, that the lower court is obliged to stay proceedings and refer the said constitutional issue to the Supreme Court for determination.*

*Having regard however to the quite sketchy processes filed in this instant application, we fail to see how the Applicant expects this Court to make any proper determination as to whether any real and genuine issue for Constitutional interpretation was properly raised before the court below and whether the court below fell into error when it refused to make a reference under Article 130 (2) of the Constitution. "*

**Submissions for and against the application**

In the applicant's statement of case counsel for the applicant argued that the Court of Appeal breached Article 130(2) of the 1992 Constitution when it refused to refer the question of constitutional interpretation of article 94(2)(a) to the Supreme Court.
According to counsel, the Court of appeal erred fundamentally in so doing when it ignored submissions of counsel, drawing the court's attention to the High Court's refusal at the trial to refer the interpretation and enforcement of Article 94(2) (a) to the Supreme Court for its opinion. It is the appellant's contention that in the appeal pending before the Court of Appeal it had amply demonstrated that a constitutional issue had arisen. The moment the court's notice is drawn to the question of constitutional interpretation, it is obliged to stay proceedings and refer that question to the Supreme Court and not to embark on its own uncalled for path to refuse the application for referral. Counsel supported this argument with the case of ***Republic v High Court (Fast Track Division) Accra; Ex-parte Electoral Commission (Mettle-Nunoo & Others Interested parties).***

It is a further submission in support of the application that the ruling was per incuriam the following decisions of the Supreme Court: ***Republic v High Court (Commercial Division), Accra Ex-Parte Attorney General (Balkan Energy Ghana Ltd & Others Interested Parties) [2011]2 SCGLR 1183 and Republic v High Court (General Jurisdiction 6)Accra; Ex-Parte Zanetor Rawlings [2015-2016]1 SCGLR 53***.

In a further argument that the decision is per incuriam counsel argued that the Court of Appeal overlooked its own rule of procedure, that is, Rule ***21 of the Court of Appeal Rules, 1997 C. I. 19.***At the time of the application and the impugned ruling, the record of Appeal was forwarded to the Court of Appeal from the High Court and Form 6 was issued. That means the court was seized with the appeal, therefore, the application for reference was properly brought before it.

In answer to the above submissions, counsel for the Interested party made reference to several decisions of this court on circumstances the court would grant an application for certiorari, and argued that the discretionary jurisdiction of the Supreme Court is exercised in the grant of certiorari applications only in circumstances where there is patent error of law on the face of the record. The error must go to the root of jurisdiction. Where the lower court acted within its jurisdiction the remedy available to an aggrieved party is appeal. Counsel argued that the present application is based on counsel for the applicant's misconception of the relevant Rules of procedure regulating appeals to the Court of appeal. Particularly Rules 21 and 20 of C. I. 19 as amended. Counsel concluded that the Court of Appeal committed no error when it ruled that the appeal record was not before the court therefore the application for referral was premature. Counsel urged the court to dismiss the application for the grant of an order of certiorari. Counsel however did not address the second leg of the application, which requested the court to stay the proceedings before the Court of appeal and refer the constitutional question to itself for interpretation.

Counsel however submitted that the 1st interested party had issued a writ in this court in which it is seeking among other reliefs, interpretation of Article 94 (2) (a) of the 1992 Constitution. The writ has been annexed to their affidavit in opposition as exhibit MAN4.

**Issues to be determined**

The issues I have identified are two

1) Whether the Court of Appeal committed errors in its ruling dated 13th December 2021 that warrant the grant of certiorari to quash same.

2) Whether this court can in the circumstance of this case make a referral of the constitutional question of interpretation of Article 94 (2) (a) of the 1992 Constitution to itself

The error the Court of Appeal is alleged to have committed is that it refused to refer a constitutional question to the Supreme Court for determination, in so doing it breached article 130 (2) of the constitution, not only that, it also failed to follow previous decisions of the Supreme Court that are binding on it.

Article 130 of the 1992 Constitution provides as follows:

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

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

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

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

The Court of Appeal, in its ruling the subject matter of this application, admitted the obligation placed on it by article 130 (2) quoted above. The court's reasoning in the

ruling in question, I have quoted above. The situation the court faced which it stated for not granting the application is that though the appeal had been lodged in the registry of the court and the form 6 served, the appeal was not ripe for hearing, the judges had no access to the record of appeal and therefore were not in a position to make a referral of a constitutional question. Rule 20 of C. I. 19 as amended by C. I. 25 makes the position clear. It reads ***"(1) An appellant shall within 21 days of being notified in Form 6 set out in Part I of the Schedule that the record is ready, or within such time as the Court may upon terms direct, file with the Registrar a written submission of his case based on the grounds of appeal set out in the notice of appeal and such other grounds of appeal as he may file***."

***(2) Where the appellant does not file the statement of his case in accordance with sub rule (1), the Registrar shall certify the failure to the Court by a certificate as in Form 11A in Part I of the Schedule and the Court may upon that order the appeal to be struck out.***

It is clear from the above provisions that the service of Form 6 is notice to the parties that the record of appeal is ready. What follows is filing of written submissions. It is only after the requirement in Rule 20 are completed that the appeal is listed and the record placed before the judges.

Sight must not be lost of the fact that referral of constitutional matters by the lower courts to the Supreme Court as provided by Article 130 of the Constitution has procedural rules provided in C. I. 16. A lower court making a referral must comply with the procedure provided in Rule 67 of C.I. 16

***Rule 67 of C. I. 16 provides***

*"(1) A reference to the Court for the determination of any question, cause or matter pursuant to any provision of the Constitution or of any other law shall be 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) of this rule shall contain-*

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

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

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

*(d) any findings of fact relevant to the matter or question referred to the court*

*(e) the arguments of counsel, if any;*

*(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 a decision of the action, where the reference is made under clause(2) of article 130 of the Constitution*."

In view of the above provisions of the Rules of this court, the Court of Appeal would not be in a position to fulfil the procedural requirements in making reference to the Supreme Court without access to the record of appeal. The argument by counsel for the applicant that once he had made reference to the issue of constitutional interpretation in the High Court, the appellate court should have acted without access to the record of

appeal is not in place. That argument lost sight of the procedure that the court ought to follow as stipulated by Rule 67 of C. I. 16. The Court of Appeal committed no error when it held that the timing of the application before it was premature.

On the issue that the ruling in question was made per incuriam certain decisions of this court, I hold the opinion that the decisions in those cases can be distinguished from the present case before us.

In the case of ***Republic v High Court (Fast Track Division) Accra; Ex-Parte Electoral Commission (Mettle-Nunoo & Others Interested Parties) [2005-2006] SCGLR 514***for example, both parties at the hearing of the application in the trial court prayed that the issues set down for trial be referred to the Supreme Court under Article 130 (2) for interpretation. The trial judge refused this prayer and maintained that he would only consider referral after he was certain in his mind on the facts of the case to enable him formulate the referral accordingly. The trial judge decided that he would determine the issue as to whether there was the need to make a referral to the Supreme Court for interpretation of a constitutional question in the course of the trial. This court disagreed with the position taken by the trial court, and expressed its opinion on when it is appropriate for a trial court to make a reference of questions of enforcement or interpretation of the Constitution to the Supreme Court. This court per Professor Ocran JSC, in its majority decision held at page 555 of the report as follows ***"While article 130(2) does not use the phrase "immediate" referral, it does state that when an issue of interpretation arises in any proceedings the court concerned must make a referral to the Supreme Court. To the extent that the timing would be determined by the nature of the case or issues, and when it is raised, one cannot lay down a hard and fast rule. In that sense, the judge might be said to have a discretion in the matter. But it is certainly not a discretion to be exercised in a petulant fashion. It is not given to a trial court to say***

***in effect that it will make the referral in its own good time; or that it will make referrals only when it thinks it is worth the time and effort of the Supreme Court."***

In the case under consideration, the Court of Appeal did not refuse the application by the applicant for referral in an exercise of discretion, the situation the Court of Appeal faced simply, was that the procedural steps the appeal before it would take to come to fruition for hearing was not complete. Rule 20 of C. I. 19 had not been complied with, so the appeal had not been listed and the judges had no access to the appeal record. In such a circumstance, it was impossible for the court to fulfil the procedural conditions spelt out in Rule 67 of C. I. 16 to make a referral to the Supreme Court. No error can be attributed to the court when it declined the application in the circumstances.

In the case of ***Republic v High Court (General Jurisdiction 6) Accra; Ex Parte Zanetor Rawlings,*** the High Court declined to state a case to the Supreme Court for interpretation of article 94 (1) (a) of the 1992 constitution on the ground that the said article is clear and unambiguous, therefore, the court was merely called upon to apply it and was not obliged to make a reference to the Supreme Court for interpretation. This court held the High Court wrongly assumed jurisdiction to interpret article 94(1) (a) of the 1992 Constitution, the court therefore granted the application for certiorari to quash the ruling of the High Court. The court further suo motu referred the matter to itself for interpretation.

In the case of ***Republic v High Court (Commercial Division), Accra; Ex Parte Attorney-General (Balkan Energy Ghana Ltd. & Others Interested Parties)*** The High Court refused an application by the Attorney-General to refer the question of interpretation of article 181(5) of the 1992 Constitution for interpretation on grounds that) the issue of proper interpretation of article 181(5) of the Constitution had already been determined by the Supreme Court in the case of Attorney-General v Faroe Atlantic Co Ltd.[12005-

2006]SCGLR 271andb) There could not be any genuine controversy concerning the meaning of article 181(5) therefore there was no need for referring any question concerning its interpretation to the Supreme Court. This court distinguished its decision in the Attorney-General v Faroe Atlantic Co Ltd. case and held the High Court usurped the Supreme Court's exclusive interpretative jurisdiction.

It is obvious that the circumstances of these cases and the grounds that were relied on by the lower courts to refuse to make a reference to the constitutional questions that arose to the Supreme Court for interpretation are distinguishable from the case under consideration. Therefore, the applicant's submission that the impugned ruling was given per curiam the Ex-Parte Zanetor Rawlings case and the Balkan Energy cases is not well placed and I reject same.

I hold the view that the applicant herein has not made out a case for the grant of an order of certiorari. I would therefore dismiss that prayer.

The second issue I have identified relates to the applicant's second prayer. The issue is,whether this court can in the circumstance of this case make a referral of the constitutional question of interpretation of Article 94 (2)(a) of the 1992 Constitution to itself.

The Interested party in his statement of cases had stated that it had issued a writ in this court seeking among other things the interpretation of article 94(2) (a) of the 1992 Constitution. The said writ is exhibited with the affidavit in opposition. This means both parties are in agreement that the Supreme Court gives its interpretative opinion on article 94(2) (a) of the 1992 Constitution. It had been the position of this court in a good number of its previous decisions that the remedies the court can give in the exercise of its supervisory jurisdiction under article 132 of the 1992 Constitution is not limited to

the conventional prerogative writs but the court has power under the said article to issue orders and directions that will prevent illegalities, injustice and unnecessary delays in the administration of justice.

Thus in the Balkan Energy Co Ltd. case cited supra the court in holding (3) of the head notes of the report held that. ***"The remedies available to the Supreme Court, when exercising its supervisory jurisdiction under Article 132, were not limited to the issuing of the conventional writs of certiorari, mandamus, prohibition, etc. The court was also empowered under article 132 to issue orders and directions, as shall be necessary, to prevent illegalities, failure of justice and needless delays in the administration of justice, "for the purpose of enforcing or securing the enforcement" of the court's supervisory power. Additionally, the court would, in the exercise of its jurisdiction under article 129(4), which had vested in the Supreme Court a***ll ***the powers, authority and jurisdiction vested in any court established by [the] Constitution or any other law, to refer to itself, in order to expedite the determination of the constitutional issue at stake."***

For the expeditious disposal of the question of interpretation which arose before the trial court but was not addressed and for the fact that both parties are ad idem on referring the question of the true meaning of article 94 (2)(a) of the 1992 Constitution to the Supreme Court for interpretation; I find the 2nd leg of the applicant's relief to be appropriate and I would grant same. I would in the circumstances order that the hearing of the appeal pending before the Court of Appeal Cape Coast involving the parties herein be stayed and the Constitutional issue that arose, that is, the true and proper meaning of article 94 (2) (a) be referred to this court for interpretation.

**A. M. A. DORDZIE (MRS.)**

**(JUSTICE OF THE SUPREME COURT)**

**PWAMANG, JSC:-**

My Lords, I had the benefit of reading in draft the opinion to be read by my noble and celebrated sister, Dordzie, JSC and I agree completely with her reasoning and conclusion that, though certiorari is not an appropriate remedy in this case, a referral be made by this court to itself of article 94(2)(a) of the Constitution, 1992, for interpretation. Nonetheless, I wish to add a few words of my own in further justification of the conclusion.

My Lords, the applicant before us has an appeal pending in the Court of Appeal and he applied to that court by motion on notice to stay proceedings and make a referral to the Supreme Court of article 94(2)(a) of the Constitution, for interpretation. He made his application on the strength of article 130(1) & (2) of the Constitution, but the Court of Appeal dismissed the application so he is applying to us to quash the decision of the Court of Appeal by order of certiorari, stay the proceedings in the Court of Appeal and make a referral to ourselves.

**Article 130 (1) & (2) are as follows;**

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

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

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

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

The interested party has opposed the instant application and argues that the Court of Appeal did not err on any of the known grounds for certiorari so no case has been made for the invocation of the supervisory jurisdiction of the Supreme Court over the Court of Appeal in respect of its decision in this case. This argument is being made notwithstanding the fact that in a deposition by the interested party in his affidavit filed in opposition in this present application, he said that he has filed a writ in the Supreme Court invoking its original jurisdiction for the interpretation and enforcement of article 94(2)(a) of the Constitution, 1992.As will soon be noticed, the reliefs prayed for by this same interested party in the High Court were premised on his interpretation of the same article 94(2)(a) with the only difference being that in the case of his writ in the Supreme Court, he added to the declaratory reliefs the words "upon a true and proper interpretation of article 94(2)(a) of the Constitution, 1992". At the hearing of the application when counsel's attention was drawn to the point that in taking out a writ for interpretation of article 94(2)(a) his client admits that a genuine need for interpretation of the provision has arisen and therefore a referral ought to be made, his reaction was that the present application should be decided on its own merits. But, it appears to me that Counsel for the interested party has confined himself to the prayer

for certiorari by the applicant and failed to note that the motion paper before us states a second prayer of the applicant which is;

**"The Court will further be moved to stay proceedings in the said Court of Appeal, Cape Coast, in respect of the suit and to refer to itself the interpretation and enforcement of Article 94(2)(a) of the 1992 Constitution and to make any further or other orders and directions for the purpose of enforcing or securing the enforcement of its supervisory power."**

The position that has been taken here by counsel for the interested party which seeks to limit the court to a consideration of only the grounds for certiorari in the exercise of the supervisory jurisdiction of the Supreme Court in a case of this nature is similar to the stance that was taken by counsel who resisted the application for constitutional referral in the case of **Ex parte Electoral Commission (Mettle-Nunoo & Ors-Interested Parties)[2005-2006] SCGLR 514**. In disposing of a likewise argument, Prof Ocran, JSC said as follows at page 543 to 544 of the Report;

*"This is an application by the Electoral Commission, hereinafter called the applicant on motion to invoke the supervisory jurisdiction of the Supreme Court, praying for certain orders to be directed at the High Court (Fast Tract Division), Accra presided over by Mr Justice Victor Ofoe. In the application, we are asked to:*

*(i) stay further proceedings in the said High Court in the suit entitled Rojo Metttle-Nunoo and Two Others v. The Electoral Commission (Suit No. AP 4/2006) hereinafter referred to as the Mettle-Nunoo case); and*

*(ii) order the immediate referral to the Supreme Court, for constitutional interpretation, of the issues set down by the parties themselves in the said suit.*

*Article 132 of the 1992 Constitution is the basis of the invocation of our supervisory jurisdiction. The interested parties, the plaintiffs in the action pending in the High Court, under ground three of their statement of case,* ***apparently believe that this is a certiorari application. They therefore question not only the appropriateness of that writ in the context of this case, but also of the resort to supervisory jurisdiction in general.*** *I should state at the outset that while article 161 of the 1992 Constitution defines supervisory jurisdiction to include the traditional prerogative writs of habeas corpus, certiorari, mandamus, prohibition and quo warranto, that jurisdiction is, of course, wider than those writs viewed either separately or collectively. It enables us to intervene in proceedings to rectify procedural lapses that clog the proper administration of justice. As I explained in Republic; In re Appenteng (Decd); R v High Court, Accra, Ex parte Appenteng [2005-2006] SCGLR 18 at 23-24, delivering the unanimous ruling of the Supreme Court on 19 January 2005:*

***"…we as the Supreme Court do retain our supervisory jurisdiction over all and over any other adjudicatory authority, even when we decide that a particular order such as prohibition is not quite appropriate in a particular context.*** *And we need to reiterate that under section 5 of the Courts Act, 1993 (Act 459), the Supreme Court may issue such directions as may be required for the purpose of enforcing or securing the enforcement of this supervisory power.* ***Such directions may relate to such future course of action in a suit as appear best to secure a just and expeditious disposal of a case, including all matters which may not already have been dealt with'.***

***….I am satisfied that our jurisdiction is appropriately invoked in this matter and I will proceed to consider the merits of the case brought by the applicant. In so doing I will focus on the motion on notice and the supporting affidavits, the statements of case submitted by the applicant and the interested parties, and the ruling of the High Court…dated 14th February 2006."*** *(Emphasis supplied).*

Therefore, as explained by my sister Dordzie, JSC in her opinion, when it concerns article 130 matters, this court has always drawn on its wide powers under article 132 and not constrained itself within the customary limits of the writ of certiorari.

The interested party also argues that the Court of Appeal did not take a decision that there is no real question for constitutional interpretation in the case but only held that the timing was wrong for such an invitation to be made to them. He then submits that since the making of a referral of article 94(2)(a) is contained in one of the grounds of the appeal, this application ought not to be considered but wait until the Court of Appeal have heard the substantive appeal. The implication of this position is that, if the Court of Appeal at the hearing of the substantive appeal, which will be in the future, take a decision that they will not refer the case, then and only then would the applicant be justified to apply as he has done. This argument begs the question whether this court has jurisdiction to make a referral to itself of a question for interpretation or enforcement of the Constitution that is pending in another court or not. In the cases of **Republic v High Court, Accra; Ex parte Commission for Human Rights and Administrative Justice (Richard Anane Interested Party)[2007-2008] SCGLR 213** and **Republic v High Court (General Jurisdiction), Accra; Ex parte Zanetor Rawlings (Ashittey & National Democratic Congress-Interested Parties)(No.1) [2015-2016] 1 SCGLR 53**, the parties were in the Supreme Court on applications for certiorari, pure and simple, without any prayer for a referral to be made but in both cases the Supreme Court, on its own motion, made the referrals of the constitutional question to itself in order to expedite the determination of the meaning and effect of the provisions in contention. In this case, the applicant has specifically invoked our wide powers under article 132.

On account of the above reasons, which have been elaborately explained by my sister, Dordzie, JSC in her opinion, I am of the firm view that the applicant has appropriately invoked our supervisory jurisdiction and, taking a leaf from the opinion of Prof Ocran,

JSC in **Ex parte Electoral Commission (Mettle-Nunoo & Ors Interested Parties)** already quoted above, I shall proceed to consider the application on its own merits, as invited to do by counsel for the interested party, by examining the affidavits, the exhibits and statements of case of the parties, the judgment of the trial judge and the Notice of Appeal. These documents will reveal the nature of the case and the issues that are pending determination before the Court of Appeal such that if a real and genuine question for interpretation or enforcement of the Constitution arises, that will be evident.

The full facts giving rise to the case in the High Court are contained in Exhibit 'E' of the affidavit in support of the instant application. Exhibit 'E' is the judgment of the High Court, Cape Coast, delivered on 28th July, 2021 in the Election Petition by the interested party against the applicant. At pages 17 to 18 of the judgment the trial judge said that the facts are not disputed in any way and he captured them as follows;

"1. The 1st Respondent once held both Ghanaian and Canadian citizenship.

2. On 19th December 2019, Respondent through his lawyers wrote to the Canadian authorities to renounce his Canadian citizenship.

3. 1st Respondent has had his Canadian Citizenship since 1983 and received Permanent Residence in 1979 and had since worked as an Administrator in social studies.

4. Between 5th and 9th October 2020 when 2nd Respondent opened and closed nominations to contest the Parliamentary Elections, for the Assin North Constituency, 1st Respondent filed his nomination form with 2nd Respondent to contest as such.

5. Before the 7th December 2020 general elections organized by 2nd Respondent, a Youth Group known as Concerned Citizens of Assin North alleging that 1st Respondent owed allegiance to another country other than Ghana, presented a petition to 2nd Respondent on the grounds that he was not qualified to be a Member of Parliament.

8. 2nd Respondent in a letter dated 24th November 2020, requested 1st Respondent to respond to the petition.

9. On 26th November 2020, the Canadian authorities wrote to approve of 1st Respondent's renunciation of his Canadian citizenship.

10. 1st Respondent honoured 2nd Respondent's invitation regarding the petition written by the Youth Group of Assin North and presented the Certificate of Renunciation of his Canadian citizenship.

11. 1st Respondent contested the 2020 December 7th Parliamentary Elections conducted in the Assin North Constituency."

It is upon these facts that the interested party prayed for the following reliefs from the High Court;

**"a. a declaration that the filing of Parliamentary nomination forms by 1st Respondent when he held a Canadian Citizenship at the time of filing the said nomination form between 5th-9th October, 2020 violates Article 94 (2)(a) of the Constitution of the Republic of Ghana 1992, Section 9 (2)(a) of Representation of the People Act 1992 (PNDC 284) as Amended, as well as Public Elections Regulations, 2020 (C.I. 127) and same is illegal, void and of no effect whatsoever.**

**b. a declaration that the decision of the 2nd Respondent to clear the 1st Respondent to contest Parliamentary Elections in the Assin North Constituency when the 1st Respondent was not qualified as candidate on account of his holding dual nationality violates Article 94(2)(a) of the Constitution of the Republic of Ghana 1992, Section 9 (2)(a) of the Representation of the People Act 1992 (PNDCL 284) as Amended as well as the Public Elections Regulations, 2020 (C.I. 127) and same is void and of no effect whatsoever.**

**c. a declaration that the decision by the 2nd Respondent to allow the 1st Respondent to contest Parliamentary Election in the Assin North Constituency when he held a Canadian Citizenship at the time of filing his nomination form, violates Article 94**

**(2)(a) of the Constitution 1992, the Representation of People Act 1992, (PNDCL 284) as Amended, as well as Public Election Regulations, 2020 (C.I. 127) and same is illegal and of no effect whatsoever.**

**d. a declaration that 1st Respondent's election as Member of Parliament for the Assin North Constituency is null and void and of no effect whatsoever as same violates Article 94 (2)(a) of the Constitution of the Republic of Ghana 1992, Section 9 (2)(a) of the Representation of the People Act 1992, (PNDCL 284), as Amended, as well as the Public Elections Regulations, 2020 (C. I. 127) being laws regulating Parliamentary Elections in Ghana.**

**e. a declaration that 1st Respondent at the time of the Parliamentary Elections in the Assin North Constituency was not qualified to contest as a candidate for the Assin North Constituency in accordance with the electoral laws for the time being in force in Ghana.**

**f. An order of the Court cancelling the Parliamentary Elections in the Assin North Constituency and further Orders directed at 2nd Respondent to conduct fresh Elections in the Assin North Constituency.**

**g. An order of Perpetual injunction restraining 1st Respondent from holding himself out as Member of Parliament-Elect for the Assin North Constituency or presenting himself to be sworn in as a Member of Parliament."**

Article 94(2)(a) of the Constitution, 1992 is as follows;

**(2) A person shall not be qualified to be a member of Parliament if he -**

**(a) owes allegiance to a country other than Ghana:**

Clearly, in reliefs (a), (b) ,(c) and (d) above the interested party specifically alleged that the applicant and the Electoral Commission violated article 94(2)(a) of the Constitution, 1992 and prayed the High Court to make declarations to that effect. In his case in the High Court, the interested party took the view that "owes allegiance to a country other

than Ghana" under article 94(2)(a) of the Constitution means that you are a legal citizen of another country, such that even though the applicant had commenced the processes by which he would cease to be a Canadian citizen, since the Certificate of Renunciation had not been issued out by the Canadian authorities as at the time of filing his nomination forms, he still owed allegiance to that country. This is an interpretation of the constitutional provision that equates owing allegiance to a country other than Ghana to being a legal citizen of another country.

Another leg of the case of the interested party in the High Court was that the disqualification criteria under article 94(2)(a) kicks in at the time of filing nomination forms. At pages 7 to 8 of the judgment, the trial judge summed up that argument of the interested party in the following words;

"[The petitioner] contends that the process of becoming a Member of Parliament commences with the filing of nomination forms of a prospective candidate with the [EC] and terminates with [the] due election and swearing in of the elected candidate as a Member of Parliament. As a result, he argues that the requirement of section 9(2)(a) of PNDCL 284, supra, kicks in as soon as a person takes the first official step in the Parliamentary Election process by filling his or her nomination forms with [EC]."

But the applicant disputed the two interpretations placed on article 94(2)(a) by the interested party and proffered his interpretations, the first of which the trial judge recorded at page 9 of his judgment as follows;

"[The 1st Respondent] contends that owing allegiance to another country other than Ghana within the meaning of article 94(2)(a) of the 1992 Constitution does not and cannot mean that the person is [not] necessarily a dual citizen as the Petitioner seems to suggest and that if the framers of the 1992 Constitution intended that to be the case, they would have expressly stated so in article 94(2)(a). Therefore, to him, within the intendment of article 94(2)(a) of the 1992 Constitution, he is only required not to owe

allegiance to any other country other than Ghana which he did by disavowing his allegiance to Canada in 2019 prior to the commencement of the nomination process."

This contention by the applicant plainly challenges the interpretation put forward by the interested party of the phrase "owes allegiance to a country other than Ghana" in article 94(2)(a). Then at page 12 of his judgment the trial judge stated the response of the applicant to the interpretation by the interested party as to the time disqualification under article 94(2)(a) kicks in. He stated as follows;

"He [1st Respondent] avers that in any event, section 20(d) of PNDCL 284, as amended, expressly states that the election of a candidate be declared void on an election petition only if the court is satisfied that the candidate was not qualified for election at the time of his election and not at the time of his nomination. He referred to the Cambridge definition of the word 'election' as 'a time when people vote in order to choose someone for a political or official job'. He says nomination is also an act of officially suggesting someone or something for a job, position or prize. According to him, the grounds of cancelling results of Parliamentary Election or declaring same void are expressly and exhaustively provided by section 20(d) of PNDCL 284, supra."

By this, the view of the applicant was that the time the disqualification criteria ought to bite within the meaning of article 94(2)(a) is as at the date of the election and not the date of filing nomination forms as claimed by the interested party.

Now, for me, this is a typical **Ex parte Akosah** instance of parties placing rival meanings to a constitutional text. The High Court judge apparently took the view that the meaning of "owes allegiance to a country other than Ghana" is clear and unambiguous and that it is equivalent to saying that the person is a legal citizen of another country, whether in addition to or apart from Ghana. The applicant did not think so and the interested party too, at least, at this time, does not also think that the

phrase is unambiguous. (The interested party has called for the interpretation of the phrase by the Supreme Court by issuing a writ for that purpose). Additionally, it can be argued legitimately that, if the framers of the Constitution intended to disqualify non-citizens of Ghana unconditionally from becoming members of Ghana's Parliament, then they could have stated the provision using language similar to that used in article 266 of the Constitution. That article is headed "Ownership of Land by Non-Citizens" and states in clause 1 thereof as follows;

**"No interest in or right over any land in Ghana shall be created which vests in a person who is not a citizen of Ghana a freehold interest in any land in Ghana."**

So, an argument that where the framers of the Constitution meant a disqualification to operate on the basis of citizenship simpliciter they were express about it is a substantial point that the Supreme Court would need to take into account in determining what class of persons are targeted by article 94(2)(a). It ought not to be hastily presumed that "owes allegiance to a country other than Ghana" in the provision is clear and is synonymous with being a legal citizen of another country. It must be recognized that when article 94(2)(a) was drafted, the Constitution, 1992 contained the original article 8 that completely disallowed dual citizenship for Ghanaians. The original article 8 has since been amended and now dual citizenship is lawful. Does that change the meaning of "owes allegiance to a country other than Ghana" since by the canons of interpretation, the Constitution is to be interpreted as a whole with the amended Article 8 as part of it? These factors, for me, make the meaning of "owes allegiance to a country other than Ghana" in article 94(2)(a) of the Constitution imprecise and unclear.

As was advised by Prof Ocran, JSC in **Ex parte Electoral Commission (Mettle-Nunoo & Ors Interested Parties)** at page 559 of the Report;

*"… the trial court should not presume that 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 to 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."*

In **Ex parte Commission for Human Rights and Administrative Justice (Richard Anane Interested Party) (supra)**at page 238 of the Report, Wood, JSC in justification of the majority's decision to *suo motu* make a referral under article 130(2) of the Constitution said as follows;

*"In the instant case, I had little difficulty in concluding that the action at the High Court, raised genuine interpretative issue, given the nature of the action, the rival and irreconcilable interpretations placed on the crucial word "complaint" in terms of article 218(a) of the Constitution and the fact that also there is no prior judicial pronouncement by this court on the matter."*

In this case, the parties placed rival irreconcilable interpretations on the phrase "owes allegiance to a country other than Ghana" and further, there is no prior judicial interpretation of the phrase by the Supreme Court. In the meantime, article 94(2)(a) got mentioned after the parliamentary elections of 2008 under considerably different circumstances in the cases of **Sumaila Bielbiel (No 1) v Adamu Dramani & Attorney-General (No 1) [2011] 1 SCGLR 132** and **Adamu Dramani (No 2) v Sumaila Bielbiel (No 2) [2011] 2 SCGLR 853** but the Supreme Court did not get the opportunity to consider the scope and effect of the provision. In this case, the issue has arisen directly from the facts, the positions taken by the parties and the reliefs that were sought. It therefore surprises me that the interested party who is plaintiff in the constitutional case currently pending in the Supreme Court is opposing this application which seeks to achieve the same ends as his writ; an authoritative and binding interpretation of article 94(2)(a) by the Supreme Court.

In the circumstances of this case, until the meaning of "owes allegiance to a country other than Ghana" in terms of article 94(2)(a) is determined by the Supreme Court, either pursuant to a referral as is being prayed for by the applicant, or pursuant to the invocation of its original interpretative jurisdiction as has been done by the interested party, it would be highly inappropriate for the Court of Appeal to decide whether the applicant violated article 94(2)(a) of the Constitution or not and whether his election as MP ought to be cancelled. For this reason alone, there has to be a referral of the article to the Supreme Court for interpretation after which the Court of Appeal would determine the appeal in accordance with the interpretation.

The second issue that has arisen in the case concerning article 94(2)(a) is when does the disqualification in article 94(2)(a) bite? The Constitution does not provide time for the disqualification to operate, unlike it did with Article 266 of the Constitution where it is stated in plain words in clause (3) thereof that the disqualification bites from 22nd August, 1969. The contention of the interested party is that the provision bites at the time of filing nominations alleging that that was judicially decided by the Supreme Court in the case of **Republic v High Court, General Jurisdiction, Accra; Ex parte Zanetor Rawlings (Ashittey & National Democratic Congress Interested Parties)(No.2) [2015-2016] 1 SCGLR 92**. The trial judge appeared to buy into this claim and at page 55 of his judgment the judge also asserted as follows;

…article 94(2) of the Constitution has received judicial consideration and clarity by the Supreme Court which is by law, the highest court and the final court of Appeal in Ghana in Republic v High Court General Jurisdiction, Accra; Ex parte Zanetor Rawlings (Ashittey & National Democratic Congress Interested Parties), supra."

Again, at page 56 of his judgment he stated that;

"In the considered view of the court the answer to the issue as to whether the eligibility or qualification to become a member of parliament begins from the filing of nomination

forms with the 2nd respondent or at the time a person is elected and sworn in as such can be found in Ex parte Zanetor Rawling's case, supra. Why? It is the recent and authoritative decision by the Supreme Court on what point in time the eligibility or qualification criteria as set out in article 94(2)(a) of the 1992 Constitution come into play."

But, the provision in contention in this case is article 94**(2)**(a) and it is different from the provision interpreted by the Supreme Court in **Ex parte Zanetor Rawlings** which was article 94**(1)**(a). That provision is as follows;

**94(1) Subject to the provisions of this article, a person shall not be qualified to be a member of Parliament unless –**

**(a) he is a citizen of Ghana, has attained the age of twenty-one years and is a registered voter;**

In that case, the question that the Supreme Court referred to itself for constitutional interpretation was as follows;

**"When can it be properly said that a Ghanaian citizen is by reason of non-registration as a voter not qualified to be a Member of Parliament within article 94(1)(a) of the 1992 Constitution of Ghana?"**

That case concerned the internal parliamentary primaries of the National Democratic Congress (NDC) that were held well ahead of the opening of nominations for the national parliamentary elections. The party's constitution had incorporated the qualification and eligibility criteria in article 94(1)(a) of the national Constitution, 1992 as part of its conditions for a member to be permitted to contest in the parliamentary primaries within the party. The applicant contested in the primaries and defeated the 1st interested party to become the parliamentary candidate of the party for the Osu Constituency. But the 1st interested party sued in the High Court arguing that the applicant had not registered as a voter as at the time she contested the primaries so she

was not qualified to contest in the primaries by virtue of article 94(1)(a) of the 1992 Constitution of Ghana that had been made a part of the NDC Constitution. Since it was interpretation of the national Constitution that was in question, it had to be interpreted by the Supreme Court and not the High Court. So, when the case came before the Supreme Court on an application for certiorari, the court *suo motu* made the referral to itself for interpretation. At the hearing of the substantive case on the interpretation of article 92(1)(a), the 1st interested party contended that the time the qualification was to be met was at the time of the party primaries. The applicant on the other hand took the view that it was when nominations were opened by the Electoral Commission for the national elections. The Supreme Court answered the question as follows as stated at pages 104 to 105 of the Report;

*"Consequently, it is our view that the eligibility criteria set out in **Article 94(1)(a)** come into force only when a public election of a Member of Parliament has been declared by the Electoral Commission and it has set the time to file nominations. Thus a person who qualifies to enter Parliament must be a Ghanaian citizen, of twenty-one years or beyond and a registered voter as at the date he files his nomination papers within the time stipulated by the Electoral Commission for that particular election. That is the true intendment of **Article 94(1)(a)** of the Constitution; the eligibility criteria come alive from time to time when the Electoral Commission sets the date to file nominations for parliamentary elections."*

In the judgment the court was clear and specific that it was article **94(1)(a)** of the Constitution that was interpreted. This is plainly at variance with the assertions by the trial judge quoted above where he claimed that article 94**(2)(**a) of the Constitution had received judicial interpretation by the Supreme Court in Ex parte Zenator Rawlings. In fact, after the judge had made that assertion he decided at pages 56 to 57 of his judgment to quote directly what the Supreme Court actually said and he reproduced the above passage where the court repeatedly confined itself to article **94(1)(a)**. In apparent realisation that his position that article 94**(2)(**a) received judicial determination

in Ex parte Zenator Rawlings was not borne out by the passage he quoted, he made a sudden turn in his judgment and said as follows;

"***In effect, it can be said that the Supreme Court held that the applicability of article 94(2)(a) of the 1992 Constitution did not deprive the High Court of its jurisdiction.*** *The Court finds the argument coming from the 1st Respondent to the contrary absolutely shocking. The decision by the highest court and final court of appeal is coming from his own party backyard. It is therefore intriguing as to why he could not take the cure therefrom. This is a decision coming from the Supreme Court of Ghana. This court comparatively as a lower court as such has no option than to enforce same by reason of 'stare decisis' in this judgment."* (Emphasis supplied).

Regrettably, it is hard to understand what the trial judge meant by the above quoted passage because, while he talked of 'stare decisis', he no longer continued with his claim that the Supreme Court in Ex parte Zenator Rawlings had interpreted article 94**(2)(**a) of the Constitution as taking effect from the time of nominations and not the time of elections. Wrongfully alleging that "the Supreme Court held [in Ex parte Zenator] that the applicability of article 94(2)(a) of the 1992 Constitution did not deprive the High Court of its jurisdiction" is unfortunate because the Supreme Court never made any such inference in Ex parte Zenator Rawlings and the issue the judge was addressing in that part of his judgment was not the jurisdiction of the High Court but whether article 94(2)(a) had been interpreted by the Supreme Court to the effect that disqualification under the provision comes to live at the time of nominations and not elections. In the end, the judge did not directly express an opinion on the rival competing interpretations of when disqualification under article 94(2)(a) kicks in. We are only left to surmise from his final *'ex abuntanti cautela'* declaratory order (a) at pages 63 of his judgment that his conclusion was that the criteria kicks in at the time of nomination for he declared that;

"The filing of Parliamentary nominations forms by 1st Respondent when he held a Canadian Citizenship at the time of filing the said nomination forms between 5th-9th October, 2020 with 2nd Respondent violates article 94(2)(a) of the 1992 Constitution, section 9(2)(a) of PNDCL 284 and C.I.127."

The reasoning behind this conclusion was not explained since the judge appeared to have abandoned his assertion that the matter had received judicial pronouncement by the highest court of the land. If the trial judge reasoned that a principle deducible from Ex parte Zenator Rawlings is that all eligibility criteria in article 94 of the Constitution kicks in at the time of nominations and not time of elections, he did not say so and try to justify it. To leave it at the obviously inaccurate statement that article 94(2)(a) had been interpreted in Ex parte Zenator Rawlings when the issue of time of the national elections did not come up in that case is unsatisfactory. It appears to me that this abandonment of the issue of time for operation of article 94(2)(a) by the trial judge partly informed this new move by the interested party and his legal advisors in submitting the issue among others for definitive pronouncement by the Supreme Court.

In the midst of all this, it bears pointing out that the interpretation proffered by the applicant that the time the disqualification in article 94(2)(a) of the Constitution ought to bite should be the time of the election basing on section 20(1)(d) of the **Representation of the Peoples Act, 1992, (PNDCL 284)**raises a real and genuine point that ought to be considered by the Supreme Court. The provision is as follows;

**"20. Grounds for cancelling election results**

**(1) The election of a candidate shall be declared void on an election petition if the High Court is satisfied……or**

**(d) that the candidate was at the time of the election a person not qualified or a person disqualified for election."**

The ordinary meaning of this provision can arguably be said to be that the operative date of disqualification is the date of the election for if it was to be the date of nomination it could have been so stated. Now, it is important to observe that in section 9 of PNDCL 284, the qualification and eligibility criteria for members of parliament stated under article 94 of the Constitution is repeated as part of the Representation of the People Act. Besides section 20(1)(d) of PNDCL 284 which the applicant contends sets the operative date for qualification to be the date of the election, there is another legislation, **Public Elections Regulations, 2020 (C.I.127)** of which the interested party says has the effect of making qualification operative from the date of nominations. What this means is that when interpreting article 94 of the Constitution, the provisions of PNDCL 284 and C.I.127 would have to be considered in order that there is internal consistency and harmony in all these provisions which are *inpari materia.* See **Sallah v Attorney-General, Supreme Court unreported 20th April, 1970**. In fact, when the framers of the Constitution leave out the time line for a provision to operate, it is lawful for subsequent legislation to fill the gap. This was recognised by the court in Ex parte Zenator when it said as follows at page 103 of the Report;

*"At what point in time do the eligibility criteria come into play? As rightly observed by the lawyers herein, there is no time element in the provision for a person to satisfy the qualification criteria. The Constitution is a living document and because it is a brief expression of the aspirations of the people and also establishes key institutions of state, it cannot contain every conceivable matter.* ***Thus a lot of things are left to Parliament to legislate upon by Act of Parliament and in some cases other persons, both corporate and human, are allowed to fill in the gaps by subsidiary legislation.*** *Thus the Constitution does not leave the people in a state of helplessness when some element is missing in a constitutional provision.* ***It is our view that where time for doing an act is not provided for in the Constitution, as in the***

***instant, it is legitimate to have regard to other provisions of the Constitution or an Act of Parliament or Regulations made under the Constitution in order to address the question of time.*** *In the absence of any such legislation, the rules of equity cognizable under the common law could be applied under Article 11(2) of the Constitution."* (Emphasis supplied).

Despite this statement, the above relevant enactments, section 20(1)(d) of PNDCL 284 and C.I. 127 were not brought to the court's attention in Ex parte Zenator Rawlings and the court proceeded as if there were no relevant legislations touching on the issue. This may have been due to the fact that the dispute in that case focused on the times between internal party primaries and filing of nominations for national elections. Now they have been brought up in this case because the disputed times are filing nominations and holding of elections. So, apart from the fact that the Supreme Court has not previously pronounced on the time disqualification under article 94(2)(a) of the Constitution operates, it would be necessary that it should be given the opportunity to consider the effect of section 20(1)(d) of PNDCL 284 and C.I.127 in arriving at an interpretation of the general constitutional question on the time the disqualification criteria in article 94 ought to bite and to synchronise all the enactments on the question with the intention of the framers of the Constitution to be discerned by a holistic interpretation of article 94.

**In Republic v High Court (Commercial Division), Accra**; **Ex parte Attorney-General (Balkan Energy Ghana Ltd Interested Party) [2011] 2 SCGLR 1183** the trial High Court judge refused an application made under article 130(2) for a referral claiming that article 181(5) of the Constitution on international business transactions had already been interpreted by the Supreme Court in another case. The judge failed to realise that the set of facts that gave rise to the question about the meaning of "international business transaction" that the Supreme Court determined in the earlier case was different from the issues in contention in the subsequent case before him. At page 1191of the Report Sophia Akuffo, JSC explained as follows;

*"At the core of the Attorney General's application for referral lies the fact that, whilst in the abovementioned case of Attorney General v. Faroe Atlantic Company Limited, the agreement in question was between the Government of Ghana and a foreign company, in the matter before the High Court in Suit No. BDC 32/2010, the agreement in question was between the Government of Ghana and a company incorporated in Ghana but wholly owned by a foreign company and, as contended by the Attorney General, controlled by persons outside Ghana. Clearly, the parties were in disagreement as to whether, within the meaning of Article 181(5), the agreement was an international business transaction, and therefore should have been first laid before Parliament. In other words, the scope of a provision of the Constitution had come into contention and this necessitated further interpretation of article 181(5), to settle once and for all the question raised. In such circumstances, the best course of action (indeed the only lawful course of action), for the learned Judge, was to refer the issue to the Supreme Court in compliance with Article 130(2), to avoid the usurpation of this Court's exclusive interpretative jurisdiction."*

In this case, when the trial judge went on with the case claiming that the question of time in article 94(2)(a) of the Constitution had been interpreted in Ex parte Zenator Rawlings when it had not, he, in my opinion, usurped the jurisdiction of the Supreme Court. This is therefore a second reason why there ought to be a referral in this case for the Supreme Court, which has exclusive jurisdiction, to interpret article 94(2)(a) of the Constitution once and for all.

In conclusion, I hereby make a referral to the Supreme Court for interpretation of the following two questions;

1. Whether on a true and proper interpretation of article 94(2)(a) of the Constitution, 1992, a native Ghanaian who holds dual citizenship and has submitted an application for renunciation of his second citizenship still owes

allegiance to a country other than Ghana for the purpose of disqualification to be a member of parliament?

2. At what point in time in the electoral process can it be said that a Ghanaian who owes allegiance to a country other than Ghana is disqualified to be a member of parliament within the meaning of article 94(2)(a) of the Constitution, 1992.

Consequently, I hereby stay all proceedings in the appeal in this case pending in the Court of Appeal.

**G. PWAMANG**

**(JUSTICE OF THE SUPREME COURT)**

**COUNSEL**

**TSATSU TSIKATA ESQ. WITH HIM JUSTIN PWAVRA TERIWAJAH ESQ. FOR THE APPLICANT.**

**FRANK DAVIES ESQ. FOR THE 1ST INTERESTED PARTY.**

**EMMANUEL ADDAI ESQ. FOR THE 2ND INTERESTED PARTY.**