IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA AD 2012

CORAM: ATUGUBA, AG .C.J (PRESIDING)
AKUFFO, J.S.C.
DATE-BAH, J.S.C.
ANSAH, J.S.C.
ADINYIRA (MRS), J.S.C.
OWUSU, J.S.C.
BAFFOE-BONNIE, J.S.C.
GBADEGBE, J.S.C.
AKOTO-BAMFO (MRS), J.S.C.

WRIT NO. J1/1/2012

9TH MAY 2012

SAMUEL OSEI BOATENG - - - PLAINTIFFS

VRS

1. NATIONAL MEDIA COMMISSION --- DEFENDANTS
2. BERIFI AFARI APENTENG

R U L I N G

ATUGUBA, J.S.C:

I have had the advantage of reading the characteristic masterly opinion of my brother Dr. Date-Bah J.S.C. I agree with much of it and its conclusion.

However, I perpetually disagree, with global respect to him, in so far as he holds that this court's enforcement jurisdiction does not arise unless an issue of interpretation arises. The original jurisdiction of this court stems from articles 2 and 130 of the Constitution. One of its most essential components is the enforcement of the Constitution as an item of jurisdiction in its own right and

though it may arise jointly with an issue of interpretation its existence and invocation cannot be inextricably linked to the incidence of an interpretative issue, as a sine qua non prerequisite.

It is common knowledge that the original jurisdiction of this court has been conferred in almost identical language in the 1969 and 1979 past Constitutions of Ghana and has been consistently interpreted in the same manner by the Supreme Court.

Thus in *Edusei v. Attorney-General* [1996-97] SCGLR 1 at 51 Kpegah JSC recalled the earliest authoritative construction of the original jurisdiction of this court thus:

> " In the case of *Gbedemah v. Awoonor-Williams* (1970) 2 G&G 438 at 439 the *Court of Appeal*, sitting as the Supreme Court, *stated the parameters within which the original and exclusive jurisdiction can be invoked* thus:
>
> "It seems to us that *for a plaintiff to be able to invoke the original and exclusive jurisdiction of the Supreme Court his writ of summons or statement of claim or both must prima facie raise an issue relating to*:
>
> (1) *the enforcement of a provision of the Constitution*; or
>
> (2) the interpretation of a provision of the Constitution; or
>
> (3) a question whether an enactment was made ultra vires Parliament, or any other authority or person by law or under the Constitution." (e.s)
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> *The above dictum was approved and applied in Tait v. Ghana Airways Corporation* (1970) 2 G&G 527 where the plaintiff's case was held to be essentially one of wrongful dismissal and rejected the contention of counsel for the plaintiff that the court was being called upon to interpret and enforce articles 138(b) and 140(2) of the 1969 Constitution."

So entrenched is this construction that in *Edusei v. Attorney-General* (1997-98) 2 GLR 1 at 43 Acquah JSC (as he then was) robustly said:

> "The word "exclusive" was not used in article 130(1) of the Constitution, 1992 without significance. And *an interpretation which fails to bring out the meaning and effect of the word "exclusive" would be myopic*. For as the Privy Council cautioned in *Ditcher v. Dension* (1857) 11 Moo PCC 324 at 337:
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> > "It is also a good general rule in jurisprudence that one who reads a legal document, whether public or private, *should not be prompt to ascribe, should not without necessity or some sound reason, impute to its language tautology or superfluity*, and should be rather at the outset inclined to suppose *each word intended to have some effect, or to be of some use*." (e.s.)
>
> *The word "exclusive"* in article 130(1) of the Constitution, 1992 *was therefore not put down for fun but intended to vest in the Supreme Court a jurisdiction not to be shared with any other.* Not surprisingly therefore, the unanimous decision in *Gbedemah v. Awoonor-Williams* (supra), as already pointed out, came to the conclusion as I have done *when in defining the exclusive original jurisdiction in the enforcement of the provisions of the Constitution, 1969* and the Court stated at 440 that *the Supreme Court's power of enforcement " ... means the enforcement of the provisions of the Constitution, other than the provisions of article 12 to 27"* [ie those on fundamental human rights.]." " (e.s.)

Actions in which this court has exercised its exclusive original jurisdiction in respect of clear and unambiguous provisions include *National Media Commission v. Attorney-General* [2000] SCGLR 1, *Agbevor v. Attorney-General* [2000] SCGLR 403 and *Adofo v. Attorney-General* [2005-2006] SCGLR 42. Indeed in *Nana Yiadom v. Nana Maniampong* (1981) GLR 3 at 7-8

Apaloo C.J. delivering the judgment of the Supreme Court preserved the independent identities of this court's interpretative and enforcement jurisdictions when he said:

> " Article 161 and section 7(1) of the transitional provisions seek to continue in office after the promulgation of the Constitution, 1979, all holders of public and other offices on the eve of the coming into force of the Constitution. *It is not suggested that either provision is ambiguous or give rise to any problem of interpretation.* It is difficult to see how either of these provisions shed any light on the question in controversy in this case, namely, whether or not the first defendant is still in lawful occupation of the paramount stool of Mampong, Ashanti.
>
> *If the plaintiff's case for interpretation is tenuous, her plea for enforcement is even more so. To enforce a provision of the Constitution is to compel its observance.* The plaintiff was not able to point to *any provision of the Constitution which the first defendant has breached, or threatens to breach.*" (e.s.)

The locus classicus of Anin J.A. (as he then was), in Republic *v. Special Tribunal, Ex parte Akorsah* (1980) GLR 592 at 605 summed up in his statement that *"there is no case of "enforcement or interpretation" where the language of the article of the Constitution is clear, precise and unambiguous"* needs restatement. It certainly cannot, with tremulous respect to him, be right to the extent that this court's enforcement jurisdiction only arises where the article that falls to be enforced is not devoid of ambiguity. No court other than the Supreme Court has jurisdiction to entertain **an ACTION to enforce any article of the Constitution even if its clarity is brighter than the strongest light. However, when an enforcement ISSUE coincidentally arises in any court and the article involved is crystal clear such court may apply the Constitution to it.**

This means that for example if the President appoints a superior court judge of the High Court or Court of Appeal without the advice of the Judicial

Council as required by article 144(3) of the Constitution he would have acted in clear breach of that provision. That provision is one of the clearest in the world and runs thus:

> "(3) Justices of the Court of Appeal and of the High Court and the Chairmen of Regional Tribunals *shall be appointed by the President acting on the advice of the Judicial Council*." (e.s.)

An action to enforce the Constitution for the breach of this provision by way of declaration and ancillary reliefs can only be brought in the Supreme Court under articles 2 and 130 and in no other court.

However, if in an action in a court other than the Supreme Court relating to title to land a party relies on a grant that contravenes article 266(5), for example, which converts previous tenancies of land to non citizens exceeding 50 years to a term of 50 years, such a court can apply such a provision which also arose incidentally in that court.

The point that the enforcement jurisdiction of this court does not have to depend upon the incidence of an ambiguous constitutional provision has been stressed by Dr. Bimpong-Buta at 529-530 of his celebrated book, *The Role of the Supreme Court in the Development of Constitutional Law in Ghana*. This view has been indorsed by this court in its Ruling on a preliminary objection to its jurisdiction in *Samuel Okudjeto Ablakwa & Anor v. The Attorney-General & Another*, J1/4/2010 dated 10/11/2011.

Subject to this caveat and leaving open the question of *stare decisis* in this court relating to the pre 1992 Constitution decisions of the previous Supreme Courts, I would also overrule the preliminary objection.

(SGD) W. A. ATUGUBA
ACTING CHIEF JUSTICE

AKUFFO [MS.], JSC:

For the reasons stated by my esteemed brother Atuguba, I agree that the objection be overruled.

(SGD) S. A. B. AKUFFO [MS.]
JUSTICE OF THE SUPREME COURT

DR. DATE-BAH JSC:

The plaintiff, by a writ filed on 26th October 2011, sought to invoke the original jurisdiction of this Court for:

"Enforcement of the constitution by:

1. A declaration that on a true and proper interpretation of articles 168, 23 and 296 of the Constitution, the National Media Commission cannot appoint one of its members to the position of Director General of Ghana Broadcasting Corporation without affording other qualified Ghanaians the opportunity to apply for the position.
2. A declaration that the appointment of the 2nd defendant, a member of the National Broadcasting Corporation, without offering other qualified

Ghanaians the opportunity to apply for the job contravenes the letter and spirit of articles 23 and 296 of the 1992 constitution.

3. Any other consequential orders as to the Honourable Court will seem meet."

The writ was accompanied by the usual Statement of Case of the plaintiff, verified by an affidavit, all filed on the same day. After the defendants had been served, they filed their Statement of Case in response on 11th November, 2011. On 17th February, 2012, the defendants filed notice of their intention to rely on a preliminary legal objection. The notice listed the grounds of the objection as follows:

1. "The Supreme Court does not have original jurisdiction to hear this action as the action is premised on Article 23 of the Constitution, 1992, a human rights provision. Thus, while dressed up as a constitutional issue, the action in fact involves the enforcement of a human right provision which by virtue of the combined effects of Article 33(1), 130(1) and 140(2) is a matter that the High Court and not the Supreme Court has original and exclusive jurisdiction over. *Abel Edusei v Attorney General* [1996-97] SCGLR 1; *Abel Edusei (No. 2) v Attorney General* [1998-99] SCGLR 753. The instant action is no more than one to enforce a human rights provision of the Constitution dressed up in the garb of interpretation and enforcement of the Constitution. See *Yiadom I v Amaniampong* [1981] GLR 3, SC; *Ghana Bar Association v Attorney General* [1995-96] 1 GLR 589 SC; [2003-2004] 1 SCGLR 250; *Yeboah v Mensah* [1998-99] SCGLR 492. What is more, in order successfully to bring an action to enforce a human rights provision, the Plaintiff/Respondent (hereinafter referred to as "the Plaintiff") ought to have a "personal interest" in the outcome of the litigation. Plaintiff however has no such right in this case and accordingly lacks *locus standi* to bring an action to enforce Article 23.

2. Article 168 of the Constitution the interpretation of which Plaintiff seeks does not raise any question of interpretation as same is clear, precise and unambiguous, admitting of no controversy as to its meaning. *Ahumah-Ocansey v Electoral Commission; Centre for Human Rights & Civil Liberties (Churcil) v Attorney-General & Electoral Commission (Consolidated) [2010] SCGLR 575 at 673; Bimpong-Buta v General Legal Council & Others* [2003-2004] SCGLR 1200, Holding 1. Article 168 is straightforward and to the point: "The Commission (i.e. the National Media Commission) shall appoint the chairmen and other members of the governing boards of the public corporations managing the state-owned media in consultation with the President." What is more Plaintiff has not, by his pleadings, demonstrated in any way that Article 168 of the Constitution has been breached or otherwise violated by the 1st Defendant in any manner to sustain a claim based on breach and/or enforcement of Article 168 of the Constitution, 1992. Accordingly, the Supreme Court, with respect, lacks jurisdiction to entertain the instant writ invoking the Court's original jurisdiction under Article 2(1) and Article 130(1) of the Constitution.
3. The sort of discretionary powers contemplated by Article 296 of the Constitution, 1992, are those that arise when the legislature or executive or other arm of government constitutes an administrative agency or other authority with power to adjudicate quasi-judicially on administrative matters. *Captan v Minister for Home Affairs (Minister of Interior)* G & G, 2nd Edition, Vol. 2, Part 2, 2233 at 2234; *R v Askew* (1768) 4 Burr. 2186 at 2189. De Smith, Woolf and Jowell, *Judicial Review of Administrative Action,* Fifth Edition, London, Smith & Maxwell, pages 298 to 299. The function of the National Media Commission challenged in this suit, the power to appoint the Director General of the Ghana Broadcasting Corporation, does not partake of any such adjudication of a

quasi-judicial matter and accordingly the institution of the action in the Supreme Court based on Article 296 is misconceived and without merit."

The notice of preliminary objection was accompanied with written submissions in support of the objection. Counsel for the plaintiff in turn responded to these written submissions with his own written submissions rejecting the defendants' preliminary objection.

This ruling is thus a determination of whether the preliminary objection raised by the defendants is justified. It will, of course, consider the defendants' arguments and the plaintiff's counterarguments, before coming to a decision.

Ground 1

The defendants' argument on ground 1 is that plaintiff's action is founded on Article 23 of the 1992 Constitution, a human rights provision contained in Chapter 5 of the Constitution. It is their contention that it is the High Court, not the Supreme Court, which has jurisdiction to enforce such fundamental human rights provisions of the Constitution. They cite in support of this argument *Abel Edusei v Attorney-General* [1996-97] SCGLR 1 which held that the effect of articles 33(1), 130(1) and 140(2) of the 1992 Constitution was to vest in the High Court, as a court of first instance, an exclusive jurisdiction in the enforcement of the fundamental human rights and freedoms of the individual and that the Supreme Court had only an appellate jurisdiction in such matters. They also cite *Abel Edusei (No. 2) v Attorney-General* [1998-99] SCGLR 753 in support of this proposition of law.

The defendants therefore submit that though the plaintiff has couched his sought relief in respect of article 23 in terms that invite this Court to interpret article 23, it is no more than an endeavour to invoke the original jurisdiction of this Court to enforce article 23. They maintain that this Court has been consistently vigilant in identifying and striking down writs that invoke the original jurisdiction of this Court to enforce article 21(1) of the Constitution,

but which are in substance actions for which the Constitution has provided other fora for their determination. They point out in effect that suits dressed up in the garb of actions for the interpretation and enforcement of the Constitution will not be countenanced by this Court when they can be remedied by other types of action. They give the following examples: *Yiadom I v Amaniampong* [1981] GLR 3 (a chieftaincy dispute couched as a writ to invoke the original jurisdiction of this Court under article 2(1); *Ghana Bar Association v Attorney-General* [1995-96] 1 GLR 589 SC;]2003-2004] SCGLR 250 (an action primarily aimed at removing the Chief Justice from office clothed in the garb of an action for the interpretation and enforcement of the Constitution under article 2(1); and *Yeboah v Mensah* [1998-99] SCGLR 492 (an election petition dressed up as a writ for the interpretation and enforcement of the Constitution).

The defendants further point out that to enforce a human rights provision, the plaintiff has to prove a "personal interest" in the outcome of the litigation. They cite *Sam (No. 2) v Attorney-General* [2000] SCGLR 305 as authority for this. In that case, this Court interpreted the words "in relation to him" and "that person" in article 33(1) to mean that a plaintiff must have a personal interest in litigation brought pursuant to article 33(1), whereas in litigation brought under article 2(1) any citizen of Ghana irrespective of personal interest can seek an interpretation and enforcement of the Constitution. Accordingly, the defendants submit that since the plaintiff does not demonstrate either by his pleadings or otherwise any breach of his fundamental human right under article 23 or any threat of such breach, he has no *locus standi* to bring the present action, which, in their view, is really a suit to enforce Article 23.

In response to these arguments, the plaintiff asserts that he does not seek to enforce a fundamental human right in relation to himself. Rather, his suit is based on the "public interest" leg of article 2(1), in contradistinction from the personal interest leg provided for in article 33(1). He contends that the

substance of his case is that the plaintiff is complaining as citizen of Ghana that the National Media Commission, a creature of the Constitution, has exercised its constitutional mandate in a manner that sins against the Constitution. He draws attention to the clear distinction made in *Sam (No. 2) v Attorney-General* [2000] SCGLR 305 between this Court's jurisdiction in respect of article 2(1) and 33(1). This Court there held that its jurisdiction under article 2(1) is a special one available to only citizens of Ghana irrespective of personal interest, which entitles them to seek an interpretation and enforcement of the Constitution, in furtherance of the duty imposed on all citizens "to defend the Constitution" under articles 3(4)(a) and 41(b). He further cites *FEDYAG v Public Universities of Ghana* [2010] SCGLR 265 which also makes the distinction between public interest actions (under article 2(1)) and personal interest actions under article 33(1). The only *locus standi* needed under article 2(1) is citizenship of Ghana.

In response to the defendants' point that the plaintiff's action is a human rights action dressed up in the garb of an action for interpretation or enforcement of the Constitution, the plaintiff counters by indicating that in the *Yiadom* case *(supra)* the Court was of the view that the House of Chiefs was the appropriate forum, while in the *Yeboah v Mensah* case (*supra)* the Court decided that the High Court was the appropriate forum since the suit was in substance an election petition. He then poses the question: what other forum will be available to the plaintiff on the facts of this case, where the plaintiff has no personal interest in the suit? Clearly that forum will not be the High Court because of the lack of personal interest. He therefore argues that this Court has jurisdiction since in any case he is not relying exclusively on article 23, but also alleging breach of article 296, in both reliefs 1 and 2 of his writ. He also invokes the "spirit" of the Constitution to buttress his claim.

I think that the plaintiff's response to the defendants' objection on this ground is sound and must be upheld. His point is made eloquently for him

by the Supreme Court in *Adjei-Ampofo v Accra Metropolitan Assembly* [2007-2008] SCGLR 611 where the Court said (at pp. 621-622):

> "Although the High Court's jurisdiction in Article 140(2) appears to be very broad, the provision is nothing more than a practical restatement of the exception to the Supreme Court's jurisdiction, as defined by article 130(1) in cases brought under article 2(1). The High Court's enforcement power is therefore to be exercised within the scope of article 33(1), the language of which is clear. Hence the emphasis we must not loose sight of in article 33(1) is the phrase "*in relation to him".* In other words, in the High Court, the actual, ongoing or threatened contravention of the fundamental human right or freedom must be in relation to the plaintiff and no one else. However where the human right or freedom sought to be enforced is not in relation to the plaintiff's personal rights and freedoms, but for the purpose of enforcing a provision of the Constitution under article 2 (1), the proper court is the Supreme Court. In the latter case, such a plaintiff would not have access to the High Court for lack of locus standi. Likewise the former would not have access to the Supreme Court because he or she would be seeking to invoke the original jurisdiction of the High Court to enforce his or her personal fundamental right or freedom. Thus the two jurisdictions are not concurrent. The jurisdiction of the Supreme Court is not ousted simply because of the provision sought to be enforced. The court's jurisdiction in such a case is determined by whether or not the plaintiff is pursuing a personal interest (as in the ***Edusei and Bimpong –Buta cases*** as well as the case of ***Oppon v. Attorney-General [2003-2004] 1 SCGLR 376***, for example), or the enforcement of a provision of the Constitution in interest of the public good (as in the ***CIBA case*** and ***Sam (No. 2) v. Attorney – General.***"

The view of the law expressed above is now settled law, having been re-affirmed by the majority decision in *FEDYAG v Public Universities of Ghana* [2010] SCGLR 265. Thus, even if the plaintiff were relying on article 23 alone, this Court would still have jurisdiction because he would be relying on article 23, not in his own personal interest, but in order to test the constitutionality of the defendants' action in the public interest. The plaintiff's case is even stronger because he is claiming to enforce a further provision other than one in Chapter 5, namely, article 296.

Ground 2

Under ground 2, the defendants argue that article 168, pursuant to which the first defendant made the second defendant's appointment, is clear and unambiguous and therefore does not raise any question of interpretation. They further argue that no question of enforcement arises, since an examination of the plaintiff's Statement of Case shows that he does not aver that the first defendant breached the provisions of article 168 in appointing the second defendant. The defendants contend that no question of offering other qualified Ghanaians the opportunity to apply for the position arises from the text of article 168 and that if this Court were to so hold it would be substituting for, or adding to, the express and clear words of article 168. They buttress this point by quoting the words of Apaloo JA, as then was, in *Awoonor Williams v Gbedemah*, G & G, 2nd Edition, Vol. 2, Part 2, 1184 at 1190 that:

> "We think therefore the words 'adjudge or declare' have no technical connotation and in the context of Article 72(2)(b) mean the Commission of inquiry 'found or pronounced' that a person acquired assets unlawfully, etc. To accede to the interpretation put on behalf of the defendant, it would be necessary to substitute for the words 'report of a Commission of Inquiry' the words by a Court as a result of the finding of a Commission of Inquiry'. In our judgment, this would be an

amendment, not an interpretation of the article. To do so, would be anything but our duty."

Responding to this argument, the plaintiff concedes that article 168 is clear and unambiguous, but contends that the crux of his case is that in the exercise of its duty under article 168 the first defendant owed a duty to be open, transparent, unbiased and fair. The plaintiff states that this duty is imposed by articles 23, 296 and the spirit of the Constitution. The plaintiff further makes the point that the jurisdictions of this Court with respect to interpretation and enforcement, respectively, are separate. While it may be necessary to show some ambiguity in relation to a provision before the interpretation jurisdiction is invoked, they contend that in relation to the jurisdiction to enforce, there is no need to identify any ambiguity before the court's jurisdiction is invoked. In support of this proposition, it cites *Adjei-Ampofo v Accra Metropolitan Assembly* [2007-2008] SCGLR 611, quoting Holding 1, which is as follows:

"the objective of article 2(1) of the 1992 Constitution was to foster the enforcement of all provisions of the Constitution by encouraging all Ghanaians (whether natural persons or corporate) to access the original jurisdiction of the Supreme Court in the interest of the general polity. Whilst the outcome of an action under article 2(1) was invariably, primarily of benefit to the citizenry in general, it might not necessarily inure to the direct or personal benefit of the plaintiff therein. The objective of article 2(1) was to encourage all Ghanaians to help ensure the effectiveness of the Constitution as a whole, through legal action in the Supreme Court. Therefore, every Ghanaian, natural or artificial, had *locus standi* to initiate an action in the Supreme Court to enforce any provision of the Constitution."

A moment's reflection on the last sentence in the above quotation should lead to the conclusion that it cannot be entirely correct. If it were right, it would mean, for instance, that any person who is falsely detained in Ghana, instead of suing

in the tort of false imprisonment, could bring an action to enforce article 21(1)(g), which guarantees the right to freedom of movement. It is to prevent such an outcome that Anin JA, in *Republic v Special Tribunal; Ex parte Akosah* [1980] GLR 592 at 605, said of a previous provision *in pari materia* with the current provisions that:

> "From the foregoing dicta, we would conclude that an issue of enforcement or interpretation of a provision of the Constitution under article 118(1)(a) arises in any of the following eventualities:
>
> (a) where the words of the provision are imprecise or unclear or ambiguous. Put in another way, it arises if one party invites the court to declare that the words of the article have a double-meaning or are obscure or else mean something different from or more than what they say;
>
> (b) where the rival meanings have been placed by the litigants on the words of any provision of the Constitution;
>
> (c) where there is a conflict in the meaning and effect of two or more articles of the Constitution, and the question is raised as to which provision should prevail;
>
> (d) where on the face of the provisions, there is a conflict between the operation of particular institutions set up under the Constitution, and thereby raising problems of enforcement and of interpretation.
>
> On the other hand, there is no case of "enforcement or interpretation" where the language of the article of the Constitution is clear, precise and unambiguous. In such an eventuality, the aggrieved party may appeal in the usual way to a higher court against what he may consider to be an erroneous construction of those words; and he should certainly not invoke the Supreme Court's *original* jurisdiction under article 118. Again, where the submission made relates to no more that a proper application of the provisions of the Constitution to the facts in issue, this is a matter for the trial court to deal with; and no case for interpretation arises."

Thus, Anin JA, in this *locus classicus* on the exclusive original jurisdiction of the Supreme Court under the previous equivalent of the current articles 2(1) and 130 of the 1992 Constitution, asserted that the requirement of an ambiguity or

imprecision or lack of clarity applied as much to this Court's enforcement jurisdiction as it did to its interpretation jurisdiction. This is clearly right in principle since to hold otherwise would imply opening the floodgates for enforcement actions to overwhelm this Court. Accordingly, in my view, where a constitutional provision is clear and unambiguous any court in the hierarchy of courts may enforce it and this Court's exclusive original jurisdiction does not apply to it.

Accordingly, for this Court to accept to exercise its exclusive enforcement jurisdiction in this case, the plaintiff has to comply with the threshold requirement of identifying at least one of the four eventualities listed by Anin JA as existing in relation to the constitutional provisions in issue. I think that at least one of those eventualities exists in this case. Clearly the interpretation put on article 296 by the defendants, relying on Akufo-Addo CJ's interpretation of a provision *in pari materia (*article 175 of the 1969 Constitution) in *Captan v Minister for Home Affairs(Minister of Interior) (supra)* is different from that put forward by the plaintiff. While the Akufo-Addo view is that the discretionary power referred to in article 296 is only that exercised by an administrative agency or some other authority with power to adjudicate quasi-judicially on administrative matters or with power of legislation delegated to it, the plaintiff contends that the express language of article 296 does not restrict the discretionary power as used there to only quasi-judicial matters. We thus have a situation in this case where "rival meanings have been placed by the litigants on the words of [a] provision of the Constitution," in the words of Anin JA. To conclude on ground 2, it should be stressed that ambiguity or imprecision or lack of clarity in a constititutional provision is as much a precondition for the exercise of the exclusive original enforcement jurisdiction of this Court as it is for its exclusive original interpretation jurisdiction.

To sum up, if one accepts the view that the function exercised by the first defendant under article 168 Is to be carried out in accordance with the standard

set in article 296, then the seemingly clear and unambiguous language of article 168 is infected by the uncertainty in meaning afflicting article 296 and that infection imported into article 168 thus makes that article a fit object for the enforcement or interpretation jurisdiction of this Court.

Ground 3

As already adumbrated above, the interpretation of article 296 on which the third ground of the preliminary objection is based is contested by the plaintiff. The defendants' submission is that the function of the first defendant that is challenged by the plaintiff is not in the nature of an adjudication of a quasi-judicial matter, nor is it the exercise of the type of discretionary power contemplated by article 296. Accordingly, they contend that the institution of the plaintiff's action in the Supreme Court based on article 296 is misconceived and without merit. The plaintiff retorts, in its written submission in response to the preliminary legal objection that:

> "Indeed, whether the function of the NMC in appointing the Director General of the Ghana Broadcasting Corporation is one that should be governed by Article 296 is one of the issues that this court must consider in the substantive matter. It is not an issue that goes to the jurisdiction of the court or the capacity of the Plaintiff to bring this action. It therefore cannot be a reason for the court to refuse the Plaintiff a hearing."

As already argued above, the fact that the parties to this suit have competing interpretations of what "discretionary power" means in the context of article 296 and whether it applies to the exercise of the first defendant's power under article 168 is a reason for this Court to exercise its exclusive original jurisdiction, rather than the contrary. There is clearly a dispute as to the meaning of a constitutional phrase that justifies this court's exercise of its enforcement or interpretation jurisdiction.

One other issue arises from the defendants' submission on this ground. It relates to the doctrine of *stare decisis* and whether this Court is absolutely bound by the *Captan* case *(supra)* or not. In *Republic v National House of Chiefs; Ex parte Odeneho Akrofa Krukoko II (Osagyefo Kwamena Enimil VI, Interested Party* [2010] SCGLR 134, the majority of this Court held that decisions of the Superior Courts established before those under the Fourth Republic were binding on the Fourth Republic courts, depending of course on the position of a particular court in the hierarchy of courts. This is how Dotse JSC, speaking for the majority of the Court, expressed it:

> "The above provisions give the clearest indications that the framers of the Constitution did not intend to be any vacuum between the Superior Courts of judicature in existence before the coming into force of the Constitution 1992 on 7th January, 1993 and those in existence after the constitution 1992.
>
> If my analysis is correct, then there should be continuity in the jurisdiction, composition, functions and scope of the Superior Courts from the pre January 7th 1993 to post 7th January 1993. In other words, the constitution 1992 does not admit of any difference in the Courts structure, jurisdictional powers and composition.
>
> That being the case, the provisions of *Article 136 (5) of the Constitution 1992* would apply equally to all decisions of the Court of Appeal prior to January 7th 1993 and the principle of Judicial precedent established therein would apply equally. This means that all the decisions of the court of Appeal pre-January 1993 would also be binding not only on the Court of appeal itself, but also on all Courts below the Court of Appeal."

However, this view, with respect, was expressed *per incuriam* of a decision which, by Dotse JSC's own formulation, he was bound by. In *In Re Agyepong; Donkor v Agyepong* [1973] 1 GLR 326, Apaloo JA, as he then was, said (at p. 331):

> "We are then squarely faced with the question whether a pre-1960 decision of the then Court of Appeal binds any court after the Republican Constitution in 1960. We think not. Since 1960, there has been a completely new constitutional set-up with a fresh hierarchy of courts. Before the Republican Constitution of 1960, the highest court in the land was the Privy Council. Its decisions were binding on the then Court of Appeal whose decision in turn was binding on all other courts on points of law. With the promulgation of the 1960 Constitution, the Supreme Court, a completely new institution became the final Court of Appeal. Appeals to the Privy Council were stopped and Court of Appeal which fathered *Nimoh v Acheampong (supra)* was abolished. The Supreme Court was not made a successor of any of the previous courts. In so far as the 1960 took any cognisance of the cherished principle of *stare decisis*, article 42(4) provides that:
>
> > "The Supreme Court shall in principle be bound to follow its own previous decisions on questions of law, and the High Court shall be bound to follow previous decisions of the Supreme Court on such questions, but neither court shall be otherwise bound to follow the previous decisions of any court on questions of law." "

The logical implication of the *Republic v National House of Chiefs; Ex parte Odeneho Akrofa Krukoko II (Osagyefo Kwamena Enimil VI, Interested Party Republic v National House of Chiefs; Ex parte Odeneho Akrofa Krukoko II (Osagyefo Kwamena Enimil VI, Interested Party* is that the Court of Appeal is absolutely bound by the previous decision of itself and all its predecessor courts. Yet Apaloo JA, as he then was, sitting in one of these predecessor courts expressed the contrary view that the decision of the Court of Appeal before 1960 was not binding on a post 1960 Court of Appeal. With respect, this contrary view was one that, by Dotse JSC's own showing in his judgment, was

binding on the Court of Appeal under the Fourth Republic whose decision he was considering. Accordingly, the majority's decision was *p*er *incuriam* for not having taken Apaloo JA's view into account before reaching its decision. In other words, if Justice Apaloo's binding view had been adverted to by Justice Dotse and the majority of the Court, they may well have reached a different decision. The authority of the majority view is thus diminished and should not necessarily be followed by this Court.

In my view, the preferable position for this Court to adopt is that whilst the decisions of courts established under previous Republics are of a highly persuasive nature, none of them is of an absolutely binding nature on Superior Courts established under the Fourth Republic, since those courts are new courts. This is the view that I expressed in a dissent to Dotse JSC's view in the *Ex parte Krukoko* case and I would like to re-iterate it here. I said then that:

> "To rephrase the issue, the question for consideration is this: is the Court of Appeal under the 1992 Constitution bound by its previous decisions without exception or are the exceptions formulated by the *Bristol Aeroplane* case applicable to its decisions? Secondly, is the Court bound by its decisions given since the coming into force of the Constitution in January 1993 only or is it bound by all appellate courts that have exercised jurisdiction in relation to the territory of Ghana? When I refer to "bound", I mean a binding precedent, as opposed to a persuasive precedent. It is reasonable to contend that the only binding precedents are those handed down subsequent to 1993 and that the previous decisions are merely persuasive, although they carry a high degree of persuasiveness. Such a view of the operation of the doctrine of precedent in our jurisdiction would make for greater flexibility in adapting the law to social change and make the need to resort to the principles of the *Bristol*

Aeroplane case less frequent, assuming that they have any applicability to the existing courts of Ghana.

Addressing the second issue first, I think that the doctrine of precedent established by article 136(5) applies only to the Court of Appeal and the lower courts established by the 1992 Constitution. I consider that the pre-1993 cases are persuasively binding, but they do not fall into the strict doctrine of precedent underlying article 136(5)."

In conclusion, the point that I wish to make on this *stare decisis* issue is that this court is not absolutely bound by the decision in the *Captan* case and therefore the correct interpretation of "discretionary power" remains open, so far as this Court is concerned. Accordingly, that is a further reason why the preliminary objection cannot succeed. It cannot be legitimately asserted that the meaning of "discretionary power" has already been authoritatively and conclusively determined and therefore there is no issue left for interpretation.

In sum, I find the three grounds of the preliminary objection unmeritorious and they are thus dismissed.

(SGD) DR. S. K. DATE-BAH
JUSTICE OF THE SUPREME COURT

ANSAH JSC;

I had the privilege of reading the opinions of my learned brethren Atuguba and Dr. Date-Bah JJSC before hand and I agree with the opinion, reasons and conclusion of Dr. Date-Bah JSC. I have nothing to add to it.

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COURT

ADINYIRA,(MRS) JSC

I also agree that the preliminary objection is without merit and is hereby overrule.

(SGD) S. O. A. ADINYIRA [MRS].
JUSTICE OF THE SUPREME COURT

OWUSU (MS.) JSC;

I have had the opportunity to read the Judgment of my respected Brother and I am in full agreement with the conclusion arrived at by him.

I have also looked at the Judgment of the respected president on the issue of interpretation and enforcement Jurisdiction of the Supreme Court and I seem to agree with the distinction made by him that the enforcement jurisdiction can be enforced without necessarily having to interprets.

(SGD) R. C. OWUSU [MS].
JUSTICE OF THE SUPREME COURT

BONNIE JSC;

I have had the benefit of reading beforehand the two main opinions read by my esteemed brothers Atuguba, Ag. CJ and Date-Bah J.S.C. I also agree that the preliminary legal objection should be over-ruled.

(SGD) P. BAFFOE-BONNIE
JUSTICE OF THE SUPREME COURT

GBADEGBE JSC;

I have had the advantage of reading beforehand the draft of the opinions just delivered by my worthy brothers and I also agree that the preliminary objection be overruled.

(SGD) N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

BAMFO [MRS.] JSC;

I had the opportunity of reading before-hand the well reasoned opinion of my respected brethren, Atuguba, Acting Chief Justice and Prof. Date-Bah, JSC.

I agree with their conclusions that the objection be overruled.

I therefore have nothing useful to add.

(SGD) V. AKOTO-BAMFO [MRS.]
JUSTICE OF THE SUPREME COURT

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AKOTO – AMPAW FOR THE DEFEDANTS.