IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – A. D. 2013

ATUGUBA, JSC (PRESIDING)
ANSAH, JSC
ADINYIRA (MRS), JSC
OWUSU (MS), JSC
DOTSE, JSC
ANIN-YEBOAH, JSC
BAFFOE-BONNIE, JSC
GBADEGBE, JSC
AKOTO-BAMFO (MRS), JSC

WRIT No. J1/6/2013

29TH AUGUST, 2013

PRESIDENTIAL ELECTION PETITION

IN THE MATTER OF A PETITION CHALLENGING THE VALIDITY OF THE ELECTION OF JOHN DRAMANI MAHAMA AS PRESIDENT OF THE REPUBLIC OF GHANA PURSUANT TO THE PRESIDENTIAL ELECTION HELD ON 7TH AND 8TH DECEMBER, 2012.

Article 64 of the Constitution, 1992; Section 5 of the Presidential Election Act, 1992 (PNDCL 285); and Rule 68 and 68A of the Supreme Court (Amendment) Rules 2012, C.I. 74.

BETWEEN:

1. **NANA ADDO DANKWA AKUFO-ADDO**] 1ST PETITIONER
   H/No. 2, Onyaa Crescent, Nima, Accra.]

2. **DR. MAHAMUDU BAWUMIA**] 2ND PETITIONER
   H/No. 10, 6th Estate Road, Kanda Estates, Accra.]

3. **JAKE OTANKA OBETSEBI-LAMPTEY**] 3RD PETITIONER
   24, 4th, Circular Road, Cantonment, Accra.]

AND

1. **JOHN DRAMANI MAHAMA**] 1ST RESPONDENT
   Castle, Castle Road, Osu, Accra.]

2. **THE ELECTORAL COMMISSION**] 2ND RESPONDENT
   National Headquarters of the Electoral]
   Commission, 6th Avenue, Ridge, Accra.

3. **NATIONAL DEMOCRATIC CONGRESS (NDC)**] 3RD RESPONDENT
   National Headquarters, Accra.]

JUDGMENT

ATUGUBA, JSC

By their second amended petition dated the 8th day of February 2013 the petitioners claimed, as stated at p.9 of the Written Address of their counsel;

> "(1) that John Dramani Mahama, the 1st respondent herein, was not validly elected President of the Republic of Ghana;
>
> (2) that Nana Addo Dankwa Akufo-Addo, the 1st petitioner herein, rather was validly elected President of the Republic of Ghana;
>
> (3) consequential orders as to this Court may seem meet."

Although the petitioners complained about the transparency of the voters' register and its non or belated availability before the elections, this line of their case does not seem to have been strongly pressed. In any event the evidence clearly shows that the petitioners raised no such complaint prior to the elections nor has any prejudice been shown therefrom. Indeed even in this petition the petitioners claim that the 1st petitioner was the candidate rather elected, obviously upon the same register. So also their allegations that there were irregularities and electoral malpractices which "*were nothing but a deliberate, well-calculated and executed ploy or a contrivance on the part of the 1st and 2nd Respondents with the ultimate object of unlawfully assisting the 1st Respondent to win the 2012 December Presidential Elections.*" Indeed the 2nd petitioner for and on behalf of all the petitioners, testified that the first respondent did no wrong with regard to the conduct of the elections but was merely the beneficiary of the alleged malpractices, irregularities and violations

Eventually the core grounds of their case are as summarised at p.125 of their counsel's Written Address as follows:

> "I. over-voting
> II. voting without biometric verification
> III. absence of the signature of a presiding officer

IV. duplicate serial numbers i.e. occurrence of the same serial number on pink sheets for two different polling stations
V. duplicate polling station codes, i.e. occurrence of different results/pink sheets for polling stations with the same polling station codes
VI. unknown polling stations i.e. results recorded for polling stations which are not part of the list of 26,002 polling stations provided by the 2nd respondent for the election."

At conference we unanimously saw no merit in ground IV relating to "*duplicate serial numbers i.e. occurrence of the same serial number on pink sheets for two different polling stations."*

We were at a loss as to how the embossment of the same number on more than one pink sheet whether serial or otherwise in respect of two different polling stations has impacted adversely on the 2012 electoral process. Those numbers, on the evidence of Dr. Afari Gyan the Electoral Commission's chairman, are the offshore generation of the printers of the pink sheets. Those numbers have no statutory base. However the decisive fact is that their incidence has not been shown to have any detrimental effect on the electoral process. We felt that grounds V and VI did not relate to matters that could have any substantial effect on the declared results. We therefore dealt mainly with the first three grounds of the petition.

Nonetheless, for the easy future ascertainment of the number and electoral location of pink sheets in the electoral process their numbering should be streamlined.

ABSENCE OF PRESIDING OFFICER'S SIGNATURE

By far the irregularity which has engaged and sharply divided this court as to its consequence is "*absence of the signature of a presiding officer*." This irregularity

is anchored in article 49 of the 1992 constitution, which, as far as relevant, provides thus:

> "**49. Voting at elections and referenda**
>
> (1) At any public election or referendum, voting shall be by secret ballot.
>
> *(2)* Immediately after the close of the poll, *the presiding officer shall*, in the presence of such of the candidates or their representatives and *their polling agents as are present*, proceed *to count*, at that polling station, *the ballot papers of that station* and record *the votes cast in favour of each candidate or question.*
>
> (3) The presiding officer, the candidates or their representatives and, in the case of a referendum, the parties contesting or their agents and the polling agents if any, shall then *sign a declaration stating*
>
> (a) the polling station, and
>
> (b) the number of votes cast in favour of each candidate or question,
>
> and the presiding officer *shall*, there and then, *announce the results of the voting at that polling station* before communicating them to the returning officer."(e.s)

It is undoubtable that in some instances the declared results were not signed by the presiding officer though the petitioners' polling agents did sign. The crucial question that has devastated this court is whether those results should be annulled.

To arrive at an answer to this question a number of considerations are relevant. To some minds the sacred nature of the constitution and the clarity of article 49 so far as the requirement of the presiding officer's signature is concerned warrant the unmitigated annulment of the votes involved. Quite clearly however this has not been the approach of this court and its predecessors to constitutional construction or application.

Clear violation of Constitutional Provisions

Article 157 of the constitution provides as follows:

"**157. Rules of Court Committee**

(1) There shall be a Rules of Court Committee which shall consist of

(a) the Chief Justice, who shall be Chairman,
(b) Six members of the Judicial Council, other than the Chief Justice nominated by the Judicial Council, and
(c) Two lawyers, one of not less than ten and the other of not more than five years' standing, both of whom shall be nominated by the Ghana Bar Association.

(2) The Rules of Court Committee *shall*, by constitutional instrument, *make rules and regulations for regulating the practice and procedure of all Courts* in Ghana."

It is globally acknowledged that despite such mandatory language in a constitutional provision, the failure of the Rules Committee to make such procedure Rules does not debar a litigant from adopting any appropriate method for approaching the court – see *Edusei [No. 2] v Attorney-General* (1998-99) SCG LR 753. In *Peters v Attorney-General* (2002) 3 LRC 32 C. A, Trinidad and Tobago at 657 de la Bestide CJ said:

> "There is abundant authority for the proposition that where matters of pure procedure have not been prescribed in relation to the exercise of a jurisdiction conferred by statute, *the court has an inherent jurisdiction* to approve or direct the procedure to be adopted. In *Jaundoo v A-G of Guyana* [1971] AC 972 the
> Government proposed to construct a road on a piece of land which was privately owned without paying the landowner compensation. *The landowner applied to the High Court under a provision of the Constitution* which gave t he High Court jurisdiction to grant redress for infringement of constitutional rights. *The Constitution further provided for Parliament to make provision with respect to the practice and procedure to be followed in the High Court in relation to the exercise of this jurisdiction. Neither Parliament nor the rule-making authority had made any provision in this regard*. The landowner non the less applied by way of originating motion to

the High Court naming the attorney General as respondent. *The courts in Guyana held that in the absence of any provision as to the means by which proceedings of this kind were to be instituted, the High Court had no jurisdiction to entertain the landowner's application.* The Privy Council, however, held that in the absence of any provision prescribing the method of access to the High Court, a person complaining of an infringement of his constitutional rights was entitled to adopt any form of procedure by which the High Court might be approached to invoke the exercise of any of its powers. In delivering the judgment of the Privy Council, Lord Diplock said ([1971] AC 972 at 982)

"*The clear intention of the Constitution* that a person who alleges that his fundamental rights are threatened should have uninhibited access to the High Court *is not to be defeated by any failure by Parliament or the rule-making authority to make specific provision as to how that access is to be gained*.'

x x x

The Privy Council held that an originating motion was an appropriate procedure in the circumstances and *proceeded to remit the matter to the High Court of Guyana to deal with on its merits*.

In *Port Contractors v Seamen and Waterfront Workers' Trade Union* (1972) 21 WIR 505 *the Court of Appeal refused to hold that the power given by statute to the Industrial Court to order the joinder of a party to proceedings 'on such terms and conditions as may be prescribed by rules made by the court'* was *stultified by the failure of the court to make any such rules.* Georges JA said ((1972) 21 WIR 505 at 510:

> 'To hold that *the power cannot be exercised* in the absence of a prescribed code of rules *would mean that parties to disputes would be deprived of the benefit of the exercise of the power because of the court's failure to produce a code- a circumstance over which they could have no control.* I do not think that this could have been intended.'(e.s)

Again he said ((1972) 21 WIR 505 at 510):

> 'I am satisfied also that the preparation of *such a code was not a condition precedent to the exercise of the power of joinder*. The

provision is directory- not mandatory. The failure to prepare rules does not stultify the power conferred upon the court to exercise the power of joinder.'" (e.s)

Again article 125(1) of the constitution provides thus:

"**125**. **The judicial power of Ghana**

(1) *Justice* emanates from the people and *shall be administered in the name of the Republic* by the Judiciary which shall be independent and subject only to this Constitution." (e.s)

In the case of *Tsatu-Tsikata v Attorney General (No. 1)* (2001 – 2002) SCGLR 189 the majority of this court held that a criminal summons issued in the Fast Track High Court in the name of the President of Ghana rather than the name of the Republic contravened this provision and was therefore a nullity. This decision was reversed on Review by the majority of this court in *Attorney-General (No. 2) v Tsatsu Tsikata (No. 2)* (2001-2002) SCGLR 620. At 647 Acquah JSC (with the concurrence of Wiredu C.J, Sophia Akuffo and Afreh JJSC) held poignantly as follows:

"**Constitutionality of the criminal summons**

The applicant also *complains about the majority's holding that the criminal summons served on the respondent was unconstitutional*. Now *it is true that the criminal summons was inadvertently issued in the name of the President*, but *what harm or threatened harm did that error cause the plaintiff*? Did he as a *result of that error go to the castle to answer the call of the President*, or when he came to the court, *did he find the President of the nation presiding*? The plaintiff came to court *because he knew it was the court that summoned him*, and that *whoever issued the criminal summons, obviously made a mistake*. The plaintiff *suffered absolutely no harm by the error*, neither has he demonstrated any. *That error was one obviously amendable* without prejudice to the rights of the plaintiff-respondent. And *the majority's declaration on this error was nothing but an exercise in futility."* (e.s)

General Demands of Justice and Constitutional Provisions

It is globally established that where a constitutional infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Thus in *State v. Shikunga* (1998) 2 LRC 82 the Namibian Supreme Court was faced with a situation in which an appellant convicted of murder and robbery contended that his said conviction was vitiated by the reception in evidence of a confession statement in relation to which s.217(1) (b) (ii) of the Criminal Procedure Act 1977 had placed on him the burden of proof of its involuntariness contrary to article 12(1) (a) (f) of the Constitution of Namibia 1990. The court, after considering authorities from Canada, the United States of America, Jamaica and Australia, held as per holding (2) of the Headnote thus:

> "(2) *In considering whether to quash a conviction resulting from a trial in which a constitutional irregularity had occurred* (in the instant case the admission of a confession pursuant to an statutory provision found to be unconstitutional), *the court had to balance two conflicting considerations of public policy,* namely, that while manifestly guilty persons should be convicted, *the integrity of the judicial process should also be upheld.* Before the constitutional entrenchment of the rights in question, the test that had evolved at common law in respect of non-constitutional irregularities was such that the effect of an irregularity depended upon whether or not a failure of justice had resulted from it. Under the common law, *where an irregularity was of so fundamental a nature* as to require that *the proceedings* in which it had occurred *be regarded as fatally defective*, any *resulting conviction had to be set aside*. Where *the irregularity was not of such a fundamental nature*, its effect would *depend on the impact of the irregularity* on the verdict and *whether the irregularity had in fact tainted the verdict*. It was considered that *this common law test should apply with equal force to cases where the irregularity complained of consisted of a constitutional breach.* In applying the test to the instant case, there was no justification for interfering with the conviction as *the conviction had not been dependent on the confession*, the *guilt of the accused* having been *proved by other reliable evidence*." (e.s)

Similarly in *Armah Mensah v The Republic* (1971)2 GLR it is stated in the headnote as follows:

> "The appellant was tried and convicted of stealing by a district court. When the *case was called for the first time* the appellant *applied for an adjournment to secure the presence of his counsel*. This was *disallowed and the appellant had therefore to defend himself in person*. Consequently *he did not adequately put his defence to the prosecution witnesses*. When, however, he put forward that defence when he was himself giving evidence, he was not cross-examined upon it. A statement made by the appellant, exhibit B was admitted in evidence although the appellant objected to it on the ground that it was not on caution, the trial magistrate holding that an objection to admissibility can only be on the ground that the statement was not made voluntarily. On appeal,
> *Held, allowing the appeal:* (1) article 20 (2) (e) of the Constitution, 1969, gives to every person charged with a criminal offence the right to defend himself or to be represented by counsel of his choice. That choice is not the tribunal's and where the tribunal narrows the choice to one there is an infringement of constitutional rights.
> (2) In depriving the appellant of his rights under article 20 (2) (e) *the trial might have occasioned a miscarriage of justice* in that *the appellant was denied an adequate defence* and such defence as he put forward was rejected upon legally indefensible grounds, namely (a) the trial court was not entitled to disbelieve the appellant's story on which he was not cross-examined, and (b) exhibit B was admitted for the wrong reasons since involuntariness is not the only ground upon which a statement may be excluded. Further it was not certain whether the appellant's conduct constituted a crime or was general misconduct. The matter being in doubt, it should be resolved in favour of the accused." (e.s)

It is thus clear that Taylor J did not mechanically hold that a breach of article 20(2) (e) of the 1969 constitution ***ipso facto*** vitiated the appellant's conviction but that such breach occasioned a miscarriage of justice warranting the quashing of the conviction.

Purposive Construction of the Constitution and other statutes

In *Republic v High Court Accra ex parte Attoney-General (Delta Foods case)* 1998-99) SCGLR 595, even though the plaintiff instituted his action against the Minister of Agriculture rather than the Attorney-General as required by article 88(5) of the constitution, this court dismissed the application to quash the proceedings in the trial court, holding that the conduct of the defence had been done by state attorneys.

In these circumstances this court per Acquah JSC at 610 stated poignantly thus: "*Clearly* then, *the rationale underlying the need to have the Attorney-General named as the defendant in all civil actions* against the state *is satisfied in the instant situation.*" Accordingly this court concluded as stated in holding (1) of the headnote thus:

> *"(1) the effect of article 88(5) of the 1992 Constitution, by directing that the Attorney-General, and no other else, should be named the defendant in all civil proceedings against the State meant that in the instant action by the plaintiffs, the Attorney-General, and not the Minister of Food and Agriculture, ought to have been made the defendant – not to assume liability* but as the nominal defendant. *The failure to name the Attorney-General as a defendant in a suit where he ought to be so named should not, depending upon the circumstances in each case, be fatal, if the amendment could easily be effected (as in the instant case) by substituting him for the wrong defendant in the exercise of: (1)* the court's supervisory powers under article 132 of the constitution and section 5 of the Court's Act, 1993 (act 459); (ii) under the court's general jurisdiction under article 129(4) namely, to exercise all the powers, authority and jurisdiction vested in the court whose judgment or conduct is the subject-matter of the suit before the court; or (iii) *in the exercise of the court's powers in fitting situations and in the interest of justice to amend the record by substituting a new defendant for the one sued.* "

It is quite clear that this court in that case applied the PURPOSIVE approach to constitutional construction which has been enthroned in this court particularly in

the adulated era of Dr. Date-Bah JSC, as the dominant rule for the construction of our constitution. Two very strong and recent decisions of this court based on the purposive approach to constitutional interpretation should be beacon lights to constitutional adjudication in this court. In *Amegatcher v Attorney-General (No. 1)* & Others (2012) 1 SCGLR this court, had to revisit the starkly clear provisions of article 88(5) of the constitution that

> " **88. The Attorney-General**
>
> x x x
>
> (5) The Attorney-General shall be responsible for the institution and conduct *of all civil cases* on behalf of the State; and *all civil proceedings* against the State *shall be instituted against the Attorney-General as defendant*."

This court unanimously held that to avoid the abuse of that power certain institutions of state could sue and be sued independently of the Attorney-General. Again in *Ransford France (No. 3) v Electoral Commission & Attorney-General* (2012) SC GLR 705 this court was again confronted with the starkly plain literalistic wording of article 296(c) which provides thus:

> "**296. Exercise of discretionary power**
>
> Where in this Constitution or in any other law discretionary power is vested in any person or authority,
>
> x x x
>
> (c) where the person or authority is not a justice or other judicial officer, *there shall be published by constitutional instrument or statutory instrument, Regulations* that are not inconsistent with the provisions of this Constitution or that other law *to govern the exercise of the discretionary power"*

In that case, fastening hard on that provision is consolidation with article 23 and 51 the plaintiff contended as stated in the Headnote:

> "that upon a true and proper interpretation of articles 23, 51 and 296 (c) of the 1992 Constitution, *the Electoral Commission*, the first defendant, in the exercise of its functions and discretionary power *in creating new constituencies, was required to make to make by constitutional instrument, regulations* not inconsistent with the 1992 Constitution or any other law *to govern the exercise of its discretionary power*. The plaintiff also sought *an order* directed at the first defendant *compelling the first defendant to*, as required by articles 51 and 296 (c) of the 1992 Constitution or any other law, *regulations to govern the exercise of its discretionary power* to create new constituencies including, in particular, *the specification of the formula and mechanism to be used in the creation of new constituencies*."

Dismissing the action this court stated per Dr. Date-Bah JSC, with fluorescent ability that this Court will not sanction a construction of the constitution that would lead to a nuclear melt-down of governmental functioning.

In *Francis Jackson Developments Limited v. Hall* (1951) 2 K.B. 488 C.A at 493-494 Denning L. J (as he then was), delivering the judgment of the Court of Appeal said thus:

> "The result would be, therefore, that, by reason of Perkins' application for security of tenure, all of them, including Perkins himself, would lose their security of tenure. *We do not think that we should adopt a construction of the Act which would produce a result so opposed to the intention of parliament. If the literal interpretation of a statute leads to a result which parliament can never have intended, the courts must reject that interpretation and seek for some other interpretation, which does give effect to the intention of parliament:*"

In *Coltman v Bibby Tankers Limited* (1986) 2 All ER 65 at 68 Sheen J. bluntly said: "...it is to be presumed that Parliament *did not intend to pass an Act* which, on its true construction would *be manifestly unjust or absurd*."

In *Mokotso v H M King Moshoeshoe II* (1989) LRC 24 Cullinan C.J sitting in the Lesotho High Court at 150 quoted Professor de Smith, Judicial Review of Administrative Action, 4th edn 1980 at 71 as saying that "The Courts will endeavour to construe Acts of Parliament so as *to avoid a preposterous result*; but if a statute *clearly evinces an intention to achieve the preposterous*, the courts, are under an obligation to give effect to its plain words."

In *Regina v. Bow Road Justices (Domestic Proceedings Court) Ex parte Adedigba* (1968) 2 QB 572 CA at 583-584 Salmon L.J said: "It seams to me that the words of Lord Blackburn in *Tiverton & Nouth Devon Rly Co v Loosemore* (1884) 9 ARO. Cas. 480, 497 can appropriately be applied to the intervening Acts." He said: "*In construing an Act of Parliament we ought not to put a construction on it that would work injustice, or even hardship, or inconvenience, unless it is clear that such was the intention of the legislature."*

Similarly in *Kwakye v Attorney-General* (1981) GLR 944 SC at 1070 Taylor JSC (descenting) said:

> "... In my humble opinion, *the function of the Supreme Court in interpreting the Constitution or any statutory document, is not to construe written law merely for the sake of laws. It is to construe the written law in a manner that vindicates it as an instrument of justice. If therefore a provision in a written law can be interpreted in one breadth to promote justice and in another to produce injustice, I think the Supreme Court is bound to select the interpretation that advances the course of justice unless, in fact, the law does not need interpretation at all but rather specifically and in terms provides for injustice."*

<u>Fraudulent Advantage of a Statute</u>

Our illustrious judicial predecessors here and in England in particular have from earliest times been alert to prevent the taking of an unfair or fraudulent advantage

of a statute. Thus in *Tekyi @ Mensah v Ackon* (1980) GLR 779 at 786 Osei-Hwere J said:

> "*In spite of the prohibition in section 4 of the statute of Frauds, equity has, since 1686*, addressed itself to what has been described as *the task of decorously disregarding an Act of Parliament by means of the doctrine of past-performance."*

This stance of the courts in applying statutory provisions in a manner that even contravene their plainest words in order to avoid grotesque and gargantuan injustice has had the consistent support of the legislature in statutes passed to back them, see s.2 of the Conveyancing Act 1975. Indeed the legislature is deemed not to alter the common law except by very clear words or compelling implication. This is trite law. Consequently the vigilant Editor in his preface and Editorial Review to the (1998-99) SC GLR at p.xiv has hailed at length the decision of this court in *Amuzu v. Oklikah* (1998-99) SG GLR 141 thus:

> "**Land registration and equitable doctrine of notice and fraud**
>
> In a far-reaching decision in *Amuzu v Oklikah*, the Supreme Court has exploded the myth surrounding the long held view of the effect of section 24(1) of the Land Registry Act, 1962 (Act 122), as determined in *Asare v Brobbey* the Court of Appeal held that since the mortgage deed relied upon by the third respondent had not been registered as required by section 24(1) of Act 122 at the time the power of sale was exercised, the document was ineffective and invalid to convey rights under the mortgage deed, and that the third respondent, as a bona fide purchaser of the disputed house, could not be protected under the Act. In the words of Archer JA (as he then was):
>
> > "*...there is no statutory provision in the Land Registry Act, 1962, which protects the third respondent. Nowhere in the Act is it stated that a purchaser for value of land, the subject-matter of a mortgage deed which is unregistered shall not be affected by the provisions of the Act provided he has no notice that the mortgage deed has not been registered.*"

It is in the light of the statement of the law as enunciated in *Asare v Brobbey*, that the Supreme Court's decision in *Amuzu v Oklikah* in the present Volume of the Report becomes very significant. The court unanimously held that the Land Registry Act, 1962 did not abolish the equitable doctrines of notice and fraud. It was thus held that a later registered instrument relied upon by Dr. Oklikah, the plaintiff, could only obtain priority over an earlier unregistered instrument affecting the same plot of land under Act 122, s.24(1) if it was obtained without notice and fraud of the earlier unregistered instrument In support of the decision, his lordship Charles Hayfron-Benjamin JSC said:

> "*Asare v Brobbey*... cannot stand since *it did not take into consideration any equitable doctrine or rule which could ameliorate the harshness of the statute*. In my respectful opinion, *that decision must, to the extent* that *it requires the strict application of section 24(1)* of Act 122, be overruled ... While a party with an unregistered document may be unable to assert legal title in court, nevertheless the document will take effect in equity and will defeat all claims except the holder of the legal title."

In his contribution to the decision in *Amuzu v Oklikah*, his lordship Ampiah JSC admitted that the decision of the court in favour of the defendant, the first purchaser whose document remained unregistered, amounted to "*a revolutionary stance against settled authorities*." However, his lordship added:

> "But as stated before, *if justice is to prevail* in the manner lands are disposed of, *the courts must be bold to avoid too strict an application of the provision of the Land Registry Act, 1962 which gives blessing to fraudulent land dealers*. In other words, *justice must not be sacrificed on the alter of strict adherence to provisions of laws which at times create hardship and unfairness*." (e.s)
> The conclusion to be inexorably drawn is that the decision in *Amuzu v Brobbey* has, in effect, overruled the long-standing interpretation placed by the courts on section 24(1) of Act 122."

In this case it would be unfair and fraudulent for the petitioners to authenticate the results through their polling agents' signatures and turn round to seek to invalidate on the purely technical ground of absence of the presiding officer's signature.

Administrative Error

It is judicially acknowledged that failure to sign an official document could be due to an administrative error. In *Practice Note (Guardianship: Justices' Signatures)* In *re N(A Minor)* (1972) I WLR 596 at 597 Sir, George Baker P said:

> "in the present case *the justices' reasons are signed by two justices*. We have been told by Mr. Eady, who was present before the justices, that *in fact three justices sat and* that it appears from a letter from the justices' clerk that *the justice who has not signed was the chairman of the justices*. The inference which I would draw from that is that the chairman dissented from the view of the other two justices. It is not satisfactory that this court should be left to draw that inference, which may be wrong. *It may be that the failure to sign is simply an administrative error,* or because the chairman has been ill or abroad, or something of that kind. Further, practice varies: some justices' clerks put on the documents the names of the justices who were sitting, others do not. I would direct, first, that the names of the justices should always appear either, and preferably, at the top of the reasons or at the top of the notes. It is very important in many cases, and particularly in cases concerning children, for this court to know the composition of the bench and whether a lady or indeed ladies sat. Secondly, if a justice does not sign the reasons it should be stated either that the cause of not signing is that that justice did not concur in the decision or reasons, alternatively that there is some other reason, which need not necessarily be specified, for the absence of his or her signature."

The Court however did not base its judgment on the absence of the presiding judge's signature but on the merits of the case. It however issued this Practice Direction for future guidance.

In *Plymouth Corporation v. Hurrel* (1968)1 QB 455 CA. at 465-466 Salmon L. J commenting on the signature of a town clerk on a notice to a person in control of a house under the authority of the local council said "*Clearly the only purpose of having the town clerk's signature* upon the notice *is to provide some evidence that it has been duly authorised by the local authority.* The signature *in itself* has *no*

magic about it..." This being the clear purpose of a signature, in dealing with the problem of absence of signature of the presiding officers in this case, as sir Donald Nicholls V-C said in *Deposit Protection Board v Dalia* (1993)1 All ER 599 at 605-606, "the court *treading circumspectively, must look at the underlying purpose of the legislation* and *construe the draftsman's language with that purpose in mind"*

Clearly the underlying purpose of the signatures of the presiding officer and the polling agents on the pink sheets is to provide evidence that the results to which they relate were those generated at the relevant polling station in compliance with the constitutional and other statutory requirements, otherwise each "*signature in itself has no magic about it."* The evidence in this case clearly shows that absent the presiding officer's signature, those of the polling agents are there. In those circumstances even if the failure by the presiding officer to sign the same is condemned as unconstitutional yet the polling agents' signatures, the public glare of the count and declaration of the results in question, the provision of copies of the same to the polling agents and their sustenance at the constituency's collation centre and all the way to the strong room of the 2nd respondent (the Electoral Commission) and the cross checking of the same thereat by the parties; representatives should satisfy the policy objective of article 49(6) regarding signature. Indeed the petitioners have not on any ground approaching prejudice of any sort questioned the authenticity of the results which do not bear the presiding officer's signature.

Even though the constitution is undoubtedly the most sacred law of this country, despite the passion attached to the rebirth of constitutionalism in 1969 it was not pursued even in those early days to the point of crushing substantial justice. Thus in *Okorie alias Ozuzu v The Reupublic* (1974) 2 GLR 272 C.A in reacting to the

reception in evidence at the trial of two confession statements from the appellant without informing him of his right to consult counsel of his own choice Azu Crabbe C.J delivering the judgment of the Court of Appeal firstly held that that fundamental right could be waived (though today some jurisdictions like India would disagree). He then held as follows:

> "There is no proof of any conscious waiver in this case, but counsel for the Republic, Mrs. Asamoah, has contended that failure to inform the second appellant of his right did not occasion a miscarriage of justice.
> In the opinion of this court, *it is irrelevant that an infringement of a constitutional right has not occasioned a miscarriage of justice. Any breach of the provisions of the Constitution carries with it "not only illegality, but also impropriety, arbitrariness, dictatorship, that is to say, the breaking of the fundamental law of the land*": see The proposals of the *Constitutional Commission For a Constitution For Ghana*, 1968, p. 22, para 88. The statement in exhibits A and K, were obtained in violation of the second appellant's constitutional rights, and consequently, *we hold that they were inadmissible in evidence at the trial* of the second appellant. *There is, however, sufficient evidence aliunde to support the conviction* of the second appellant, and *his appeal must, therefore, fail*." (e.s)

As I have endeavoured to demonstrate *ut supra*, absent the presiding officer's signature there is copious evidence *intra* the relevant pink sheets by way of the eternal signatures of the polling agents and also *aliunde* to sustain the authenticity of those results. Consequently I would adopt the attitude of the Court of Appeal in *Clerk v Clerk* (1976) 1 GLR 123 C.A in dealing with the absence of the presiding officer's signature in this case. In that case Archer J.A (presiding) would appear to have overlooked the earlier decision of the Court of Appeal of which he was a concurring member *in Akunto v Fofie* (1973) 1 GLR 81 C.A and joined his brethren in deciding, as stated in the headnote thus:

> "W. Appealed against a decree of divorce granted H. Under the English Divorce Reform Act, 1969, s. 2(1) (e) on the grounds that the petition was signed not by H. But by his solicitor, and that even thought he petition was amended by substitution of H.'s signature for that of the solicitor, the

amendment was filed out of time, thus the whole proceedings should be declared null and void.

> *Held, dismissing the appeal:* (1) a petitioner's failure to sign a petition was a mere irregularity and not a fundamental defect. It could therefore under the authority of L.N. 140A, Order 70, be remedied by the substitution of the signature of the petitioner for that of the solicitor which had erroneously been subscribed especially, as in the instant case, no disadvantage nor erosion of natural justice as occasioned by it *Armar v Armar*, Court of Appeal, 21 April 1969, unreported; digested in (1969) C.C. 73 followed.
>
> (2) The appellant could not be heard to complain that the amendment was filed out of time because she participated fully in the hearing before the trial court and yet failed there to invoke L.N. 140A order 28, r.7 or r. 4."

Even though there is no provision like O.70 the old High Court Civil Procedure Rules, LN. 140 A or O.81 of the current High Court Civil Procedure Rules, 2004, C.147, the principles evolved in Ghana and outside Ghana regarding constitutional construction which I have set out *ut supra*, warrant my adoption of the decisions in Clerk v Clerk.

Again in *Pollard v R.* (1995) 3 LRC 485 P.C the failure of the appellant to sign his notice of application for leave to appeal against his conviction for murder which had rather been signed by his counsel was not such a fundamental error that could not be cured. As stated in the Hednote:

> "The appellant and a co-accused were convicted of murder and sentenced to death. A notice of application for leave to appeal signed by counsel was taken within the time prescribed by the West Indies Associated States Court of Appeal Rules 1968 as stipulated by s. 48(1) of the Eastern Caribbean Supreme Court (St Vincent and the Grenadines) Act but was rejected because the appellant had not signed it as required by r.44(1) of the 1968 rules. When the co-accused's appeal came on for hearing the appellant, having signed a further notice for leave to appeal, moved the Court of Appeal to extend the time within which to lodge the notice. The Court held

that it had no jurisdiction to extend time under s.48 (2) of the Acct where an appellant was under sentence of death. The court heard the co-accused's appeal and, after considering the poor quality of the sole witness's evidence, quashed his conviction on the ground that it was unsafe and unsatisfactory. The appellant appealed.

HELD: Appeal allowed.
Rule 11 of the West Indies Associated States Court of Appeal Rules 1968 should be applied to allow the hearing of a criminal appeal where an appellants failure to sign the notice of application for leave to appeal was not wilful and amounted to no more than a technical non-compliance with the rules and where it would be in the interests of justice to waive the non-compliance, thereby validating the notice under s.48 (1) of the Eastern Caribbean Suprem Court (St Vincent and the Grenadines) Act from the date of its lodgement. On the facts, there were compelling reasons in the interests of justice to apply r.11 with the result that the appeal was validly constituted so that the court of Appeal had jurisdiction to hear it. Accordingly, the appeal would be remitted to the Court of Appeal for determination."

It is true however that in the Nigerian case of *INEC v Oshiomole*, supra, the Nigerian Supreme Court took the view that an unsigned Election petition is a dud document to be struck out but Election petitions are sometimes treated very strictly because of the element of protraction over the outcome of the exercise of the franchise, see *Hari Shanker Jain v Gandhi* (2002)3 LRC 562 S.G. India. Even there the court bemoaned the days of technicalities in the administration of justice and liberally held that where there are several petitioners the signature openly one of them can support the petition and if a listed solicitor's agent signed a petition it should be accepted as valid.

OVER VOTING

There is a question as to what constitutes over-voting. The evidence of Dr. Mamudu Bawumia, the 2nd petitioner, Johnson Asiedu Nketia, General Secretary of the National Democratic Congress and of Dr. Kwadwo Afari Gyan, Chairman of the electoral Commission the 2nd respondent, is said to establish two types of overvoting.

The first is where the number of those who voted at a polling station exceeds the number of voters contained in the relevant polling station register. The second situation is where the number of ballots in the ballot book exceeds the number of ballot papers issued to the relevant polling station. Pondering over these two categories closely I would think that the second category of overvoting is rather an instance of ballot stuffing as testified by Johnson Asiedu Nketia.

According to the evidence where the votes in the ballot box are exceeded by even one vote the integrity of that vote is said to be compromised and must be annulled and depending on the impact of that vote on the overall results, the election in that polling station must be rerun.

Burden of Proof

Before tackling the issues of overvoting and voting without biometric verification at length the question of the burden of proof has to be settled.

It is said that election petitions are peculiar in character hence the question of burden of proof has evoked various judicial opinions in the common law world. However, upon full reflection on the matter I have taken the position that the provisions of the Evidence Act, 1975 (N.R.C.D 323) with the appropriate modifications, where necessary, suffice.

Presumptive effect of the Instrument of Declaration of Presidential Results

Article 63(9) of the Constitution provides thus:

"(9) An instrument which,

(a) is executed under the hand of the Chairman of the Electoral Commission and under the seal of the Commission; and

(b) states that person named in the instrument was declared elected as the President of Ghana at the election of the President,

shall be prima facie evidence that the person named was so elected."

This means that unless the contrary is proved the president is presumed to haven been validly elected. The legal effect of this is governed by ss. 18-21 of Evidence Act, 1975 (NRCD 323). On the facts of this case the relevant provision are sections 20 and 21 (a), this not being a jury trial. The cardinal question therefore is whether the petitioners have been able to rebut the presumption of validity created by the presidential Declaration of Results Instrument. The evidence led by the petitioners is almost exclusively that of the pink sheets. Dr. Mahamudu Bawumia chiefly in his evidence, relied on his evidential maxim "you and I were not there" "The evidence is on the face of the pink sheets" which to him are the primary record of the election. The petitioners also sought to rely on extractive evidence from cross-examination of Johnson Asiedu Nketia and Dr. Kwadwo Afari Gyan Chairman of the Electoral Commission and Mr. Nii Amanor Dodoo the KPMG representative. They also relied on certain aspects of the pleadings supported by affidavits.

However Dr. Afari Gyan made it clear to this court in his evidence that the entries on the pink sheets were in such a state of omissions, repetitions etc that one would have to read them as a whole and construe them carefully and if necessary resort to the relevant polling station register of voters, the serial numbers of the ballot papers and even the data base of the biometric verification machines themselves etc. To see one's way clear as to the course of voting.

On page 35 of the proceedings of the 3rd day of June, 2013 his evidence on the issue of overvoting was as follows:

"Q: In situations like that, can you tell the court whether there is a procedure that should be followed.

A: The annulment or you are talking about when there was an excess

Q: Yes

A: If they had been reported to us, that would have been a different issue. We would have taken certain steps to ascertain whether in fact those things constitute excess. There are all kinds of things that you would do, because we are dealing with a very sensitive situation so you must be sure of what you are doing. It is gone over by the claim one and may be in some places the votes involved are huge. So what do we do to make sure whether it is really gone over by 1. I will first carry out a very careful examination of the pink sheet, that will be the starting point, a very careful analyses of the pink sheet. *You have seen that somebody says that I was given 4 ballot papers when in fact he was given 325 and in some cases when you check the difference, there could be a mistake in the addition of the figures*. So that is a starting point check *whether the pink sheets have been properly executed*. In addition to that as the returning officer, I will *recheck whether all ballots in contention fall within the serial range of the ballots that were allocated to the station.* I would also cause are check of whether *every ballot paper in contention has the validating stamp of the polling station*. And because our law says that when you vote *your name must be ticked I would cause a count.*

Q: Ticked where.

A: In the register. Your name must be ticked in the register. I would cause a count of the ticks in the register and all these things would have to be done before I take a decision on what to do."

Voting without Biometric Verification

The evidence clearly establishes that the 2012 election started on 7/12/2012 and due to difficulties with the biometric verification machines, continued on 8/12/2012. The evidence also shows that form 1C which was meant for those voters who had biometric voter ID cards but their names were not on the register, was not taken to the polling stations due to opposition from the political parties. In consequence form C3 was not to be filled but a few presiding officers still filled it in error. Dr. Afari Gyan's conflicting evidence as to the date of the printing of the pink sheets and the instructions concerning form C3 is such a technical error of recollection that not much weight should be attached to it.

The plaint about voting without biometric verification cannot, in addition to the foregoing reasons, therefore hold in the absence of some other contrary evidence.

The pink sheets contained errors of omission of e.g. proxy votes, blanks, repetitions, wrong grammatical renditions, etc. Indeed Dr. Bawumia admitted under cross-examination that the pink sheets cannot alone supply answer to issues arising from them, in all situations.

The pink sheet or its equivalent in other jurisdictions has been judicially regarded as the primary record of an election. But no one has given it a conclusive effect. Neither the constitution nor any other statute, substantive or subsidiary has accorded the pink sheet any particular status. I would not infer from the constitution and Electoral laws that its reputation as the primary record of the

election means anything more than that it is the ready and basic document to resort to, for a start, when one wants to ascertain how the elections fared in a particular polling station.

I am not aware of any judicial University that has awarded or conferred a graduate or doctoral degree on the pink sheet. Some of the Nigerian authorities filed by the petitioners are in point. Thus in *INEC v. Oshiomele* (2008) CLR 11 (a) S.C the Independent National Electoral Commission of Nigeria (NEC) was subpoenaed by the petitioners and did produce inter alia "*forms, voters registers, ballot papers and records of counting and sorting of the ballot papers*" in the challenged election, and the Supreme Court held that such documents largely established their case in addition to oral evidence.

Again in I.N.E.C v Ray (2004) 14 NWLR (Pt. 892) the Court of Appeal (Enugu Judicial Division) held as per the headnote (4) as follows:

"**ELECTION PETITION –**ALLEGATION OF HOLDING OF ELECTION:

> How allegation that election took place in a particular ward or Constituency can be proved.
>
> "*...a party who alleges that election took place in a particular ward or Constituency is required,* in order to prove that allegation; ...to call at *least one person who voted at any of the polling units in the* two wards whose registration card would show the stamp of the presiding officer and the date confirming that he had voted at the election. In the alternative, the presiding officer or any other official of INEC who participated in the conduct of the election, could give evidence to that effect and support that evidence by the production of the register of voters and other official documents of INEC prepared, signed, and dated by him, showing that election had taken place in all or some of the units of the wards concerned. Per OGUNBIYI, J. CA"

Indeed in *DTA v Prime Minister* (1996) 3 LRC 83 High Court, Namibia O'Linn J presiding, vigorously dissented from the validity of a law prohibiting the opening or inspection of sealed electoral material by any person except by order of court in criminal proceedings, saying as stated in the Headnote that it was an absurdity that a complainant be given the right to come to court *only to be deprived of the procedural right of discovery and inspection once there.*

It appears that the petitioners rather belatedly, towards the end of the case, realised the need for the adduction in evidence of such vital documents like the voters registers, collation sheets, etc and tried to do so, sometimes with the indulgence of this court, through cross-examination of Dr. Kwadwo Afari Gyan, Chairman of the Electoral Commission and also through unsuccessful applications for leave to serve on him notices to produce such documents.

It is felt, and the petitioners so submit, that the pink sheets do operate as estoppel as to the facts therein contained and therefore, inter alia, extrinsic evidence is inadmissible. The shortest answer to this is that the constitution being the supreme law of the land doctrines of estoppels do not apply to constitutional litigation, see *Tuffuor v Attorney-General* (1980) GLR 637 C.A (sitting as the Supreme Court*), New Patriotic Party v Attorney-General* (1993-94) GLR I. do not think that it makes a difference that such estoppels are contained in statutes, since such statutes cannot derogate from the supremacy of the constitution. In any case estoppels do not apply where the parties, as here, possessed common knowledge of the real facts involved such that no party can mislead the other as to them, see *Ghana Rubber Products Ltd v. Criterion Company Ltd* (1982-83) GLR 56 C.A, *Odonkor v Amartei* (1992) 1 GLR 577 S.C and in *Re Fianko Akotuah* (Decd); *Fianko v Djan* (2007-2008) SC GLR 170. I also need not waste time demonstrating that extrinsic

evidence, were estoppels applicable here, is admissible under the exceptions thereto, see *Dua v Afriyie* (1971) 1 GLR 260 C.A and *Koranteng II v Klu* (1993-94) 1 GLR 280 SC.

In the circumstances I do not think that the petitioners have established their allegations of overvoting and voting without biometric verification, except to the limited extent admitted by the Electoral Commission's chairman, which cannot impact much on the declared results.

POLLING AGENTS

It was sought to devalue the status of the polling agents to that of mere observers. That is certainly unacceptable. If they were such passive attendants at an election it is inconceivable that the constitution would have considered their signatures to the results sheet significant enough to merit express constitutional requirement. Before exiting the constitution to seek for other signs of their powers one is met squarely with article 297 (c) as follows:

> "**297. Implied power**
>
> x x x
>
> (c) where a power is conferred on a person or authority to do or enforce the doing of an act or a thing, all such powers shall be deemed to be also given as *necessary to enable that person or authority to do* or enforce the doing of the act or thing;"

Also under the Public Elections Regulations, 2012 (C.I. 75) Regulation s.19, as far as relevant is as follows:

> "**Polling agents**
>
> x x x

(2) A candidate for presidential election may appoint one *polling agent* in every polling station nationwide.

(3) An appointment under subregulations (1) and (2) is *for the purpose of detecting impersonation and multiple voting and certifying that the poll was conducted in accordance with the laws and regulations governing the conduct of elections.*

(4) *A presiding officer shall give a polling agent the necessary access to enable the polling agent to observe election proceedings at a polling station.*

x x x

(6) The returning officer shall set a date on which the polling agents shall appear before the returning officer *to swear an oath to the effect that the polling agent shall abide by the laws and regulations governing the conduct of elections.*

x x x

(8) The polling agent shall present *the duplicate copy of the letter of appointment to the presiding officer of the polling station* to which the agent is assigned on the day of the poll.

(9) Despite subregulation (5) a candidate *may change an agent under special circumstances* and a new agent appointed by the candidate shall swear an oath before the presiding officer in charge of the polling station where that agent is assigned." (e.s)

In *Jayantha Adikari Egodawele v Commissioner of Elections* (2002) 3 LRC 1, the Sri Lanka Supreme Court per Fernando J commenting extensively on the important role of polling agents in an electoral system which is very similar to that of Ghana, said at 19 thus:

> "Would potential voters not lose confidence in the ability of the law enforcement authorities to protect them against unlawful acts and/ or to duly investigate them if they did occur? Ballot-stuffing and driving out polling agents go hand-in-hand with violence or the threat of violence – which, in

turn, will have a deterrent effect on electors in the vicinity as well as on those still in their homes. *Impersonators will not have an easy task if there are polling agents present who might challenge them* (and demand declarations under s.41). *Obviously, polling agents are not chased away because they are disliked, but because they hinder impersonation*. Further, the practice of seizing polling cards from electors must not be forgotten. That is seldom an end in itself, because it does not prevent those electors from voting. However, if those electors can somehow be deterred from voting, and *if there are no polling agents likely to object*, a seized polling card will be a passport to impersonation. *Thus driving away polling agents is a classic symptom of graver and more widespread electoral malpractices*, ranging from the intimidation of electors and the seizure of polling cards to large-scale impersonation." (e.s)

Continuing at 21 he said:

"*Polling agents have a special role to play in a free, equal and secret poll*, and this court emphasised the need to ensure their security shortly before the disputed poll. Their right to be present at the polling station is expressly recognised by s.33, in the same breath as the right of election staff, the police and candidates. *Their duties commence from the time the empty ballot box is sealed*; and, inter alia, *they have the right to challenge suspected impersonators*. An election, ultimately, is determined by the number of ballots cast. *It is the polling agents who play a leading part in ensuring that only those entitled to vote do cast ballots*. Chasing away *polling agents makes a poll cease to be equal."*(e.s)

Indeed in *Mcwhirter v Platten* (1969)1 All ER 172 serious discrepancies in the declared results of the Enfield borough local elections were taken up by an election agent called Harris and this led to the pursuit of criminal process. At 173 Lord Parker CJ said:

"On 9th May 1968 local elections took place, amongst other places, in the borough of Enfield. There are thirty wards, each returning two candidates, and in one of those wards, West Ward with which we are concerned in the present case, there is no doubt that the elected candidates wee Conservatives. There were in addition two Labour candidates, two Liberal candidates and two Independent candidates, the two Independents being Mrs. Bradbury, who is one other appellants, and her husband, Mr. Bradbury. *The count in*

this ward took place in the presence of the election agents of the various candidates. The matter with which we are concerned came to light as the result of something that was said to Mr. Harris, who was the electing agent of the two Independent candidates. The counting officer, or his deputy, told Mr. Harris at the end of the count that broadly speaking, subject to checking, the Conservative candidates had 2,600 votes each, the Labour candidates 170, and the two Liberal candidates had 140 votes. *So far as Mr. Harris's candidates, Mr. And Mrs. Bradbury, were concerned, he was told that subject to minor adjustment, Mr. Bradbury had got 525 and Mrs. Bradbury 519; in other words, they came second to the Conservatives and above the Labour and Liberals.*

To Mr. Harris's amazement, when the formal announcement was made of the result, he found that the two Labour candidates had been given votes which exceeded those in respect of Mr. And Mrs. Bradbury, in other words the Labour candidates had come second. As a result, the returning officer, the respondent, looked into the matter, and he came across a very curious state of affairs- a shocking state of affairs really- as the result of which he felt constrained to make an announcement in the press, and on 24th May the following announcement was made by the respondent:

> "Following publication of the detailed results of the recent Borough Elections my attention has been drawn to apparent arithmetical discrepancies in the figures for [not merely West Ward, but Craig park and High field Words] I have discussed these matters with the Agents of the candidates primarily concerned and such enquiries as I have been able to make, have regard to the provisions of Electoral Law designed to preserve the secrecy of the ballot, lead me to the following conclusions: (i) *There has been no case in which there has been a failure to include in the Count any votes cast*, but the total *number of votes appears to have been miscalculated*, with the result that in two cases candidates as a whole appear to have been credited with more votes than were actually cast. (ii) In the third case candidates as a whole appear to have been credited with fewer votes than the total votes cast but in such proportions as not to affect their relative positions (iii) *In no case does it seem that these matters affect the result of any election*. ..."" (e.s)

This shows that misrepresentations of electoral results do not necessarily invalidate them when the real ascertainable truth can establish the contrary. So let it be with our pink sheets herein.

Continuing at 175 he said:

> "Let me say at once that there is no question whatever of an election petition. *The Conservatives were elected by a very large majority*, and *there is no question of Mrs. Bradbury or any body else bringing an election petition*. Therefore *the sole ground advanced*, and it is advanced by Mr. McWhirter and Mrs. Bradbury is the first one, namely *that the order is required for the purpose of instituting a prosecution for an offence in relation to ballot papers*. Both Mr. McWhirter and Mrs. Bradbury have sworn that is the object, in their affidavits." (e.s)

The certification of the results by the polling agents without any complaint at the polling station or by evidence before this court shows that certain recordings on the pink sheets should not readily be taken as detracting from the soundness of the results declared but rather point to the direction of administrative errors which at the worst, as demonstrated supra, can be corrected by the defaulting officials.

By analogy, though a company law case, I adopt substantially and ***mutatis mutandis*** the reasoning in *Marx v Estates and General Investments Ltd*. (1976) I WLR 380 as set out in the Headnote as follows:

> "A merger agreement between C. Ltd. and the defendant company was entered into, whereby the defendant company should acquire the share of the former in return for approximately 5.500,000 new ordinary stock units in the defendant company. The agreement was conditional on a resolution being passed by a general meeting of the defendant company approving the merger and increasing the authorised capital. A meeting was convened for June 12, 1975, for that purpose but, as a substantial number of shareholders objected to the merger, the meeting was adjourned. The dissentients distributed unstamped forms of proxy providing for the appointment of a proxy vote "at the adjourned extraordinary general meeting of the company ... or any further adjournment or adjournments thereof or at any new extraordinary general meeting of the company during 1975" dealing with the matter. The

meeting was reconvened for July 16 and was adjourned to July 30. At that meeting the resolution approving the merger was defeated on a show of hands and a poll was demanded. The chairman accepted the votes tendered, appointed scruitineers and adjourned the meeting until the result of the poll could be declared. Article 66 of the company's articles provided that no objection should be raised as to the admissibility of any vote except at the meeting at which it was tendered and "every vote not disallowed at such meeting shall be valid for all purposes.

On August 4, when the count was almost concluded, objections were raised as to the validity of the proxy forms on the ground that as they related to more than one meeting they should have been stamped 50p. In accordance with the Stamp Act 1891. The validity of the votes cast by the proxies appointed on the unstamped forms determined whether the resolution had been passed. The opinion of the Controller of Stamps was obtained that the forms of proxy were not chargeable.

On a motion, treated as the trial of the action, by the dissentient shareholders to restrain the defendant company from treating the resolution as having been passed:

Held, giving judgment for the plaintiffs, that since the proxy forms were capable of being used to vote not only at adjournments of the meeting of June 12 but at any new extraordinary general meeting in 1975, even though they might have been intended only for use at one meeting, they were liable to a 50p. stamp and the chairman would have been entitled to reject them at any time at or before the July 30 meeting, but he was entitled to accept the votes of a proxy because the unstamped proxy votes were not void and were valid authorities capable of being stamped; and, accordingly, since the company had accepted them without objection at the meeting the votes cast by the proxies were valid (post, pp. 386H – 387a. 388A-B, C-D, 391D-E); and that in all the circumstances the dissentient shareholders were entitled to their costs on a common fund basis under R.S.C., Ord. 62 r. 28 93) (post, pp. 392D-F, H-393A).

Held, further, that by virtue of article 66 the objection taken several days after the meeting at which the votes were tendered was made too late to invalidate them (post, pp. 389H-390A) . . .(1) Adjudication by the Controller of Stamps does not prejudice rights asserted and relied upon prior to adjudication (post, pp. 387H-388A).

Prudential Mutual Assurance Investment and Loan Association v Curzon (1852) 8 Exch. 97 considered.
(2) There is *much to commend an article in a company's articles of association to the effect that an objection to the admissibility of a vote should only be raised at the meeting at which it is tendered* (post, p. 390A-E)"

At 390 Brightman J said:

> "If an objection is raised to the form of proxy, there may be an explanation if only it can be heard. *What is more sensible than to provide that an objection must be voiced at the meeting where the vote is to be cast so that there is at least the opportunity for it to be answered?"*

In *The King v Robert Llewelyn Thomas* (1933) 2 K.B 489 C.C.A where a verdict in a criminal trial, at which the evidence was given partly in English and partly in Welsh, was delivered in the sight and hearing of all the jury without protest, the Court of Criminal Appeal refused to admit affidavits by two of the jurors showing that they did not understand the English language sufficiently well to follow the proceedings.

The signatures of the polling agents to the declaration of results therefore have high constitutional and statutory effect and authority, which cannot be discounted.

The Dimensions of an election Petition

An election petition is multidimensional. There are several legitimate interests at stake which cannot be ignored. In Ghana this is fully acknowledged. The fundamentality of the individual's right to vote and the need to protect the same have been stressed by this court in several cases – *Tehn Addy v Electoral Commission* [1996-97] SC GLR 589 and *Ahumah-Ocansey v Electoral*

Commission, Centre for Human Rights & Civil Liberties (CHURCIL) v Attorney General & Electoral Commission (Consolidated) [2010] SCGLR 575.

Indeed in *Azam v Secretary of State for the Home Department* (1974) AC 18 at 75 HL Lord Salmon (dissenting) said that the right to vote is so fundamental that if a person entitled to vote in the House of Lords managed to enter the chamber without a pass as required his vote should not be invalidated.

Beyond the individual's right to vote is the collective interest of the constituency and indeed of the entire country in protecting the franchise, see *Luguterah v Interim Electoral Commissioner (*1971) 1 GLR 109. In *Danso-Acheampong v Attorney-General & Abodakpi* (2009) SCGLR 353 this court in upholding the validity of s. 10 of the Representation of the People Act, 1992 (PNDCL 284) and rules 41(1) (e) and (3) of the Supreme Court rules 1996 (C 116) suspending the effect of a disqualification pending the determination of an appeal from a conviction, this court, ably speaking through Dr. Date-Bah JSC at 360 said: "what is at stake is not just the member of Parliament's private interest. *There is the public interest* which requires that *the constituents' choice should not be defeated by the error of a lower court* (e.s)"

Indeed in Cyprus voting is compulsory. In *Pingoura v The Republic* (1989) LRC 201 CA the Cyprus Court of Appeal held that compulsory voting was designed to reinforce the functioning of a democracy, an important constitutional objective.
In *Langer v Australia* (1996) 3 LRC 113 the High Court of Australia upheld the validity of a law, backed by criminal sanctions, which requires a voter to mark his ballot paper by showing his order of preference for all candidates, on the ground that it was meant to further or enhance the democratic process.

In *Peters v Attorney-General* (2002) 3 LRC 32 C.A., Trinidad and Tobago at 101 Sharma J.A Said:

> "An election petition is not a matter in which the only persons interested are candidates who strive against each other in elections. The public are substantially interested in it and that it is an essential part of the democratic process. It is not a lis between two persons, but a proceeding in which the constituency itself is the principal party interested. The characteristics of an election petition are fundamentally different from civil proceedings. Hence for example there was the need for special rules concerning, for example, the notice and publication, which is outside the courts ordinary jurisdiction and procedures.
>
> An election petition is quite unlike any of the initiating proceedings in the High Court. It is not a writ, or originating summons, nor is it in any way close to say a petition in bankruptcy or a petition for divorce which respectively have their own rules of procedure. In a sense an election petition can be described as sui generis."

In *Jayantha Adokari Egodawole v Commissioner of Elections* (2002) 3 LRC 1 the Supreme Court of Sri Lanka at 26 stated per Fernando J thus:

> "The citizen's right to vote includes the right to *freely choose* his representatives, through a *genuine* election which guarantees the free expression of the will of the *electors*: not just his own. Therefore not only is a citizen entitled himself to vote at a free, equal and secret poll, *but he also has a right to a genuine election guaranteeing the free expression of the will of the entire electorate to which he belongs*. Thus *if a citizen desires that candidate X should be his representative, and if he is allowed to vote for X but other like-minded citizens are prevented from voting for X, then his right to the free expression* of the will *of the electors* has been denied. If 51% of the electors wish to vote for X, but 10% are prevented from voting- in consequence of which X is defeated – that is a denial of the rights not only of the 10%, but of the other 41% as well. Indeed, in such a situation the 41% may legitimately complain that they might as well have not voted. To that extent, the freedom of expression, of like-minded voters, when

exercised through the electoral process is a 'collective' one, although they may not be members of any group or association." (e.s)

These judicial pronouncements as to the national dimension of a public election have been justified in this case. About 360 registered voters applied ***in initio litis*** to join in this petition in order to protect their vote. Failing in that move several of them have filed affidavits to protect their vote. Others took to lawful demonstrations calling for their votes to count. They are entitled under the constitution so to do. They are also particularly entitled under article 23 of the constitution to relief from administrative errors of public officials that affect their rights. It provides thus:

"**23. Administrative justice**

Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal."

The administrative error of the presiding officers to sign the pink sheets was not only properly corrected at the collation centres in some instances but can still be corrected by order of this court by way of relief against administrative lapses under article 23 of the constitution or pursuant to s.22 of the Interpretation Act, 2009 (Act 792). It provides thus:

"22. (1) Where an enactment confers a power or imposes a duty on a person to do an act or a thing of an administrative or executive character or to make an appointment, the power or duty may be exercised or performed in order to correct an error or omission in a previous exercise of the power or the performance of the duty.

(2) The substantive right of, or the procedure for redress by a person who has suffered loss or damage or is otherwise aggrieved as a result of an omission or error corrected as is referred to in subsection (1) shall not be affected as a result of the correction of

> that omission or error and an investigation, a legal proceeding or a remedy in respect of a right, a privilege, an obligation or a liability shall continue as if the omission or error had net been corrected."

Even though this Act, despite s.10(4) thereof, professes not to be applicable to the Constitution the principle involved in s.22 thereof conduces to good governance and so can be adopted by this court under s.10(4) thereof.

The memorandum on Act 792 states with regard to this section as follows:

> "*It is not unknown for an authority on which or a person on whom a power is conferred to make a mistake or an error in the exercise of that power*. In an important case it may require an Indemnity Act or a Validating Act to solve the problem. *Clause 22* of the Bill thus seeks *to make it an ancillary power for that authority or person to correct the error or omission* in the previous exercise or performance of the power or function. It should be emphasised, though, that the correction of an error or omission will not affect the substantive rights or procedures for redress by a person who has suffered loss or damage or is otherwise aggrieved as a result of the error or omission that has been corrected. In the circumstances, an investigation, a legal proceeding or a remedy in respect of a right, a privilege, an obligation or a liability will continue as if the omission or error had not been corrected." (e.s)

I should think that the implied powers in article 297(c) could even cater for this situation.

All these steps advocated here are warranted, inter alia, by the principle of constitutional interpretation that the constitution be construed as a whole so that the constitution be construed as a whole so that its various parts work together in such a way that none of them is rendered otiose. The oft quoted words of Acquah JSC (as he then was) in *J H Mensah v Attorney-General* (1996-97) SC GLR 320 at 362 repay constant resort to them. He said:

> "I think *it is now firmly settled* that *a better approach to the interpretation of a provision of the 1992 Constitution is to interpret the provision in relation*

to the other provisions of the Constitution so as to render that interpretation consistent with the other provisions and the overall tenor or spirit of the Constitution. An *interpretation based solely on a particular provision without reference to the other provisions is likely to lead to a wrong appreciation of the true meaning and import of that provision*. Thus in Bennion's *Constitutional Law of Ghana* (1962) it is explained at page 283 that it is important to construe an enactment as a whole: (e.s)

> "...since it is easy, by taking a particular provision of an Act in isolation, to obtain a wrong impression of its true effect. The dangers of taking passages out of their context are well known in other fields, and they apply just as much to legislation. Even where an Act is properly drawn it still must be read as a whole. Indeed a well-drawn Act consists of an inter-locking structure each provision of which has its part to play. Warnings will often be there to guide the reader, as for example, that an apparently categorical statement in one place is subject to exceptions laid down elsewhere in the Act, but such warnings cannot always be provided.""

Therefore in the exercise of this court's original jurisdiction, which does not include the fundamental human rights, it does not mean that when such rights arise incidentally or are interlocked with matters falling within our original jurisdiction the same should be prejudiced or ignored, see *Tait v. Ghana Airways Corporation* (1970) 2 G&G 1415(2d), *Benneh v The Republic* (1974)2 GLR 47 C.A (full bench) and *Ogbamey-Tetteh v Ogbamey-Tetteh* (1993-94) 1 GLR

Furthermore to negate the constitutional inelasticity of *Re Akoto* (1961) GLR 523 I would hold that since article 33(1) provides for the right to resort to the High Court for redress of the fundamental human rights is "without prejudice to any other action that is lawfully available," the steps of some citizens of Ghana, in filing affidavits herein, inter alia, to protect their right to vote and the lawful demonstrations in that direction cannot be ignored by this court.

PRINCIPLES FOR ANNULLING RESULTS

For starters I would state that the Judiciary in Ghana, like its counter parts in other jurisdictions, does not readily invalidate a public election but often strives in the public interest, to sustain it. Thus in *Seyire v Anemana* (1971) 2 GLR 32 C.A. the appellant sought to invalidate a petition against his election on the ground that the respondent's petition was not accompanied by a deposit for security of costs since the said security had been paid not to the High Court but through a bank. On appeal from the trial court's rejection of that contention the Court of Appeal unanimously held as stated in the head note as follows:

> "*Held, dismissing the appeal:* (1) *Per Azu Crabbe J.A.*in the ordinary course of things a person who is required by law to make a payment into court cannot make a bank the agents of the court to receive such payment on behalf of the court. A bank, in those circumstances, would become the agents of the payer only. But when the registrar of the court, whose duty it is to receive the payment, directs the payer to pay the amount through a bank, he makes the bank the agent of the court. Therefore the registrar of the High Court, Tamale, constituted the Ghana Commercial Bank his agents for the purposes of receiving the amount paid on 10 October on behalf of the respondent as security for costs, and there was nothing fundamentally wrong in his having done so. *Hodgson v Armstrong* [1967]1 All E.R. 307, C.A. considered.
>
> (2) *Per Azu Crabbe J.A.* Although the payment of security for costs through the bank would not be payment according to Order 65, r.4, this was a procedural error which, because it can be waived by the other party without any injustice to him, can be considered as an irregularity and the court was able to cure the defect by applying Order 70, r.1. *MacFoy v United Africa Co., Ltd.* [1962] A.C. 152, P.C. and dictum of Lord Denning M.R. in *In re Pritchard* [1963]1 Ch. 502 at p. 516, C.A. applied.
>
> *Per Amissah J.A.* Since the respondent had divested himself of the funds at the appropriate time, the registrar had consented to the method of payment and the appellant had not been prejudiced by the act or the method adopted, then the respondent had, on 10 October, given security in the required amount and within the time limited."

Again in *Osman v Tedam* (1970) 2 G&G 1246 (2d) C.A and *Osman v Kaleo* (1970) 2 G&G 1380 C.A. the Court of Appeal held that though the respondents were members of the Convention People's Party whose constitution made all members of Parliament of the Convention People's Party members of the party's Regional Executive Committees, that did not without more, make the respondents members of such committees and therefore disqualified to contest the 1969 parliamentary elections, which they had won.

The *Osman v Kaleo* case is even more striking. Though the respondent had secured exemption from disqualification from contesting the parliamentary elections, it was submitted that since his exemption had not been published in the Gazette, upon which publication it would have effect, under paragraph 3(5) of NLCD 223, 1968, the same was inoperative, notwithstanding that under paragraph 3(7) of that Decree the decision of the Exemptions Commission was final and conclusive. The Court of Appeal rejected that contention. At 1385 Sowah J.A held as follows: "Amongst the procedure adopted by the commission was *the announcement of its decision after hearing an applicant*. There is not *much substance* in the argument that *since there was no publication in the Gazette the exemption was not valid*."

At 1391 Apaloo J.A trenchantly held as follows:

> "That the defendant appeared before the commission and satisfied it that he was deserving of exemption, is beyond question. He produced a certificate to that effect signed by all the members of that commission. After this, the defendant need do no more. *A mandatory duty is cast upon the commission to notify the National Liberation Council of this fact and the latter is under an obligation no less mandatory to publish this fact in the Gazette.* Both *these statutory duties are mere ministerial acts with which a successful party before the commission is not concerned.* But in his favour, it ought to be

> presumed that all these official acts were properly performed. ***Omnia praesumuntur rite esse acta***. *It would indeed be odd if a person who satisfied the commission and was so informed were to be said to be still under the disability from which he was freed because either the commission or the National Liberation Council failed to perform its official duties.* I think *the defendant gained exemption under paragraph 3(5) of N.L.C.D. 223 and I am in disagreement with Mr. Bannerman on this point.*" (e.s)

This reasoning should restrain this court from nullifying the otherwise sacred votes of citizens due to the oversight of the presiding officers in not signing the Results. Also in *Nartey v Attorney-General and Justice Adade* (1996-97 SC GLR 63 this court after declaring the second defendant's continued stay in office beyond one year of the extension of tenure as unconstitutional under the 1992 constitution further held that that declaration should not affect prior judgments delivered or participated in by him, so as to protect third parties' rights. This is in line with article 2(2) of the constitution which empowers this court thus:

"**2. Enforcement of the Constitution**

> (2) The Supreme Court shall, for the purposes of a declaration under clause (1) of this article, *make such orders and give such directions as it may consider appropriate for giving effect, or enabling effect to be given, to the declaration so made*." (e.s)

As to the general principles for determining an election petition various tests have been formulated. The English approach was extensively evaluated in *Evov. Supa* (1986) LRC (Const) 18 but the court eventually concluded in much the same way as the Kenyan Supreme Court did in Raila Odinga v the Independent Electoral and Boundaries Commision and Others namely, "Did the petitioner clearly and decisively show the conduct of the election to have been *so devoid of merits*, and *so distorted as not to reflect the expressing of the people's electoral intent? It is this broad test that should* guide us in this kind of case, in deciding whether we should disturb the outcome of the Presidential election."

Mr. Quashie-Idun, counsel for the 2nd respondent urged on us that the provisions relating to the validity of an election in the Representation of the Peoples Law, 1992 (PNDCL 284 are applicable to a presidential election petition. Having pondered over the matter I cannot uphold that submission. The preamble to that law shows that it relates to parliamentary elections. Mr. Quashie-Idun's contention is piously based on only the Representation of the People (Amendment) Law, 1992 which amends the definition of "election" which in s.50 of PNDCL 284 related to parliamentary elections only, to mean "any public elections." The original definition excluded from its purview District level elections, etc which the High Court could also handle. The amendment will now cover such elections also. The definition of Court though as a court of competent jurisdiction is referable to courts which under the provisions of PNDCL 284 have various roles to play.

This however is somewhat academic since the principles laid down in *Re Election of First President Appiah v Attorney-General* (1970) 2 G&G 2d 1423 C.A at 1435-1436 when determining a presidential election under provisions of the 1969 Constitution which are in ***pari material*** with article 64 of the 1992 Constitution are substantially the same as those in PNDCL 284.

The Court said:

> "We wish to conclude with the words of Kennedy, J. in the Islington West Division Case, *Medhurst v. Laugh and Casquet* (1901) 17 T.L.R. 210 (at page 230):
>
> > "An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinate in the conduct of the election where the court is satisfied that the election was notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that the result of the election, that is, the success of the one candidate over the other was not and could not have been affected by

> those transgressions. If on the other hand the transgressions of law by the officials being admitted, the court sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it is open to reasonable doubt whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the court is then bound to declare the election void. It appears to us that this is the view of the law which has generally been recognised and acted upon by the tribunals which have dealt with election matters."

And again, the judgment in the case of *Woodward v Sarsons* (1875) 32L.T(N.s.) 867 at pp.870-871:

> "... we are of opinion that the true statement is, that an election is to be declared void by the common law applicable to Parliamentary elections, if it was so conducted that the tribunal, which is asked to avoid it, is satisfied, as a matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election law: . . But if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reason to believe that a majority might have been prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the election void by the common law of Parliament.""

This is much the same as Canadian case of *Opitz v. Wrzensnewskyj* 2012 SCC 55-2012-10- in which the court said as follows:

> "The practical realities of election administration are such that imperfections in the conduct of elections are inevitable ... A federal election is only possible with the work of thousands of Canadians who are hired across the country for a period of a few days or, in many cases, a single 14-hour day. These workers perform many detailed tasks under difficult conditions. *They are required to apply multiple rules in a setting that is unfamiliar*. Because elections are not everyday occurrences, it is difficult to see how workers

could get practical on-the-job experience... The current system of electoral administration in Canada is not designed to achieve perfection, but to come as close to the ideal of enfranchising *all entitled voters as possible*. Since the system and the Act are not designed for certainty alone, courts cannot demand perfect certainty. *Rather, courts must be concerned with the integrity of the electoral system*. This overarching concern informs our interpretation of the phrase "irregularities ...that affected the result." (Rothsterin and Moldaver JJ)."

The petitioners through their counsel's written Address, at p.88 rely on *Besigye Kuza v Museveni Yoweri Kaguta and Election Commission [2001]* UGSC 3 Judgment dated 20th April 2001 quoted Odoki CJ of Uganda saying:

> "From the authorities I have cited there is a general trend towards taking a liberal approach in dealing with defective affidavits. *This is in line with the constitutional directive enacted in article 126 of the Constitution that the courts should administer substantive justice without undue regard to technicalities*..."

At p. 89 counsel also submitted as follows:

> "In the Nigerian case of *Dr. Chris Nwebueze Ngige vrs Mr. Peter Obi and 436 Others* [2006] Volume 18 WRN 33, it was held by the Court of Appeal at holding 30 that, election petitions are by their nature peculiar from the point of view of public policy. It is, therefore, the duty of the court to endeavour to hear them without allowing technicalities to unduly fetter their jurisdiction."

Consequently the petitioners seek equity from this court (which they deny to the pink sheets) as follows:

> "It is therefore submitted that since the affidavit of the 2nd petitioner to which the pink sheets were annexed was duly executed and sworn to, the unavoidable errors of pink sheet exhibits, *where the authenticity is not*

disputed by the respondents, ought to be treated and waived as mere irregularity, so that the said pink sheets exhibited which are already in evidence can be considered and evaluated in the interest of substantial justice."

CONCLUSION

In modern times the courts do not apply or enforce the words of statutes but their objects purposes and spirit or core values. Our constitution incorporates its spirit as shown for example, in article 17(4) (d). This means that it should not be applied to satisfy its letter where its spirit dissents from such an application. Thus in *Black v Value Capital Ltd.*(1975) 1 WLR 6 Goulding J held as stated in headnote 2 thus:

> "That although he plaintiffs' proposed amendments *could technically be brought under paragraph (f) or (i) and (j) of Order 11, r.1(1), they should not be allowed since to do so would be an application of the letter but not of the spirit of the rule,* in that it would allow the trial in England of a dispute between foreigners merely because it concerned money in the hands of English bankers whose only interest therein was their proper bank charges, or because the agreements were expressed to have been executed in London, although the disputant companies were neither incorporated, resident nor trading in England, and the agreements were expressly to be governed by and enforced in accordance with Bahamian law (post, pp. 15G-16A); that in all the circumstances the only court that could effectively exercise jurisdiction was the Bahamian court which could act in personam against PRL and VCL and compel the use of their names and seals, and which was already seised of the winding up petitions, and leave to amend would therefore be refused (post, p. 16D-F)"

The Mischief rule of construction is much the same as the spirit of a statute. In *Catherine v Akufo-Addo* (1984-86) 1 GLR 96 C.A at 104 Mensa Boison J.A in delivering the judgment of the Court of Appeal said:

> "It is a sound rule, where the words admit, that an enactment should be construed such that *the mischief it seeks to cure is remedied, but no more.*"

Further allied is the rule of construction relating to absurdity, see *Brown v Attorney-General* (2010) SC GLR 183.

It would indeed be absurd for the courts to hold as was done in *Republic v Chieftaincy Committee on Wiamoasehene Stool Affairs; Ex parte Oppong Kwame and Another* [1978] 1 GLR 467 C.A (Full Bench) and do otherwise in this case. As stated in the headnote to that case:

> "Having been destooled by the Agona Ashanti Traditional Council, the Wiamoasehene appealed, and the National Liberation Council (N.L.C.) acting under Act 81, s.34 appointed a chieftaincy committee to inquire into the matter. The committee found the destoolment null and void and recommended that the appeal be allowed. The N.L.C. confirmed the findings by a notice in the Local Government Bulletin which also included the phrase "that the appeal be dismissed." A corrective notice repeating the confirmation but using the phrase "That the appeal be allowed" was published in a subsequent Local Government Bulletin. This attempt at correction was challenged by certiorari proceedings on the grounds that when the second notice was published the N.L.C. was *functus officio* and had no right to effect corrections after the first publication; and even if it had such right, the party adversely affected should have been given an opportunity to challenge the correction. The High Court held that the N.L.C. was precluded from re-opening the matter and this decision was affirmed by the Court of Appeal.
>
> On an application for review by the full bench,
>
> Held, allowing he application: (1) on the facts, far from having a change of mind, the N.L.C. had from the outset been desirous of giving force to the decision of the chieftaincy committee. The deliberate and repeated use by the N.L.C. of the term "confirmed" made it clear that *not only was the first publication contrary to the findings and recommendations of the chieftaincy committee, but also that an obvious mistake had occurred.* The argument *that a word once inscribed in print was beyond recall was contrary to good*

sense. Even the finality of *res judicata* permitted the correction of clerical mistakes by the contrivance of the "slip rule."" (e.s)

Indeed when the constitution itself or any statute commits an error this court rectifies it see *Agyei Twum v Attorney-General Akwety* (2005-2006) SC GLR 732 where a constitutional omission relating to the procedure for the removal of the Chief Justice was rectified by reading into the relevant provisions, the necessary addition.

To sum up the result sought by the petitioners in this case would involve what Mackinnon J protested against in *British Photomaton Trading Company, Limited v Henry Playfair, Limited* (1933) 2 K.B 508 at 520 when he said: "this is a result against which one is inclined to struggle, because it tends to outrage both common sense and what is fair."

REFORMS

This petition however has exposed the need for certain electoral reforms. I mention same of them.

- The Voters register must be compiled and made available to the parties as early as possible.
- A supplementary register may cater for late exigencies.
- The calibre of presiding officers must be greatly raised up.
- The pink sheet is too elaborate, a much simpler one to meet the pressures of the public, weariness and lateness of the day at the close of a poll etc.
- The carbon copying system has to be improved upon.
- The Biometric Device System must be streamlined to avoid breakdowns and the stress on the electorate involved in an adjournment of the poll.

- Invalidating wholesale votes for insignificant excess numbers is not the best application of the administrative principle of the proportionality test.

The South African biometric system as judicially reviewed in *The New National Party of South Africa v The Government of the Republic of South Africa*, Case CCT 9/99 dated 13/4/1999 may be instructive.
However it is judicially acknowledged that the Electoral Commission is the body mandated by the constitution to conduct Elections and Referenda in Ghana and their independence must be respected as required by article 46 of the constitution. Their subjection to judicial control under articles 295(8), 23 and 296 (a) and (b) must be operated within the well known principles of judicial review of administrative action.

The case of *Appiah v Attorney-General*, supra therefore cautions that the reasonable exercise of a discretion by them in situations that may confront them ought not to be judicially impeded.

K P M G

I do not know how to express the gratitude of the judiciary and indeed of Ghana to KPMG for their unprecedented selfless and patriotic service so fully rendered this court with such professionalism and dedication. They are a rare species of Lover of Ghana and the cause of justice and democracy.

We are also grateful to counsel for their industry.

But in the end I am driven by the sheer justice of this case which hinges much on technicalities of the pink sheet, to dismiss the same subject to the useful electoral

reforms it has exposed as necessary to enhance the transparency of the Electoral process of Ghana.

(SGD) W. A. ATUGUBA

JUSTICE OF THE SUPREME COURT

ANSAH,J.S.C

INTRODUCTION/BACKGROUND

The facts surrounding this suit have been fully played out in near epic dimensions before the public.

However, there is no way this suit can be seen as a likeness of the numerous cases on various aspects of our 1992 Constitution. Indeed, I venture to say it cannot be compared to any of the cases touching on various aspects of all our previous Constitutions.

By virtue of its peculiar nature and potential effects, many commentators have rightly described this suit as one posing a test of the structural maturity of our democratic ethos, causing all eyes worldwide to focus, even if only briefly, on our polity to see if and how we can surmount this unique challenge.

Without doubt, the resolution of this case portends much for the future path of our democratic development.

On 7th December, 2012, Ghana underwent its sixth general elections under the 1992 Constitution. On account of factors which led in part to the present suit, the elections for the first time in the post-1992 Constitution era spilled over into the next day, that is, 8th December, 2013. Whiles the parliamentary results from the elections were largely unchallenged, the results of the presidential elections have come up for judicial scrutiny through this action.

On 9th December, 2012, the Electoral Commissioner, the constitutionally designated returning officer in presidential elections, announced the results of the Presidential elections as follows:

a. John Dramani Mahama	5, 574, 761	50.70%
b. Dr. Henry Herbert Lartey	38, 223	0.35%
c. Nana Addo Dankwa Akufo-Addo	5, 248, 898	47.74%
d. Dr. Papa Kwesi Nduom	64, 362	0.59%
e. Akwasi Addai Odike	8, 877	0.08%

f.	Hassan Ayariga	24, 617	0.22%
g.	Dr. Michael Abu Sakara Forster	20, 323	0.18%
h.	Jacob Osei Yeboah	15, 201	0.14%

Based on these results, the 2nd respondent declared John Dramani Mahama, the 1st Respondent in this case, as the winner of the Presidential elections. Subsequently, on 7th January, 2013, the Chief Justice of the Republic of Ghana swore the 1st Respondent to assume office as the President of the Republic of Ghana.

THE PETITIONERS' ACTION

The petitioners seek in this action to set aside the election and swearing in as president of the 1st Respondent.

The 1st and 2nd petitioners had contested the 2012 general elections on the ticket of the New Patriotic Party (hereinafter referred to as the NPP) as that party's presidential and vice presidential candidates. The third respondent is the chairman of the NPP.

By their petition, the petitioners themselves proceeded against the first and second respondent. The first respondent is the current President of the Republic of Ghana, whereas the second respondent is the body set up under Chapter Seven (7) of the Constitution to inter alia, conduct and supervise all public elections and referenda. The National Democratic Congress (hereinafter referred to as the NDC) was joined as the third respondent herein after a successful application to this Court.

The petitioners seek a one hundred and eighty degree twirl from the events of 9th December, 2012 and 7th January, 2013. In their own words, they seek from this Court:

"(1) A declaration that John Dramani Mahama, the 1st respondent herein, was not validly elected president of the Republic of Ghana;

(2) A declaration that Nana Addo Dankwa Akufo-Addo , the 1st petitioner herein, rather was validly elected President of the Republic of Ghana;

(3) Consequential orders as to this Court may seem meet."

The grounds for these reliefs were inextricably linked to various alleged deviations from the prescribed procedures for the conduct of presidential elections which said deviations, according to the petitioners, incurably vitiated the election and swearing in of the 1st respondent as president of Ghana.

The petitioners stated the said Grounds in their second amended petition in these terms:

> "Ground 1: There were diverse and flagrant violations of the statutory provisions and regulations governing the conduct of the December 2012 Presidential elections which substantially and materially affected the result of the elections as declared by the 2nd Respondent on 9th December, 2012.
>
> Ground 2: That the election in **11,916** polling stations was also vitiated by gross and widespread irregularities and/or malpractices which fundamentally impugned the validity of the results in those polling stations as declared by 2nd Respondent."
>
> I consider it essential to set out the petitioners' particulars of this Ground 2 as these indeed embody several of the irregularities relied on by the petitioners in their challenge of the 2012 presidential election results. The petitioners couched the said particulars thus:
>
> "(a) That the results as declared and recorded by the 2nd Respondent contained widespread instances of over-voting in flagrant breach of the fundamental constitutional principle of universal adult suffrage, to wit, one man one vote.
>
> (b) That there were widespread instances where there were the same serial numbers on pink sheets with different poll results, when the proper and due procedure established by 2nd Respondents required that each polling station have a unique number in order to secure the integrity of the polls and will of the lawfully registered voters.

(c) That, while the total number of registered voters as published by the 2nd Respondent and provided to all political parties or candidates for the Presidential and Parliamentary elections was **fourteen million thirty-one thousand, [six**

hundred] and eighty (14,031,680), when 2nd Respondent announced the result of the presidential election on 9th December 2012, the total number of registered voters that 2nd Respondent announced mysteriously metamorphosed to a new and inexplicable figure of **fourteen million, one hundred and fifty eight thousand, eight hundred and ninety (14,158,890)**. This, thereby wrongfully and unlawfully increased the total number of registered voters by the substantial number of **one hundred and twenty-seven thousand, two hundred and ten votes (127,210)**.

(d) That there were widespread instances of voting without prior biometric verification.

(e) That there were widespread instances of absence of the signatures of presiding officers or their assistants on the Declaration Forms known as 'pink sheet'; and

(f) That there were widespread instances where the words and figures of votes cast in the elections and as recorded on the "pink sheets" did not match".

The petitioners added a Ground 2 (a) as follows: "That there were **28 locations** where elections took place which were not part of the **twenty-six thousand and two (26,002)** polling stations created by the 2nd Respondent for purposes of the December 2012 elections." (emphasis in the original)

Ground 3 of the petition was: "That the statutory violations and irregularities and/or malpractices described under Grounds 1, 2 and 2a herein, which are apparent on face of the Declaration forms ('pink sheets'), had the direct effect of introducing into the aggregate of valid votes recorded in the polling stations across the country, a whopping figure **four million six hundred and seventy thousand five hundred and four (4,670,504)** unlawful and irregular votes which vitiated the validity of the votes cast and had a material and substantial effect on the outcome of the election…." (emphases in the original).

Thus stated, the Grounds of the petition show that it was centrally based on alleged irregularities, namely, duplicate pink sheets, over voting, voting without biometric verification, pink sheets lacking signatures by presiding officers or their

assistants and that voting took place at unknown polling stations, that was outside the 26002 created by the Electoral Commissioner.

The petitioners initially included in their case allegations that votes had been unlawfully varied such that votes for the first respondent were increased whereas those for the first petitioner were decreased. The petitioners' also claimed initially that the STL Company acted in cohort with the first respondent to increase his votes, and to reduce those for the first petitioner. Both claims were subsequently withdrawn by the petitioners on grounds of lacking adequate evidence. In the result, I shall consider them no further in evaluating the case of the petitioners.

THE RESPONDENTS' CASE

The respondents denied all the petitioners' averments.

The respondents did not deny the fact that serial numbers had been repeated on some pink sheets. However, they vehemently disagreed with the petitioners on the effect of the various repetitions. This was based on a supposed crucial difference between pink sheets and polling station codes and numbers – the latter are security features whereas pink sheets are not generated by the 2nd respondent but by printers and thereafter randomly assigned to polling stations. In the result, according to the respondents, the lack of distinctive serial numbers on pink sheets did not occasion any irregularity in the presidential elections.

The petitioners' claim of over voting was also denied by the respondents. The respondents stated that no evidence was shown, proving any incident of multiple voting at any polling station and that no one had voted when he was not entitled to vote. Indeed, the petitioners themselves, under cross-examination, recanted parts of this claim here by removing certain polling stations from the list of polling stations where they alleged over voting occurred. Further, the petitioners' polling station agents were not only present at the polling stations but had participated in counting and declaring the votes there and signed the declaration of results, all without raising any protests of over voting.

As regards the claim of some persons voting without prior biometric verification, the respondents contended that some faulty equipment which prevented

biometric verification were repaired and this allowed biometric verifications of all persons before voting. Further, the second respondent claimed that some presiding officers erroneously made entries in column 'C3' on pink sheets contrary to instructions on completing the pink sheets.

Concerning the claim of the lack of presiding officers' signatures on pink sheets, the respondents' case was that given that the Constitution did not specify the result of that failure, it was unconstitutional to rely on this ground to invalidate votes on those pink sheets. In any case, this lapse could be remedied through compelling the concerned presiding officers by way of an order of mandamus to undertake their official duties. For the third respondent, it was argued that qualified voters having stood in queues to cast their votes, quashing their votes solely on grounds of this lapse by election officials, which lapse the voters had no control over, entailed imposing a retroactive penalty on the voters in breach of the constitutional prohibition. That was also for no wrong done by the innocent voters; in fact it would amount to visiting the punishment of presiding officers on the voters.

Finally, the respondents also denied the petitioners' claim of unknown polling stations. Here, they rightly pointed to the petitioners' changing reckoning of the number of these unknown polling stations, beginning with a number of 28, changed to 26 and eventually given as 22. Although the petitioners claimed these polling stations were unknown, they dispatched polling agents there to witness voting there on the strength of appointment letters signed by no person other than the first petitioner himself.

ISSUES FOR DETERMINATION BY THE COURT

The Court ordered the parties to agree on the issues for trial. However, the parties were unable to agree on the issues following which issues were settled by the Court for the resolution of the petition thus:

"1. Whether or not there are statutory violations in the nature of omissions, irregularities and malpractices in the conduct of the Presidential Elections held on the 7th and 8th December 2012.

2. Whether or not the said statutory violations, if any, affected the results of the elections. "

Upon distilling the case of the petitioners and that of the respondents in answer, the issues I shall seek to address in resolving the above issues and ultimately evaluate the reliefs sought by the petitioners are as follows:

a. Whether the petitioners have proved the claim that voting occurred at unknown polling stations;
b. Whether the petitioners established the allegation of unsigned pinked sheets by presiding officers or their assistants;
c. Whether the petitioners established the allegation of duplicate serial numbers and polling station codes;
d. Whether the petitioners proved the claim of over-voting;
e. Whether the petitioners proved the allegation of voting without the required biometric verification;

BURDEN OF PROOF AND APPLICABLE STANDARDS

These are governed by statute and are provided in the Evidence Act, 1975, (NRCD323).

From the Evidence Act (supra), the burden of proof comprises the burden of persuasion and the burden of producing evidence.

Section 10 of the Act defines the burden of persuasion thus:

"10. Burden of persuasion defined

(1) For the purposes of this decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the Court.

(2) The burden of persuasion may require a party

(a) to raise a reasonable doubt concerning the existence or non-existence of a fact, or

(b) to establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt."

In civil cases such as the instant petition, the burden of producing evidence is covered by Section 11 (1) and (4) of the Act which state that:

"11. Burden of producing evidence defined

(1) For the purpose of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue.

(4) In other circumstances, the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of a fact was more probable than its non-existence."

The standard of proof to be satisfied by a party is by a "preponderance of probabilities" save where a contrary requirement is created by law. This is by virtue of Section 12 (1) of the Act which is in these terms:

"12. Proof by a preponderance of the probabilities

(1) Except, as otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities".

This standard is defined under Section 12 (2) thus:

"(2) Preponderance of the probabilities" means that degree of certainty of belief in the mind of the tribunal of fact or the Court by which it is convinced that the existence of a fact is more probable than its non-existence."

On whom does the burden of persuasion rest?

This is based on Section 14 of the Act which provides that:

"14. ALLOCATION OF BURDEN OF PERSUASION

Except as provided by law, unless it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defense that party is asserting."

The allocation of the burden of producing evidence on the other hand is governed by Section 17 which is in these terms:

"17. ALLOCATION OF BURDEN OF PRODUCING EVIDENCE

Except as otherwise provided by law,

(a) the burden of producing evidence of a particular fact is on the party against whom a finding on that fact would be required in the absence of further proof;

(b) the burden of producing evidence of a particular fact is initially on the party with the burden of persuasion as to that fact."

THE PRESUMPTION OF PERFORMANCE OF OFFICIAL DUTY

Rebuttable presumptions are described under Section 20 of the Evidence Act (supra) as:

20. Effect of rebuttable presumption

A rebuttable presumption imposes upon the party against whom it operates the burden of producing evidence and the burden of persuasion as to the non-existence of the presumed fact."

It results from certain facts and operates to establish a prima facie case. Unlike conclusive presumptions, it may be rebutted by the introduction of contrary evidence.

To start with, the law is settled that official duty is presumed to have been regularly performed; see section 37 (1) of the Act.

It reads:

"37. Official duty regularly performed

(1) *It is presumed that an official duty has been regularly performed.*

As stated already, a rebuttable presumption means evidence can be led to show that what is purported to obtain is not really so. In other words a party can lead evidence to show that some official duties were not regularly performed. In that situation the onus of proof lies on the person seeking to rely on the rebuttable presumption, such as the petitioners in this case, to prove the contrary assertion as a fact. I shall presently revisit this issue.

The second respondent submitted in its address to this Court that:

"The Representation of the People Law, PNDC 284, as amended by the Representation of the People (Amendment Law), 1992, to apply to any public elections in its Section 20 (2) (b) provides as follows:

'Where at the hearing of an election petition the High Court finds that there has been failure to comply with a provision of this Act or of the Regulations, and the High Court further finds:

(i) *That the election was conducted in accordance with this Act and Regulations, and*

(ii) *That the failure did not affect the results of the election,*

the election of the successful candidate shall not, because of the failure be void and the successful candidate shall not be subject to an incapacity under this Act or the Regulations."

In the view of the second respondent, the effect of this provision is that "it requires that it is not enough to allege and indicate a failure, but that it must also be demonstrated that the failure affected the results of the election."

I have no doubt about the truthfulness of this submission as that was the very issue we set down for determination by this court in these proceedings. However, it was obvious the law quoted applied to Parliamentary elections, but not to

presidential elections. It may apply to all public elections which comprise both types of elections.

It is needless to repeat that this is an election petition which was a civil suit and therefore partook of all the incidents known to it; flowing from these provisions (quoted supra) and backed by the well known principles governing civil procedure and practice in civil trials like the present case before this court, the burden of proof is on the petitioner to prove the facts alleged against the respondents. This is because the law is well settled that:

"the burden of proof in election petition lies on the petitioner; and a petitioner who sought to annul an election bears the legal burden of proof throughout the proceedings. In other words, he who asserts is required to prove such facts by adducing credible evidence in support and if he fails to do so his case must fail"; on these general principles of burden of proof, see **Yorkwa v Duah [1992-93] GBR 280, CA; Buhari v INEC (2008)12 SC 1; Ackah v Pergah Transport Ltd. [2010] SCGLR 728; GIHOC Refrigeration v Jean Hanna Assi [2005-2006] SCGLR 198; Dr. Kwame Appiah Poku & ors v Kojo Nsafuah Poku ors. [2001-2002] SCGLR 162**;

In **Takoradi Flour Mills v Samir Faris [2005-2006] 882**, I said concerning these provisions at page 896 of the report that: "A great deal of the submissions made on behalf of the second defendant in support of the grounds of appeal centered on the burden of proof, or the *onus probandi,* by which it is the duty of the party who asserts the affirmative to prove the point in issue. This was expressed in classical terms '*ei incumbit probatio qui dicit , non qui negat'*. As it was the plaintiff who made a claim and asserted the positive, he had to adduce evidence sufficient to establish a prima facie case a required by section 14 of the Evidence Decree, 1975, because in law a fact is essential to a claim, the party who asserts the claim has the burden to persuade the court of the existence of that fact. The standard of proof is by a preponderance of the probabilities: see section 12 (1) of the Decree. Section 17(1) states that the burden of producing any particular fact is on the party against whom a finding on that issue would be required in the absence of further proof."

The standard of proof in especially election petitions, a species of a civil case, is on the balance of probabilities or preponderance of probabilities.

I return to the issue on the presumption of regularity of the performance of official acts and state that in election matters there is a presumption that the results declared by the Electoral Commission, are correct until the contrary is proved. This is on account of Section 37 (1) of the Evidence Act, 1975 (NRCD323) which provides that:

"It is presumed that official duty has been regularly performed."

This is rendered with some classical flourishes or latinism as *'Omnia praesumuntur rite et solemnite esse acta'* – all things are presumed to be done in proper and regular form; the principle applies to the performance of public functions, no less presidential elections like where the Electoral Commission created by the Constitution and vested with the power to conduct all public elections and referenda in Ghana. They are public functions when it declares results of such elections such declarations are presumed to be correct. Our law goes on to stipulate that such presumptions are rebuttable. Therefore anyone who asserts the results so declared are incorrect or are invalid, bears the onus of proving that assertion. He places himself under section 20 of the Evidence Act (supra).

The inference is that the petitioners were required by law to allege sufficient facts to support their claims; secondly, when that is done, the court will have to consider how it was satisfied that the petitioners adduced sufficient evidence to support the facts. This is because they would have succeeded in discharging the evidentiary burden on them.

If the petitioners are able to establish the facts they rely on to ask for their reliefs, the onus will then shift to the respondents to demonstrate the non-existence of that fact. This was because the court bases its decision on all the evidence before it; the petitioner and the respondent alike have a burden to discharge so as to be entitled to a claim or a defence put up.

The respondents submitted the petitioners failed to discharge the evidentiary burden that lay on them, for they pleaded they had filed about 11,916 pink sheets in support of their case, yet in their oral evidence in court, they kept reducing the figure till they ended up saying they produced 11, 138, a far less figure at that. Even there they said they were no longer relying on 704 pink sheets. The respondents submitted on account of this, the petitioners failed to discharge the onus of proof or the evidentiary burden on them and so should lose the action.

I am not in the least impressed by that submission. A party may plead a higher figure for a claim but may reduce it or even further reduce it in the course of proceedings; it will be unreasonable to say because of these reductions in initial figures he should lose the entire action. Rather I incline to the view that the party will be judged on the quality of evidence he produced on the figures he finally quoted. I also believe in matters of this nature it is not the number of pink sheets that will tilt the scales one way or the other, but rather the weight to give to each. What benefit will one derive if one should produce tons of pink sheets but found to be of little weight when put in the imaginary pair of judicial scales? The number of pink sheets produced, just like witnesses called at a trial, will be weighed but not counted. If a party put up a case and supported it with a certain number, but no longer relied on them or only on some part, or a lesser part, that per se, did not or should not spell the doom of the entire case. A trial court would be within its rights to consider its judgment on the residue.

In their affidavit filed, the petitioners complained of breach of Regulation 30 (1) and (2) of C.I. 75, in respect of which they provided particulars pursuant to orders of further particulars and following memorandum of issues and mode of trial as follows:

"52. That there were 379 polling stations where exclusive instances of voting without prior biometric verification occurred and can be found on pink sheets. The combined effect of this infraction vitiated 134,289 votes. Attached herewith and marked Exhibits MB-L-1 to MB-L-378 are photocopies of pink sheets of the polling stations where there these infractions occurred."

The duty of the court was to determine how the evidence supported the facts alleged. The court will subject the evidence before it to a microscopic analysis to determine its probative value. Before then, I must observe that the petitioners no longer relied on some of the allegations they made such as:

i) that votes for the first respondent from some polling stations were illegally padded in his favor, whilst some for the first petitioner were reduced all geared towards securing a favorable verdict for the first respondent;
ii) allegations of fraud and conspiracy leveled against the first respondent and others were abandoned for lack of sufficient evidence in support thereof;
iii) allegations of clandestine activities by the STL Company to receive, doctor and manipulate results before transmitting them to the second respondent to declare results were also abandoned for the same reason above;
iv) some allegations of over-voting at some polling stations were abandoned for lack of sufficient evidence in support;
v) no evidence was led on ballot-stuffing by anybody during the voting;
vi) there was no allegation made that somebody who wanted to vote was prevented from doing so, or that
vii) that a voter whose name was not on the register nevertheless attempted to vote.

I note that the respondents denied each and every averment of the petitioners in the petition. This imposed on the petitioners the duty of proving every single allegation they made in order to obtain a favorable finding thereof by this Court.

I will next proceed to discuss seriatim the various categories of irregularities raised by petitioners in this case.

CATEGORIES OF IRREGULARITIES

A. UNKNOWN POLLING STATIONS

The petitioners' claim here concerns the 22 so-called unknown polling stations. This was a reduction of the petitioners' initial allegation of 28 unknown polling stations.

The 2nd respondent showed that the flag bearer of the political party to which the petitioners belong, who is also the 1st petitioner herein, himself signed letters appointing polling agents to these same polling stations. It is difficult to fathom how in light of this the petitioners could maintain a claim that these polling stations were unknown.

I find the petitioners' case in this respect not satisfactory. There was evidence that following the aforesaid appointment letters, the petitioners sent their agents to the polling stations, voting took place there, the votes were counted and results declared, and finally the agents signed the result forms. In the face of these overwhelming evidence, no one will doubt that the allegation of voting taking place at stations outside the 26,002 polling stations created by the second respondent was ill founded and remained unproven at the end of the trial.

For these reasons, I also like my respected brethren, dismiss that part of the petitioners' claim against the 2012 presidential elections founded on that ground.

B. PINK SHEETS NOT SIGNED BY PRESIDING OFFICERS OR THEIR ASSISTANTS

The petitioners alleged there were widespread instances of polling stations where there were no signatures by the presiding officers or their assistants on the pink sheets in clear violations of Article 49(3) of the Constitution and Regulation 36(2) of CI 75. These are contained in Paragraphs 33, 47 and 58 of the affidavit by Dr. Bawumia. He deposed that (quoted in extenso below):

"33. That I am advised and verily believe same to be true that by virtue of Article 49 of the Constitution, especially clause (3) thereof, and also Regulation 36 (2) of C.I.75, the Presiding Officer has a mandatory constitutional and statutory duty to

sign the declaratory form at the polling station before he can lawfully declare the results at the polls at that polling station."

47. That there were 66 polling stations where instances of constitutional and statutory violations malpractices and irregularities in the nature of (I) over voting, (ii) voting without biometric verification; (iii) the same serial numbers on pink sheets with different results and (iv) the absence of signatures of the presiding officers or their assistants on pink sheets occurred and can be found on the pink sheet , the combined effect of these infractions completely vitiated the 32,469 votes cast in these polling stations. Attached hereto and marked as Exhibits MB-F, ,B-F-1 TO MB-F-65 are photocopies of the pink sheets of the polling stations where these infractions occurred.

58. That there were 310 polling stations here exclusive instances of constitutional and violations in the nature of absence of signatures of polling presiding officers and their assistants on the pink sheets occurred and can be found on the pink sheets. The combined effect of these infractions vitiated 112,754 votes. Attached herewith and marked as Exhibit MB-S to MBS-1 to MB-S-309 are photocopies of pink sheets of the polling sheets where the infractions occurred.

The constitutional provision relied on in connection herewith is Article 49, which provided that:

> *"(1) At any public election or referendum, voting shall be by secret ballot.*
>
> *(2) Immediately after the close of the poll, the presiding officer shall, in the presence of the candidates or their representatives and their polling agents as are present, proceed to count, at that polling station, the ballot papers at that polling station, the ballot papers of that polling station and record the votes cast in favor of each candidate or question.*
>
> *(3) The presiding officer, the candidates or their representative and, in the case of a referendum, the parties contesting or their agents and the polling agents if any,* shall *then sign a declaration stating*
>
> *(a) the polling station, and*

(b) the number of votes cast in favor of each candidate or question,

and the presiding officer shall, *there and then announce the results of the voting at that polling station before communicating them to the returning officer."*

Another relevant statutory provision is Regulation 36 (2) of the Public Elections Regulations 2012, C.I. 15 which read:

"(2) The Presiding officer, the candidates, or their representatives and the counting agents *shall* then sign a declaration stating

a. the name of the polling station;
b. The total number of persons entitled to vote at that polling station;
c. The number of votes cast in favor of each candidate; and …"

The words of Article 49 (3) and Regulation 36 (2) of C.I.75 are the same. In fact the constitutional provision was lifted word for word in C.I.75. They are *in pari materia* one with the other.

I would say of these provisions that they are some of the safeguards of the right to vote; the signature by the persons named in the statutes authenticates the document and its contents and by the rules of interpretation are to be read as enforcing each other.

It may be recalled that the Director of Finance and Administration of the Electoral Commission, Mr. Amadu Sulley, swore an affidavit to challenge the claim by the petitioners that some pink sheets were not signed. The second respondent commission in these proceedings said 1,009 pink sheets were signed by the Presiding officers at the polling station or at the instance of the Returning officer at the collation center; but 905 pink sheets were found to have been left unsigned. Dr. Kwadwo Afari Gyan said in his evidence in chief that it is only the presiding officers and the candidates' agents who can sign the pink sheets lawfully. The petitioners submitted there were more than 905 unsigned pink sheets. Dr. Afari Gyan conceded these facts, and that they were more than that. In fact in his address, counsel for the petitioners said he was relying on 1638 unsigned pink sheets, involving '65,9814' votes.

It is not difficult to interpret the meaning of these provisions. They mean that the persons named therein, namely the presiding officer, the candidates or their representatives and the counting agents, shall sign the declaration form stating the particularized items. There was no mention made of 'polling assistants' in the two provisions let alone requiring them to sign the declaration form. If therefore they did not sign the forms they committed no irregularity; none could therefore use that failure to found or support a case of irregularity or violation of any law. But the presiding officer was not relieved from the duty to sign the declaration forms; it was a mandatory duty cast on them by the constitutional and statutory provisions governing elections in the country; the legitimate inference is that failure by the presiding officer to sign the declaration form is an irregularity which cannot be excused or waived on the grounds that the pressure of time, prevailing atmospheric condition, etc, etc, did not simply allow or permit them to sign the forms and thereby comply with the constitutional duty.

The duty cast on the presiding officers to sign the declaration was couched in mandatory terms and deserves obedience and not meant to be disobeyed. An election much more so, Presidential Elections, are serious matters governed by well laid rules to preserve sanctity and integrity of the elections, especially where a specific duty is imposed on election officials. A breach of any of those duties meant the integrity of the election was compromised and ultimately affected the exercise of the right to vote as well as jeopardizing the sovereign will of the people.

Because of this, I am unable to accept the alibi put up by the respondents, like pressure of work, nature of carbon paper making the signatures look faint through over use, and pressing the pen too often, too hard.

In paragraph 47 of the affidavit, the petitioners deposed that:

"47. There were 66 polling stations where violations of constitutional and statutory violations, malpractices and irregularities in the nature of (i) over voting,(ii) voting without biometric verification, (iii) same serial numbers on pink sheets with different results and(iv) absence of signatures of the presiding officers and their assistants occurred and can be found on the same pink sheets. The

combined effect of these infractions completely vitiated 32,469 votes cast in these polling stations. Attached herewith and marked as Exhibit MB-F, MB-F-1 to MB-F-65 are photocopies ….."

Paragraph 58 of the affidavit of Dr. Bawumia read:

"58 That there were 310 polling stations where exclusive instances of Constitutional and statutory violations in the nature of: absence of signatures of the presiding officers or their assistants on pink sheets. The combined effect of these infractions vitiated 112,754 votes. Attached herewith and marked as Exhibits MB-S to MB-S-1 to MB-S 309 are photocopies of pink sheets of the polling stations where these infractions occurred."

These paragraphs of the affidavit spoke of the same thing, namely the absence of signatures of the presiding officers on the face of the pink sheets; paragraph 58 went on to show where these infractions occurred and also to provide the exhibits affected pink sheet by pink sheet as well as the number of votes vitiated thereby.

Article 49 (3) of the Constitution read:

" (3) The presiding officer, the candidates or their representatives and, in the case of a referendum, the parties contesting or their agents and the polling agents if any, shall then sign a declaration stating

(a) The polling station, and
(b) The number of votes cast in favor of each candidate or question ,

and the presiding officer shall there and then announce the results of the voting at that polling station before communicating them to the returning officer,"

The Regulation referred to also read:

"36 (2) The presiding officer, the candidates, or their representatives and the counting agent shall then sign a declaration stating

(a) The name of the polling station;
(b) The total number of persons entitled to vote at that polling station;

(c) The number of votes cast in favor of each candidate; and
(d) The total number of rejected ballots."

I shall return to this ground again in this delivery for the issues involved are of prime importance in conducting elections in the country. For the meantime it is sufficient to say that the real meaning of the combined effect of these constitutional and statutory legal provisions, is that they cast a mandatory duty on the presiding officer, the candidates or their representatives are to sign the declaration form before the presiding officer announces the results at the polling station. Signing a document like a declaration means the person wrote it or part of it, that he agrees with what it says, or that it is genuine; see the Oxford Advanced Learner's Dictionary, p 1366. The authors of the pink sheets, the framers of the constitution and the legislature really meant to do a serious business when they made the law and couched it in these mandatory terms. By the use of the word 'shall', the legislature intended that the duty to do the act specified and cast on the presiding officer must be honored in obedience than the letter.

I am fortified in this view because of the interpretation given of the word in our Interpretation Act, 2009, (Act 792) which provided that:

"27 'Shall' and 'may

In an enactment made after the passing of this Act, 'shall', shall be construed as imperative and 'may' as permissive and empowering."

'Shall' connotes an obligation, or mandatory duty conveying a command bereft of a discretion: see Blacks Law Dictionary (supra) at page 1407.

The unreported judgments of this court in Suit No. J1/23/2013, Martin Amidu v Attorney General & 2 ors 2013 unrep. dated 21st June 2013, SC; (commonly called the Isofoton case.); Writ No. Writ No. J1/15/2013 Martin Amidu v Attorney-General, Waterville and Woyome (the Woyome case), S.C. unrep. 14TH June 2013, SC; Attorney-General v Faroe Atlantic Co. Ltd. [2005-2006] SCGLR 271 support the proposition that where an enactment uses the word 'shall', it means mandatory or imperative.

In consideration of this well known interpretation, when the petitioners alleged these violations of the constitution and enactments and went on to provide evidence in support by way of the Exhibit MB-S series, the onus shifted by law on to the respondents to lead evidence in rebuttal or to admit the allegations.

The second respondent deposed to an affidavit in response to this allegation that when it received the allegation of no signature by the presiding officer or his assistant on the pink sheet it proceeded to examine them (pink sheets) and found that out of the 2009 pink sheets alleged by the petitioners that were not signed, 1099 were in fact signed by the Presiding Officer at the polling station, or at the instance of the Returning Officer at the Collation Center, 905 were unsigned representing 3.5% of the total number of pink sheets nationwide.

When Dr. Kwadwo Afari Gyan, the Chairman of the Electoral Commission, who gave evidence for and on behalf the Commission second respondent, was cross examined on his evidence he said there were instances where some pink sheets in addition to the 905 admitted not to have been signed, there more unsigned pink sheet, but which were signed at the collation center at the instance of the Returning officer. Mr. Johnson Asiedu Nketia made a similar admission that presiding officers did not sign the pink sheets as was required of them by the law.

If it was accepted that the law cast a mandatory duty on the presiding officer to sign the pink sheet, then he could not neglect to perform that act; excuses like the officer had a lot of work to do that day, and signing the pink sheet was only one of them, the prevailing weather, the crowd at the polling station shouting 'tsoo boi' (see the evidence of Asiedu Nketia), could not be good enough reasons to relive him from discharging his legal duty. Considering the importance the nation attaches to the exercise of conducting a national election, sustaining the integrity of the election should be zealously guarded; this could best be done by the presiding officer in charge of affairs at the polling station appending his signature to the declaration to testify that the events on the face of the pink sheet took place there.

In Presidential elections, a polling station is but a microcosm of the country at large where the whole country is a one constituency. A presiding officer at a

polling station in a constituency is like a returning officer for the whole country in Presidential elections where there is only one constituency. If the presiding officer at a polling station shall fail to sign a declaration form at the end of a poll what shall it mean? Can the Returning officer in a Presidential election refuse to sign the declaration form and announce the results of the election and still hope it will still be accepted as valid? If the answer is in the negative, then it is to the same effect where a presiding officer fails to sign the declaration of results portion of a pink sheet at a polling station and so do I hold.

I hold in my concluding comments on this ground, that the failure to sign the pink sheet was a monumental irregularity unmitigated by any circumstances. I am further fortified in this view by the observation that in establishing the duty for presiding officers to sign pink sheets before proceeding to declare the results of the polls at the polling station, Article 49 (3) of the Constitution does not merely constitute a mandatory constitutional duty on presiding officers to do so prior to announcing the election results, but it is also one of the entrenched provisions of the Constitution. In the face of the full force of this entrenched constitutional requirement, I am unable to make any exception to save the pink sheets impugned by the omission of the presiding officers on the basis of the explanations offered by the respondents. I am emboldened to come to this conclusion following upon the holding that:"the Ghana Supreme Court has recognized the concept of the spirit of the constitution as a tool of constitutional interpretation……to ensure that Ghana succeeds in her fourth attempt at democratic and constitutional system of government, both the government and the people should observe not only the written provision of the constitution but it's spirit as well." See The Law of Interpretation in Ghana, Exposition and Critique by S.Y.Bimpong-Buta Chapter 10 p373.

All things considered, I am of the candid opinion that the failure by the presiding officer to sign the pink sheet before announcing the results constituted an omission to perform and a breach of his constitutional duty. It vitiated the votes cast at the polling station, a more monstrous irregularity no one can imagine.

I may remark that it was as unpardonable as it was inexcusable that presiding officers should fail to sign declaration portion of pink sheets they worked with on the polling day from the beginning to the end of polls on the election day.

Based on the foregoing discussion under this head of irregularities, I find that all votes cast and declared during the 2012 presidential elections which involved pink sheets not signed by presiding officers or their assistants are to be nullified and I so declare.

C. DUPLICATE SERIAL NUMBERS AND POLLING STATION CODES

The petitioners deposed in their grounds for the petition that:

"40. There were widespread instances where different results were strangely recorded on the pink sheets in respect of polling stations bearing the same polling station codes, when by the second respondents established practice each polling station was assigned a unique code in order to avoid confusing one polling station with another which could not be explained by a reference to special voting."

In their affidavit in affidavit filed pursuant to the court directions and memorandum of issues and mode of trial dated 2nd April 2013, the second petitioner deposed in paragraph that:

"40. That exclusive … polling station codes were found in 37 polling stations in 34 of these stations, representing 91% of this irregularity together with i) over voting, ii)voting without biometric verification and iii) same serial number of different pink sheets with different … Only in 3 polling stations did the irregularity occur without other violations, irregularities or malpractices."

It was further deposed on the grounds of the petition that:

"59 That there were polling stations where exclusive instances of irregularities and malpractices of polling stations with some polling station codes and different results occurred and can be found …

The respondents agreed that what differentiates one polling station from the other is the polling station code. Dr. Afari-Gyang said at page 12 of the record of proceedings of 31 May 2013, that:

"the code is unique; first in the sense that no two polling stations ever have the same code number or code. It is also unique in the sense that the code is consciously crafted to contain information that directs you the location of the polling station. And the system is alpha-numeric, that is to say, it combines the letters of the alphabets and numbers, and the system is a letter followed by 6 digits and it may end or may not end with another letter."

a.) The petitioners also complained of the use of serial numbers for different polling stations with different results. They stated this irregularity affected …polling stations and … votes. I have considered the defence to this allegation that there is no constitutional or any other statutory backing for the serial numbers, which were not generated by the EC for any purpose except that they were created by the printers and randomly assigned to the constituencies and onward to the polling stations. In the absence of any such constitutional and statutory foundations, their use as alleged by the petitioners did not amount to any breaches such as will attract the draconian effect of being used to annul votes affected thereby.

In the result I hold they could not be used to annul the votes in the polling stations specified. I rather dismiss the claim based on that ground, just as my brethren have done.

D. OVER VOTING AT POLLING STATIONS

In paragraph 44 of the affidavit filed by the petitioners (infra), they alleged over voting took place in over 320 polling stations. I must observe that the electoral laws of the land, the Constitution itself or any other enactment, did not define the term. The petitioners pleaded over voting as an irregularity in the conduct of the elections and said it tainted the results and invited the court to so find and annul the votes thereby affected. Over voting was pleaded as either standing alone or

being exclusive of any other irregularity, or violation etc, etc (see paragraph 44 of the affidavit by Dr Bawumia) where he deposed that:

'44. That there were 320 polling stations where exclusive instances of the constitutional and statutory violations of over voting occurred and can be found on the same pink sheets. These completely vitiated all the 130,136 votes cast in those polling stations. Attached herewith and marked as Exhibit MB-C, MBC 1 to MB-C-319, are photocopies of the pink sheets of the polling stations where these infractions occurred."

It was the petitioners speaking through the second petitioner their spokesman, who gave evidence on their behalf and said in his evidence that*:*

"First, over voting would arise if the total votes in the ballot box as recorded on the face of the pink sheet exceeds the voters register at the polling station as recorded on the face of the pink sheet. Secondly, over voting would arise if the total votes in the ballot box as recorded on the face of the pink sheet exceed the total ballots issued to voters as recorded in Section C1 and C2 including proxy voters. So the total votes in the ballot box, if they exceed the number of voters you have given ballots to, to vote, then there is over voting." (See a copy of a pink sheet quoted below for ease of reference.)

Giving evidence on behalf of the first and third defendants, Mr. Johnson Asiedu Nketia, General Secretary of the National Democratic Congress, said*:*

"We have come to know over voting to mean an occurrence where the number of votes found in the ballot box exceed the number of people who are entitled to vote at that polling station."

Continuing his evidence under cross-examination the following took place:

"Q. In your evidence you gave a definition of over-voting which excludes a situation where if there are 100 ballots issued and it turns out that there are 110 ballots in the ballot box, you exclude that as over-voting. Am I right?

Ans. Yes you are right.

Q In such a situation what will you term it?

Ans. When such a situation arises, my lord it is an indication that some 'unidentified material' is in the box and there is a procedure of locating that 'unidentified material' during sorting and it is removed and the other valid votes are counted."

The Chairman of the Electoral Commission, Dr Kwadwo Afari Gyan also said concerning over voting that:

"I think I am not too clear in my own mind what the connotation of over voting is so at this time I think it is subject to further clarification. Oh yes my lords the 'classical' definition of over votes is where the ballot cast exceeded the number of persons eligible to vote at the polling station or if you like, the number of persons on the polling station's register, that is the classical definition of over voting. Two new definitions have been introduced there is nothing wrong with that but I have problems with this new definition proposed and the problem is that they limit themselves visibly to what is on the face of the pink sheet as I understand the definition."

A careful reading of the evidence by Mr. Asiedu Nketia and Dr. Afari Gyan revealed a marked difference between their definitions and that provided by Dr. Bawumiah. It was that unlike theirs, the petitioners talked about the number of ballots *'issued to voters'.* Another real difference inherent in the definition by Dr Bawumia which did not seem to find favor with Dr Afari Gyan was that it limited itself to what was 'on the face of the pink sheet'. That compelled me to take a close look at the face of the pink sheet, which is otherwise called by its full name and title of what has been called a 'pink sheet' in these proceedings, a word which has gained a wide usage or currency and enriched our vocabulary, is <u>"Electoral Commission of Ghana. Statement of Poll and Declaration of results for the office of President</u>."(see the heading of a typical pink sheet, quoted in full infra.) A study of an anatomy of the face of a pink sheet shows it contains a great lot of information including the following (I am not ashamed to be pedantic enough to provide a panoramic view of a pink sheet hereunder, if to do so will

provide relevant information so as to drive home the opinion I am about to make of the definition of over voting, or some of the grounds of the petition).

"A. Ballot information on (to be filled in at start of poll).

1 What is the number of Ballots issued to this polling station? A1 [ ]

2 What is the range of serial numbers of the ballot papers issued to the polling station? A2 [[

B. Information at the Register and other lists at the polling station? B1 [ ]

1 What is the number of voters on the polling station register? B2 [ ] 2 What is the number of voters on the proxy voters list? B3 [ ]

3 What is the TOTAL voters eligible to vote at this polling station? (B1 plus B2) B3 [ ].

C. Ballot Accounting (to be filled in at end of poll before counting commences).

1 What is the number of ballots issued to voters on the polling station register? C1 [ ]

2 What is the number of ballots issued to voters on the Proxy Voters list? C2 [ ]

3 What is the number of ballots issued to voters verified by the use of Form 1C but not by the use of BVD? C3 [ ]

4 What is the TOTAL number of SPOILT ballots? C4 [ ]

5 What is the Total number of UNUSED Ballots? C5. [ ]

6 What is the TOTAL number of C1, plusC2, plus C3, plus C4, plus C5 (This number should be equal to A1 above) C6 [ ].

D is on Rejected ballots report to be filled in at the end of poll after counting is complete***."***

The point I am striving to make is that the pink sheet is a very vital document to consider when determining several issues in this matter like the issue as to

whether or not there was over voting at a polling station; it contains a summary of information on what exactly took place during the voting and the number of ballots issued for the day, what use they were put to and the results of voting at the end of the poll. Apart from the pink sheets there is no other comprehensive record of how the polls were conducted at the polling stations and the counting of the ballots. These vital pieces of information are found on the face of the pink sheet. The pink sheet contains information on the number of people registered to vote at the particular polling station; the respondents did not show by any evidence how a register shows more information on ballots, let alone the events at a particular polling station.

It is for all these reasons that I prefer the definition of 'over voting', as given by Dr. Bawumia to what the respondents gave. Undoubtedly, I accept that in the web of electoral laws, over voting is where the number of ballots in the ballot box *after* a poll exceed the number of ballots issued *before* a poll. These are discernible from the face of the pink sheet, an electoral document which I agree with Dr. Bawumia, is the primary document for the 2012 Presidential elections. Of course, other documents like the register for a polling station, collation forms, etc, etc may come in handy.

The register may contain names of people registered to vote at the polling station, but on the election date for one reason or the other, not all of them may turn out to vote. It is not always that all may do as empirical studies show that a 100% voter turnout is a rare occurrence in our municipality nowadays. This is a fact of which judicial notice can be taken.

On the other hand a criterion like 'ballots issued', is a certainty for the ballots will be issued to voters present – a sure ascertainable number. It was for these reasons that I prefer the definition by Dr. Bawumia to any other put before me in these proceedings.

Dr Afari Gyan did not supply the source of his so called 'classical definition', of over voting and his self confessed confusion and lack of clarity in mind made it extremely impossible to accept his definition. Indeed, I reject it just as I do of the definition by Mr. Johnson Asiedu Nketia. Both definitions were short, simple but

very wrong. There was nothing classical about it. Both should have referred to *the ballots issued before the voting began,* if they desired to make their definitions credible.

When I considered the definition of over voting by the respondents I found that they were mere distinctions without any difference, for both ended up referring to the register something Dr Bawumia did earlier in his definition; I still wonder why the respondents did not readily agree with him but tried to create the impression they were bringing something new to assist the court determine whether there was any over voting or not in the elections. They failed abysmally and left Dr. Bawumia's definition intact.

Almost everything about voting is premised on the right to vote, and it is gratifying to note that the petitioners referred to article 42 of the constitution and Regulation 24 (1) of CI 75 as the constitutional and statutory violations which had a close link with over voting. I respectfully quote them *in extenso* hereunder for their full import and effect:

"42. The Right to Vote".

Every citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda."

Regulation 24 (1) is as follows:

"The poll

Number of votes and place of voting

24 (1) A voter shall not cast more than one vote when a poll is taken."

The two enactments are to be read together because, the right to vote is the pivot around which political rights revolve; it is the heart beat and crescendo of democracy. The real meaning of these legal provisions above is that where a citizen decides to go to the poll to exercise his/her undoubted right to vote, he casts his vote only but once. Anything more than that is unlawful and if found out

attracts the penalty of having that extra vote declared null and void. Before proceeding further, I must state that the right to vote under our constitution, is governed by qualifications, some of which are that the person must be:

i) a Ghanaian citizen;
ii) of eighteen(18) years of age or above;

(iii) of sound mind; and

(iv). be or is entitled to be registered as a voter

Thus in the Ghanaian law, the right to vote is not automatic. It is hemmed in by qualifications as to citizenship, age, soundness of mind and the fact of registration.

The pith of the ground of 'over voting' is the right to vote set out above. If Article 42 (supra) created the right, Regulation 24 (1) (supra) showed how to exercise it; the Preamble to the Constitution laid the roots and foundation as it pointed to the principles of 'Universal Adult Suffrage' and 'The Rule of Law'.

There is no paucity of case law on the topic and the local cases of Tehn-Addy v Electoral Commission [1996-97] SCGLR 589, and Ahuma-Ocansey v Electoral Commission and others; Centre for Human Rights & Civil Liberties (CHURCIL) [2010] SCGLR 575, expatiated on the principles which cumulatively said that where the right to vote has been conferred on the citizen of Ghana by the 1992 Constitution, whatever is provided for by law to enjoy the right, should aim at complementing to the full, promote, enforce, facilitate and encourage that right to vote. Anything done by any person or authority to fetter that right is inconsistent with the constitution will attract the sanction of being declared unconstitutional, null and void, to the extent of the inconsistency; see Article 2 (1) of the constitution. In election matters, it is to be annulled.

I like to clinch the deal by taking a leaf from the ruling by the US Supreme Court, in the recent case of George Bush v Al Gore 531 US 98,where it was ,held at page 148 that:

"The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by a later arbitrary and desperate treatment, value one persons vote over that of another."

This case underscores the principle that one person's vote is not more important than that of another and therefore a person cannot be made to win elections where the results are flawed by over voting, the implication being that a citizen's vote has been preferred or upgraded over the vote of another.

The right to vote, I must remark, did not come as a matter of course or given on a silver platter. It came as a result from the struggles, sweat, blood and toil of others till we in Ghana became the benefactors thereof. A reading of the Tehn-Addy (supra), Ahumah-Ocansey (supra) and Apaloo v Electoral Commission [2001-2002] SCGLR 1 cases, to name only these few ones, throw much light on the point I am seeking to make.

The legal provisions quoted above provided the basis for the allegation of constitutional and statutory breaches or violations spoken of by the petitioners. The true import of these statutes is that where they confer powers on any person, it must be exercised in terms of the enabling statute: see Apaloo v Electoral Commission [2001-2002] SCGLR 1 at 14, and more recently, Nii Tetteh Opremreh v Electoral Commission [2011] SCGLR1159. The upshot of this is that where there is proof of over voting at any polling station, it will attract the full effect of declaring the results of that polling station null and void in which case the results will be annulled. Therefore over voting cannot be trifled with in any election much less a Presidential election and so if the petitioners were to make out a case of over voting they are required by law to furnish this court with all the pink sheets in the MB-C series and to also demonstrate that on the face of the pink sheets there was a real case of over voting.

If I may respectfully revisit the issue of proof in law, I may remark that the law was settled that where a party makes an averment which was capable of proof

the positive way, but the averment was denied by his adversary, he succeeds in his proving his case by producing the proof in court by evidence; in this case by producing the evidence in the pink sheets in court. A bare allegation bereft by any probative evidence does not and cannot amount to proof of that allegation: See Samuel Okudzeto Ablakwa & other v The Attorney General and another ….; Dogo Dagarti v The State [1964] GLR 653, and the oft -cited case of Majolagbe v Larbi [1959 GLR] 199.

As said already, the petitioners mentioned that the exhibits supporting the allegations of over voting was in 320 polling stations exhibited by the MB-C-1 to MB-C-319 series. However, in his evidence the witness said that some of them had been deleted and were no longer relied upon. In other words, they were no longer part of the case supporting the allegation of over-voting.

they made up a total of 83), 57 in the over voting category, 1 each in the over voting and no signature of presiding officer category, over voting, voting without biometric verification and no signature of presiding officer category]. The names of the Region, constituency, polling station, code, serial number and exhibit number as well as the category were given. The evidence which the petitioners put before the court must carry a great deal of weight; their probative value must be borne by the contents discernible on the face of the pink sheet, bearing in mind that 'you and I were not at the polling station', to borrow the words of Dr. Bawumia. Evidence on the deleted pink sheets in the over-voting and the various categories was given in Exhibit C, C1-C11; C3. Exhibit C4 was showed the polling stations deleted from the over voting category.

In the result, all pink sheets deleted from the exhibits relied on as proving over voting will not be considered in so far as that irregularity is concerned. I must state that notwithstanding this, all other exhibits that were not deleted are relied upon and will be considered, just as those that were admitted no longer supported allegations of over-voting.

I also find it from the evidence under cross-examination by the second petitioner given on 24th April 2013 that the petitioners admitted that on the face of the pink

sheets, (eight of them), some polling stations were found to have been wrongly described as over voting in the Exhibit MB-C category.

When the petitioners conducted a quality control exercise over the exhibits, they ended up no longer relying on 704 pink sheets.

In addition to this, when the evidence of the respondent was studied carefully, it tended to show that under cross-examination, that

(i) Dr. Bawumia admitted some pink sheets did not support a case of over voting at some polling stations;

(ii) others were simply cases of arithmetical errors. In my assessment of the defence by the respondents, I am able to conclude that there was no evidence that any voter voted more than once at any polling station; in fact that was not the case by the petitioners;

(iii) no person voted who was not entitled to vote; that was also not part of the case by the petitioners;

(iv) agents who were deployed to the polling stations signed the declaration of results forms after the votes had been counted in full public view after the voting, but,

(v) none of them ever lodged a complaint against the declaration of results;

(vi) Notwithstanding these admissions, the petitioners succeeded in proving on the preponderance of probabilities that there was over-voting in some polling station results and I so find as a fact. That would also support a finding that the irregularity affected the results of the polling station. The evidence would tend to show that the number of polling stations mentioned in paragraph 44 of the affidavit as being 320 for the over voting category, was reduced by 57.

(vii) The petitioners removed some polling stations as result of what they termed a quality control and removed 83 of them from the over voting category; they were listed in evidence in exhibit C, C1 and C2. The total number of votes affected in the exercise was 33, 972.

(viii) The petitioners relied on 1722 polling stations as presented in Table 10 of Volume 2B; the number of votes affected was 745,569.

CREDIBILITY OF SECOND PETITIONER AS A WITNESS

Counsel for the third respondent cast a serious aspersion on the credibility of the second petitioner, on the grounds that his own evidence was that he was not at the polling station when the irregularities took place and for that reason could not be a witness to the events he testified about in court. Well could that be true but, as stated Dr. Bawumia left no doubt that he was not at any polling station to observe proceedings and the evidence he gave did not stem from personal observation, ocular or any such other personal perception. That being so, the respondents submitted he could not be a witness properly so called. The reason was that he was a witness who satisfied the requirement in section 60 of our Evidence Act, 1975, that:

"60. (1) A witness may not testify to a matter unless sufficient evidence is introduced to support a finding that the witness has personal knowledge of the matter.

(2) Evidence to prove personal knowledge may, but need not consist of the testimony of witness himself.

(3). A witness may testify to a matter without proof of personal knowledge if an objection is not raised by a party."

Thus, under the law of evidence, a witness may testify if he had a personal knowledge of what he is testifying about. Aside of that a person who does not have any personal knowledge of what he testified about because he was not at the scene or shown that he has some extra-sensory power of perception, may still be a witness if his adversary did not raise any objection to his giving evidence on the matter.

Section 6 of the Evidence Act (supra) was that:

"6 (1) In every action, and at every stage thereof, any objection to the admissibility of evidence by a party affected thereby shall be made at the time the evidence is offered.

(2) Every objection to the admissibility of evidence shall be recorded and ruled upon by the court as a matter of course. "

Despite the confession by Dr. Bawumia summed up pithily in his refrain 'you and I were not there' he could still testify about the matters he testified about because no objection was raised by the respondents. That he was truthful in saying so was not far to rationalize, for how, he bereft as he was of any power of omnipresence, or ubiquity, could be at the over 26,000 polling stations *parri passu*, or at all, could be doubted. He could only rely on what was on 'the face of the pink sheet' and still qualify as a witness, especially when counsel did not raise any objection against his giving evidence when he did so, the court will be perfectly entitled to use the evidence led.

I will base my findings on the admissibility of Dr. Bawumia's oral evidence on the pink sheets on another separate point. Even though a witness may not testify in respect of a matter outside his personal knowledge, this bar does not apply to official or public records.

On this, Section 126 of the Evidence Act, 1975 (NRCD 323) provides that:

126 OFFICIAL RECORDS

(1) Evidence of a hearsay statement contained in writing made as a record of an act, event or condition is not made inadmissible by section 117 if
(a) the writing was made by and within the scope of duty of a public officer;
(b) the writing was made at or near the time the act or event occurred or the condition existed; and
(c) the sources of information and method and time of preparation indicate that the statement contained in the writing is reasonably trustworthy.

In application of this exception to the admissibility of hearsay evidence, the evidence concerning the pink sheets are admissible since they are duplicates of

the original pink sheets, which are the official primary records of the election. The pink sheets being duplicates, they are as good as the originals, unless their authenticity is successfully challenged.

There being no such challenge, the fact that Dr. Bawumia was not present at any of the polling stations from whose results were captured on the pink sheets, does not detract from the admissibility of his testimony in respect of the pink sheets. To put it bluntly, as I saw and heard Dr. Bawumia as he gave his evidence on oath in the witness box my impression about him was that he was a witness of truth. He frankly admitted salient facts and answered questions put to him freely and unhesitatingly.

I like to consider another point raised by the respondents which I think bordered on the credibility of Dr. Bawumia. The first was that he said polling agents were mere observers at the polling stations. I think he underestimated the role of polling agents at elections; they were more than that. Polling agents are appointed and assigned specific functions to perform at elections under C.I.75. They act under an oath and when they breach their oaths or perform their duties willfully, they suffer penalties for that; (see Regulation 19 of the Public Elections Regulations, 2012, C.I.75).

Secondly, the respondents submitted nobody complained at the polling stations that infractions took place there during the voting and the polling agents signed the pink sheets to demonstrate their approval at events at the polling stations. Studying the evidence closely, it was clear nobody complained against anything at the polling stations, but I do not infer from that that the petitioners had no basis to complain. As Dr Bawumia said the polling agents only signed to acknowledge what took place there but not as to its legality or that everything was done regularly.

Where it is shown that relevant legislation and regulations governing elections were breached in the course of voting, the fact that polling agents did or did not complain against the events or signed pink sheets would not invalidate that which was invalid, or regularize that which was irregular. The result would be that the evidence on record will be evaluated for its probative value to be assessed.

It was said in the KPMG report that paragraph 44 of the affidavit of the second petitioner alleged 320 pink sheets were filed but 318 Exhibits were counted in the Exhibit MB-C- series: see Appendix A.1: Report Summary of Pink Sheet Count: see Page 5 of the KPMG Report. Appendix A.2.1 contained the details of data captured for the MB-C Series of exhibits in the paragraph stated. The summary stated clearly there was a difference of two pink sheets in support of the allegation of over-voting.

The respondents did not impugn that these were documents in support of allegations of over voting. In the law of evidence, documentary evidence prevails over oral evidence: **Fosua & Adu-Poku v Adu-Poku Mensah [2009] SCGLR 310**. The reason is not far to see. Documentary evidence if not challenged, is often the best proof of matters in controversy. In fact it should prevail over oral evidence.

I have read the evidence of the second respondent several times over and on some occasions, he impressed me as telling the truth; one was when he readily conceded that working with a large number of personnel who were trained over a very short period of time, blunders were bound to occur; blunders did in fact occur which he explained was more of arithmetical errors than deliberate or out of mischief. But it was on the basis of these errors that he declared the results. These errors he also labeled 'excess votes'. So 'arithmetical errors', 'trans-positional errors', 'excess votes' and the result is over-voting. Mr Asiedu Nketia even spoke of 'unidentified materials in the box' whatever he meant by that. My observation is that in these proceedings no party had an exclusive monopoly over 'arithmetical challenges' or any other such challenges.

There was credible evidence that where there was proof that there was over voting, the Electoral Commission annulled the votes at the particular polling station. This step by the commission was justified because they apparently were violations of statutory provisions quoted above in this opinion. That much was also admitted by the second respondent; he only sought to mitigate the effect of these errors when he made a half hearted effort by saying that he was not made aware of those cancellations and if he had been he would have checked the records further before cancelling the results. The fact that they had been

cancelled for over voting was not doubted; by that the second respondent set an example he ought to follow wherever there was an over-voting.

I am of the view that our electoral laws will be given a lot of impetus and strength and respect if they are given teeth to bite and all breaches are given uniform treatment; what is good for the goose is equally good for the gander. Reduced to simple practical terms polling stations where over voting took place the results were cancelled, and there was no reason why the same thing ought not to be done to where the same thong took place.

My overall assessment of the evidence on the ground of over-voting is that the petitioners proved their case on the preponderance of evidence and that looking at the weight of the votes affected by that irregularity, it affected the outcome of the results so much that I have no option other than annulling those votes and I do so annul them.

E. VOTING WITHOUT PRIOR BIOMETRIC VERIFICATION

The petitioners pleaded in their paragraph 29 of the affidavit by Dr Bawumia that:

"29. That equally, prior to the December 2012 elections, and after the enactment of C.I. 75, Regulation 30 (2) which provides 'The voter that shall go through a biometric verification process.' Before being allowed to vote, the second respondent issued the following directive 'NVNV' . This again is to protect the integrity of the voting register, and the entire elections. The Chairman of the Electoral Commission stated it and four polling stations had their votes annulled for 'No verification no vote' at the Nalerigu-Gambaga constituency, Kutre (No 1) polling station, Code Number G 124201."

The second respondent submitted that the petitioners did not produce a single piece of evidence of anyone voting without being biometrically verified. Thus the issue arose as to whether or not anybody voted without a prior biometric verification and the burden of proof of this fact was cast on the petitioners.

Voting after a biometric verification was governed by Regulation 30 of the Public Elections Regulations, 2012, C.I, 75. It is not a long provision and I would like to quote the whole of it here. It was that:

"30 (1) A presiding officer *may* before delivering a ballot paper to a person who is to vote at the election, require the person to produce

a) a voter identification card, or
b) any other evidence determined by the Constitution

in order to establish by fingerprint or facial recognition that the person is the registered voter whose name and voter identification number and particulars appear in the register.

(2) The voter *shall* go through a biometric verification process."

Everything Biometric, registration and verification, burst on to the Ghanaian electoral landscape only just recently. It followed a thorough debate by political parties as a result of lots of agitation and clamor for reforms in the system so as to generate public confidence and integrity in the electoral system by checking impersonation, multiple voting and provide a quicker method of registering voters, amongst others. On the voting day, after a voter had gone through the essentials in Reg. 30 (1), then he was required to go through a biometric verification exercise.

I am persuaded that regulation 30 (2) of C.I.75 was a mandatory provision in our enactment regulating the conduct of elections in the country. Regulation 30 (2) (supra), stated that biometric verification is a process to verify the identification of a voter which may involve fingerprint or facial recognition that the particular voter standing or appearing before the presiding officer, is the person whose name and voter identification number and particulars appear in the register. Biometric verification is only by the use of an electronic device called the biometric verification device (bvd) or equipment, interpreted in C.I. 75 as:

47. (1) “biometric verification equipment” means a device provided at a polling station by the Commission for the purpose of establishing by finger print the identity of the voter.”

It was gratifying to learn that exceptions were made to the application of the mantra for it was readily recognized that there was an inherent limitation to the use for either through an act of God or natural causes over which no one had any control or any other cause like human activity, many a people may either have no fingers at all, like lepers and amputees, accident victims, called ‘those with permanent trauma’; some may have finger prints which could not be captured by the biometric verification device like those whose fingers prints have been worn out with age or repeated human activities like the use of that part of their members. The law made room for these people so they did not lose the franchise for any reason whatsoever.

The Electoral commission crafted a special dispensation for them and they were identified by their face only and labeled ‘FO’. The letters ‘FO’ were inscribed against their names in the register, but even such persons had to undergo a form of biometric information. ‘FOs’ had to swipe the barcode on their voter’s identity card through the biometric verification device. Successful verification thereafter occurred where the photograph of the ‘FO’ popped up. When this happened then to all intents and purposes such a person was deemed biometrically verified so there would be no need to proceed further to ask that voter to still put a finger on the device. He would proceed to vote by casting his ballot for his/her preferred candidate.

All witnesses before this court testified on this and sang the same song in court to underscore the veracity in it. Dr Bawumia said there were about 700 of such people in the country, Dr. Kwadwo Afari Gyang said that figure was an understatement for they were more than that.

The second respondent referred to the Public Elections (Registration of Voters) Regulation, 2012, C.I. 12, and submitted that sub-regulation 12 stated that

"A registration assistant shall capture the biometric data made up of the ten finger prints and the photograph of the head, showing the face and two ears without any obstruction of the applicant"

Also, sub-regulation (9) stated that

"the Commission shall make alternative arrangements in relation to biometric data for a person who has no fingers."

Regulation 31 explained that

"bio-data refers biographic and biometric information of a person required for the purpose of establishing that person's identity."

The second respondent submitted that in view of these provisions biometric verification could not be limited to only finger prints.

I am unable to agree with that submission. A reading of regulation 30 of C.I. 75 shows that the voter shall mandatorily go through a biometric verification process by a biometric verification equipment for the purpose of establishing the identity of the voter by finger print. In order to ensure that those who through no fault of theirs have no fingers at all, or have fingers but whose finger prints could not be taken for one reason or the other, special provisions/arrangements were made for them. Those voters are labeled 'FOs' and are excused from undergoing biometric verification by the equipment.

I note there was a difference between 'identifying' and 'verifying' a voter. I agree biometric verification is a process under our electoral laws. It begins with the process in regulation 30(1) and continues at regulation 30(2). The two provisions mention identification and verification of voters and truly they are to be read as forming one scheme even though it is a process involving several steps, voters are verified with biometric verification devises which establishes the identity of the voter by his her fingerprints.

Apart from them I do not know of any other exception recognized by statute or regulation. It would therefore be wrong for anybody advocating that there could be voting without verification biometrically, where even the machine failed to

function. Evidence put before this court had it that when political parties suggested this could be done the suggestions were rejected. Other persons including chiefs who made similar suggestions were equally rebuffed. My heart missed a beat when Dr Afari Gyan said if a chief popular in the area appeared at a polling station to vote, he could be excused from undergoing biometric verification. He did not provide data of those who benefitted from that dispensation and it could safely concluded that it did not happen, for it was wrong, dangerous to accept and follow.

I am satisfied from the KPMG Report that in Appendix A.2.9, Details of data capture for MB-L Series of Exhibits, 382 pink sheets were counted.

I conclude on the issue of voting without biometric dispensation that where power is conferred, it ought to be exercised in terms of the enabling statute. Anything done outside the power stands the risk of being affixed with the ultra vires stamp and declared null and void: see Apaloo v E.C. [2001-2002] SCGLR 1, at 14; Nii Tetteh Opremreh v E.C. [2001-2002] SCGLR 1159;

The petitioners were obliged to give evidence to prove their allegation that people voted without going through biometric verification. Dr. Bawumia stated the evidence is on the face of the pink sheet, tendered in evidence, marked and stamped with the commissioner of oaths stamp. They were tendered in evidence and accepted without any objection. They were photocopies of the originals, which were in the custody of the second respondents.

It may be asked, how does the biometric verification device (bvd) infringe on the right to vote? The onus is on those alleging the infringement to establish it. There is a presumption of regularity of legislation until it is proved otherwise. Article 63 (2) of the constitution emphasizes that presidential elections shall be based on universal adult suffrage; the biometric verification device ensures that voting is done by universal adult suffrage. Therefore it promotes the enforcement of the principle of universal adult suffrage.

Whether or not anybody voted without biometric verification is an issue of fact.

The petitioner sought to prove their case by relying on the contents of the pink sheets tendered in evidence. He pointed to column C3 of the pink sheet and the entry made as to the number of voters who voted without being verified by Form 1C, or the biometric verification device (bvd) machine. On the other hand the respondents did not tender any pink sheet to counter the case for the petitioners. They gave evidence through Dr. Afari Gyan who said when it was suggested voters could be allowed to use the card in Form C1 to vote for it was generated from data collected by the EC but was lost through no fault by the voters but rather by the EC. This was because the EC. did not want any voter to lose his/her franchise, or, her right to vote. However political parties strenuously opposed the idea till the EC agreed to stick to the idea of voting only by the biometric verification process. He then said he told the presiding officers not to fill the column 3C on the forms.When Dr. Afari Gyan was asked how he gave that instruction to the presiding officers not to fill column C3, he could not tell positively. In my assessment of his creditworthiness on this wise, I found him wanting. I gave him zero marks. The conclusion I came to was that no such instructions were given to the presiding officers and they filled the pink sheets as truthfully as they could. I therefore found no reason to disbelieve the evidence of Dr. Bawumia. I accept and find that some voters voted without undergoing the biometric verification. Again, I think they should have to challenge the veracity of the genuineness of what the petitioners tendered in evidence. If it is considered that the second respondent had custody of all the pink sheets and only gave photocopies to the parties according to Regulation 36 (3) of C.I. 75, then the petitioners' pink sheets tendered in evidence remained the only evidence before the court, and their authenticity could not be impugned by the respondents. The pink sheets in evidence provided the best evidence of what transpired at the polling station in the absence of better evidence must be accorded the best regard. Their contents are conclusive of the facts in issue, and no oral evidence is admissible to add to, subtract from or vary them.

Arguing in support of this legal point, the appellants relied on Section 25 (1) of the Evidence Act which provided that:

"Except as otherwise provided by law, including a rule of equity, the facts recited in a written document are presumed to be true as between the parties to the document, or their successors in interest."

This means that after filing the numbers of pink sheets and given oral evidence in support, the onus shifted to the respondents to lead evidence to challenge it or to leave doubts on the existence of those facts.

I believe that the petitioners have the duty to prove the irregularity alleged, and also that they affected so many polling stations. In their effort to discharge this burden they gave evidence relying on the face of the pink sheet. In column 'c' figures were to be filled as to the number of voters who voted without being verified biometrically. The evidence supplied was that where figures were not written but were only left blank, that was an attempt to cover over voting, or any other irregularity. A blank space therefore was construed to mean zero. In Table 10 B of Volume 2B, Page 360 it was stated that 223 polling stations were affected, and it covered the various categories. The total number of votes affected was 93, 273. Forty three (43) of these polling stations were in the over voting category alone. I must be quick to state that I do not think the construction by the petitioners that a blank means zero can be correct, for I did not see any real justification for that; I simply reject that interpretation by the petitioners.

In evaluating the evidence by the petitioners, I note that when the petitioners were ordered by the court to provide further and better particulars on the allegation of voting without biometric verification, they stated the irregularity took place at 2,279 polling stations. However, by the close of trial and addresses stage, they deleted 148 of them from the list relied on 2,131 polling stations. I have said these reductions in figures did not prove fatal to the petitioners' case and will be considered by the court.

In the result, I declare that all votes cast at the 2012 presidential elections which were affected by this irregularity of voting without prior biometric verification are nullified.

ANNULLING ELECTION RESULTS BASED ON IRREGULARITIES

I now consider some of the principles upon which a court considers whether or not to annul an election results have been discussed in several cases and a few will be considered.

In Re Election of First President – Appiah v The Attorney General, 1970, reported at pp 1423-1436, A Sourcebook of Constitutional Law of Ghana, Bannerman Acting.C.J said, citing **Medhurst v Lough Casquet [1901] 17 LTR 210**, where ,Kennedy J said (at p 230) that:

"An election ought not to be held void by reason of transgression of the law committed without any corrupt motive by the returning officer or his subordinate in the conduct of the election where the court is satisfied that the election was, notwithstanding those transgressions, the election, an election really and in substance conducted under the existing election law, and that the result of the election, that is the success of the one candidate over the other was, or could not have been affected by those transgressions. If on the other hand the transgressions of law by the officials being admitted, the court sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it was open to reasonable doubt whether these transgressions may not have affected the result and it [was] uncertain whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the court is then bound to declare the election void. It appears to us that this is the view of the law which [was] generally been recognized and acted upon by the tribunals which have dealt with election matters." And again the judgment in the case of Woodward v Sarsons 1875 32 L.T(NS) 867 at pp. 870-871; L.R. 10 C.P. 733: "…we are of opinion that the true statement is, that an election is to be declared void by the common law applicable to Parliamentary elections, if it was so conducted that the Tribunals, which is asked to avoid it, is satisfied, as a matter of fact either that there was no real election at all, or that the election was not really conducted under the subsisting election laws … but if the Tribunals should only be satisfied that certain of such mishap had occurred, but should not be satisfied either that a

majority had been, or that there had been reason to believe that a majority might have been prevented from electing the candidate they preferred, then we think that the existence of that mishap would not entitle the Tribunal to declare the election void by the common law of Parliament'. We do not think that it can be said or even suggested that in the election under review the candidate returned had really been elected by the majority of electors and are satisfied that that the election was really and in substance conducted in accordance with the existing election law."

Woodward v Sarsons, L.R. ; was also reported in L.R.10 C.P. 733, and cited in Morgan and others v Simpson and another [1875] 3 WLR 517; [1975].

Another case cited to us by all the parties herein was the Canadian case of **Ted Opitz (Appellant) v Borys Wrzesnewskyj 2012 SCC 55**. The Supreme Court of Canada held in an election petition that:

"The practical realities of election administration are such that imperfections in the conduct of elections are inevitable. As recognized in Camsell v Rabesca, [1987] N.W.T.R. 186 (S.C.), it is clear that 'in every election a fortiori, those in urban ridings, with large numbers of polls irregularities will virtually always occur in one form or another' (p.198). A federal election is only possible with the work of tens of thousands of Canadians who are hired across the country for a period of a few days or, in many cases a single 14-hour day. These workers perform many detailed tasks under difficult conditions. They are required to apply multiple rules in a setting that is unfamiliar. Because elections are not everyday occurrences, it is difficult to see how workers could get practical, on-the-job experience.'"

The **Opitz case (supra)**, went on to say that:

"Lower courts have taken two approaches to determine whether votes should be invalidated on accounts of irregularities. Under the strict procedural approach, a vote is invalid if an official fail to follow any one of the procedures aimed at establishing entitlement. Under the substantive approach, an election official's failure to follow a procedural safeguard is not determinative. Only votes cast by

persons not entitled to vote are invalid. The substantive approach should be adopted, as it effectuates the underlying Charter rights to vote, not merely the procedures used to facilitate that right. The substantive approach has two steps under s.524(1)(b). First, an applicant must demonstrate that there was a breach of a statutory provision designed to establish the elector's entitlement to vote. Second the applicant must demonstrate that someone not entitled to vote, voted. He may do so using circumstantial evidence. The second step establishes that the 'irregularity affected the result' of the election. Under this approach an applicant who has led evidence from which an irregularity could be found will have met his prima facie evidentiary burden. At that point the respondent can point to evidence from which it can be inferred that no irregularity occurred or that despite the irregularity, the voter was in fact entitled to vote and prevent those not entitled to vote from voting. After-the-fact evidence of entitlement is admissible. If the two steps are established, a vote is invalid. Finally, although a more realistic test may be developed in the future,.. "the magic number test" is used for the purpose of the application. It provides that an election should be annulled if the number of invalid votes is equal to or greater than the successful candidate's plurarity."

In **Morgan & others v Simpson & others [1974] 3 WLR 517; [1975] Q.B. 151**, the English Court of Appeal had occasion to consider the conditions where electoral results could be nullified on grounds of violations of statutory electoral rules. The facts were that at an election, the number of votes in the ballot box were 23,691, 44 of which had been rejected because the polling officials at 18 polling stations had inadvertently omitted to stamp them with the official stamps. After some recounts the candidate declared winner had a majority of 11. If the rejected votes had been counted, he would have had a majority of 7 votes. The candidate and four others petitioned for a declaration against the successful candidate and the returning officer that the election was invalid for the reason that the issue of unstamped papers was an act or omission in breach of the official's duty and that as it had affected the result the court ought under section 37 (1) of the Peoples Representation Act 1949, to make the declaration. The court dismissed the petition holding that as the election was conducted substantially in accordance

with the law as to elections, the fact that a small number of errors had affected the result was not a sufficient reason for declaring it invalid.

On appeal, the Court of Appeal reversed the earlier decision and ruled that the election was to be declared invalid even though it had been held substantially in accordance with the law governing elections. In so ruling, the Court of Appeal recognized two circumstances in which election results could be nullified. In his judgment, Lord Denning M.R. said collating all the relevant cases together, he could make the propositions that:

"1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated irrespective of whether the result was affected or not…(that is for example, where two out of 19 polling stations were closed all day).

2 If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided it was not affected by the results.

But even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it did affect the results – then the result is vitiated."

I approve of the material holding in the case above and apply them to the facts of this case.

It is clear from this decision that a petitioner is not entitled to an order quashing election results merely upon establishing some form of non-compliance with the rules governing the poll; the non-compliance must further either be of a substantial proportion or the non-compliance must produce a different outcome in the election, namely, result in some person emerging victor who would but for the non-compliance not secure such victory.

In the Nigerian case of **General Muhammadu Buhari v. Independent National Electoral Commission &4 Ors. (2008) 12 S.C. (Pt. I) 1** that country's Supreme Court recognized that a claimant is entitled to relief not merely on the basis of

proven non-compliance but where it is shown that substantial non-compliance with electoral regulations has resulted in a variation of the allocation of votes between the contenders. Tobi, JSC expressed himself in that case thus at page 75 of the report:

"It is manifest that an election by virtue of [the applicable statute] shall not be invalidated by mere reason that it was not conducted substantially in accordance with the provisions of the [applicable statute]. It must be shown clearly by evidence that the non-compliance has affected the result of the election. Election and its victory is like soccer and goals scored. The Petitioner must not only show substantial non-compliance but also the figures, i.e. votes that the compliance attracted or omitted."

I note that unlike **Morgan and ors v. Simpson and Others (supra),** both **Buhari v. INEC (supra)** and **Re Election of First President: Appiah v. Attorney-General (supra)** establish a higher standard by their requirement that a petitioner must establish *both* substantial non-compliance with electoral regulations and impact of the non-compliance on the election results. **Morgan and ors v. Simpson and Others (supra)** allows a petitioner to succeed upon establishing any one of the requirements.

I hold that the distinction between these two standards is not necessary for the resolution of this case, and I shall express no preference for either standard at this time. This is because, in the cases of the irregularities established by the petitioners, they are entitled to judgment even when the higher standard in **Buhari v. INEC (supra)** is applied.

Firstly, it is clear that the irregularities associated with the 2012 presidential elections were substantial. Substantial is not used here as a term of art and it can be understood in its natural sense as meaning either materially or essentially.

Secondly, it is equally clear that the non-compliance in this case affected the results of the 2012 presidential election. Once account is taken of the irregularities (which is shown in the next discussion on the numerical effect of the irregularities), the first respondent no longer has the required fifty percent plus

one of the valid votes cast which produces the remarkable effect that he was not entitled to be declared president-elect of the Republic of Ghana. Put differently, the irregularities produced the significant consequence that the first petitioner was deemed to have lost any chance of continuing the race for the presidency of Ghana, whereas a proper reckoning of the election outcome, that is, minus the nullified votes, would have shown that he was entitled to a final shot at that high office through a run-off poll.

IMPACT OF NULLIFIED VOTES ON THE 2012 PRESIDENTIAL ELECTION RESULTS

I now proceed to assess the impact of annulment of votes due to the various categories of irregularities established by the petitioners as follows:

a. Voting without prior biometric verification

His Excellency Mr. John Mahama obtained 560,399 votes which were actually invalid under this category. When these are subtracted from total votes declared in his favour by the E.C., namely, 5,574,761 he is left with 5,014,362 representing 49.25 of the total valid votes.

Nana Akufo-Addo had 5,48,898 votes declared in his favour of which 234,970 fall in this category of irregularities. The difference of these two is 5,013,928 and this represents 49.25 of valid votes cast.

b. Pink sheets not signed by presiding officers or their assistants

Here, Mr. John Mahama had 382,088 invalid votes which when subtracted from the total number of 5,574,761 votes declared in his favour leaves him with 5,192,673 valid votes. This remainder accounts for 49.78% of the valid votes cast.

Out of the 5,248,898 votes declared in his favour, Nana Akufo-Addo had 170,940 votes affected by this category. This leaves him with 5,077,958 representing 48.68 of the valid votes cast.

c. <u>Over voting</u>

For His Excellency Mr. John Mahama, he had 5,574,761 declared in his favor by the E.C., in the over voting category, he benefitted by 504,014 votes. When these are annulled, he had 5,070,747 valid votes in his favor. That would leave him with 49.47%.

Nana Akufo-Addo had 5,248,898 votes declared in his favor by the E.C., out of which he benefitted 226,198 in the over voting category, which as they are being annulled left a total of 5,027,700 valid votes in his favor. Expressed in percentages, that would be 49.00% of the valid votes cast at the elections.

The foregoing evaluation of the impact of the nullified votes shows that they resulted in neither the first petitioner nor the first respondent obtaining the critical fifty percent plus one valid vote threshold.

As neither the first petitioner nor the first respondent had the required number of votes by the constitution to be declared the President of the Republic of Ghana,

I make the following conclusions and directions:

1. That the relief that an declaration be made that Mr. John Dramani Mahama was not validly elected the President of Ghana, is hereby granted;
2. That a declaration be made that Nana Akufo-Addo be declared the candidate who was validly elected the President of Ghana, is also refused.
3. The consequential order I make is that the E.C. conducts a re-run of the Presidential elections for the two leading candidates, Mr. John Dramani Mahama and Nana Akufo-Addo, in all the polling stations affected and indicated in the petition and its supporting documents, forthwith.

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COURT

ADINYIRA (MRS) JSC;

Your Ladyships and Lordships, permit me to start my opinion with this prologue:

> *"…[W]hat all citizens expect form the highest court of the land is the interpretation and enforcement of the Constitution and the law, and their application to the evidence adduced in this trial without fear or favour, as the judicial oath of the learned justices of this Honourable Court requires of them."*
>
> *-The Petitioners' Plea, at page 171 of Written Address*

INTRODUCTION

Human rights as outlined in the Universal Declaration of Human Rights (UDHR) of 1948 and guaranteed by the International Covenants on Civil and Political Rights and on Economic, Cultural and Social Rights (collectively known as the International Bill of Human Rights) to which most countries including Ghana subscribe; include:

UDHR ARTICLE 21.1:

Everyone has the right to take part in the government of their country, directly or through freely chosen representatives.

UDHR ARTICLE 21.3

The will of the people shall be the basis of the authority of government; this will, shall be expressed in periodic and general elections, which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

The Principle of Universal Adult Suffrage as affirmed in the preamble of the Constitution of Ghana, 1992, is guaranteed and entrenched in Article 42 of the Constitution of Ghana. It reads:

> *"Every citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and entitled to be registered as voter for the purposes of public elections and referenda."*

The fundamental purpose of this right to vote was described in **Figueroa v. Canada (Attorney General) 2003 SCC 37, 1 S.C.R. 912**by Iacobucci J., for the majority at para. 39:

> "*In the final analysis, I believe the Court **in Haig v. Canada [1993] 2 S.C.R. 995**, define s.3 with reference to the right of each citizen to play a meaningful role in the election process. Democracy of course, is a form of government in which sovereign power resides in the people as a whole. In our system of democracy, this means that each citizen must have a genuine opportunity to take part in the governance of the country through participation in the selection of electoral representatives. The fundamental purpose of s.3, in my view, is to promote and protect the right of each citizen to play a meaningful role in the political life the country. Absent such a right, ours would not be a true democracy."*

On 7 and 8 Dec 2012the people of Ghana, exercised their natural and inalienable right and their political will as makers and main beneficiaries of the Constitution, and cast their votes, to elect the Head of State and Head of Government and Commander in Chief of the Armed Forces of Ghana: Article 57 (1) of the Constitution, 1992.

What is now before the Court is a case in which the Petitioners are seeking electoral justice. Electoral Justice gives people who believe their electoral rights to have been violated, the ability to make a complaint, get a hearing, and receive adjudication within a reasonable.

Your Lordships, permit me to quote from an international statement of the "Principles of Electoral Justice" developed by senior judicial officers and experienced election commissioners known as the Electoral Integrity Group, in Accra Ghana 15 September 2011; in a manual entitled: ***Towards an International Statement of the Principles of Electoral Justice.***

"Electoral Justice[is] a broader concept than the holding of a technically correct polls [it] fulfils the human rights belonging to all people and as citizens as outlined" above in the UDHR of 1948 and International Bill of Human Rights.

"The Principles of Electoral Justice requires a set of institutions, practices, norms, mechanisms, practices and procedures that culminates in fair and open processes by which citizens choose those who are to govern them and to hold them to account-and this is not simply on polling days but on day to day basis. Electoral Justice gives people who believe their electoral rights to have been violated, the ability to make a complaint, get a hearing, and receive adjudication within a reasonable time."

The guiding principles of electoral justice developed by this august group include: "**integrity"…**"a vital element that contributes to the legitimacy of, every aspect of the electoral process"

"**Participation"**- "the principle that the voice of the people must be heard, respected, and represented in the context of a free, fair and genuine contest…Elections provide a way for all to decide on the decision makers in a way

that ensures that all voters have a free and equal opportunity to participate in the election process"

"Lawfulness" (Rule of Law)-The lawfulness of every electoral act and likely consequences of violations must be firmly established and widely understood in order to secure the legitimacy of the outcome…The laws themselves must comply with relevant international norms and their implementation should reflect the principles of Electoral Justice and appropriate sanctions must be defined."

"Impartiality and Fairness-The principle of impartiality and fairness guarantees the equal treatment of voters and contestants"

"Professionalism-Managing the electoral process requires technical knowledge of electoral issues and competent delivery of the process."

"Independence- The independence of all those authorities that are legitimately engaged in the electoral process and the resolution of electoral grievances and disputes must be respected and guaranteed by law. There must be no interference by any outside interests.

"**Transparency**- Transparency is a core element that involves openness at all stages of election organization, which must include access to relevant information on a timely basis, a readiness to provide justification for decisions and a frank admission and swift correction of any mistakes or oversights so as to inspire confidence and credibility in the system in the mind of all stakeholders"

"Timeliness-Timeliness must be demonstrated in a manner consistent with the other principles before, during and after the poll and at all stages in electoral management, including resolution of disputes as this is an integral element in

Electoral Justice. The element of time in the administration of justice cannot be ignored, because justice is a time bound concept."

"Non-Violence(Freedom from threats and violence)- All stages of the electoral process must be conducted without violence, intimidation, coercion, corruption, or other conduct that can interfere with the free conduct of the elections in accordance with the values of Electoral Justice.'

"Regularity- Elections must be conducted periodically, and at more or less intervals, as well as any variations, must be clearly set out."

"Acceptance-Where the foregoing principles of Electoral Justice have been substantially observed, the electoral processes reflect the will of the people. It is then an overriding principle of Electoral Justice that everyone abides by the outcome; that the outcome be given effect by the institutions of government; and that the legitimacy of the results be acknowledged by the international community."

These principles of Electoral justice would be used or applied as a yardstick in this opinion to determine whether the electoral processes were substantially observed and reflected the will of the people.

BACKGROUND

The Role of the Electoral Commission

The Electoral Commission (EC) is conferred with the responsibility for conducting free, fair and transparent electionsunder Article 45 (d) of the Constitution, 1992. The EC at various stages of the 2012 election began with the compilation of the register, demarcation of electoral boundaries, education of the people and political parties and election officials that culminated in the 7 and 8 December elections.

The EC at various stages of the election used a new technology of a Biometric Voter Registration by the use of a biometric verification device (BVD). This involves biometric technology, which uses computer finger-print scanners and digital cameras to capture the bio-data of an applicant; such personal details of finger-prints and face photo technology are used to verify the authenticity of the voter, and to ensure greater transparency and credibility in the elections. The Public Elections (Registration of Voters) Regulations, 2012 (C.I. 72) regulates the procedure on registration of voters.

After conducting the election which took place on the 7 and 8 December 2012, the Chairman of EC, Dr Kwadwo Afari Gyan announced on 9 December 2012, that Mr John Dramani Mahama has received 5,574,761 votes (50.70% of the votes cast), while Nana Akuffo Addo has received 5,248,898 votes (47.74%of the votes cast). Pursuant to Article63 (9), the EC declared Mr John Dramani Mahama the President Elect.

Subsequent to the announcement, a petition challenging the results of the presidential elections was filed at the Supreme Court on 28 December 2012 by the 1st Petitioner Nana Akufo -Addo the presidential candidate of the New Patriotic Party (NPP), in the 2012 elections; the2nd Petitioner, Dr Mahamadu Bawumia the running mate of the1st Petitioner, and the 3rd Petitioner, Jake Otanka Obeitsebi-Lamptey the National Chairman of the NPP; against John Dramani Mahama, and the Electoral Commission as 1st and 2nd Respondents respectively. The National Democratic Congress, the party on which the 1st Respondent stood as its presidential candidate applied and was joined as the 3rd Respondent.

The Petition

The petition filed on 28 December 2012 was amended on 8 February 2013. The Petitioners say that prior to the December elections, 2nd Respondent informed all regional executives of registered political parties that all the results would be received through faxes installed in the 'Strong Room' of the 2nd Respondent directly from its officials from the regions and that there could be no opportunity for tampering with the results before same were received in the 'Strong Room'. Petitioners say however that it came to their notice, during the declaration of the provisional results, that the offices of Superlock Technologies Limited (STL), a security installation and information technology company, was receiving the results of the elections before transmitting same to 2nd Respondent in its 'Strong Room'. NPP hence sent a delegation to confront the STL officials whereupon they were informed that they had a contract with EC to provide IT services which included receiving all results of votes cast and faxed from the regional offices of the 2nd Respondent before transmitting same to the 'Strong Room' of 2nd Respondent.

Petitioners claim the said arrangement with STL was made without the knowledge of the NPP or the Inter-Party Advisory Committee (IPAC) to which NPP belongs and it provided an opportunity to tamper with the election results.

Petitioners also say that before the elections in December, the Chairman of the 2nd Respondent announced to Parliament that he had registered some 1,000,000 voters who have not been assigned to any polling station, even though the Public Elections (Registration of Voters) Regulations 2012, (C.I. 72) requires that registration of voters shall be carried out in designated polling stations (registration centres).

Petitioners state further that the total number of registered voters after 2nd Respondent had conducted its biometric registration exercise was a little less than 13,000,000 however this number inexplicably increased by over 1,000,000 after cleaning the provisional register and verifying same.

Petitioners say that around the 26th of September 2012, that is about 42 days before the presidential election scheduled for 7th December, the Chairman of the 2nd Respondent officially announced the total number of polling stations to be employed in conducting the elections as 26,002. This is in compliance with Regulation 16 of C.I. 74.

The Petitioners complain that the total number of registered voters that the NPP was furnished with was 14,031,680. However on 9th December 2012, 2nd Respondent declared the total number of registered voters as 14,158,890. Further on the same date, 2nd Respondent posted on its website the total number of registered voters as 14,031,793 showing a clear disparity of 127,097. The Petitioners also contend that the total number of registered voters for the presidential elections exceeded that of the registered voters for the parliamentary elections by 127,210 voters.

Petitioners say that 2nd Respondent delayed in furnishing the NPP with the final voter's register until just a few days before the December 2012 elections which prevented the NPP from scrutinizing the register and this contributed in undermining the transparency of the elections.

The irregularities emerging from the case of the Petitioners are as follows:

- Change in total number of registered voters
- Printing of ballot papers

- Over-voting
- Voting without fingerprint biometric verification
- Same serial numbers on pink sheets with different results
- Polling stations bearing the same polling station codes and yet with different results
- Absence of signature of presiding officer on some pink sheets
- 28 locations where elections took place which were not part of the 26,002 polling stations created by the 2nd Respondent for purposes of the elections
- Widespread instances where figures and words of votes cast in the elections and as recorded on the pink sheet did not match
- Padding of votes for the 1st Respondent and reducing the votes of the 1st Petitioner.

However, by paragraph 23 of the affidavit of Dr Mahamadu Bawumia filed on the 7th April 2013, pursuant to the directions given by the court on the 2nd April 2013, the grounds set out in the petition were subdivided by the Petitioners into six categories as follows:

i) Over-voting, that is to say, widespread instances of polling stations where (a) votes cast exceeded the total number of registered voters or (b) votes exceeded the total number of ballot papers issued to voters on voting day in violation of Article 42 of the Constitution and Regulation 24 (1) of C1.75

ii) Widespread instances of polling stations where there were no signatures of the presiding officers or their assistants on the pink sheets in clear violation of Article 49 (3) of the Constitution and Regulation 36 (2) of C.I.75

iii) Widespread instances of polling stations where voting took place without prior biometric verification in breach of Regulation 30 (2) of C.I.75

iv) Widespread instances where there were the same serial numbers on pink sheets with different poll results, when the proper and due procedure established by the 2nd Respondent required that each polling station have a unique serial number in order to secure the integrity of the polls and the will of lawfully registered voters

v) Widespread instances of polling stations where different results were strangely recorded on the pink sheets in respect of polling stations bearing the same polling station code, when, by 2nd Respondent's established procedure, each polling station was assigned a unique code in order to avoid confusing one polling station with another which could not be explained by a reference to special voting

vi) Twenty three (23) locations where voting took place which were not part of the twenty six thousand and two (26,002) polling stations created by the 2nd Respondent for purposes of the December 2012 elections.

The Petitioners contend that the irregularities vitiated the presidential results in eleven thousand nine hundred and sixteen (11,916) polling stations by four million six hundred thousand five hundred and four votes (4,670,504).That if these votes were to be annulled, the 1st Petitioner would get three million seven hundred and seventy-five thousand five hundred and fifty-two votes representing 59.69% of votes cast while the 1st Respondent gets two million four hundred and seventy-three thousand one hundred seventy-one votes representing 39.1% of votes cast.

The Petitioners say that in circumstances the 1st Respondent did not obtain more than 50% of the total votes cast in the election as required by Article 63 (3) of Constitution, in order to become President and such ought not to have been declared President. The Petitioners concluded that the 1st Petitioner having obtained more than 50% of the votes cast ought to be declared the President of the Republic of Ghana.

The Petitioners say that the irregularities were a deliberate well-calculated ploy to assist the 1st Respondent thereby subverting the sovereign will of the electorate contrary to the preamble of the Constitution, Articles 1(1), 42 and 63(3) of the Constitution.

The Petitioners therefore request the Court to declare that:

1. John Dramani Mahama, the 1st Respondent was not validly elected as President of Ghana
2. Nan Addo Dankwa Akufo-Addo, the 1st Petitioner herein was rather validly elected President of Ghana
3. Consequential orders as to this Court may seem meet.

1st Respondent's Answer

1st Respondent denies the allegation of the Petitioners that STL was contracted by the 2nd Respondent to carry out the said functions in respect of the elections and this was affirmed when a delegation of political parties led by Hon. Osafo Maafo visited STL.

1st Respondent asserts that the difference in the figure of 13, 917,366 announced by 2nd Respondent was provisional since 2nd Respondent had at that time not yet registered prisoners and other voters, including those in the diplomatic missions abroad and on peace-keeping missions, and had also not done the mop-up exercise it undertook subsequently. He disputes any suggestion that there were some veiled reasons in the differences in the provisional registered voters after the biometric registration; and that the suggestion is without basis and smacks of utmost bad faith. 1st Respondent also says that Petitioner has failed to supply them with particulars of the manner in which the results of the presidential elections were tampered with.

1st Respondent also denies that 2nd Respondent delayed in making the voters register available to the NPP and states that the register was delivered to both parties at the same time. He added that a common register was used for both the presidential and parliamentary elections.

1st Respondent contends that the basis of the declaration of the results was the aggregate of total valid votes cast which was 10,995,262.

1st Respondent rejects the irregularities canvassed by the Petitioners and states that fingerprint verification is not the only means of verification. He contends that in terms of Article 42 of the 1992 Constitution, failure or the inability of voters to go through fingerprint verification should not be used to deprive voters of their Constitutional right to vote. As such, any electoral law which has that effect is inconsistent with the Constitution and as such unconstitutional.

1st Respondent contends the 1st Petitioner's agents certified the results at the polling stations without protest, and thereby accurately represented to the world that the results accurately reflected the outcome of the election in the respective polling stations.

1st Respondent contends that duplicate codes on pink sheets would not invalidate the declared results of supervised elections in those polling stations and the votes validly cast.

1st Respondent contends further that the absence of signatures on any of the pink sheets cannot invalidate the results shown on those sheets as they were the result of painstaking, public and transparent sorting and (re)counting at the various polling stations with the full participation of 1st Petitioner's agents.

In addition to denying the allegation of duplicate serial numbers, 1st Respondent says that even if it were true, it did not affect the declared results of the elections.

1st Respondent says that the change in the total number of registered voters between that given to the parties and that declared on 9th December, even if it were true would not invalidate the elections.

He also states that as the polls were declared publicly and openly, even if there were conflicts between the words and figures on the pink sheets that did not affect the declared results of the elections. This is even more so as 1st Petitioner's agents were present at the various polling stations and did not protest.

1st Respondent disputes the table set out in paragraph 20 of Ground 3 of the petition and states that it is the product of double counting in many instances. He says further that the request to annul that number of votes would undermine the fundamental rights of Ghanaians under Article 42 of the Constitution. Also any deduction derived from that table, lacks any basis in law or in fact.

1st Respondent states that there was no ploy to unlawfully assist him to win and 1st Petitioner is only finding an excuse for losing the elections.

2nd Respondent's Answer

The 2nd Respondent states that there was no arrangement with STL to receive and transfer election results. Instead STL after winning a competitive bidding was chosen to provide services to the 2nd Respondent which included training of staff and field support and provision of equipment including the provision of a VSAT (Very Small Aperture Terminal) system whereby Registration Database would be

sent directly from the 2nd Respondent's District Offices to the Registration Database at its Head Office.

Also the situation of one million voters not being assigned to any polling station was corrected.

The 2nd Respondent says that the initial provisional figure he announced was 13, 917,366 which was later changed to 14, 158, 890 after the registration of foreign service officials, students abroad on government scholarship, other Ghanaians working abroad in international organisations and the late registration of service personnel returning from international peace keeping duties. After adding those wrongly omitted, excluding those wrongly added and removing multiple registrations, the number finally obtained was 14,031,680. He adds that the voters register is dynamic and not static as required by ***Regulation 9 of (C.I. 72).***

2nd Respondent states that the number of registered voters that was given to the political parties including the NPP was 14,031,793 and that the figure of 14,158,890 stated in the declaration result was an error. The correct number of registered voters of 14, 031,793 was duly posted on the 2nd Respondent's website. It states that the error would have no bearing on total votes cast and would only affect the turnout percentage and change it from 79.43% to 80.15%.

The 2nd Respondent states that the NPP and NDC were the first to receive the final voters register on 21November, 2012 and that the preparation of the final voters registers was a mammoth exercise.

The 2nd Respondent also states that all the political parties, including the NPP, received daily print outs of the registration effected at the registration centres.

The 2nd Respondent also states that the registers for both the parliamentary and presidential elections had the same number of registered voters. The 2nd Respondent states further that each voter was verified only once to cast votes for the candidate of his choice for both the presidential and parliamentary elections.

The 2nd Respondent states further that the total number of valid votes cast is 10,995,262 and not 14,158,880 as shown in the Petition.

The 2nd Respondent claims it kept to its decision and allocated to each polling station, 10% ballot papers that were above the number of registered voters for the polling station. Further, during printing, representatives of political parties were present at the printing houses that were engaged by 2nd Respondent. They were also briefed prior to this about the statistics of the number of ballot papers that were to be given to each polling station in booklets of 100, 50 and 25 sheets which could not be split.

The 2nd Respondent claims that the polls were counted in the public view and results announced publicly in the presence of the agents of the candidates. Agents also have a right to ask for a re-count or to refuse to sign the declaration form.

2nd Respondent also states that it were only persons who were successfully verified that were allowed to vote and this is why the elections in 400 polling stations were postponed to the next day, when the biometric verification equipment broke down. The EC also noted that the Commonwealth Observer Group recommended on page 36 of their report that the requirement that elderly people be biometrically verified should be reviewed. The ECcontends that the fact that every voter was verified is also supported by the pink sheets.

2nd Respondent also claims that every polling station had a name and unique code. Its examination of the further and better particulars supplied by the Petitioners

showed that wrong codes were quoted by the petitioners in their particulars and also that where a polling station used for the presidential and parliamentary election was also used for Special Voting (by Security Personnel, etc.), that polling station kept the same code number though the Results of the Special Voting and the results of the voting on December 7 and 8 were given separately. Thus the request to invalidate votes should be refused as it is without merit.

The 2nd Respondent claims that of the 2,009 Pink Sheets that the Petitioners claimed to be unsigned, 1,099 were, in fact signed by the Presiding Officer at the polling station or, at the instance of the Returning Officer, at the Collation Centre; 905 were unsigned representing 3.5% of the total number of Pink Sheets nationwide; and 1,989 Pink Sheets, representing 99% of the number claimed to be unsigned, were signed by the Polling or Counting Agents of the candidates. It could also be that the signature failed to appear as the Pink Sheets the Petitioners had were only copies of the original.

It also claims that there was no instance where total votes cast exceeded number of voters on the register.

It also claims that in instances where different polling stations had the same serial number, they bore different names and code as such the request to annul those Sheets should be rejected.

It also states that there is no explanation for how the figures in the table in ground 3 of paragraph 20 of the petition were arrived at; and above all there is no justification for the deduction.

2nd Respondent claims further that of the three instances of over padding cited, two were wrong and one was a transposition error in which 17 was stated instead of 97.

The 3rd Respondent's Answer

The 3rd Respondent claims that 2nd Respondent declared 1st Respondent the winner of the 2012presidential elections based on the tally of votes and that the voters were biometrically verified and voted in the full view of the public, the media and domestic, as well as international, election observers who reported that the elections were generally free and fair. The media also kept a tally of the results from the various polling stations, and reported tallies consistent with that of the 2nd Respondent.

3rd Respondent claims that at the instance of the NPP, the Peace Council organized a meeting, involving the 2nd and 3rd Respondents and representatives of NPP, on the evening of 9th December 2012. This was to enable the latter make representations to the 2nd Respondent about alleged irregularities in the elections. After hearing the NPP, the 2nd Respondent found no reason to defer announcement of the results and proceeded to give same.

3rd Respondent states the allegations about the premises of STL being used to change election results in favour of 1st Respondent were proved false.

3rd Respondent claims that the spokespersons of the NPP and of the 1st Petitioner have given different figures as the figures by which they claim the votes of 1stRespondent were illegally inflated without giving a meaningful account of how this happened.

It states that 1st Respondent defeated 1st Petitioner in eight out of ten Regions in the Presidential elections. 3rd Respondent also won 148 out of 275 seats in Parliament while the NPP won 123 seats.

3rd Respondent contends that Petitioners cannot claim that the Presidential elections were conducted irregularly, in respect of voter verification, for instance, while acknowledging the validity of the parliamentary elections.

It also claims that the Petitioners through their polling agents acknowledged that the presidential elections were validly conducted and claims to the contrary are an afterthought and in bad faith.

Issues for determination by Court

At the close of pleadings, the parties were not able to agree on issues for determination by the Court. Each of them filed multiple issues. The Court therefore reduced the issues to two which were agreed on by the parties. The issues set down for determination by the Court were:

1. Whether or not there were violations, omissions, malpractices and irregularities in the conduct of the presidential election held on the 7th and 8th December, 2012.

2. Whether or not the said violations, omissions, malpractices and irregularities, if any, affected the results of the election.

Mode of Trial and Burden of Proof

This is the first time that a petition challenging the election of a President of the Republic of Ghana under the 1992 Constitution has taken place and there was therefore no precedent to follow. Guided by the principle of timeliness as an integral part of Electoral Justice this Court ruled, on 10 April 2013 that:

> *" It is deducible from Article 1(2), 64(1) and (3) and Part VIII of C.I. 16 aforesaid that a presidential election petition is intended to be determined*

with the utmost expedition. That being so all other laws must be applied with modifications to effectuate this constitutional intent… To expedite the determination of this case the trial will be by affidavits. However, the parties themselves may lead oral evidence. Oral evidence by any other person may be allowed where compelling reasons therefore are given."

The Court held further that rules as to the burden of proof are observed even with affidavit procedure - see ***Republic vs. Director of Prisons Ex parte Shackleford*** (1981) GLR 554 at particularly 577 – 582, ***Republic vs. Mensa-Bonsu Ex parte Attorney-General*** (1995-96) 1 GLR 377 and the recent decision of this Court in ***Republic vs. High Court, Accra; Ex parte Concord Media Ltd. & Ogbamey (Ghana Ports & Harbours Authority & Owusu Mensah Interested Parties)*** (2011) 1 SCGLR 546.

Standard of Proof

What is the standard of proof required in an election petition brought under constitutional provisions that would impact upon the governance of the nation and the deployment of the constitutional power and authority?

The Evidence Act, 1975 (NRCD 323), section 10 (1) and (2) provides:

Section 10

(1) For the purposes of this Decree, the burden of persuasion means the obligation **of a party to establish a requisite degree of belief concerning a fact in the mind of** the tribunal of fact or the court.

(2) The burden of persuasion may require a party to raise a reasonable doubt concerning the existence or non-existence of a fact or that he establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.

Section11

(1) For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue.

(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence."

Thus in ***Ackah v. Pergah Transport Limited and Others***, **[2010] SCGLR 728**; I had this to say at page 736:

> "It is a basic principle of the law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail. The method of producing evidence is varied and it includes the testimonies of the party and material witnesses, admissible hearsay, documentary and things(often described as real evidence), without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the court or tribunal of fact such as a jury. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact is more reasonable than its non-existence. This is a requirement of the law on evidence under sections 10 and 11 of the Evidence Decree."

Comparative judicial practice on the burden of proof informs this Court's perceptions, in a case which rests, to a significant degree, on fact. In the Nigerian election case of ***Abu-Bakr v. Yar'Adua [2009]*** **All FWLR (Pt. 457)1 SC;** the Supreme Court of Nigeria held "that the burden is on the Petitioner to prove, not only non-compliance with the electoral law, but also that the non-compliance affected the results of the election. The same jurisprudence was enunciated in ***Buhari v. Obasanjo (2005) CLR 7(k) (SC)***, also cited by the Attorney-General; the various components of burden of proof were distinguished, in their shifting pattern: the burden is on the petitioner to prove non-compliance with the electoral law; and

it then shifts to the Respondent, or the electoral board, to prove that such non-compliance did not affect the results of the election."

In the Ugandan election petition, ***Col. Dr Kizza Besigye v. Museveni Yoweri Kaguta & Electoral Commission, Election Petition No. 1 of 2001***, the majority of the Ugandan Supreme Court Justices held as follows:

> "… [T]he burden of proof in election petitions as in other civil cases is settled. It lies on the Petitioner to prove his case to the satisfaction of the Court. The only controversy surrounds the standard of proof required to satisfy the Court."

In a recent Canadian case of ***Opitz v. Wrzesnewskyj 2012 SCC 55-2012-10-256***, the Canadian Supreme Court tersely held, by majority opinion, that:

> "An applicant who seeks to annul an election bears the legal burden of proof throughout…"

From the foregoing it seems to me that high standards of proof required in cases imputing election malpractice, appears to be the norm. In this respect I refer to the Kenyan Supreme Court Case; ***Petition No. 5 of 2013 betweenRaila Odinga v. Uhuru Kenyatta [2013]***at paragraph 196:

> "We find merit in such a judicial approach, as is well exemplified in the several cases from Nigeria. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. *Omnia praesumuntur rite et solemniter esse acta*: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by

raising firm and credible evidence of the public authority's departures from the prescriptions of the law."

Accordingly the Petitioners bear the burden of proof to establish that there were violations, omissions, malpractices and irregularities in the conduct of the presidential election held on the 7th and 8th December, 2012 but also that the said violations, omissions, malpractices and irregularities, if any, affected the results of the election. It is after the petitioners have established the foregoing that the burden shifts to the respondents, to establish that the results were not affected.

The threshold of proof should, in principle, be above the balance of probability,

Witnesses

The Court began taking evidence on 17 April 2013 with live television and radio broadcast which was unprecedented. Dr Mahamadu Bawumia testified on behalf of the Petitioners; the General Secretary of the NDC, Mr Johnson Asiedu Nketia gave evidence on behalf of President John Mahama and the party; while Dr Kwadwo Afari-Gyan testified on behalf of the Electoral Commission. All the witnesses were subjected to rigorous cross-examination.

Six additional witnesses testified on behalf of the petitioners, while about 4,000 people testified on behalf of President Mahama and the NDC, through sworn written affidavits.

Documentary Evidence

The Petitioners by their initial petition alleged that the stated irregularities occurred at 4,709 polling stations. It was later amended to indicate that, the irregularities

occurred at 11,916 polling stations. The Petitioners further reduced the number to 11,842, 11,138, 11,115, 10,119 and finally 10, 081 polling stations.

The Respondents throughout the trial to the time of closing addresses disputed the exact number of pink sheets the Petitioners allege the irregularities could be determined on the face of the pink sheets. They indicated they were served with a lower number and also cited instances of duplication in the exhibits they received. By a Court Order dated 9 May 2013 this Court appointed KPMG an auditing firm as referee to undertake the following task.

1. To make a faithful and truthful count of all the exhibits of pink sheets delivered by the Petitioners to the Register of the Supreme Court according to and under the various categories of alleged electoral malpractices as appearing, contained and specified in paragraphs 44 to 67 of the affidavit of the second Petitioner filed in the registry of the Supreme Court on 7 April 2013; and
2. Specifying in respect of each pink sheet, it exhibit number, if any, as well as it polling station name and code number.

A further order was made by the Court on 5 June 2013 ordering KPMG to use the set of exhibit of the Presiding Judge to cross check and finalise the count of the pink sheets. Appendix A1 of the report which contained a summary of pink sheet count show that 13,926 pink sheets were filed a variance of 2,084 of the 11,842 mentioned in the affidavit of 2nd Petitioner. In all the KPMG identified 8,675 polling stations, but as many as 1, 545 were partially or totally ineligible.

By the close of the Petitioners' case statutory violations and the irregularities relied on by the petitioner on the face of the pink sheets were as in the order considered in this opinion:

- Absence of signature of presiding officer on some pink sheets
- Voting without fingerprint biometric verification
- Over-voting
- Same serial numbers on pink sheets with different results
- Polling stations bearing the same polling station codes and yet with different results
- 22 Unknown polling stations.

Before dealing with these issues I will deal with the voters register

Voters Register

An election is a process which consists of various activities that include the demarcation of constituencies, the registration of voters, the nomination of candidates, the conduct of the election and the declaration of results and these culminate in the activities of Election Day and the subsequent declaration of election results.

In this election the biometric verification was first used in Ghana. The Chairman of the EC, Dr Kwadwo Afari-Gyan, provided information on the biometric verification process. He said it is a system used to register a voter's ten fingers and capture the face image. The biometrics is captured using this device of registration, comprising software, a laptop computer, a digital camera and a device to capture fingerprints. The voter's personal bio data were taken and filled on a Form 1C by a registration assistant and this is scanned unto the BVD, an electronic copy is printed out and the Voters ID with picture is detached and laminated for the

registered voter. The information captured was used in the compilation of the Voters Register.

Provision was made for: a) voters with disability: those whose fore-limbs or parts of their fore-limbs were unavailable for the purposes of capturing their biometrics; b) those who, due to the nature of their work or age, who had either their fingerprints scarred or those whose fingerprints had lost impression and could not be captured. Such persons were to be identified facially only [FO] and this fact are indicated on their voter's ID card, and in the voters register and in the bio data on the BVD.

The Petitioners cited variations in the Voting Register and the register used at the polling stations and double registration as factors of illegality in the conduct of the Presidential election.

The evidence adduced in support of the bloated register by the 2nd Petitioner was that the EC provided the NPP with a voters' register of 14,031,680 which was used for the election; but that at the time the election results were declared the number was 14,158,890, a difference of 127,210.

Explanation given by the EC was that in compiling the Provisional Voters Register, they noticed from the daily printouts and the Forms1C that some voters were inadvertently assigned the wrong polling stations; there were names of people whose biometric details had not been captured, or were captured but subsequently lost. Furthermore, there were some registration centres that showed zero registration, some areas turn out much fewer voters than was anticipated.

The EC said they searched their data base and were able to recover some of the lost data; particularly in situations where wrong codes were used and as a result the people were thrown to some other place. The EC could not restore all the people to

the Voters Register. The EC went to 400 affected polling stations and did what was called special inclusion in order not to disenfranchise the people. Other affected people were allowed people to go to district offices for them to be put back on the register. As a result of this exercise nearly 11,000 people were placed back on the Voters Register.

Another reason given by the EC for the variation in the Voters Register was that initially, they had a figure of 13,917,366 but after the registration of Ghanaians working in diplomatic missions and international organization of which Ghana is a member, Ghanaian students on government scholarship, security personnel, soldiers and policemen who were returning home from peace keeping duties; this figure jumped from 13,917,266 to 14,168,890. This was a difference of 241,524.

The petitioners asked for a production of the names and bio-data of this 241,524. The EC provided 2,883 names, 705 of which were supposed to be for diplomatic missions. The petitioners in examining the 705 names, found 51 of them to be duplicate names, with same ages, except the voter ID number. The Petitioner further showed evidence of double registration at the Mampong Anglican Primary School. The EC though conceding those instances of double registration said those persons could only vote once due to the use of biometric verification.

Although the Petitioners claimed the number of registered voters entered on the pink sheets varied from what was listed in the voters register, they could not substantiate the allegation. The Petitioners also claimed that the EC gave the NPP a register different from what was used for the presidential elections.

1st and 3rd Respondents' Response

The 1st and 3rd Respondents' evidence was that the register by the nature of the processes involved kept changing because after the provisional register was

announced further registration was done for Ghanaians in missions and organizations abroad some Ghanaians on scholarship and troops returning from peace keeping duties and a few others.

Mr Johnson Asiedu-Nketia who spoke on behalf of the 1st and 3rd Respondents said the basis of a clean free and fair election is a credible voters register and throughout our electoral history under this Fourth Republican Constitution the 2012 elections register which is a biometric register has been the most accurate register that we have ever had in any elections in this country. According to him because of the biometric registration, it was not possible to have the name of the same individual repeated in the register and because of the verification procedure, it is also not possible for one person to vote more than once and indeed the records show that there is nowhere, where the total number of votes exceeded the number of registered voters.

On the claim by the Petitioners that different registers in respect of parliamentary and presidential elections, the 1st and 2nd Respondents respond that there was only one register that was used for both the parliamentary and presidential elections; and that voters were verified only once they cast their votes for presidential and then they proceeded to cast their votes for parliamentary.

I appreciate the concern raised by the Petitioners on the voters register as the Constitution that conferred the right to vote also conferred the right to registration as underscored by this Court in ***Tehn-Addy v. Electoral Commission [1996-97] SCGLR 58;*** and***Ahumah-Ocansey v. Electoral Commission; and Centre for Human Rights & Civil Liberties (CHURCIL) v. Attorney-General & Electoral Commission (Consolidated) [2010] SCGLR 575.***

One of the core values of Election Justice is the principle of *Participation*: "that the voice of the people must be heard, respected, and represented in the context of a free, fair and genuine context." A citizen can only exercise his right to participation by registering as a voter for the purpose of public elections and referenda.

Two other core values are *Professionalism*: "Managing the electoral process requires technical knowledge of electoral issues and competent delivery of the process." [Reference Accra Guiding Principles ***supra***]

The other is *Transparency*: "Transparency is a core element that involves openness at all stages of election organization, which must include access to relevant information on a timely basis, a readiness to provide justification for decisions and a frank admission and swift correction of any mistakes or oversights so as to inspire confidence and credibility in the system in the mind of all stakeholders" [Reference Accra Guiding Principles***supra***]

As a demonstration of transparency in the electoral process leading to the elections, an Interparty Advisory Committee [IPAC] was established with the purpose of achieving consensus in managing the elections which was to be organized under the auspices of the Electoral Commission. The EC had series of meetings with IPAC at various stages in the electoral process.

The political partiesand the public were fully informed by the EC about the voter registration exercise and the various steps taken to assure the integrity, accuracy, impartiality, efficiency, simplicity and security of voter registration. The print and electronic media covered the process.

It is the duty of the EC to ensure that all eligible persons are registered and have their names on the Voters register. The EC is therefore required by Regulation 22

of the Public Elections (Registration of Voters) Regulations 2012, to exhibit the Provisional Register for public inspection at the registration centres. The purpose of the public display is for the registered voter to check whether his name is on the register and to ascertain whether the particulars on his voter's identification card are the same as the particulars contained in the provisional register. In case of any discrepancy a person may request for the exhibition officer to make correction in the provisional register. In case a person is registered and his name does not appear in the provisional register he may make a claim in the prescribed manner to have his name entered on the provisional register. A person may also file a challenge to a person whose name appear in the provisional register on the ground that the person is not qualified to be registered as a voter.

These claims and objections are settled by a District Registration Review Officer. The Commission certifies the register after the determination of claims and objections.

This verification exercise naturally resulted in a variation between the number of registered voters in the provisional register and the final Voters Register.

It seems to me that apart from the discrepancies in the voters register, I do not find any substance in the complaints being made by the Petitioner against the voters register. The Political parties and citizens had the shared responsibility to check the provisional register for accuracy when it was exhibited, though the ultimate responsibility for a clean and reliable register rests on the EC.

There was bound to be hiccups during the registration and compilations of the Principal Register by the use of biometric verification devices for the first time in Ghana namely unfriendly climatic conditions in which the machine was operated causing it freeze; and unfamiliarity with the device by the users.

Despite these few setbacks, I find that the EC had conducted its affairs professionally and transparently to produce a clean, credible and reliable voters register. Information regarding the voters register is available on the EC's Website. At the trial it was established that the final register was given to all political parties in the form a CD-ROM and hard copies as well.

From the foregoing I hold that the petitioner's complaint that the compilation of the voters register had an adverse impact on the 2012 December Elections cannot be sustained.

Violations, Omissions, Malpractices and Irregularities in the Conduct of the Presidential Elections held on the 7 and 8 December, 2012.

The petitioners in the written address made what I term the Petitioner plea that:

> *"…[W]hat all citizens expect form the highest court of the land is the interpretation and enforcement of the Constitution and the law, and their application to the evidence adduced in this trial without fear or favour, as the judicial oath of the learned justices of this Honourable Court requires of them."*

And this is what I set out to do.

CONSTITUTIONAL AND STATUTORY VIOLATIONS

Article 49 of the Constitution makes provision for the conduct of voting. The same Constitution under Article 51 empowers:

> "The Electoral Commission, by constitutional instrument, make regulations, for the effective performance of its functions, under the Constitution or any

other law, and in particular, for the registration of voters, the conduct of public elections and referenda, including provisions for voting by proxy"

One of such regulations is the Public Elections Regulations, 2012, (C.I. 75).

The Petitioners are seeking annulment of results in certain polling stations for alleged violation of the Article 49 and Regulation 30 of C.I.75. These alleged violations came about from the conduct of the election, and the Petitioners identified them as voting without biometric verification, over voting andnon-signature of declaration forms.

In the evidence put before the Court the Petitioners made no allegation of misconduct against voters and the 1st and 3rd Respondents. The allegation of collusion by the EC with STL was dropped. Allegation of vote padding was dropped. The violation and irregularities complained about were as a result of lapses on the part of presiding officers and polling/counting agents.

The election at the polling stations was conducted by presiding officers and polling assistance on behalf of the EC, and supervised on behalf of the candidates by their appointed polling and counting agents. It is therefore pertinent to set out the role of the presiding officer, the polling agents and counting agents on Election Day.

Role of Presiding officers and Polling/Counting Agents

The role of Presiding officers and Polling/Counting Agents are constitutionally and statutorily regulated. Article 49 of the Constitution clearly articulates the constitutional roles of polling agents alongside presiding officers at public elections.

"49. (1) at any public election or referendum, voting shall be by secret ballot.

(2) Immediately after the close of the poll, the presiding officer shall, in the presence of such of the candidates or their representatives and their polling agents as are present, proceed to count, at that polling station, the ballot papers of that station and record the votes cast in favour of each candidate or question.

(3) The presiding officer, the candidates or their representatives and,inthe case of a referendum, the parties contesting or their agents and the polling agents if any, shall then sign a declaration stating -

(a) the polling station; and

(b) the number of votes cast in favour of each candidate or question: and the presiding officer shall, there and then, announce the result of the voting at the polling station before communicating them to the returning officer."

Additional Functions of Presiding Officer

Regulation 17 of C.I. 75 provides for the appointment and role of presiding officer and polling assistants. Their appointment is made by the EC. The role of the presiding officer includes:

(a) Setting up the polling station;
(b) Taking proper custody of ballot boxes, ballot papers, biometric verification equipment and other materials required for the poll; filling the relevant forms relating to the conduct of the poll
(c) Supervising the work of the polling assistants;
(d) Attending to voters without identity cards
(e) Attending to proxy voters;
(f) maintaining order at the polling station;
(g) undertaking thorough counting of the votes;
(h) announcing the results of election at the polling station; and
(i) conveying ballot boxes and other materials to the returning officer after the poll.

I notice that no mention is made of the signing of a declaration form and giving a copy of the pink sheet to the candidate or his or her agents. This omission is not fatal as they are covered by Article 49 (3) and Regulation 36 3 (b). I however recommend they are included.

Role of Polling Agent

Regulation 19 of C.I. 75 provides for the appointment and role of polling agents. The role description shows that Polling agents are not mere or "exalted observers" as claimed by the Petitioners. The section provides:

> "19. (1) A candidate for parliamentary election, may appoint one polling agent to attend at each polling station in the constituency for which the candidate is seeking election.
>
> (2) A candidate for presidential election may appoint one polling agent in every polling station nationwide.
>
> (3)An appointment under sub-regulations (1) and (2) is for the purpose of detecting impersonation and multiple voting and certifying that the poll was conducted in accordance with the laws and regulations governing the conduct of elections."
> (4) A presiding officer shall give a polling agent the necessary access to enable the polling agent to observe election proceeding at a polling station."

Role of a Counting Agent

Regulations 35 make provisions for the appointment of counting agents and counting of votes.

> "35 (1) A candidate for parliamentary or presidential elections may appoint a counting agent to attend the counting of votes at each polling station in the constituency which the candidate is seeking election.
> (2) In the case of a candidate for presidential elections the candidate may appoint a counting agent in every station nationwide."

The counting agent is also given specific roles to play at the counting stage of the elections. The regulations allow a polling agent to act as a counting agent as well. Regulations 36 provides as follows:

(1) The presiding officer shall immediately after the close of the poll, in the presence of the candidates or their representatives and counting agents:
    (a) open each box and take out all the ballot papers in the box ;
    (b) sort out, the ballot papers into valid ballot papers and rejected ballot papers in accordance with regulations 37;
    (c) proceed to count the ballot papers at the polling station
    (d) record the total number of votes cast in favour of each candidate
    (e) record the total number of rejected ballots
(2) The presiding officer, the candidates, or their representatives and the counting agents shall then sign a declaration stating

    (a) the name of the polling station;
    (b) the total number of persons entitled to vote at that polling station;
    (c) the number of votes cast in favour of each candidate; and
    (d) the total number of rejected ballots.

(3) The presiding officer shall
    (a) then announce the results of the voting at that polling station before communicating the results to the returning officer; and
    (b) give each candidate or the representative of the candidate or the counting agents a copy of the declaration of the results."

It is clear from these provisions that a presiding officer, a polling agent and a counting agent have important roles to play from the beginning of polling to the declaration of results; and that they complement each other in conducting the polls. Looking on the face of the pink sheets it is not farfetched to say that both 1st Petitioner and 1st Respondent appointed a polling agent and a counting agent to the polling stations, that explains why invariable two agents signed the pink sheets as Regulation 36(2) ***supra***permits 'candidates, or their representatives and the counting agents shall to sign'. Regulation 35 (6) permits a polling agent appointed by a candidate to act as a counting agent. It is in the interest of a candidate to appoint at least one agent to be at each of the 26,002 polling stations due to the roles they are mandated by the constitution and regulations to perform.

Swearing of Oath

The duties of a presiding officer, polling agents and counting agents are weighty as it is by their performance that an election can be judged fair, impartial, and non-discriminatory and the results accepted by all as credible. Since their role requires honesty, integrity and impartiality they are all (including polling assistance) at the various stages of their appointment) required "to swear to an oath that they shall abide by the laws and regulations governing the conduct of elections".

The presiding officer and polling assistants who work under him, in taking their oaths swear further that ‘’they will faithfully carry out duties in a fair and impartial way". [Regulation 17(4) (a) and (b)]

An additional oath taken by a counting agent is that he:

> (c) "will sign the declaration of results following the count of the ballot, or state in writing to the presiding officer the reason for failing to do so." [Regulation 35(4)]

Sanctions for breach of oath

In the case of presiding officer and polling assistance, Regulation 17(5) provides that:

> "A person appointed a presiding officer or polling assistant who contravenes the laws and regulations governing the conduct of elections commit an offence and is liable to sanctions applicable under the electoral laws of Ghana."

For a counting agent, he takes the oath "upon penalty of perjury'. [Regulation 35(4)] In the case of a polling agent no sanction is stated but under common law an oath is taken upon penalty of perjury.

Is the role of the polling /counting agent a mere observing role as put out by the Petitioners?

It is clear from the constitutional and statutory regulations that the polling agent forms an integral part of the conduct of the polls on Election Day. He has before the polls sworn to the same oath that the presiding officer and polling assistance have sworn to abide by the laws and regulations governing the conduct of the election.

Although he does not directly perform the tasks assigned to the polling assistance, for instance matching ID cards of voters or distributing ballot papers, he is enjoined by his oath see to it that the rules for the conduct of elections are followed. The presiding officer is also to give him space to do that. Accordingly before the polls begin at a polling station, a polling agent is required to observe the presiding officer setting out tables and materials for the election and most importantly fill Sections A and B of the pink sheet.

When polling starts polling agents as watchdogs are to help detect impersonation, multiple voting, tampering with the contents of a ballot box and polling staff that do not follow the laid down procedures, or misconduct themselves.

A polling agent is expected to call the attention of the Presiding Officer to anything he considers to be irregular, and if necessary, fill an irregularity form or give a written account of the irregularity to the Presiding Officer or a higher election officer like the returning officer at the collation centre.

Under Article 49.3 polling agents are required to certify the results of their polling stations, consequently polling agents are expected to pay close attention to rejected ballots, closely observe the counting of votes; and make sure that the total number of votes obtained by each candidate has been properly recorded. A polling agent may ask for a recount if he genuinely thinks that the votes have not been counted correctly. Recount is done only once at the polling station. If still unsatisfied the all

agents must accompany the ballot box to the constituency centre for the Returning Officer to count the ballots.

A counting agent is required to sign the Declaration of Results form. Poling agents should obtain copies of the signed copy of the results for their candidates. If a polling agents refuse to sign the results he must give reasons to the Presiding Officer or a superior election official.

To conclude the discussion on the role of presiding officers and polling/counting agents I wish to observe that these presiding officers and polling/counting agents have to undergo intensive and proper training to be able to carry out this very sensitive tasks assigned them under the Constitution and C.I. 75. These persons have to show professionalism, understanding of the electoral laws which may seem simple but complex to carry out. Even though the EC offers training for the agents of candidates, I think it is the responsibility of Political parties to ensure that the agents they appoint have been thoroughly trained and acquainted with what they have to look for. Most of the irregularities complained of in this petition are not trivial as it is the inaction of both the polling agents and presiding officers that has brought us here. Had the polling/counting agents been more attentive to what the presiding officers were required to fill on the forms and the sources from which the information is to be extracted e.g. the voters register, ballot booklets and the biometric verificationequipment the errors on the pink sheet might have been minimal. Political parties must invest in the training of their polling agents and not leave it all to the Electoral Commission which appears to organize crash training programs due to limited time.

I will now proceed to deal with the allegation of no signatures of pink sheets by presiding officers to be followed by voting without biometric violation.

ABSENCE OF SIGNATURES BY PRESIDING OFFICERS

This category of irregularity is outside the voter's control, and is caused solely by the error or omission on thepart of the presiding officer. Article 49 (3) ***supra***, and Regulation 36 (2) ***supra***requires the presiding officer, the candidate or their representatives to sign a declaration stating that the results are a true and accurate account of the poll at that polling station, the name of the polling station, the total number of votes cast in favour of each candidate and the total number of rejected ballots.

There was evidence that some forms were unsigned by the presiding officers and the party agents. The Petitioners are requesting that the votes in these polling stations be annulled as the non-signing of the sheets by presiding officers is an infringement of Article 49 (3).

Counsel for Petitioners submits that:

> "It should respectfully be noted that article 49 (3) does not place any premium on the presence of the signature of the agent on the declaration forms unlike that of the presiding officer. That is why it stipulates that "the polling agents (if any)" shall then sign the declaration form after the signing by the presiding officer."

I find this argument misplaced as the words the 'polling agents if any' is taken out of context. To single out the words 'the polling agents if any' without reference to the remaining words in section 49(3) of article 49 would be a totally wrong approach to the interpretation of that subsection. For it is important in interpreting a provision of a statute to take account of all the words used since the legislature is presumed not to have used the words unnecessarily. In ***Halsbury's Laws of England,*** (3rd ed.) at pages 389 to 390, paragraph 583, states:

> "It may be presumed that words are not used in a statue without a meaning and are not tautologies or superfluous, and so effect must be given, to all the words used, for the legislature is deemed not to waste its words or say anything in vain."

It is also trite law that the overriding principle of statutory interpretation is that the "words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act." E. A. Driedger, *Construction of Statutes (2 ed. 1983)* at page 87.

Article 49(3) which states:

> "The presiding officer, the candidates or their representatives and, in the case of a referendum, the parties contesting or their agents and the polling agents if any, shall then sign a declaration stating…"[Emphasis added]

In my opinion by the use of the commas in the sentence, the underlined words relate to referenda and the phrase 'if any' refers to the whole of the underlined words. This makes sense as voting in a referendum does not involve candidates vying for public office; but is usually to decide on constitutional issue(s) as was held in 1977 or 1978 on the issue of UNIGOV oron 28 April, 1992 for the adoption of the 1992 Constitution; or as the citizens of Ghana may probably be required do in the future for the amendment of some entrenched provisions of the Constitution following the recommendations of the Constitution Review Commission.

It is not envisaged that there would be or should be contesting parties in a referenda that is why the words 'if any' was used by the legislator. The phrase'contesting parties'to me does not necessarily mean political parties. It includes any group of persons such as civil society, pressure groups, organised labour and civil rights activists who may choose to campaign on the issues that

affect governance and civil rights of citizens or group of persons; and also to be watchdogs at the polling stations.

Mr. Addison compares the signatures of the polling agents on the declaration forms:

> "…at best, are akin to those of witnesses to a document. The signature of a witness to the execution of a document is valueless in the absence of the signature of the principal party itself, i.e. the party who is to be bound by the contents of the document."

Contrary to counsel's submission, the language of Article 49 (3) does not speak or imply that polling agents are required to sign the declaration form as witnesses to the signature of the presiding officers. A polling agent who represents the candidate is obliged to sign the declaration together with the presiding officer. Both of them have the same obligation tocertify the regularity of the conduct of the poll in accordance with the laws and regulations. That is why the polling agent has to pay attention to the sorting and counting of the votes and rejected ballots have to be shown to him and he is entitled to object to the rejection of a ballot paper.

The role of the polling agent as shown in the preceding paragraphs is not a mere spectator at the polls. The Presiding officer is obliged to give him space to observe the poll and where a polling agent has any complaint, he can refuse to sign the declaration form and give reasons in the column provided on the declaration form and/or file a complaint which must be resolved at the collation centre.

The polling agent and presiding officer both face sanction if they do not perform their duties according to the electoral laws.

It is noteworthy that in a majority of the pink sheets where there is no presiding officer's signature the polling agents of the two contesting parties signed the pink

sheets, because they are required by the constitutional and statutory regulations to do so.

Counsel for the Petitioners submits further that:

… "It has always been the law that an unsigned document, in circumstances where signatures is essential, is bad in law and void," citing ***Akowuah & Anor vs. Ammo& Anor*** **[2012] 1SCGLR 261** which deals with cancellations and lack of signature on a bail bond; and ***Attorney-General, Kwara State & Anor v. Chief Joshua Alao&Anor. (2009) 9 NWLR Part 671, 84 @ 104*** and ***Omega Bank Plc. v. O. B. C. Limited, 21 NSCQR 771 @ 794*** (per Musdapher JSC).

Counsel for the 1st Respondent submits that:

> "The competing constitutional provisions guaranteeing the right to vote under Articles 42, and Article 49(3), which impose a duty on the Presiding Officer to sign a declaration form, should be resolved in favour of preserving the Ghanaian citizen's inalienable right to vote, particularly when there is no proof that failure by the Presiding Officer to sign the declaration was wilful or affected the results in any manner.

He submits further that:

> "In resolving the issue, therefore, we invite your Lordships to take into consideration the following factors:

(a) Petitioners do not allege that the voter has committed any unlawful act;

(b) Voters had no control over the acts and omissions of the Presiding Officers

(c) Petitioners do not allege collusion between the voter and the Presiding Officers, or indeed between the Presiding Officers and any candidate or political party;

(d) They do not allege misconduct on the part of the Presiding Officers. Indeed it would have been counter-productive on the part of

Petitioners to allege wilfulness on the part of the Presiding Officer because then that would make Petitioners the beneficiaries of such misconduct, if their claim in this regard were upheld;

(e) There are no allegations of wilfulness on the part of the Presiding Officers;

(f) The polling agents of the candidates signed their respective portions of the pink sheets in accordance with Article 49(3) of the Constitution;

(g) Petitioners are not alleging any other head of claim in respect of the polling stations that have the exclusive irregularity;

(h) Petitioners do not challenge the results that were tallied and declared at those polling stations;

(i) Petitioners have not complained in prescribed manner, either at the polling stations or at the constituency collation centres, about the conduct of the elections or the declaration of the results."

The submissions by Mr Lithur are in line with election jurisprudence. Counsel cited**Halsbury's Laws of England 4th Edition, Volume 15(4) atparagraph 670,** whereit was stated as follows:

> "No election is to be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the appropriate elections rules if it appears to the tribunal having cognizance of the question that the election was conducted substantially in accordance with the law as to the elections, and that the act or omission did not affect the result. The function of the court in exercising this jurisdiction is not assisted by consideration of the standard of proof but, having regard to the consequences of declaring an election void, there must be a preponderance of evidence supporting any conclusion that the rule was affected."

And also***Opitz case,*** **(supra),** where it was held on page 42 (paragraph 66) as follows:

> "By contrast, if a vote cast by an entitled voter were to be rejected in a contested election application because of an irregularity, the voter would be irreparably disenfranchised. This is especially undesirable when the

> irregularity is outside of the voter's control, and is caused solely by the error of an election official."

Counsel concludes that:

> "It would be misdirecting punishment indeed for entitled voters who stayed in long queues to cast their votes, and whose vote had been counted, entered onto a declaration form and publicly declared to be deprived of the right to have those votes counted as a result of an act of omission by an electoral officer (not wilfully done), over whose conduct the voters have no control."

I find these authorities persuasive. Compliance failures do not automatically void an election; unless explicit statutory language specifies the election is voided because of the failure. There is no such explicit language in Article 49 or C.I. 75. In election jurisprudence, as in Canada, when election officials fail to comply with election codes, the statutes are evaluated as directory unless the officials' committed fraud, the statute expressly declares noncompliance fatal, or the noncompliance changed or muddied the result. ***McCavitt v. Registrars of Voters of Brockton, 434 N.E.2d 620, 626 (Mass. 1982)*** ("A voter who has cast his ballot in good faith should not be disenfranchised 'because of the failure of a ministerial officer to perform some duty imposed upon him by law.'")Att'y Gen. ex rel. Miller v. Miller, 253 N.W. 241, 243 (Mich. 1934); Pyron v. Joiner, 381 So.2d 627, 629(Miss. 1980) (en banc) (quoting authorities that stated that elections held at the proper time and place and under the supervision of competent persons will not be overturned for irregularities in the manner the election was conducted unless the contestant proves that legal votes were rejected, illegal votes were allowed, or a combination in a number sufficient to change the results or render them uncertain)."

In this petition as enumerated above by the 1st Respondent, no evidence was adduced to show that the noncompliance were premeditated and carried out by the

presiding officers who were agents of the 2nd Respondent, with the intent of causing prejudice to any particular candidate or change the election's outcome or to render it uncertain. Courts usually apply the election code to protect—not defeat—the right to vote. Public policy favours salvaging the election and giving effect to the voter's intent, if possible. The right to vote is at the core of our democratic dispensation, a principle I have earlier affirmed in this opinion with reference to***Tehn-Addy andAhumah-Ocansey*** line of cases***supra.***

Counsel for the 2nd Respondent drew the Court's attention to **The Representation of the People Law 1992, (P.N.D.C.L. 284)** as amended by the **Representation of the People (Amendment) Law 1992 (P.N.D.C. L. 296),** to apply to any public elections, in its Section 20 (2) (b), provides as follows:

> 'Where at the hearing of an election petition the High Court finds that there has been failure to comply with a provision of this Act or of the Regulations, and the High Court further finds
>
> (i) that the election was conducted in accordance with this Act and Regulations, and
>
> (ii) that the failure did not affect the result of the election,
>
> the election of the successful candidate shall not, because of the failure be void and the successful candidate shall not be subject to an incapacity under this Act or the Regulations.'

Clearly, this Law requires that it is not enough to allege and indicate a failure, but that it must also be demonstrated that the failure affected the results of the election. I agree with him.

From the foregoing I would <u>in the absence of explicit statutory language that specifies the election is voided because of the failure of the signature of a presiding officer; conclude that the votes on the unsigned sheets are valid.</u> Failure by Presiding Officers to sign declaration forms did not affect the results of the elections at the respective polling stations. The presiding officers who did not sign the declaration forms are liable to be sanctioned.

Iam conscious of the role of this Supreme Court to interpret and enforce the Constitution, which is one of its underlying concepts of the Constitution. Ghana has progressed immensely in electoral laws and processes and we are in fact the beacon of light in Africa in the conduct of elections. Suffice me to say that gone were the days as in the 60's:

> "…where to register as a candidate for an opposition party required an act of faith; to vote for a United Party member in an election for example, was tantamount to a criminal offence before rural CPP thugs. Whatever went on behind the screen in the polling booths was discovered to be no secret to CPP polling assistants; for the blinds have been rigged so high and the ballot boxes for the parties positioned so far apart that by watching the voter's feet it was easy to tell for which candidate he was voting [By courtesy and culled frompage63 of T. Peter Omari's book "KWAME NKRUMAH- The Anatomy of an African Dictator; Reprint 2009]."

Gone were the days when counting was not done at the polling station but taken to a collation centre that led to abuses like ballot stuffing and in extreme cases dumping opponents ballot boxes.

With the kind of peaceful election that we experienced on the 2 polling days 7 and 8 December are we setting the clock back by a narrow interpretation of electoral laws? A strict interpretation would curtail and erode the gains we have made so far. What Ghanaians need to do is to shun and shame the growing violence that has come about as a result of irresponsible, impudent, disrespectful and chauvinistic persons, whose unguarded utterances,and machinationsat times bordering on treason are causing disunity in this our dear country all in the name of politics.

I request my colleagues who are not persuaded by my stand to reflect on the following legal exposition by Mr S. Y. Bimpong Buta, the eminent and luminous

lawyer and author in his monumental book, "***The Role of the Supreme Court in the Development of Constitutional Law in Ghana***"; at pages 617 to 618, where he ably sums up what is expected to be our role in nation building. He noted that:

> "…the Supreme Court has made very distinctive contribution to the important and crucial question of the policy considerations for determining the interpretation of a national Constitution. It is suggested that the principles of constitutional interpretation, such as the need for a benevolent, broad, liberal and purposive construction of the 1992 Constitution as a political document *sui generis*, and capable of growth (as stated by the Supreme Court in cases such as ***Tuffuor v. Attorney-General)*** would very much assist the court in the exercise of its original jurisdiction in all matters relating to the enforcement or interpretation of the Constitution under article 2 and 130(1). As pointed elsewhere, the 1992 Constitution as the fundamental law of the landmust not be narrowly construed. Rather the Constitution must be given: '…a wide generous and purposive construction in the context of the people's aspirations and hopes and with special reference to the political, social and economic development of the country. Such an approach would, it is submitted, create the peaceful and congenial atmosphere necessarily required for addressing the challenges for national development in all facets."[1991-92] 18 RGL93 at 104; See also the dissenting opinion of Sophia Akuffo JSC in ***Tsatsu Tsikata (No1)*** where she pointed out the need to avoid "absurdity and stultification of the organic dynamism that must inform constitutional development."] [See also ***New Patriotic Party v. Ghana Broadcasting Corporation [1993- 94] 2 GLR 354*** at 366 where Francois JSC said: The Constitution, 1992 itself points the way to its liberal interpretation. It illustrates from the horse's own mouth the

spirit that should guide its construction. Thus in Articles 165 and 33(5) of the Constitution, 1992 we are required not only to go by the written letter, but to adopt as well, the known criteria which attach to the democratic environment, so that the fundamental human rights guaranteed under chapter 5 of the Constitution are not curtailed."][Emphasis added]

I rest my case.

I accordingly hold that this head of claim fails and dismissed accordingly.

VOTING WITHOUT BIOMETRIC VERIFICATION

Regulation 30 of Public Elections Regulations, 2012, C.I. 75 sets out procedures that a voter goes through before casting his/her vote in accordance with article 42. It reads:

> (1) A presiding officer may, before delivering a ballot paper to a person who is to vote at the election, require the person to produce (a) a voter identification card, or (b) any other evidence determined by the Commission, in order to establish by fingerprint or facial recognition that the person is the registered voter whose name and voter identification number and particulars appear in the register.
>
> (2) The voter shall go through a biometric verification process.

Regulation 47(1) of C.I. 75 defines a biometric verification equipment to mean: "… a device provided at a polling station by the [Electoral] Commission for the purpose of establishing by fingerprint the identity of the voter." [It seems to me this definition is too limited as the biometric verification equipment (BVD) is also used for facial recognition]

The claim by the Petitioners that there has been a violation of the rules relating to biometric verification is based on sub-regulation (2) of Regulation 30 which provides that: "(2) the voter shall go through a biometric verification process."

The Petitioners submits that the ordinary meaning of Regulation 30(2) of C.I. 75 is that no registered voter should be allowed to vote without first and foremost going through a biometric verification process. The word "shall" makes it obligatory for all voters to be verified biometrically before being allowed to vote.

The Respondents responds that a strict interpretation of Regulation 30(2) of C.I. 75 would disenfranchise a lot of people especially those without fingers and those whose fingerprints have so eroded that the BVD cannot pick them.

Mr Tony Lithur submits:

> "If Your Lordships, however, take the view that indeed people voted without biometric verification, it is the case of the 1st Respondent… that fingerprint verification was not the only permissible means of verification under the law. Therefore failure to undergo fingerprint verification before voting did not constitute an infringement of the law. Anyhow, the fundamental right to vote under the Constitution could not be whittled away by subsidiary legislation. To the extent that any legislation seeks to do that, same would be unenforceable.
>
> [T]he use of the word "or" in sub-regulation (b) clearly shows that fingerprint verification is not the only mode of identifying voters. Indeed the existence of FOs on the biometric register is a clear proof of the position of the law."
>
> The process contained in the legislation envisages a two-step procedure. The first is the presentation of a voter identification card. The second is the presentation by the voter of "*any other evidence determined by the Commission in order to establish by fingerprint or facial recognition that the person is the registered voter whose name*

and voter identification number and particulars appear in the register". Thus, the alternative to the production of a voter identification card is the production by the voter of evidence that would enable the Commission or its officers to properly identify the voter for purposes of voting. Such evidence may consist either of the fingerprints of the voter or evidence of facial recognition (e.g. a traveller's passport or driver's license). In the former case, the only procedure for producing the fingerprint of the voter is the use of the biometric verification equipment provided by the Commission. Indeed, Regulation 47 of the Public Election Regulations defines biometric verification equipment as "a device provided at a polling station by the Commission for the purpose of establishing by fingerprint the identity of the voter."

He continues:

> "Even if this extrapolation were correct, we submit that within the broader context of our electoral laws, a more expansive notion of biometric verification is necessary in order to give meaning to the right to vote as guaranteed by the Constitution. The restrictive approach being put forth by the Petitioners harbours the potential of nullifying or impairing the right of ordinary citizens who cannot be verified biometrically by fingerprint to vote. For example, persons who are lepers, or have coarse fingers due to farming or other manual labour or double amputees cannot vote by reason of this restrictive meaning of biometric verification."

He concludes that:

> "Your Lordships, be that as it may, it is our contention that the requirement to go through biometric verification must be given a purposive meaning within the context of the constitutional right to vote and the electoral laws of the country. Therefore failure to undergo fingerprint verification before voting did not constitute an infringement of the law. Anyhow, the fundamental right to vote under the Constitution could not be whittled away by subsidiary legislation. To the extent that any legislation seeks to do that, same would be unenforceable."

As for Mr Tony Lithur's view that a restrictive approach in applying fingerprint identification will impair a citizen's right to vote, Mr Addison points out that:

> "Biometric verification was intended to deal with instances of voter fraud and impersonation witnessed in the past. It is an even-handed restriction, since as Dr Afari-Gyan stated in evidence, every voter is supposed to be verified. Even persons with the words "Face Only" ("F. O".), written by their names in the voters‟ register, and, thereby, suggesting the presence of one form of disability or the other which would disable them from being verified by fingerprint, were verified. The only difference is the manner of verification. It is correct to say that, under the current legal regime of Ghana, biometric verification is uniformly applied to all classes of voters. It is an even-handed restriction intended to protect the reliability and integrity of the electoral process itself. As held in the U.S. case of **Anderson v. Celebreeze 460 U. S. 780 (1983),** reasonable, non-discriminatory restrictions which achieve the object of strengthening the electoral system cannot be unconstitutional."

It is obvious that the BVD is not only for fingerprint identification but also for face or picture verification by these wiping of the bar-coded identification card on the machine. On Election Day every voter with an ID card had to go through face

verification before those who are not listed as "face only" went through finger print verification. The system made special provision for those without fingers and fingerprints to be verified by face only and such data is captured on the BVD machine as well as on their voters ID card. From the foregoing it is my contention that sub-regulation (2) of Regulation 30 which provides that: "(2) [T]he voter shall go through a biometric verification process" is therefore misleading as a strict implementation of it would disenfranchise all persons who cannot go through fingerprint identification.

In any event, the compilation of a new voters register using biometric technology, plus the mandatory use of biometric verification devices on polling day, as provided by both C. I. 72 and C. I. 75 respectively, were the necessary mechanisms lawfully put in place to enhance the integrity of the ballot in Ghana. In my view the law requiring that every voter shall go through a process of verification is legitimate and is consistent with international norms. Reference is made to election jurisprudence, where the decisive question that arose for consideration is:

When can it be legitimately said that a legislative measure designed to enable people to vote in fact results in a denial of that right?

In ***Ted Opitz*** supra the Supreme Court of Canada at par.38 has this to say:

> "While enfranchisement is one of the cornerstones of the Act, it is not freestanding. Protecting the integrity of the democratic process is also a central purpose of the Act. The same procedures that enable entitled voters to cast their ballots also serve the purpose of preventing those not entitled from casting ballots. These safeguards address the potential for fraud, corruption and illegal practices, and the public's perception of the integrity of the electoral process. Fair and consistent observance of the statutory safeguards serves to enhance the public's faith and confidence in fair elections and in the government itself, both of which are essential to an

effective democracy; ***Longley v. Canada (Attorney General)***, 2007 ONCA 852,88 O.R. at para, 64 ."

Mr Addison also referred to the South African case of ***New National Party v Government of the Republic of South Africa and Others*** (CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489 (13 April 1999).The impugned provisions prescribed that, pursuant to the Electoral Act, No. 73 of 1998, South African citizens otherwise entitled to vote could only participate in the 1999 elections if they possessed and produced one of two identification documents when voting: either a bar-coded identification card or a temporary identification card (TIC).

The Constitutional Court, per Yacoob J, held:

> "But the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless. The Constitution takes an important step in the recognition of the importance of the right to exercise the vote by providing that all South African citizens have the right to free, fair and regular elections. It is to be noted that all South African citizens irrespective of their age have a right to these elections. The right to vote is of course indispensable to, and empty without, the right to free and fair elections; the latter gives content and meaning to the former. The right to free and fair elections underlines the importance of the exercise of the right to vote and the requirement that every election should be fair has implications for the way in which the right to vote can be given more substantive content and legitimately exercised. Two of these implications are material for this case: each citizen entitled to do so must not vote more than once in any election; any person not entitled to vote must not be permitted to do so. The extent to which these deviations occur will have an impact on the fairness of the election. This means that the regulation of the exercise of the right to vote is necessary so that these deviations can be eliminated or restricted in order to ensure the proper implementation of the right to vote."

From the foregoing I hold that the Respondents have failed to demonstrate a corresponding interest equally weighty to justify the non- application of Regulation 30 (2). What has weighed on me to come to this conclusion is that the EC during the registration exercise made special provisions to ensure that persons who because of trauma cannot go through fingerprint verification are not disenfranchised by being verified by face only.

To prevent abuse, FO is embossed on the voters ID card; indicated in the voters register; and in the bio data on the BVD. I accordingly I hold that the requirement by Regulation 30 (2) for a voter to go through fingerprint identification before casting his/her vote does not infringe his or her constitutional right to vote.

The requirement is necessary to prevent those who are not entitled to vote from voting and thus ensure free and fair elections as protecting the integrity of the democratic process is a central core principle of Electoral Justice.

Mr Addison further submits that:

> "Quite remarkably, contrary to the clear dictates of Regulation 30 (2) of C.I. 75, the 2nd Respondent in its training manual, exhibit EC2, granted unto its official, particularly, presiding officials at the polling stations, some amount of discretion in permitting persons whose fingerprints could not be verified to be allowed to vote."

This submission is misplaced as nowhere in the manual was the presiding officer given the discretion to allow a person whose fingerprints could not be verified to vote. At page 28 of the training manual under the heading of '**Possible Challenges in Processing Voters'** some challenges that may be encountered when using BVD with their corresponding solution were dealt with. The first deals with situations where the voter do not possess his/her voter ID or the registration receipt, the presiding officer was directed to accept any other form of valid identification

document like Passport, NHIS,NIA,Driver's Licence and SSNIT ID cards **with photograph and having the same name of voter** in the register. This is in conformity with Regulation 30 (1) of C.I. 75.

Attending to people without identity card is one of the duties of a presiding officer, specified under regulations 17 (d).The manual provides further that even if the voter has no identification document, the presiding officer is permitted to use the voter's name as recorded in the registration exercise to look for his/her details in the Name Reference list and be made to go through fingerprint verification. [This is where the reference to the Omanhene by Dr Afari-Gyan perhaps comes in.] In other instances where the voter ID number does not tally with the ID number in the Register but all other details including photograph match; or where biographic details in the voter register do not match voter's photo, the voter should be allowed to go through fingerprint verificationas fingerprint match is unique to an individual and therefore it is a perfect and conclusive form of identification. And where in all these cases the finger verification is successful the voter is to be allowed to vote,

Though it is not open to the Commission to over-ride the Regulations and rules governing the conduct of elections, such as a requirement of a voter holding a voter's ID card or some form of a valid photo of ID; it is evident that the administrative instructions in the manual are to be applied by the election officials to facilitate, and not to deny an eligible voter the right to vote. The application is not a free fall, as ultimately a voter is only allowed to vote <u>where the verification by fingerprints is successful. [Emphasis added]</u>

So ultimately with the exception of FOs a voter shall only be allowed to vote after going through verification by fingerprints.

What evidence are the Petitioners relying on to support their claim that people voted without going through biometric verification as required by Regulation 30(1) and (2) of C.I. 75?

For the Petitioners, the only evidence of voting without biometric verification is to be found in section C3 of the pink sheets.

A pink sheet comprises of two forms. Form EL 21B, the statement of poll for the office of the President for the Republic of Ghana and Form EL 22B, a declaration form to be signed by the presiding officer and polling agents of the candidates certifying the accuracy of the results of the ballots at the polling station. Form EL 21B comprise of Section A, Ballot Information, and Section B Information about the register and other lists such as proxy list. Section C Ballot Accounting Section D Rejected Ballot Report, the next Section is headed Presidential Election-Polling Station Results Form.

A presiding officer is required to answer a question on a portion of the pink sheet as follows:

C3: *What is the number of ballots issued to voters verified by the use of Form 1C (but not by the use of BVD)?*

The Petitioners throughout the trial contend the pink sheets tendered in evidence without more constituted the primary evidence on which they relied in support of their case. The Petitioners relied on the figures entered in answer to the above question as evidence of people who voted without going through verification by BVD. According to Dr Bawumia what he and his team did was to aggregate all the figures in section C3 in pink sheets in the MB-M series as evidence of people who voted without biometric verification.

The Respondents denied the claim. Dr Afari-Gyan stated that the Column C3 was not required to be filled by the presiding officers. According to him, that column was created to take care of voters who had been registered by 2nd Respondent during the biometric registration exercise that preceded voting, but whose biometric data had, unfortunately, been lost as a result of some technical difficulties that Commission had encountered. The facility was to allow such persons to vote without going through biometric verification. Some of the political parties raised objections. So the idea was dropped and the presiding officers were instructed not to fill that column; and the Forms 1C were not sent to the polling station.

The Petitioners did not provide any evidence about any complaint lodged by the 1st Petitioners polling agents in prescribed form or affidavit evidence as to people voting without biometric verification. On the face of the pink sheets none of the NPP polling agents attested there was no biometric verification of voters at the polling station.

On his part Counsel for 1st Respondent submits that:

> "That the polls were adjourned to 8th December in selected polling stations is not in doubt. The reason for the adjournment is also not in doubt. It was precisely to ensure that no voter would be allowed to vote without first undergoing biometric verification. 2nd Petitioner under cross-examination by Counsel for 1st Respondent testified to this…"

Counsel submits further that:

> "What is clear from the testimony is that the use of Form 1C was intended at all times to be the condition precedent to making any entries in column C3. In the absence of any evidence to the effect that those forms were taken to the polling stations against the express instructions of the witness, and that they were indeed utilized, the irresistible conclusion is that any entries made in the column were

made in error. This is a clear corroboration of Johnson Asiedu Nketia's testimony."

The account of the origin of the column C3 was unchallenged. I find the EC's explanation that the column was created to take care of persons who had been registered during the biometric registration exercise that preceded the election but whose biometric data was lost due to technical hitches, plausible. Any democratic society must treat all its citizenry equally and fairly. The Constitution guarantees the right of persons to equal treatment. So the system should seek to enfranchise all entitled persons to come and vote on Election Day.

The fact that the Form 1C of the affected persons were not sent to the polling centres is also unchallenged. The inference then is that people were not verified by the use of these forms and in the absence of any evidence offered by the Petitioners to the contrary; this Courtcan reasonably conclude that no-one voted without going through biometric verification.

Furthermore, even though the1st Petitioner had polling agents at all the 26,002 polling stations there was not a single complaint of non-verification by BVM filed by any of them.

To preserve the integrity,transparency and credibility the election process is open and public. Polling officials work in a public environment at a polling station where their actions can be observed by other election officials like the presiding officer, the parliamentary and presidential candidates or their polling and counting agents, election observers, the media, and members of the public present to vote and present later to watch/join in the counting of votes which is done audibly by the presiding officer. It is reasonable to expect people to protest if others voted without going through biometric verification.

Opportunity was given to the parties in pursuance of the Court's direction on the mode of adducing evidence to file affidavit evidence. The 3rdRespondents filed thousands of affidavits from their polling agents and other persons testifying that they participated in the election that was regularly conducted at their various polling stations and all who voted went through biometric verification. Even though Counsel for the Petitioners tried to downplay the evidential value of their affidavits,I am of the view that some weight is to be attached to them as they recounted the procedure that everyone went through at the polling stations.

The Petitioners had polling agents at all the 26,002 polling stations yet they did not produce a single affidavit evidence to support their allegation that some voters did not go through finger verification before voting. They also failed to apply to have any of the witnesses of the 3rd Respondent to be cross-examined to test their credibility. Having failed to call a single person for cross-examination, the Petitioners cannot turn round to say the evidence was untested.

The rules as to the burden of proof are observed even with affidavit procedure - see ***Republic vs. Director of Prisons Ex parte Shackleford*** supra***, Republic vs. Mensa-Bonsu Ex parte Attorney-General supra,*** and ***Republic vs. High Court, Accra; Ex parte Concord Media Ltd. & Ogbamey (Ghana Ports & Harbours Authority & Owusu Mensah Interested Parties;)supra.***

So the affidavit evidence filed by the 3rd respondent in support of their case stood unrebutted. I recall how about three hundred people claiming to have participated in the elections which they claim was regularly conduced in accordance with law applied to be joined as respondents but were turned down by this Court for the very reason that they could give evidence on behalf of the Respondents. From the

Appendix attached to 3rd Respondents' written address a total of 3,794 affidavits were sworn to denying the various heads of irregularities alleged by the Petitioners. We take judicial notice of the fact that voters with valid ID cards whose photo and bio data have been verified by the BVD but could not be verified by fingerprints due to technical defects were turned away. The elderly, especially women were the major victims. Breakdown of the BVM resulted in long queues making some people go away without voting.

It is a pity that technical difficulties disenfranchised some citizens. See ***Ahumah-Ocansey v. Electoral Commission; Centre for Human Rights & Civil Liberties (CHURCIL) v. Attorney-General& Electoral Commission (Consolidated)***

> Participation in elections is one of the core values of Electoral Justice that states: "The voice of the people must be heard, respected, and represented in the context of a free, fair and genuine contest. Citizens are the core representative of democracy as it is they who chose by secret ballot those who represent and govern them. Elections provide a way for all to decide on the decision makers in a way that ensures that all voters have a free and equal opportunity to participate in the election process. Full participation and diversity are manifested when arrangements facilitate the involvement of all, including first-time voters, women, and disadvantaged groups."[Reference Accra Guiding Principles ***supra***]

I find the reasons given by Dr Afari-Gyan plausible. The fact that elections were postponed to the next day due to failure of the BVD machines attest to the fact that all who voted went through biometric verification.

From the foregoing I hold that the Petitioners have not discharged the burden of proof and this category also fails is hereby dismissed.

OVER-VOTING

In paragraph 20 Ground 2 (1) (a) of the 2nd Amended Petition, over-voting is claimed to have occurred "in flagrant breach of the fundamental constitutional principle of universal adult suffrage, to wit, one man, one vote."

This principle of Universal Adult Suffrage is affirmed in the Preamble to the Constitution, 1992.Article 42 of the Constitution, to which 2nd Petitioner refers in paragraph 23 (i) of his affidavit as one of the two bases for the proposed vote annulment for over-voting, states as follows:

> "42. The right to vote
>
> ***Every citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda***."

Regulation 24(1) of C.I. 75, which is the other legal provision on which 2nd Petitioner relies, also provides as follows:

> "A voter shall not cast more than one vote when a poll is taken."

So as Mr Tsatsu Tsikata, Counsel for the 3rd Respondent submits:

"It is absolutely clear, therefore, that an allegation of a voter casting more than one vote is of the essence of what Petitioners are seeking to rely on here. In paragraph 20 Ground 2 (1) (a) of the 2nd Amended Petition, over-voting is claimed to have occurred "in flagrant breach of the fundamental constitutional principle of universal adult suffrage, to wit, one man, one vote."

However nowhere in the Petition or in the affidavit of the 2nd Petitioner is it alleged that any voter voted more than once, thus infringing the one man, one vote principle. The Petitioners did not lead any evidence to prove that someone voted more than once in the elections.

The case of the Petitioners in respect of over-voting is that whenever the ballot accounting portion of the pink sheet shows that the figure in B1, representing the number of registered voters at the polling station, or the figure in C1, representing the number of ballots issued at the polling station, is exceeded by the total number of votes in the ballot box, the votes of all those who voted in that polling station must be annulled. This includes, according to the evidence of 2nd Petitioner, where A1 or B1 has a blank since "blank means zero."

What is over-voting?

There is some divergence of opinion between the parties about what constitutes over-voting. Petitioners claim there are three definitions. The first one is the situation in which the ballots in the sealed box exceed the number of registered voters in a particular polling station. That definition is accepted by all the parties. Dr Afari-Gyan describes that situation as the classic definition of over-voting. That is where the agreement ends. Petitioners define over-voting further to include a situation in whichthe ballots in the ballot box exceed ballots issued at the polling station. The third definition is the situation where the issued ballots exceed the number of registered voters.

Usually over-voting occurs primarily through impersonation, multiple voting and stuffing of ballot boxes. The adoption of biometric registration is expected to have reduced to the barest minimum impersonation and multiple voting. The use of finger print verification and the marking of a voter's finger with indelible ink before casting his/her vote, use of transparent boxes placed in full public view are measures to eliminate voting malpractices,

Furthermore the openness of the environment, with the presence of polling agents, the media and in some places observers made up of civil society, domestic and

international observers and security personnel prevent malpractices at polling stations such as violence and intimidation. The only thing that is not done in the open but done in secret is the marking of the ballot paper to preserve the sanctity of secret ballot as enshrined in Article 49 (1), and the UDHR Article 21.3***supra***

It is the task of the presiding officers and polling agents to monitor the conduct of the election, to detect and prevent such frauds. It is also the duty of the presiding officer under the eagle eye of people mentioned above particularly counting agents of candidates, immediately after close of voting, to do ballot accounting and fill the necessary entries on the pink sheet and then proceed to sorting and counting procedures as required by Article 49 (2) of the Constitution and provided in details in Regulations 36 and 37 of CI 75.

The presiding officer then breaks the seals on the ballot box and in full view of the agents removes all papers from the ballot box sort out the ballots into separate piles for each candidate and another pile for rejected ballots if any.

Rejected Ballot Papers

A ballot paper should not be counted if it does not bear the official ballot validation of the polling station, or it is blank, or it is marked for more than one candidate, or there is reasonable doubt as to the candidate the person voted for, or something that identifies the voter has been written on it.

The presiding officer must show every rejected ballot paper to the polling agents and give reasons for its rejection. The presiding officer has to record at the appropriate column of the pink sheets the number of rejected ballot papers. If a polling agent raises any objection the presiding officer must write the words‘ rejection objected to’ on the rejected ballot and put it in an envelope and notify the returning officer at the collation centre.

I have taken pains to go through the process to demonstrate that if there is any foreign material in the ballot box and the presiding officer and agents are vigilant then it could be detected and taken out and not counted. So that only valid ballots is to be counted at the election. If correct entries are made then after a careful scrutiny the occurrence of over voting should be detected as was done in the 4 polling stations in Nalerigu-Gambaga after checking the BVD to ascertain the number of voters verified and thus eligible to vote at those stations.

It is also the duty of the polling agents to file a complaint if there is such occurrence, unless there is collusion among the election officials, polling agents and voters the public, which is highly unlikely due to competing interests at stake.

What is the evidence relied on by the Petitioners in support of their claim that there was over-voting in some of the polling stations?

This is one area that the burden of persuasion weighed heavily on the petitioners as election results benefit from a presumption of regularity. This reflects the fact that the Petitioner bears the burden establishing, on a balance of probabilities, that there was irregularities that were so substantial that it affected the results of the election. It happens that the species of evidence the Petitioners relied upon were the entries on the pink sheets. As Dr Bawumia stated he headed a task force whose duties, 'was to examine the election records in search of technical administrative errors in the hope of getting a second chance'. See par 56 of the Canadian case ***Opitz*** v. ***Wrzesnewskyj***. By this method the Petitioners capitalized on errors made in the entries in the statement of polls form.

The case of the Petitioners in respect of over-voting is that whenever the ballot accounting portion of the pink sheet shows that the figure in B1, representing the number of registered voters at the polling station, or the figure in C1, representing

the number of ballots issued at the polling station, is exceeded by the total number of votes in the ballot box, the votes of all those who voted in that polling station must be annulled. This includes, according to the evidence of 2nd Petitioner, where A1 or B1 has a blank since "blank means zero."

There were mistakes in the entries of ballot information, information about the register, ballot accounting, rejected ballots and tallying of votes in ballot boxes. There were silly arithmetically errors that was capable of being detected by a simple scrutiny of the columns. The Petitioners also capitalized on entries in C3, which this Court has held by a majority decision that the entries were made in error as no one was verified by Form 1C. Accordingly such entries cannot be used as basis for over-voting.

Some of my brother justices have dealt in detail with this ground so I would not delve into it, except to remark that the Petitioners failed to persuade me that there were votes cast that exceeded the number of voters entitled to vote at these polling stations.

It seems to me that Dr Afari Gyan and Mr Asiedu Nketia demonstrated that it is misleading for the Petitioners simply to look at the entries on the face of the pink sheets without checking the figures against other available and reliable information contained in the voters register, ballot booklets and even the biometric verification device which recorded the number of people who were verified and thus entitled to vote.; before coming to a conclusion that there was over vote. These other sources in my opinion are rather the primary sources to look at under this head of claim when the results is scrutinized for over-voting in view of the patent errors on the face of the pink sheets. The presiding officer (if working according to procedure)has to extract the information to fill columns A, B, C from the voters

register, ballot booklets, proxy voters list and the Biometric verification device before he opens the ballot box to sort and count the ballots.

However I am not convinced that no entry in B1 by itself is evidence of over-voting without establishing the number of registered voters at the polling station. The number of registered voters could be easily verified or ascertained from the Voters register of the particular polling stations which every candidate /Party had copies. Having procured the number of voters on the voters register, then the Petitioners should demonstrate the occurrence of over-voting by using any of the definition of over-voting as defined variously by the parties. The Petitioners having failed to provide such evidence cannot legitimately claim the absence of any entry in B1as evidence of over-voting.

There were also instances where C1 or the whole of C columns were blank and the Petitioners claim this was also evidence of over-voting but for the reasons given above there is no empirical evidence to show this was the case.

Furthermore some of the Pink sheets under the MB-C series were not full pink so there was no basis for determining whether there was over-voting or not. The 2nd Petitioner said under cross-examination that he deleted 53 of such pink sheets from the list after giving evidence.

We take judicial notice of the factthat there was immense pressure on the presiding officers, election officials and even the polling and counting agents on the day of the elections, the majority of whom has no previous experience in election procedures. The EC officials and presiding officers may have made some clerical errors; but there is no evidence upon which mischief or advantage can or should be attributed thereto. This is not a phenomenon peculiar to Ghana alone.

In Opitz vs. Wrzesnewskyj SCC 55, ([2012] 3 S.C.R. in which the Supreme Court of Canada held as follows in paragraph 46:

> (46) 'The practical realities of election administration are such that imperfections in the conduct of elections are inevitable. As recognized in Camsell v. Rabesca, [1987] N.W.T.R. 186 (S.C.), it is clear that "in every election, a fortiori those in urban ridings, with large numbers of polls, irregularities will virtually always occur in one form or another" (p. 198). A federal election is only possible with the work of tens of thousands of Canadians who are hired across the country for a period of a few days or, in many cases, a single 14-hour day. These workers perform many detailed tasks under difficult conditions. They are required to apply multiple rules in a setting that is unfamiliar. Because elections are not everyday occurrences, it is difficult to see how workers could get practical, on-the-job experience."

One other factor which was lacking and need to be mentioned is the absence of a complaint. The Petitioners led no evidence on events at the polling stations except by one affidavit evidence of one Peter Awuni a parliamentary candidate for the NPP, that the 2nd Petitioner annulled the results of Kuligona, Nanyeri, Bongni and Langbesi Police Station polling stations, in the Nalerigu- Gambaga constituency because the ballots counted at the polling stations exceeded the number of persons verified by the BVD by one or two people.

Mr Tsikata submits that:

> "[t]he Petitioner fails to appreciate that in the absence of any person being even alleged to have voted twice or illegally, or any person having been identified as having made a complaint of over-voting, whether formally or informally, merely invoking entries on the administrative portion of pink sheets which have been shown to contain errors cannot meet the burden of proof on the Petitioners. His testimony continues to dwell exclusively on these administrative entries."

Mr Lithur also submits:

"In determining whether or not there was over voting in the December 2012 election, in terms of Petitioners' definition, it is important to note that Petitioners have neither challenged the tallied results at the polling stations nor do they challenge the collation of the results at constituency collation centres. Their case, as stated on numerous instances including in the 2nd Amended Petition and also in their oral testimony in court, is limited to the entries made on the voting accounting sections of the pink sheets. The only evidence being relied on by Petitioners in proof of over-voting, therefore are those entries,"

This brings me to the issue:

Whether the over-vote <u>if any</u>should lead to an annulment of the total votes cast at the polling station?

This Honourable Court was invited to advert its mind to the fact that, in an election at a polling station shown to have been affected by over-voting, it is not possible to determine which of the votes cast constitutes the invalid votes and, therefore, which votes cast count as the lawful votes. The practice, therefore, has been to annul all the results of the polling stations where they are proven to have occurred

I do not subscribe to this suggestion and its application in this case. In seeking to annul votes, it needs to be clear which polling stations are being called into question. The confusions about exhibits have undermined their case. As there is insufficient clarity on the polling stations in question, the attempt to annul certain votes cannot even get off the starting blocks. Moreover the few instances of over-voting that was demonstrated during the hearing, going by the average of those votes; there is no mathematic chance that the results in those polling stations would change the outcome of the results at the polling station. Even if the aggregate of the actual over-vote in polling stations where over votes is established and proportionally deducted from the votes of each candidate, it would not affect the results. Even if they are deducted from the winning candidate's vote it would still not affect the votes.

My brethren who took the position that there was over- voting and so the votes are to be annulled for a re-run of polls in the affected were unable to ascertain and provide the total number of over votes from the pink sheets for me to change my position on this claim.

The Petitioner could not establish to my satisfaction whether the number of votes cast in these polling exceeded the number of registered voters as indicated in the Voters Register. They had copies of those registers but only produced one to show there was double registration at the Mampong Anglican School.

The Petitioners have not led sufficient evidence for me to come to the conclusion that there was clearly a mathematical chance that the results could change then the votes would have to be annulled and a re-run held. But then in many instances the over-voting was either one or two, and certainly that cannot lead to annulment of the entire votes.

Dr Bawumia referred to a statement made by Dr Afari-Gyan before the election that if the ballots are counted at the end of the day and it is found that even one ballot exceeds what was issued to voters verified to vote; the results of that polling station would be annulled.

I find this pronouncement disturbing as it is not based on any statute or any constitutional instrument made by him as he is empowered to do under Article 51 of the Constitution. The directive that an over vote by one ballot would invalidate the whole results of a polling station when despite the over vote a winner is clearly ascertainable, is contrary to both the letter and the spirit of the Constitution and contravene articles 42 on the right to vote.

In ***Tehn-Addy V Electoral Commission [1996 – 97] SCGLR 589***

Acquah JSC (as he then was) at page 594:

> "Whatever be the philosophical thought on the right to vote, article 42 of the 1992 Constitution of Ghana makes the right to vote a constitutional right conferred on every sane Ghanaian citizen of 18 years and above.
>
> As a constitutional right therefore, no qualified citizen can be denied of it, since the Constitution is the supreme law of the land.
>
> Article 45 entrusts the initiation, conduct and the whole electoral process on the Electoral Commission and article 46 guarantees the independence of the Commission in the performance of its task. A heavy responsibility is therefore entrusted to the Electoral Commission under article 45 of the Constitution in ensuring the exercise of this constitutional right to vote. For in the exercise of this right, the citizen is able not only to influence the outcome of elections and therefore the choice of a government but also he is in a position to help influence the course of social, economic and political affairs thereafter. He indeed becomes involved in the decision-making process at all levels of governance."

The underlined words above informs my opinion that this directive cannot override a constitutionally protected right to vote.

I respect the views and the authorities cited by Mr Addison, to support the Petitioner's request to annul the polls in polling stations where there is proof of over-voting.

He referred to the dictum of the Us Supreme Court in the case of **Reynolds v. Sims 377 US, 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)** which is to the effect that:

> "The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

I absolutely affirm the concept that over voting debases and dilutes the weight to be accorded each individual vote. So where in ***Lamb v. McLeod (1932) 3WWR 596***,cited by counsel the subject matter of the complaint was the validity of 17 votes in an election where the margin of victory between the candidates was only 5, the court rightly in my view annulled the votes on the grounds, inter alia, that:

> "It cannot be said that there was an electing of a Member of Parliament by the majority" as the intrusion by wrongdoers made "it impossible to determine for which candidate the majority of qualified votes were cast".

However, it is my considered opinion that with the margins of over-vote involved in each of the impugned polling stations, it was possible to determine the winner at each polling station where over-voting occurred and accordingly ***Lamb vs. Macleod*** is inapplicable to this case.

The Plaintiffs have not been able to discharge the burden of persuasion in accordance with the Evidence Act. Accordingly I would also dismiss this category of irregularity.

SAME SERIAL NUMBERS

This head of irregularity does not violate any statutory regulation**.**

The claim under this head is stated in Paragraph 20 Ground 1(b) of the 2nd Amended Petition as follows:

> "That there were widespread instances where there were the same serial numbers on pink sheets with different poll results, when the proper and due procedure established by 2nd Respondent required that each polling station

have a unique serial number in order to secure the integrity of the polls and the will of the registered voters."

According to Petitioners, the serial number is the only security feature which is pre-embossed on the pink sheet from the printers. The polling station name and polling code is entered in the space provided on the form by hand by the presiding officer. Once a pink sheet is filled the serial number locks the polling station name and code to that polling station for good. However Dr Bawumiaadmitted under cross examination that the complaint relating to the serial numbers was not derived from any constitutional or statutory infraction but as the numbers was huge they were serious and inferentially must have affected the outcome of the elections.

He said the use of duplicate serial numbers was a major 'instrument' for the perpetuation of the constitutional statutory violation of the law, irregularities and malpractice in this election.

It happened that two sets of pink sheets for the presidential elections were printed. Dr Afari-Gyan explained that the order for printing was made before the filing of nominations and balloting for positions on ballot papers was done. He said they wanted space for 18 names and this was divided into two sets, in anticipation that a lot of candidates will file nominations. As it happened only 8 candidates successfully filed their nomination papers. So after the balloting for position the EC informed the printers who printed the 8 names on both sets.

Instead of distributing one set, the EC unwisely distributed the booklets randomly and hence two sets of pink sheets with the same serial numbers were found at different polling stations.

There was much wrangling between counsel for the Petitioners, Mr Addison, and Dr Afari-Gyanover the significance of pre-embossed serial numbers on the pink sheets by the printers. According to counsel, in order to guarantee the security of electoral materials, it has been the practice of the EC among other measures to pre-emboss electoral materials with unique serial numbers. As a result ballot papers, ballot boxes tamper proof envelopes, stamps and the pink sheets have pre-embossed serial numbers.

Dr Afari-Gyan, on the other hand said, whereasRegulation26 (2) of CI 75 requires that numbers are printed on every ballot paper, there is no such requirement for the printing of pink sheets. The serial numbers on the pink sheets are generated by the printing firm to enable the EC to keep count of the number produced. He said the pink sheets are distributed randomly He said the serial numbers has absolutely no relevance to the compilation and declaration of result as polling stations are identified by their unique codes

Dr Afari-Gyan explained further that, if two polling stations have pink sheets with the same serial number that will in no way have any effect on the validity of the votes cast. As each of the two polling stations will have different polling codes and names. They will have a different voter's register, different presiding officers, election officials and polling agents, and different results. When the results are taken from the polling stations to the collation centres, they are dealt with on the basis of polling stations codes and not serial numbers.

A cursory check of the pink sheets confirms that the polling stations concerned have different identities, different numbers of registered voters, different results, and different election officers and polling agents. Accordingly I do not see how with the explanation by the EC as to how two sets of pink sheets were printed and

randomly distributed could affect votes cast at different polling stations. Even though it was suggested by the petitioners that any one up to mischief can sit in his or her house and fill in the duplicate pink sheets with correct polling station code and name and sign them; this is farfetched as the pink sheets are filled in the open at the polling stations in full glare of the public and endorsed by the agents and the agents receive a duplicate copy thereof there and then, and so there is no opportunity for any swap to take place. The pink sheets tendered by the Petitioners were collected from their polling agents present at the polling station. There was no suggestion of a swap of pink sheets at the trial under this head of claim.

Although the handling of the order of printing of the pink sheets and its random distribution is not the best of administrative decisions, the petitioners have not shown in any way as to how it interfered or compromised the vote. I will therefore without hesitation dismiss this head of claim as baseless.

22 UNKNOWN POLLING STATIONS

Before voting day, the EC gave the political parties and the independent presidential candidates a list of 26,002 polling stations in which elections were tobe conducted. The petitioners in scrutinizing the pink sheets claimed they discovered that voting occurred in 22 polling stations which were not included in the list of the 26,002 polling stations supplied them by the EC.

The EC denied this claiming the presidential results were declared on the results from 26, oo2 polling stations. The reason why the Petitioners described them as unknown is because polling codes and polling station names in some instances were wrongly quoted. The EC was able to identify those polling stations In respect

of these 22 polling stations supervised elections took place there and the results in those stations. They were endorsed by the party agents.

In any case, from the pink sheets that the petitioner supplied, there is proof that there were supervised elections those polling stations. The 1st Petitioner sent his polling agents to those 22 polling stations and that the agents did sign those pink sheets and collected duplicate copies. In so far as the Petitioners sent polling agents to the said polling stations, they cannot say they are unknown.

We find no merit in this complaint and it is therefore dismissed.

SAME POLLING STATION CODE WITH DIFFERENT RESULTS

Each polling station is identified by its name and by its polling code. The polling code is unique to each polling station.

The Petitioners further claimed that there were instances where different results from different polling stations were recorded on pink sheets bearing the same polling station code. The petitioner submits that where two polling stations bear the same polling station code, it is not possible to establish which of the results is genuine.

The EC explained that the situation where the same polling station code shows different polling station results arises where the same polling station code is used for special voting and regular voting, or where the polling station is split due to the huge number of voters. Where the station is split into two the polling station code will end with the letter A or B.

Mr Addison submits that special voting results are not recorded on pink sheets and, accordingly, the explanation proffered by Dr Afari-Gyan for pink sheets with duplicate polling station codes is untenable and false. He based his submission on the fact that provision is made for entry of special voting results of the whole constituency in the first column on Constituency Results Collation Form, without reference to any polling station name or code. [In stark contrast, the results of votes cast in any constituency on general election day are entered on the Constituency Results Collation Form by reference to the different polling station codes in that constituency.]

Counsel further referred to Regulation 21 (11) on the procedures by which the results of special voting are counted, the ballot boxes are sealed with the seal of 2nd respondent and entered onto the Constituency Results Collation Forms. It provides that, after special voting, the returning officer for the constituency shall ensure that the ballot boxes are sealed and kept in safe custody; and that he/she shall, on polling day, arrange for the ballot to be opened and the ballot boxes counted in the same manner as those contained in the ballot boxes used on polling day. Counsel concludes that no reference whatsoever is made to entering the results of the count of special voting ballot papers on pink sheets.

What is really at the heart of the issue is whether pink sheets are used to record results of special voting. Counsel's contention that no reference whatsoever is made to entering the results of the count of special voting ballot papers on pink sheets is not entirely correct if all the relevant provisions in C.I. 75 relating to special and regular polling are read as a whole and not in isolation.It is trite law that the overriding principle of statutory interpretation is that the "words of an Act are to be read in their entire context and in their grammatical and ordinary sense

harmoniously with the scheme of the Act." **E. A. Driedger,** ***Construction of Statutes (2 ed. 1983)*** at page 87.

Section 21 (10) and (11) deal with voting and counting of special votes. Voting at a polling station for special voting and counting of special voting are conducted in the same manner as that of voting on polling day. The only difference is that counting of ballots of special voting is not done at the polling station on the date of special voting but the box is sealed and kept in a safe place and taking to the collation centre on the polling date and counted in the same manner as those contained in ballot boxes used on the polling day.

Regulation 36 deals with the counting and recording of results of election. (See above). Regulation 32 (1) (d) and (e) requires of the presiding officer to record total number of votes cast in favour of each candidate and record rejected ballots and (2) signing of the declaration by the presiding officer and representatives or counting agents. All these record is made on pink sheets on which the polling station name and code are handwritten by the presiding officer.

Once the law requires that voting and counting of ballots of the special vote is to be carried out in the same manner as the regular voting, then it follows that a statement of poll form and a declaration form used for regular voting to record the poll results is required to be used for the special vote for both parliamentary and presidential candidates as well, before they are transposed unto the Constituency Collation Forms. If there is a voter and ballot accounting which had to be done before counting, I expect that sections A, B, and C of the forms should be filled and placed in the sealed ballot box before transporting it to a safe place. It is also expected that the presiding officers and polling or counting agents who conducted

the special voting would be at the collation centre for the counting of the special votes on the Election Day; and they would ultimately sign the declaration form.

Interpreting regulations 21 (11) and regulation 32 as a whole, the use of pink sheets to record the poll and election of special voting is a requirement. Consequently if the same polling station with the same polling code is used for both special voting and regular voting; then it would explain the existence of two pink sheets with the same polling station code with different results. The same explanation can be given for where a polling station is split into two. I may even go further to say that there can be three pink sheets where all the scenarios occurred.

From the foregoing I reject counsel's submission and dismiss this category of claim.

CONCLUSION

In my attempt to resolve these electoral issues, although there may be an unlimited number of ways to guide me, the fundamental one, in my opinion, is fidelity to the terms of the Constitution, and of such other law as objectively reflects the intent and purpose of the Constitution, to uphold the right to vote, and the enfranchising objective of the Constitution.

Overturning an election is a very serious matter. In order to uphold the grounds for annulling votes that the Petitioners are requesting to be annulled for irregularities, malpractices and statutory breach, this court must be satisfied that the petitioners have successfully discharged the onus they bore right from the onset.

While it is conceivable that the law of elections can be infringed, especially through incompetence, malpractices or fraud attributable to the

responsible agency, it rests on the person who thus alleges, to produce the necessary evidence in the first place.I cannot be so satisfied that the Petitioners discharged the burden of proof.

The Petitioners relied on pink sheets and no other evidence, and in view of the fact that the Petitioners kept changing categorization, number of exhibits they are relying, admission of mislabelling and double counting, I cannot be confident that these slips did not affect their case.

Using the yardstick of the principles of Electoral Justice, I am satisfied that the elections were conducted substantially in accordance with the principles laid down in the Constitution, and all governing law; that there was no breach of law such as to affect the results of the elections; and that the said elections do reflect the will of the Ghanaian people.

I accordingly hold that John Dramani Mahama was validly elected as the President of Ghana.

I will also dismiss the petition.

So I end with this delivery with this epilogue:

> **"Acceptance"**-*Where the foregoing principles of Electoral Justice have been substantially observed, the electoral processes reflect the will of the people. It is then an overriding principle of Electoral Justice that everyone abides by the outcome; that the outcome be given effect by the institutions of government; and that the legitimacy of the results be acknowledged by the international community."*

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

JUSTICE OF THE SUPREME COURT

OWUSU(MS) JSC.

The petition is brought under Art.64 (1) of the 1992 constitution of the Republic of Ghana. The Article reads as follows:

> "The validity of the election of the president may be challenged only by a citizen of Ghana who may present a petition for the purpose to the Supreme Court within twenty-one days after the declaration of the results of the election in respect of which the petition is presented."

The petitioners are all Ghanaian citizens by birth and members of the New Patriotic Party (NPP), a political party duly registered under the laws of the Republic of Ghana.

The 1st Petitioner was the presidential candidate of the party in the December 2012 elections with the 2nd petitioner as his running mate. The 3rd petitioner is the National Chairman of the party.

By their petition, the petitioners pray for the following Declarations:

(1) That John Dramani Mahama, the 2nd Respondent herein was not validly elected president of the Republic of Ghana.

(2) That Nana Addo Dankwa Akufo-Addo, the 1st Petitioner herein, rather was validly elected President of the Republic of Ghana.

(3) Consequential orders as to this court may seem meet.

The validity of the declaration of the results of the December 2012 presidential election was challenged on the following grounds:

"***Ground 1***

There were diverse and flagrant violations of the statutory provisions and regulations governing the conduct of the December 2012 presidential election which substantially and materially affected the result of the election as declared by the 2nd Respondent on 9th December, 2012.

Particulars

(a) That 2nd Respondent permitted voting to take place in many polling stations across the country without prior biometric verification by the presiding officers of 2nd Respondent or their assistants, contrary to Regulation 30 92) of C. I. 75.

(b) That the voting in polling stations where voting took place without prior biometric verification were unlawfully taken into account in the declaration of results by 2nd Respondent in the presidential election held on 7th and 8th December 2012.

(c) That by 2nd Respondent's established procedure, 2nd Respondent conducted the December 2012 presidential and parliamentary elections at polling stations each of which was assigned a unique code to avoid confusing one polling station with another and to provide a mechanism for preventing possible electoral malpractices and irregularities.

(d) That there were, however, widespread instances where different results were strangely recorded on the declaration forms (otherwise known as the 'pink sheet' or 'blue sheet') in

respect of polling stations bearing the same polling stations codes.

(e) That the existence of polling stations of the nature referred to in the preceding sub-paragraph (d) and the results emanating therefrom were patently illegal.

(f) That there were widespread instances where there were no signatures of the presiding officers or their assistants on the declarations forms as required under Regulation 36 (2) of C. I. 75. and yet the results on these forms were used in arriving at the presidential results declared on 9th December 2012 by the Chairman of 2nd Respondent, thereby rendering the results so declared invalid.

Ground 2

(1) That the election in 11,916 polling stations were also vitiated by gross and widespread irregularities and /or malpractices which fundamentally impugned the validity of the results in those polling stations as declared by 2nd Respondent.

(a) That the results as declared and recorded by the 2nd Respondent contained widespread instances of over-voting in flagrant breach of the fundamental constitutional principle of universal adult suffrage, to wit, one man one vote.

(b) That there were widespread instances where there were the same serial numbers on pink sheets with different poll results, when the proper and due procedure established by 2nd Respondent required that each polling station have unique serial number in order to secure the integrity of the polls and will of the lawfully registered voters.

(c) That, while the total number of registered voters as published by the 2nd Respondent and provided to all political parties or candidates for the presidential and parliamentary election was **fourteen million, thirty-one thousand, six hundred and eighty (14,031,680),** when 2nd Respondent announced the result of the presidential election on 9th December 2012, the total number of registered voters that 2nd Respondent announced mysteriously metamorphosed to a new and inexplicable figure of **fourteen million, one hundred and fifty-eight thousand, eight hundred and ninety (14,158,890)**. This thereby wrongfully and unlawfully increased the total number of registered voters by the substantial number of **one hundred and twenty-seven thousand, two hundred and ten (127,210).**

(d) That there were widespread instances of voting without prior biometric verification;

(e) That there were widespread instances of absence of the signatures of presiding officers or their assistants on the Declaration Form known as 'pink sheet'; and

(f) That there were widespread instances where the words and figures of votes cast in the elections and as recorded on the 'pink sheets' did not match.

Ground 2a

That there were 28 locations where elections took place which were not part of the **twenty-six thousand and two (26,002)** polling stations created by the 2nd Respondent for purposes of the December 2012 elections.

Ground 3

(1) That the statutory violations an irregularities and/or malpractices described under Grounds 1, 2 and 2a herein, which were apparent on face of the Declaration Forms ('pink sheet'), had the direct effect of introducing into the aggregate of valid votes recorded in the polling stations across the country a whopping figure **four million, six hundred and seventy thousand, five hundred and four (4,670,504)** unlawful and irregular votes, which vitiated the validity of the votes cast and had a material and substantial effect on the outcome of the election, as shown in the table below:

Particulars

NO	**VIOLATIONS, IRREGULARITIES AND/OR MALPRACTICES**	**NUMBER OF VOTES**
1	Exclusive Instances of over voting due to total votes exceeding ballots papers issued to voters or the polling station voters register	128,262
2	Exclusive Instances of the joint occurrence of: (I) Over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register. (II) Voting without biometric verification.	48,829
3	Exclusive Instances of the joint occurrence of: (I) Over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register.	145,129

	(II) Voting without biometric verification (III) Same serial numbers on "pink sheets" with different results.	
4	Exclusive Instances of the joint occurrence of: (I) Over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register. (II) Voting without biometric verification (III) Same serial numbers on "pink sheets" with different results. (IV) absence of presiding officers or assistants' signatures on "pink sheets".	34,167
5.	Exclusive Instances of the joint occurrence of: (I) Over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register. (II) Voting without biometric verification (III) Absence of presiding officers or assistants' signatures on "pink sheets".	9,004
6	Exclusive Instances of the joint occurrence of: (I) Over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register. (II) Same serial numbers on "pink sheets" with different results.	425,396
7	Exclusive Instances of the joint occurrence of: (I) Over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register. (II) Same serial numbers on "pink sheets" with different results. (III) Absence of presiding officers or assistants' signatures on "pink sheets".	93,035
8	Exclusive Instances of the joint occurrence of: I. Over voting due to total votes exceeding	

	ballot papers issued to voters or the polling station voters register. II. absence of presiding officers or assistants' signatures on "pink sheets".	34,023
9	Exclusive Instances of voting without biometric verification.	137,112
10.	Exclusive Instances of the joint occurrence of: (I) voting without biometric verification (II) Same serial numbers on "pink sheets" with different results	395,529
11	Exclusive Instances of the joint occurrence of: (I) voting without biometric verification (II) Same serial numbers on "pink sheets" with different results (III) Absence of presiding officers or assistants' signatures on "pink sheets".	71,860
12	Exclusive Instances of the joint occurrence of: (I) voting without biometric verification (II) Absence of presiding officers or assistants' signatures on "pink sheets".	21,071
13	Exclusive Instances of Same serial numbers on "pink sheets" with different results	2,583,633
14	Exclusive Instances of the joint occurrence of: (I) Same serial numbers on "pink sheets" with different results (II) Absence of presiding officers or assistants' signatures on "pink sheets".	352,554
15	Exclusive Instances of absence of presiding officers or assistants' signatures on "pink sheets".	117,870
16	Exclusive Instances of same polling station codes with different results.	687

17	Exclusive Instances of the joint occurrence of: (I) over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register (II) voting without biometric verification (III) Same serial numbers on "pink sheets" with different results (IV) Same polling station codes with different results.	
18	Exclusive Instances of the joint occurrence of: (I) Same serial numbers on "pink sheets" with different results (II) same polling station code with different results	26,208
19	Exclusive Instances of the joint occurrence of: (I) same serial numbers on "pink sheets" with different results (II) absence of presiding officers or assistants' signatures on "pink sheets". (III) same polling station code with different results	7,160
20	Exclusive Instances of the joint occurrence of: (I) over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register (II) same serial numbers on "pink sheets" with different results (III) same polling station codes with different results	6,537
21	Exclusive Instances of the joint occurrence of: (I) voting without biometric verification (II) Absence of presiding officers or assistants' signatures on "pink sheets". (III) same polling station code with different results	671

22	Exclusive Instances of the joint occurrence of: (I) voting without biometric verification (II) same serial numbers on "pink sheets" with different results (III) same polling station code with different results	7,920
23	Exclusive Instances of the joint occurrence of: (I) over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register (II) same serial numbers on "pink sheets" with different results (III) absence of presiding officers or assistants' signatures on "pink sheets" (IV) same polling station code with different results	4,855
24	Exclusive Instances of the joint occurrence of: (I) voting without biometric verification (II) same serial numbers on "pink sheets" with different results (III) absence of presiding officers or assistants' signatures on "pink sheets" (IV) same polling station code with different results	3,471
25	Exclusive Instances of the joint occurrence of: (I) over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register (II) voting without biometric verification (III) same serial numbers on "pink sheets" with different results (IV) absence of presiding officers or assistants' signatures on "pink sheets" (V) same polling station code with different results	1,787
26	Exclusive Instances of 28 locations which were not	9,757

	part of the twenty-six thousand and two (26,002) polling stations created by the 2nd Respondent prior to the December 2012 elections for purposes of the election but where elections took place.	
	GRAND TOTAL	**4,670,504**

Respondent in the presidential election held on 7th and 8th December 2012.

The 1st Respondent was the presidential candidate of the National Democratic Congress (NDC), the 3rd Respondent herein in the December 2012 presidential Election and the person declared by the 2nd Respondent on 9th December 2012 as having been validly elected as president of the Republic of Ghana following the presidential election.

The 2nd Respondent is the constitutional body established by Article 43 of the 1992 constitution and the provisions of the Electoral Commission Act of 1993 (Act 451) mandated under Art. 45(c) and section 2(c) of the constitution and the Act respectively to conduct and supervise public elections and referenda in Ghana and to declare the results thereof in accordance with the constitution and the law.

The 3rd Respondent which was later joined as a party to the action on its own application is the political party on whose ticket the 1st

Respondent contested the election. In this action, the party is being represented by its General-Secretary, Johnson Asiedu Nketia.

THE CASE OF THE PETITIONERS

The case of the petitioners is simple but very much involved. It is their case that there were constitutional and statutory violations, malpractices and irregularities in the conduct of the 2012 presidential elections and that these violations, malpractices and irregularities affected the outcome of the elections. The main categories of these they identified as follows:

i. Over-voting, that is to say, widespread instances of polling stations where (a) votes cast exceeded the total number of registered voters or (b) votes exceeded the total number of ballot papers issued to voters on voting day in violation of Article 42 of the Constitution and Regulation 24(1) of C. I. 75.

ii. Widespread instances of polling stations where there were no signatures of the presiding officers or their assistants on the pink sheets in clear violation of Article 49 (3) of the Constitution and Regulation 36 (2) of C. I. 75.

iii. Widespread instances of polling stations where voting took place without prior biometric verification in breach of Regulation 30(2) of C. I. 75.

iv. Widespread instances where there were the same serial numbers on pink sheets with different poll results, when the proper and due procedure established by 2nd Respondent required that each polling station have a

unique serial number in order to secure the integrity of the polls and the will of lawfully registered voters.

v. Widespread instances of polling stations where different results were strangely recorded on the pink sheets in respect of polling stations bearing the same polling station code, when, by 2nd Respondent's established procedure, each polling station was assigned a unique code in order to avoid confusing one polling station with another which could not be explained by a reference to special voting.

vi. Twenty-three (23) locations where voting took place which were not part of the twenty-six thousand and two(26,002) polling stations created by the 2nd Respondent for purposes of the December 2012 elections.

THE RESPONDENTS' CASE

The Respondents on the whole denied the substance of the petitioners claim. The 1st Respondent contended that even if there were such occurrences in the December, 2012 elections, the declared result of the election would not be affected. In the case of Presiding Officers of the 2nd Respondent failing to sign the pink sheets, the 1st Respondent further contended that such failure could not invalidate the results. The claim of over voting was also denied and so was the claim for voting without Biometric verification challenged.

The 2nd Respondent, in further denial of the petitioners' claim sought to vehemently defend the presidential election. The commission however partly admitted the incidents of presiding officers not signing the pink sheets contending that these are

irregularities. It was its case that no body voted without being biometrically verified.

The 3rd Respondent's case was substantially the same as that of the 1St Respondent.

On 2nd April, 2013, this court set down the following issues for trial:

1. whether or not there were violations, omission, malpractices and irregularities in the conduct of the presidential election held on the 7th and 8th December, 2012;
2. whether or not the said violations, omissions, malpractices and irregularities, if any, affected the results of the election.

To expedite the trial, the court decided that same shall be by affidavit evidence. The parties were however given the option to lead oral evidence. Oral evidence by any other person was to be allowed only where the court was satisfied that there were compelling reasons for so doing.

Following the order of the court, the parties filed affidavits in support of their cases and also preferred oral evidence.

The 2nd petitioner filed a joint affidavit on behalf of the petitioners in support of their case.

In paragraph 20 of the affidavit, the 2nd petitioner averred that following complaints that the results being declared by the 2nd Respondent were not accurate, a task force was set up by the 1st petitioner and the NPP to investigate the results as declared in the presidential election. He was placed to lead and direct the

investigation as the running mate of the 1st petitioner and also as a person with proficiency in statistics.

The investigation involved examination of the statement of poll and Declaration of the Result of the Office of president ("pink sheets") of the polling stations.

According to him, the polling stations results as captured on the "pink sheets" constitute the "primary evidence" upon which the election results were declared. The pink sheets were given to representatives of the 1st petitioner as required by Regulation 36(3) (b) of C. I. 75.

It is as a result of the investigation that the six main categories of constitutional/statutory violations, commission irregularities and malpractices were uncovered.

It is their case that these irregularities create opportunities for electoral malpractices.

The 2nd petitioner also claimed that there were 23 locations which were not part of the twenty-six thousand and two (26,002) polling stations created by the 2nd Respondent prior to the 2012 elections for the purpose of the elections but where voting took place.

In paragraphs 44-67 of 2nd petitioner's affidavit, the various categories of alleged electoral malpractices have been specified.

The oral testimony of the 2nd petitioner was in line with his sworn affidavit. He was extensively cross-examined by counsel for the Respondents but was not shaken in the evidence he proffered.

The General-Secretary of the 3rd Respondent also swore to an affidavit on the party's own behalf and on behalf of the 1st Respondent whose power of Attorney he held.

In paragraph 2 of the affidavit, he proffered that –

> "By virtue of my position as the General Secretary of the 3rd Respondent I was involved in the processes leading to the 7th and 8th December elections. I attended the meetings held by 2nd Respondent with all political parties and was an integral part of the organization of the elections on behalf of 3rd Respondent and on behalf of 1st Respondent our candidate for the Presidential Elections."

In the affidavit, the Deponent challenged the basis of the petitioners' claim for annulment of 4,637,305 votes. He averred that the total number of pink sheets submitted as exhibits by the petitioners in proof of the various permutations of alleged violations, irregularities, omissions and malpractices do not add up to 11,842 as sworn to in the 2nd petitioners affidavit nor the 11,916 polling stations as contained in the 2nd Amended petition. According to him the pink sheets submitted by the petitioners are 8,621.

Out of this, 115 have absolutely no date on the basis of which the petitioners' allegations the subject matter of the petition, can be supported. A further 373 were duplicated.

He averred further that on the pink sheets exhibit, there is no instance in which the petitioners are alleging that valid votes cast exceed number of registered voters at the polling station. That what the petitioners are alleging to be instances of over voting are in reality patent clerical, and sometimes, arithmetic errors in recording, which have no material effect on the actual votes publicly cast, sorted, counted and recorded.

On voting without prior fingerprint Biometric verification, he maintained that to the best of his knowledge, no body voted without prior biometric verification.

On absence of signatures of presiding officers on pink sheets Mr. Asiedu Nketia did not deny the violation but rather averred that the results were not challenged by the petitioners and that their own agents signed the declared results.

The Deponent sought to explain what the serial numbers on the pink sheets are meant for and that they are not to identify the polling stations. It is not the case of the petitioners that voting did not take place in the polling stations which bear the same serial numbers.

On pink sheets with same polling station code, he countered that these have been used for the special and general elections as has been explained by the 2nd Respondent.

His case in general response to the various allegations is that in most of the polling stations, in respect of which the petitioners are complaining, their polling Agents have signed the pink sheets without any protest.

The 2nd Respondent was represented by its chairman Dr. Afari-Gyan who testified at the trial even though the affidavit filed in response to the order of the court was not sworn to by him.

The said affidavit was sworn to by Amadu Sulley, a Deputy Chairman (Finance & Administration) of the Commission. He in this affidavit relied on the answer filed by the 2nd Respondent to the 2nd amended petition.

Dr. Afari-Gyan in his oral Testimony took the court through the electoral process in general and the voting process in particular. He thereafter sought to answer the various infractions alleged by the petitioners same of which he denied and explained away where he admitted them, his stance was that the entries on the "pink sheets" were made in error or wrong interpretation of the entries by the petitioners.

PINK SHEETS

By an order of this court dated 9th May 2013 Messrs KPMG was mandated to make a count of all the exhibit of pink sheets filed by the petitioners KPMG duly carried out the order of the court. Its report was tendered through its Director, Nii Amanor Dodoo as court Exhibits 1, 1A, 1B, 1C and 1D.

The report at least assisted in clarifying the issue of the number of "pink sheet" filed.

The report indicated that 13,926 were counted from the Registrar's set out of this 8,675 are unique as to its polling station name, code and exhibit numbers. Out of this are 5,470 which are not duplicated. 1,545 pink sheets could not be identified by the team because according to them, they were unclear so marked them as "incomplete Data" in the Registrar's set.

However, the petitioners were able to identify 1,219 whereas the 2nd Respondent also identified 15 more to make the total 1, 234.

A control check using the president's set, 2,876 pink sheets were found which were not in the Registrar's set.

Out of this, 804 of them were identified as unique and distinct by the petitioners. From the remaining 1,366 which the team described as unclear, according to the petitioners 60 more were counted.

With the confusion around these figures, the petitioners finally based their case on 10,119 exhibits of pink sheets.

BURDEN OF PROOF

The Respondents contend that the burden is on the petitioners to prove the irregularities, malpractices, violations, etc.

There is no gain saying that in a civil case, of which an election petition is akin to the burden of proof is on the plaintiff in this case the petitioners to lead evidence to the degree prescribed under the evidence Act (N. R. C. D. 313) on the facts in issue to make out their claim.

See the evidence Act sections 10- 14.

10. Burden of persuasion defined

(1) For the purposes of this Act, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or Court.

(2) The burden of persuasion may require a party
  (a) to raise a reasonable doubt concerning the existence or non-existence of a fact, or

  (b) to establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.

11. Burden of producing evidence defined

(1) For the purposes of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party.

(2) In a criminal action, the burden of producing evidence, when it is on the prosecution as to a fact which is essential to guilty, requires the prosecution to produce sufficient evidence so that on the totality of the evidence a reasonable mind could find the existence of the fact beyond a reasonable doubt.

(3) In a criminal action, the burden of producing evidence, when it is on the accused as to a fact the converse of which is essential to guilt, requires the accused to produce sufficient evidence so that on the totality of the evidence a reasonable mind could have a reasonable doubt as to guilt.

(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence which on the totality of the evidence, leads a reasonable mind to conclude that the existence of the fact was more probable than its non-existence.

12. Proof by a preponderance of the probabilities

(1) Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities.

(2) "Preponderance of the probabilities" means that degree of certainty of belief in the mind of the tribunal of fact or the Court by which it is convinced that the existence of a fact is more probable than its non-existence.

13. .....

14. Allocation of burden of persuasion

Except as otherwise provided by law, unless it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence that party is asserting.

The petitioners therefore have to lead sufficient evidence in proof of the irregularities, violations, malpractices etc they are alleging. In this regard, they exhibited Duplicate copies of the statement of polls and Declaration of Results forms given (pink sheets) to them by the 2nd Respondent and made it clear to the court that their whole case is based on what is stated on the "pink sheets" and therefore their analysis is based on what is on the face of the pink sheets.

They in the oral evidence of the 2nd petitioner, explained how they arrived at their analysis on the various allegations made by them. I will therefore examine the various heads of the infractions they complain of.

OVER VOTING

What is over voting?

The 2nd petitioner told the court of two instances of over-voting being

1. Where the number of people registered to vote at a particular polling station is less than the number of ballots found in the ballots box at the end of polls.

2. Where the ballots found in the ballots box at the end of polls is more than the number of votes actually issued to the votes who turned up to vote.

In evidence of the 2nd Respondent, he confirmed the first definition given by the 2nd petitioner. To a question from the Bench, Dr. Afari-Gyan's answer is:

> **"Oh yes my Lords the classical definition of over-vote is where the ballot cast exceed the number of persons eligible to vote at the polling station or if you like the number of persons on the polling stations register that is the classical definition of over-voting. ----------"**

He did not dismiss the second instance of over voting given by the 2nd petitioner even though he said he has problem with it.

Nothing is said on what constitutes over-voting in C. I. 75, so I will go by both definitions.

The petitioners contend that over-voting constitutes an abuse of the franchise under the supervision of the 2nd Respondent. It means that the integrity of the polls at the particular polling station has been compromised and the results at the polling station in question cannot be guaranteed and therefore same must be annulled.

The 1st Respondent contends that there was no over voting and that the entries on the pink sheets do not constitute sufficient proof of over voting.

In determining whether the entries alone constitute sufficient proof, counsel argued that should be done against the background of the constitutionally guaranteed right to vote under Article 42 of the constitution. He referred the court to the cases of AHUMA-OCANSEY VRS ELECTORAL COMMISSIION; CENTRE FOR HUMAN RIGHTS AND CIVIL LIBERTIES (CHURCHIL) VRS ATTORNEY GENERAL & ELECTORAL COMMISSION (consolidated) [2010] SCGLR 575 and TEHN ADDY VRS ELECTORAL COMMISSION [1996-97] SCGLR 589.

On this head, the 3rd Respondent contends that in the absence of any person being even alleged to have voted twice or illegally, or any person having been identified as having made a complaint of over voting, whether formally or informally merely invoking entries on the administrative portion of pink sheets which have been shown to contain errors cannot meet the broken of proof on the petitioners.

Section 11(1) of the evidence Act, states that –

"for the purposes of this Decree the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue."

The petitioners did introduce the evidence of over voting from the face of the "pink sheets" exhibited by them. Admittedly, it is not on the face of all pink sheets that they established the over voting. In paragraph 44 of the 2nd petitioners' affidavit, the pink sheets exhibited exclusively in the case of over voting are 310 polling stations.

The petitioners introduced evidence from which the infringement could be found. The entries on the face of the pink sheets constitute prima facie evidence in proof of the evidential burden. At that point, the burden shifts onto the Respondents to lead evidence from which it may reasonably be inferred that no over voting took place.

Whereas the 1st and 3rd Respondents contended that there was no such over voting, the 2nd Respondent when confronted with some pink sheets did admit that the entries showed that there were over voting.

WITNESS: Let me put it in a very short sentence. If I notice on the face of the pink sheet that there appears to be excess votes, I will subject the situation to very close scrutiny before I take firm determination as to what to do.

Q. Where there is an excess of votes in the ballot box in comparison with what is written on the pink sheet as the votes issued to the polling station, what would be your reaction when you see such a pink sheet?

A.. As I said just a moment ago, I will subject the situation to very close scrutiny. There are a number of things that will have to be done. I will not assume that the presiding officer had done anything directly or wrongly, I will seek to redo what was supposed to have been done, I will look at the ballot papers to find out whether all of them fall within the serial range of the ballots issued. I have narrated some of these things before that I will go through the things that I mentioned. But I must tell you that, I must do everything possible to make sure that indeed, there are excess votes because we are dealing with not abstract numbers but votes of people who have a constitutional right to take part in the choice of their leaders."

What is the effect of over voting on results?

Much as the 2nd Respondent would not readily admit on over vote, he told the court that an over vote if established will result in annulment of the results as it cannot be determined which candidate had benefited from the illegal vote and the integrity of the election would have been compromised.

There is no gain saying that over-voting if established would affect the result of the election and impact a sufficient number of votes to

have done so. DR. Afari-Gyan told the court that before annulling results because of over voting he would do a check on the face of the pink sheet. However his evidence is that he did not see any pink sheet before declaring the presidential election results. So therefore he did not have the opportunity to do any check to determine from the face of the pink sheets that there was no over voting.

Where therefore, the evidence of over-voting was introduced on the face of the pink sheets, and the error/mistake as the Respondents contend cannot be explained on the face of the pink sheet, then that is an irregularity that affects the result.

I will consequently hold that where there is over voting the results must be annulled.

When confronted with same "pink sheets," the 2nd Respondent admitted that on the face of the "pink sheets," there was over voting. He went on to say that in a case of over voting the results of the election at the affected polling station should be cancelled.

Under Article 45 (c) it is the 2nd Respondent who is mandated to conduct and supervise all public elections and referenda and the court cannot decide for him what should be done in the case of over voting in the absence of any law to the contrary.

The petitioners are asking the court to annul 745,569 votes as a result of the over-voting.

Admittedly, when the 2nd petitioner was in the box, and was confronted with a number of "pink sheets" and asked to indicate whether on their face there was any basis for saying there was over-voting, he answered there was none.

They also included "pink sheets" on which A1 or B1 has a blank interpreting this to mean zero.

I do not consider this interpretation as a valid basis in proof of over-voting.

The polling stations affected are to be excluded from the polling stations to be affected by the over-voting category as indicated in volume 2B of the written address of counsel for petitioners using Respondents preferred Data set.

After the written addresses have been filed, counsel for parties were given the opportunity to react to the filed addresses but the figures were not disputed.

ABSENCE OF PRESIDING OFFICER'S SIGNATURE

Article 49 of the 1992 constitution sets out voting at election and referenda

"(1) At any public election or referenda, voting shall be by secret ballot.

(2) Immediately after the close of the poll, the presiding officer shall in the presence of such of the candidate or their representative and their polling agents as are present, proceed to count, at that polling station, the ballot papers of that station and record the votes cast in favour of each candidate or question.

(3) The presiding officer, the candidate or their representative and in the case of a referendum, the parties contesting or their agents and the polling agents if any, shall then sign a declaration stating

(a) the polling station, and

(b) The number of votes cast in favour of each candidate or question, and the presiding officer shall, there and then announce the results of the voting at that polling station before communicating them to the returning officer."

The petitioners claim under this head is that in a number of polling stations, the results of which were declared, the presiding officers did not sign the "pink sheets'. It is their case that the signature is crucial because it is a mandatory constitutional requirement but not an administrative directory.

In all the petitioners were relying on 924 pink sheets which they presented to DR. AFARI-GYAN who admitted them. He also conceded that 905 more "pink sheets" were unsigned. Among these are 191 included in the petitioners' 924.

The pink sheets without the presiding officers' signatures therefore came to 1,638 involving 659,814.(sic)

The constitution, mirrors the will and aspirations of the Ghanaian people and it is the supreme law of the land.

Article 1 speaks of the supremacy of the constitution.

1 (1) states that –

> "The sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner within the limits laid down in this constitution.
>
> (2) This constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this constitution shall, to the extent of the inconsistency, be void. The preamble of the constitution states that:
>
> "IN THE NAME OF THE ALMIGHTY GOD
>
> We the people of Ghana;
>
> IN EXERCISE of our natural and inalienable right to establish a frame work of government which shall secure for ourselves and posterity the blessings of liberty, equality of opportunity and prosperity;

IN A SPIRIT of friendship and peace with all people of the world; AND IN SOLEMN declaration and affirmation of our commitment to Freedom, Justice, probity and Accountability;

The principles that all powers of Government spring from the sovereign will of the people;

The principle of universal Adult suffrage;

The rule of Law;

The protection and preservation of Fundamental Human Rights and Freedoms, Unity and Stability for our nation;"

DO HEREBY ADOPT, ENACT, AND GLUE TO OURSELVES

In the Interpretation Act, of 1960, section 27 states that –

In an enactment made after the passing of this Act, "shall" shall be construed as imperative and -----

Article 49 (3) therefore imposes an obligation on the presiding officer to sign before the declaration of the results. The reason for this cannot be far fetched. He must sign to authenticate the

results. If he does not sign, but goes ahead to declare the results, what will be their probative value?

DR. Afari-Gyan told the court that failure to sign is an irregularity. He did not go ahead to say what flows from this irregularity.

What is an irregularity?

In the case of BORYS WRZESNEWSKYJ VRS TED OPITZ, ATTORNEY-GENERAL OF CANADA, MARC MAYRAND (CHIEF ELECTORAL OFFICER) and ALLAN SPERLING (RETURNING OFFICER, ETOBICOKE CENTRE)

AND KEITH ARCHER (CHIEF ELECTORAL OFFICER OF BRITISH COMBIA)

The court by a majority of 4-3 allowed the appeal because the Appellant sought to have voters of several Canadian citizens disqualified on account of administrative mistakes notwithstanding evidence that those citizens were entitled to vote.

In the dissenting opinion, the court said –

> "Irregularities should be interpreted to mean failures to comply with the requirement of the Act, unless the deficiency is merely technical or trivial. For 'irregularities' to have affected the result of the elections," they must be of a type that

could affect the result of the election and impact a sufficient number of votes to have done so……."

If the presiding officers failed to sign the pink sheets, that constituted infringement of Article 49 (3) of the constitution and to me that is fatal. It renders the result declared null and void. In the Apaloo case, the Gazette Notice issued by the Electoral Commission in infringement of the Constitutional Instrument was declared null and void. What then happens to the results declared by the presiding officers in contravention of Article 49(3) by failure to sign the pink sheets?

The 2nd respondent told the court, that in spite of the failure to sign, he will accept the results because the polling Agents did sign. What is the role of the polling Agent at the polling station?

Under cross-examination by counsel for petitioners, this is what transpired;

Q. You are aware that the functions of a polling agent are strictly circumscribed?

A. My Lords, I would say so.

Q. They are not election officials?

A. In the strict sense of term, no.

Q. I would like you to read Rule 19(4) of C.I. 75?

A. WITNESS READS OUT.

Q. So I am suggesting to you that it is not the business of the polling agents to supervise the work of the election officials but to observe the conduct of the poll?

A. My Lords, I agree that the agent is not supposed to supervise but he plays an active role at the station.

At the pages 25-26 of the record of proceedings for the same day, Dr. Afari-Gyan made the point about the very limited role of polling agents abundantly clear.

Q. A polling agent is not involved in the actual administration of the election?

A. My Lords, you are correct.

Q. He does not count votes after the election?

A. My Lords no.

Q. He counts?

A. He does not.

Q. He also does not inspect the ID cards of persons who are in the queue to vote?

A. My Lords No.

Q. He cannot confront anybody directly at the polling station?

A. My Lords no and for that matter nobody can confront anybody directly at the polling station.

Q. If he has any objection to anything happening he has to inform the presiding officer?

A. My Lord yes.

Q. So the presiding officer is in charge of the polling station?

A. My Lords absolutely.

Q. He has the final say on any matter?

A. So far as it is connected with the election yes.

Q. In fact the presiding officer can ask the polling agent to leave the polling station.

A. Yes if the polling agent misconducts himself or herself.

Q. And who determines who misconducts himself, it is the presiding officer?

A. Yes it is the presiding officer but misconduct they are trained to know how mis-conducting oneself in a polling station is. (sic)

The polling Agent is not an electoral officer and the fact that he has signed the "pink sheet" cannot legalize that which is otherwise an illegality.

If even a law properly so passed cannot co-exist with the constitution if it is inconsistent with any provision of the constitution, that law to the extent of its inconsistency is null and void, how can the court give effect to that which is unconstitutional?

Article 49 is an entrenched provision and parliament by itself cannot even amend it. How can a court under the guise of interpretation give any other meaning to 49(3) other than what is stated in the clause. The golden rule of interpretation is that words must be given their ordinary meaning unless same shall lead to absurdity. The clause is clear and unambiguous and does not call for the interpretation jurisdiction of this court. None of the conditions as laid down in TUFFOUR VRS THE ATTORNEY-GENERAL [1980] SCLR is present here and I would therefore not even attempt to embark on that exercise of interpreting the "shall" or find reasons why the presiding officer might have failed to sign.

The Respondents do not deny the failure of the presiding officers to sign but contend that that should not be a basis for annulling lawfully cast votes. Counsel for the 3rd Respondent submitted that if that is done, it will mean retrospectfully punishing the voters whose votes will be annulled through no fault of theirs.

I wholly agree with counsel in that regard. In the circumstances, what is the way out?

THE RIGHT TO VOTE

It is provided by the 1992 constitution, Article 42 that:

> "Every citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda."

The right to vote is an inalienable right guaranteed and jealously guarded by the constitution. The only limitation being age and unsoundness of mind.

The respondents' case is that annulling the votes of Ghanaians who have exercised their franchise in accordance with Article 42 will be disenfranchising them and thus deny them their right to vote.

The principle is that an election should not be invalidated by reason of any act or omission by an electoral officer or any other person in breach of his official duty in connection with the election or ---------- ---------- if it appears to the tribunal having cognizance of the question that the election was conducted substantially in accordance with the law as to the election, and that the act or omission did not affect the result.

In this petition however where the evidence on the "pink sheets" on their faces indicates that the election was not conducted substantially in accordance with the law as to the election, and that the act or omission did affect the result, then the result will be invalidated.

The citizen's right to vote has been upheld by this court in numerous cases and in particular AHUMA OCANSEY and TEHN-ADDY already referred to.

I happened to be part of the decision in AHUMA OCANSEY's case and I still stand by my opinion therein expressed.

For this reason, I will not by annulling votes under the three categories indirectly deny the voters their fundamental and inalienable right to vote as enshrined in the constitution.

Consequently, where votes have been annulled as a result of violations, irregularities etc, I will call for a run off of the elections.

VOTING WITHOUT BIOMETRIC VERIFICATION

Under Article 45 of the constitution, the 2nd Respondent is mandated to conduct public elections. In this wise, the commission is uniquely empowered to enact regulations to govern the performance of its functions to ensure the sanctity of the citizens' franchise and the integrity of the electoral system.

In pursuance of its mandate, the commission enacted Regulation C. I. 75, regulating the conduct of public elections.

Regulation 18(1) makes it mandatory for every polling station to be provided with a biometric verification device. The Regulation reads as follows:

"The returning officer shall provide a presiding officer with

(a) a number of ballot boxes and ballot papers;
(b) a biometric verification equipment; and

(c) any other equipment or materials that the commission considers necessary"

Regulation 47 (1) of C. I. 75 defines a biometric verification equipment to mean:

> **"a device provided at a polling station by the electoral commission for the purpose of establishing by fingerprint the identity of the voter."**

By regulation 30 –

> "(1) A presiding officer may, before delivering a ballot paper to a person who is to vote at the election, require the person to produce (a) a voter identification card, or
>
> (b)any other evidence determined by the commission, in order to establish by finger print or facial recognition that the person is the registered voter whose name and voter identification number and particulars appear in the register."
>
> (2)The voter shall go through a biometric verification process." (emphasis mine)

Under Regulation 34 (1) of the Instrument –

> "Where the proceedings at a polling station are interrupted or obstructed by (a) riot, open violence, storm, flood, or other natural catastrophe, or (b) the breakdown of an equipment, the presiding officer shall in consultation with the returning officer and subject to the approval of the commission, adjourn the proceedings to the following day."

The Biometric verification process is therefore a mandatory component of the 2012 presidential election.

On the petitioners' claim that voters were permitted to vote without being biometrically verified, the Respondents answer is that the entries in column C3 on the "pink sheets" were filled in error.

The evidence of the 2nd Respondent is that column C3 was not required to be filled in at all by the presiding officers. According to him, that column was created to take care of those voters who had been registered during the biometric registration but whose biometric data had been lost as a result of some difficulties encountered by the 2nd Respondent. This is what Dr. Afari-Gyan told the court:

As an election administrator, he thought his duty was to give every such person the chance to cast his ballot. 2nd Respondent therefore advised this facility to allow such persons to vote without going through biometric verification. They would be required to fill in Form 1C before voting. When the idea was mooted to the political parties, they all rejected it. He therefore gave instructions that form 1C should not be sent to the polling stations. The C3 column was therefore not supposed to be filled.

> "…C3 was put there in an attempt to take care of those people who through no fault of theirs would have valid voter ID cards in their possession but whose names will not appear on the register and therefore could not vote. But let me add that when we discussed this with the political parties, some of them vehemently said no that we will not allow any persons to

be verified other than by the use of verification machine. I am just explaining why the C3 came there. The parties said no and we could understand that argument that facility is not given to one person, it is being given to every presiding officer. So you are given this facility to 26,002 and it is possible to abuse it. So we do not want it and we agreed that that facility would not be used. Unfortunately, the forms had already been printed, these are offshore items, so we could not take off the C3. And what we said, and we have already said this in an earlier communication, was that we will tell all the presiding officers to leave that space blank because they had already been printed and there was no way that we could take it off. And that explains the origin of C3 on the pink sheet. It was a very serious problem."

The question in C3 is as follows:

> "What is the number of ballots issued to voters verified by the use of form 1C (but not by use of BVD"?)

Dr. Afari-Gyan's explanation as to how column C3 appeared on the "pink sheets" turned out to be false under cross-examination as indeed he later admitted that C. I. 75 (mandating the use of biometric verification came into force long before 20th October, 2012 when the order for printing the "pink sheets" was given.

It was the evidence of Dr. Afari-Gyan that the commission instructed that the form 1C should not be taken to the polling station at all. How come then that they were taken to the polling stations? If they were not taken, how come column C3 was filled with reference to the form?

Under cross-examination, this is what transpired between Dr. Afari-Gyan and counsel for the petitioners –

"Q. Now Dr. Afari-Gyan you are aware that in the December, 2012 elections, entries were made in C3 all over the country.

A. Yes my Lords.

Q. I am suggesting to you that in fact no such instruction was given to any official to enter zero.

A. My Lords, I disagree, instructions was clearly given. Those entries I believe were made in error.

Q. Now the figures that entered there were obviously generated from the election am I right?

A. My Lords, I would believe so.

Q. You believe so, or you don't know?

A. My Lords, I believe that they are figures that are intended to relate to the election.

Q. And do you have any idea where those figures should have been placed other than in C3 column?

A. Well, in the situations that I have analyzed, they are almost invariably the same figure in C. I. and in C3 and then it was entered at the ---------- and this will give rise to a very curious situation.

Q. My question was that the numbers that had been put in C3 you agree had been generated from the elections. Where do you think it should be put instead of C3?

A. My Lords since that number was a repetition of C1 and C3 my indication is that it should not have been there at all.

Q. So where it is not equal to C1 where would it have been?

A. My Lords, he is asking me something in the abstracts and is difficult for me to know where it should have been.

Q. So your answer is that it is difficult for you to tell where it should be.

A. My Lords, in the instant that I am saying that there should have been nothing in that column so if something is entered…"

It will be recalled that Dr. Afari-Gyan earlier on in answer to a question by my brother Dotse JSC. as to how the alleged instructions to presiding officers not to fill in question C3 was given (whether written or oral), he told the court he could not remember.

The petitioners have introduced the evidence on the "pink sheets". It was for the 2nd Respondent to establish how the alleged error came about.

Where a defence goes beyond mere denial then the burden shifts to the defendant, here the Respondent to prove the error.

See the case of PICKFORD VRS ICI[1998] 3AER

The "pink sheets" were generated by the 2nd Respondent photocopies of which were given to the petitioners. The entries thereon constitute prima facie evidence which needed to be rebutted by the 2nd Respondent. Failure to rebut same is fatal to the defence of error/ mistake.

Indeed Dr. Afari-Gyan told the court in one case where the same figure was entered in C3 as it was entered in C1, that it was either or situation meaning either all the voters voted without being biometrically verified or they all went through the biometric verification process. To find exactly what happened, he said there should be a resort to the Biometric Verification Device. The Devices were not resorted to to tell the court that indeed the figures entered in column C3 were entered in error. These Devices are in the custody of the 2nd Respondent.

Their case is that even if voters voted without going through the verification process a call for annulment of the votes must be considered in the light of their fundament Right to vote as enshrined under Article 42 of the constitution.

The Chairman of the 2nd Respondent told the court that in some cases, the presiding officers were given the discretion to permit certain persons who are well- known in the community to vote without biometric verification. This is in contrast distinction to the NO VERIFICATION NO VOTE Slogan and an infringement of Regulation 30 of C. I. 75.

In the case of APALLO VRS ELECTORAL COMMISSION [2001-2002] SCGLR 1 the court held that the Regulation enacted by the 2nd Respondent constitute the only constitutionally valid and acceptable instrument by which the 2nd Respondent can regulate important matters in the conduct of public election.

Like the Gazette notice published by the 2nd Respondent, the discretion given to presiding officer to allow people like Omanhene to vote without going through Biometric verification Device is ultra vires C. I. 75 and therefore same is void.

The Indian case of A. C. JOSE VRS. SIVAN PILLAI & Others [1984] SCR (3) 74 at 75 paragraphs 86H-89G is authority for the contention that where certain election procedure are prescribed expressly by an enactment and its rules, the electoral commission is not at liberty to derogate from such rules or exercise any discretion.

In ruling against the exercise of discretion to the voting machines in some areas when the law did not support same the court held at paragraph 87A-B that:

> **"Where there is an Act and there are express Rules made thereunder, it is not open to the Commission to override the Act or the Rules and pass orders in direct disobedience to the mandate contained in the Act or the Rules. The powers of the Commission are meant to supplement rather than supplant the law (both statute and Rules) in the matter of superintendence, direction and control as provided by Article 324"**

It is unfortunate that the 2nd Respondent sought to introduce element of discretion into NO VERIFICATION NO VOTE under C. I. 75.

Voting without being biometrically verified is an infringement of the Law which cannot be countenanced under the present dispensation in an election petition. See the case of NEW NATIONAL PARTY VRS GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA and others (CCT 9/99) [1999] ZACC SA 191.

See Vol. 2B page 437 of petitioners filed address.

For this and other reasons, I am inclined to annul votes in all polling stations where the violation occurred.

DUPLICATE POLLING STATION CODE

The evidence of the Representatives of 1st and 3rd Respondents is that polling stations are identified by their unique names and code numbers. DR. Afari-Gyan representing 2nd Respondent also told the court that:

"The code is unique……

The petitioners' claim however is that there were multiple instances of same duplicate code numbers being used for different polling stations with different results. This they term a malpractice.

Under cross-examination, DR. Afari-Gyan was actually confronted with 5 pink sheets of same number of polling station name Juaso Court Hall with same code number but different results.

Again under cross-examination DR. Afari-Gyan admitted that 9 pairs of 18 "pink sheets" bore the same code numbers.

DR. Afari-Gyan again admitted another 16 polling stations with corresponding pink sheets bore the same polling station code.

There was another list of 16 (8 pairs) pink sheets which was tendered through DR. Afari-Gyan. He sought to explain away the anomaly with the suggestion that one of each pair had been used for special voting.

This list was tendered as Ex "Y",

In all, the petitioners' claim is that 35 polling stations were involved.

DR. Bawumia however told the court that the votes in terms of their impact of this elections is statistically insignificant----------

Again the petitioners said out of these 9 pairs i.e. 18 pink sheets with the same polling station codes were part of the list of 905 polling stations tendered as exhibit "P" (where the presiding officers did not sign the "pink sheets". That being the case the votes in respect of those polling stations have been annulled under no signature head.

DR. Afari-Gyan was able to explain that in some instances, special voting had taken place at the same polling station or where the registered voters there were too many the polling station would be split into two – A and B. This is plausible enough.

If therefore there are any such polling stations with the same polling station code, the number will be few and therefore as DR Bawumia himself told the court, same will be statistically insignificant. The malpractice if anything at all, will not affect the result so that malpractice is disallowed.

UNKNOWN POLLING STATIONS

The original claim by petitioners as contained in paragraph 20 Ground 2a was that:

"That there were 28 locations where elections took place which were not part of the twenty-six thousands and two (26,002) polling stations created by the 2nd respondent for purposes of the December 2012 elections."

This number was reduced to 22 when the petitioners were asked to give further and better particulars. Even with these 22 polling stations, the petitioners did not appear to be desirous of pursuing.

Dr. Bawumia in his oral testimony had this to say:

"For the 22 locations, we could not find them on the list of 26,002, we could not match the names and the polling stations. Again as with the duplicate numbers category, my Lords, we have to be upfront statistically this category is insignificant, 99% of all the irregularities and violations that we are taking about are in four categories. Over voting, voting without biometric verification, the duplicate serial numbers and the non signatures by the presiding officer ... even if it is one polling station."

The Representative of the 3rd Respondent answer to this allegation is that the 22 polling stations, formed part of the 26,002 polling stations for the 2012 Presidential election. His explanation is that the petitioners got the spelling of the polling station names and code numbers wrong. He filed Ex "JAN 5" in which he supplied the correct names and code numbers.

What is more, the petitioners sent their polling Agents to these polling stations where voting took place in the presence of their polling Agents.

I find no substance in this claim and so disallow same.

DUPLICATE SERIAL NUMBERS

The petitioners' claim that serial numbers on the face of the pink sheets are security features and this is to ensure that the results at each polling station would be entered on only one pink sheet, whose unique feature is the serial number.

This was denied by 2nd and 3rd Respondents who told the court that so far as elections are concerned, the serial numbers are of no significance and that for the purpose of the election, they are not security feature. They contended that these numbers were even generated by the commission but by the printer.

When the 2nd petitioner was asked whether the serial number is covered by any law or constitutional provision, this is what he said:

> **"This is why we say it is an irregularity. I am not aware that is covered by a law or constitution but ...you can be sure they will be dishonoured to a question**.

Q. And I am suggesting to you that that is the case because you do not challenge the account of details on those 'pink sheets'.

A. "What we are saying is that the details on those 'pink sheets' are questionable because we cannot trust the integrity of the form they are written on."

In fact the petitioners did not say that no voting took place in those polling stations. If the pink sheets' are questionable, what questions were asked and were answered by the petitioners?

No case was made under this head and I am inclined to dismiss same.

CONCLUSION

The number of votes annulled for the three irregularities and violations of over voting, voting without Biometric verification will negatively impact on the result declared by the 2nd Respondent having regard to the votes margin between the 1st petitioner and the 1st Respondent. If the invalid votes are deducted from the votes of the two, the 1st Respondent who was declared winner on 50.7% of the votes cast will not cross the threshold of 50%+1.

For this reason, I will and hereby declare that the 1st Respondent was not validly declared winner of the 2012 presidential election. The first relief of the petitioners is hereby granted.

The 2nd relief for a Declaration that Nana Addo Dankwa Akufo-Addo the 1st petitioner herein rather was validly elected president of the Republic of Ghana cannot be granted because of the order for re-running the election in polling stations where the votes are to be annulled. The 3rd relief has been granted in the polling stations where the election is to be re-run. The petition succeeds in part.

(SGD) R. C. OWUSU (MS)

JUSTICE OF THE SUPREME COURT

DOTSE JSC:

INTRODUCTION

In 1776, John Adams, one of the United States' most respected statesmen and author, wrote in his *"Thoughts of Government"* the following profound statement on the working relationship between the three arms of government, to wit, the *Executive*, *Legislature* and *Judiciary*. He stated thus:

"The dignity and STABILITY of government in all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislature and executive, and independent upon both, that so it may be a check upon both, and both should be checks upon that."

The realities of the said statement have dawned on me in my attempt to deliberate on this presidential election petition which is pending before the Supreme Court. This is a monumental and epoch making era for the Ghana Judiciary. This is because, for the first time in the history of the 4th Republic, the Ghana Supreme Court has been called upon to make pronouncement on whether the declaration made by the Chairman of the Electoral Commission in the *President-Elect Instrument, 2012 (C. I. 80) of 11-12-2012* which declared John Dramani Mahama, the 1st Respondent herein as having been validly elected as President of Ghana is sustainable or not.

It is generally understood that there are three branches of government, to wit, the **Executive, the Legislature** and **the Judiciary**. Of the three, it is only the Judiciary that is not elected. Whilst both the Executive and the Legislature are elected and appointed for fixed terms, the Judiciary to a very large extent, are appointed by the Executive sometimes with the approval of the Legislature in the case of the Supreme Court Judges, but once appointed in democratic states, the Judges have security of tenure and cannot be removed from office unless upon stated and proven misbehavior.

In most parts of the civilized world, including Ghana, the three arms of government are separate, distinct and independent, at least on paper. In practical terms however, even though there are close working relationships between the **Executive** and **Legislature** since their memberships overlap, **that of the Judiciary is expected to be truly independent in order to ensure strict adherence to the "rule of law".**

It is in this respect that I am of the view that the statement quoted above, and attributed to John Adams has become a certainty and a road map for the Ghana Supreme Court to navigate delicately during this case as it does in other cases.

It cannot be gainsaid that the stability and progress of any nation depend upon an upright and skillful administration of justice.

Secondly, in the exercise of judicial power, the ***courts should be seen as being distinct and independent from both the Executive and Legislative organs of state.***

Thirdly, in the performance of its duties, all the organs of government must be seen to be independent one of the other, so however that each may become a check on the other.

Finally, whilst the Judiciary is independent of the Executive and Legislature and a check on both, the other two should also be a check on the Judiciary not so however in the performance of its duties.

The above statement clearly epitomises the principles of separation of powers which is the bedrock of all modern and truly democratic constitutions of the free world of which Ghana is indeed a proud member.

The task facing the Supreme Court under the 4th Republican Constitution of 1992, is therefore an enormous one which demands a lot of circumspection, in order to achieve substantial justice such as would protect the dignity and morals of the society thereby upholding the dignity and stability of the state.

Since this is an election petition, I have taken inspiration from Alexander Hamilton's speech in the New York Assembly, June 21, 1788 when he stated thus:

"After all, Sir, we must submit to this idea, ***that the true principle of a republic is that the people should choose whom they please to govern them.*** *Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed."*

In also describing the enormity of the task that faces a Judge when such delicate issues come up for adjudication, another colossus of a giant in the U.S Judiciary, ***Benjamin Cardozo****, one time Associate Justice of the U. S. Supreme Court,* in his invaluable and ground breaking book ***"The Nature of The Judicial Process",*** described in simple and understandable language, the conscious and unconscious processes by which a Judge decides a case. This is the task that now faces me.

This is what is contained in *page 10 of Benjamin Cardozo's* book referred to supra:

> ***"What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions. I am not concerned to inquire whether***

judges ought to be allowed to brew such a compound at all.I take judge-made law as one of the existing realities of life."

In this judgment, as far as my ability and capacity can carry me, I shall endeavour to follow such a practice or method especially as there is no known local precedent in this aspect of the law that we are requested to enforce and or interprete.

In this case, I am called upon to make very serious decisions on the validity of the presidential elections held on 7th and 8th December 2012. The sources of information that I should be looking at, are the *Constitution 1992, The Presidential Elections, Act 1992, (PNDCL 285) (Sections 4 and 5)*. *Public Elections (Registration of Voters) Regulations 2012 C. I. 72, Public Elections Regulations, 2012 C.I. 75, Supreme Court Amendment Rules, 2012 C. I 74* and the 2nd Edition of the Manual on Election Adjudication in Ghana prepared by the Judicial Service, July 2012, decided cases, Constitutional Instruments, pleadings and relevant exhibits used by the parties in this case, decided cases from other common law jurisdictions and my own understanding of the issues and law applicable based on the evidence adduced in Court in order to ensure justice and equilibrium in our body politics.

WHAT THEN ARE THE FACTS OF THIS CASE?

In pursuit of its democratic practice, under the 4th Republic Constitution, 1992, Ghana again went to the polls on the 7th and 8th December 2012 to elect a President and also members of Parliament for the 275 constituencies that had been demarcated by the 2nd Respondents, the

Electoral Commission. It must be noted that, general elections had been conducted in Ghana for the same dual purposes in 1992, 1996, 2000, 2004 and 2008. The 2012 election was thus the 6th under the Constitution 1992 that the 2nd Respondents had conducted.

The 2012 Presidential Election was contested by the following candidates:

1. John Dramani Mahama - representing National Democratic Congress (NDC)
2. Dr. Henry Herbert Lartey- representing Ghana Consolidated Peoples Party (GPCC)
3. Nana Addo Dankwa Akufo-Addo - representing the New Patriotic Party (NPP)
4. Dr. Papa Kwesi Nduom - representing Peoples Popular Party (PPP)
5. Akwasi Addai Odike - representing United Front Party (UFP)
6. Hassan Ayariga - representing People's National Convention (PNC)
7. Dr. Michael Abu Sakara Forster - representing Convention People's Party (CPP)
8. Jacob Osei Yeboah - Independent Candidate

It is to be noted that, the 2nd Respondents herein, the Electoral Commission is the body charged under article 45 (c) of the Constitution 1992 inter alia, to conduct and supervise all public elections and referenda.

In consequence of the above, the 2nd Respondent therein, through its Chairman, Dr. Kwadwo Afari-Gyan on the 11th December 2012 issued and published the ***Declaration of President – Elect Instrument, 2012 (C. I. 80)*** in which the **1st Respondent**, **John Dramani Mahama** who had already been declared on the 9th of December 2012 as having won the 2012 Presidential Election was declared therein as having been validly elected as President of the Republic of Ghana.The total votes declared with their corresponding percentages as having been cast in favour of the contesting presidential candidates referred to supra are as follows:-

i.	John Dramani Mahama	-	**5 ,574,761**	**50.70%**
ii.	Dr. Henry Herbert Lartey	-	38,223	0.35%
iii.	Nana Addo Dankwa Akufo Addo	-	**5,248,89**	**47.74%**
iv.	Dr. Papa Kwesi Nduom	-	64,362	0.59%
v.	Akwasi Addai Odike	-	8,877	0.08%
vi.	Hassan Ayariga	-	24,617	0.22%
vii.	Dr. Michael Abu Sakara-Forster	-	20,32	0.18%
viii.	Jacob Osei Yeboah	-	15,201	0.14%
Total Votes		**-**	**10,995,262**	**100%**

Feeling aggrieved with the declaration by the 2nd Respondent of the 1st Respondent, **John Dramani Mahama**, the Presidential Candidate of the National Democratic Congress, as the winner of the 2012 Presidential

Elections, the Petitioners herein, namely Nana Addo Dankwa Akufo-Addo, the Presidential candidate of the New Patriotic Party, Dr. Mahamudu Bawumia, the running mate to the Presidential Candidate of the N.P.P, and Jake Otanka Obetsebi Lamptey, National Chairman of the New Patriotic Party commenced a petition as 1st, 2nd and 3rd Petitioners respectively on the 28th of December 2012 pursuant to article *64 of the Constitution 1992, section 5 of the Presidential Election Act, 1992 (PNDCL 285), and Rules 68 and 68A of the Supreme Court (Amendment) Rules 2012, C. I. 74* challenging the validity of the election of the 1st Respondent as the President of the Republic of Ghana and sought the reliefs stated in the petition.

The original petition filed by the Petitioners on 28/12/2012, was by order of this Court dated 7th February, 2013 amended in consequence of which the Petitioners filed their 2nd Amended Petition dated 8th February 2013.

In order to set the records straight, I wish to point out that, the Petitioners were ordered by this court to amend their original petition for the first time when the **3rd Respondents** herein, the **National Democratic Congress** were by a majority decision of 6-3 joined to the Petition as the 3rd Respondents.

That explains the 1st and 2nd amended petitions respectively.

RELIEFS CLAIMED BY THE PETITIONERS

1. **That John Dramani Mahama, the 2nd Respondent herein was not validly elected President of the Republic of Ghana,**

2. **That Nana Addo Dankwa Akufo-Addo, the 1st Petitioner herein, rather was validly elected President of the Republic of Ghana**

3. **Consequential orders as to this Court may seem meet.**

GROUNDS FOR SEEKING RELIEFS

Out of abundance of caution, I will set out in extenso the particulars of the Petitioners as set out in their 2nd amended petition from paragraphs 20, ground I through to ground 2A, Ground 3 and all their particulars to paragraphs 21-27 inclusive.

GROUNDS FOR CHALLENGING THE VALIDITY OF THE DECEMBER 2012 ELECTION

Ground 1

"There were diverse and flagrant violations of the statutory provisions and regulations governing the conduct of the December 2012 presidential

election which substantially and materially affected the results of the election as declared by the 2nd Respondent on 9th December 2012.

Particulars

a. That the 2nd Respondent permitted voting to take place in many polling stations across the country **without prior biometric verification by the presiding officers of 2nd Respondent or their assistants, contrary to Regulation 30 (2) of C. I. 75.**

b. That the voting in polling stations where voting took place without prior biometric verification were unlawfully taken into account in the declaration of results by 2nd Respondent in the presidential election held on 7th and 8th December 2012.

c. That by 2nd Respondent's established procedure, 2nd Respondent conducted the December 2012 presidential and parliamentary elections at polling stations each of which was **assigned a unique code to avoid confusing one polling station with another and to provide a mechanism for preventing possible electoral malpractices and irregularities.**

d. That there were, however, **widespread instances where different results were strangely recorded on the declaration forms** ***(otherwise known as the 'pink sheet' or 'blue sheet')*** **in respect of polling stations bearing the same polling stations codes.**

e. That the existence of polling stations of the nature referred to in the preceding sub-paragraph (d) and the results emanating therefrom were patently illegal.

f. That there were **widespread instances where there were no signatures of the presiding officers or their assistants on the declarations forms as required under Regulation 36 (2) of C. I. 75. And yet the results on these forms were used in arriving at the Presidential results declared on 9th December 2012 by the Chairman of 2nd Respondent, thereby rendering the result so declared invalid.**

Ground 2

(1) That the election in 11,916 polling stations was also vitiated by gross and widespread irregularities and/or malpractices which fundamentally impugned the validity of the results in those polling stations as declared by 2nd Respondent.

Particulars

(a) That the results as declared and recorded by the 2nd Respondent contained **widespread instances of over-voting in flagrant breach of the fundamental constitutional principle of universal suffrage, to wit, one man one vote.**

(b) That there were **widespread instances where there were the same serial numbers on pink sheets with different poll results, when the proper and due procedure established by 2nd Respondent required that each polling station have a unique serial number in order to secure the integrity of the polls and will of the lawfully registered voters.**

(c) That, while the total number of registered voters as published by the 2nd Respondent and provided to all political parties or candidates for the presidential and parliamentary election **was fourteen million, thirty-one thousand, six and eighty (sic) (14,031,680), when 2nd Respondent announced the result of the presidential election on 9th December 2012, the total number of registered voters that 2nd Respondent announced mysteriously metamorphosed to a new and inexplicable figure of fourteen million, one hundred and fifty-eight thousand, eight hundred and ninety (14,158,890). This thereby wrongfully and unlawfully increased the total number of registered voters by the substantial number of one hundred and twenty-seven thousand, two hundred and ten (127,210).**

(d) That there were **widespread instances of voting without prior biometric verification;**

(e) That there were widespread **instances of absence of the signatures of presiding officers or their assistants on the Declaration Forms known as 'pink sheet'; and**

(f) That there were widespread instances **where the words and figures of votes cast in the election and as recorded on the 'pink sheets' did not match.**

Ground 2a

That there were 28 locations where elections took place which were not part of the twenty-six thousand and two (26,002) polling stations created by the 2nd Respondent for purposes of the December 2012 elections.

Ground 3

(1) That the statutory violations and irregularities and/or malpractices described under Ground 1, 2, and 2a herein, which were apparent on face of the Declaration Forms ('pink sheet'), had the direct effect of introducing into the aggregate of valid votes recorded in the polling stations across the country, **a whopping figure of four million six hundred and seventy thousand five hundred and four (4,670,504) unlawful and irregular votes, which vitiated the validity of the votes cast and had**

a material and substantial effect on the outcome of the election, as shown in the table below:

Particulars

No	Violations, irregularities and/or Malpractices	Number of Votes
1	Exclusive instances of over voting due to total votes exceeding ballots papers issued to voters or the polling station voters register	128,262
2	Exclusive instances of the joint occurrence of: i. Over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register ii. Voting without biometric verification	48,829
3	Exclusive instances of the joint occurrence of: i. over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register	145,129

	ii. voting without biometric verification iii. same serial numbers on 'pink sheets' with different results	
4	Exclusive instances of the joint occurrence of: i. over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register ii. voting without biometric verification iii. same serial numbers on 'pink sheets' with different results iv. absence of presiding officers or assistants' signatures on 'pink sheets'	34,167
5	Exclusive instances of the joint occurrence of: i. over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register ii. voting without biometric verification iii. absence of presiding officers or	9,004

	assistants' signatures on 'pink sheets'	
6	Exclusive instances of the joint occurrence of: i. over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register ii. same serial numbers on 'pink sheets' with different results	425,396
7	Exclusive instances of the joint occurrence of: i. over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register ii. same serial numbers on 'pink sheets' with different results iii. absence of presiding officers or assistants' signatures on 'pink sheets'	93,035
8	Exclusive instances of the joint occurrence of: i. over voting due to total votes	34,023

	exceeding ballot papers issued to voters or the polling station voters register ii. absence of presiding officers or assistants' signatures on 'pink sheet'	
9	Exclusive instances of voting without biometric verification	137,112
10	Exclusive instances of the joint occurrence of: i. voting without biometric verification ii. same serial numbers on 'pink sheet' with different results	395,529
11	Exclusive instances of the joint occurrence of: i. voting without biometric verification ii. same serial numbers on 'pink sheets' with different results iii. absence of presiding officers or assistants' signatures on 'pink sheets'	71,860
12	Exclusive instances of the joint occurrence of: i. voting without biometric verification ii. absence of presiding officers or assistants' signatures on 'pink	21,071

	sheets’	
13	Exclusive instances of same serial numbers on ‘pink sheets’ with different results	2,583,633
14	Exclusive instances of the joint occurrence of: i. same serial numbers on ‘pink sheets with different results ii. absence of presiding officers or assistants’ signatures on ‘pink sheets’	352,554
15	Exclusive instances of absence of presiding officers or assistants’ signatures on ‘pink sheets’	117,870
16	Excusive instances of same polling station codes with different results	687
17	Exclusive instances of the joint occurrence of: i. over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register ii. voting without biometric verification iii. same serial numbers on ‘pink sheets’ with different results iv. same polling station code with	3,977

	different results	
18	Exclusive instances of the joint occurrence of: i. same serial numbers on "pink sheets' with different results ii. same polling station code with different results	7,160
19	Exclusive instances of the joint occurrence of: i. Same serial numbers on 'pink sheets' with different results ii. absence of presiding officers or assistants' signatures on 'pink sheets' iii. same polling station code with different results	7,160
20	Exclusive instances of the joint occurrence of: i. over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register ii. same serial numbers on 'pink sheets' with different results	6,537

	iii. same polling station code with different results	
21	Exclusive instances of the joint occurrence of: i. voting without biometric verification ii. absence of presiding officers or assistants' signatures on "pink sheets' iii. same polling station code with different results	671
22	Exclusive instances of the joint occurrence of: i. voting without biometric verification ii. same serial numbers on "pink sheets" with different results iii. same polling station code with different results	7,920
23	Exclusive instances of the joint occurrence of: i. over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register ii. same serial numbers on "pink	4,885

	sheet" with different results iii. absence of presiding officers or assistants' signatures on "pink sheets" iv. same polling station code with different results	
24	Exclusive instances of the joint occurrence of: i. voting without biometric verification ii. same serial numbers on "pink sheets" with different results iii. absence of presiding officers or assistants' signatures on "pink sheets" iv. same polling station code with different results	3,471
25	Exclusive instances of the joint occurrence of: i. over voting due to total votes exceeding ballot papers issued to voters or the polling station voters registers ii. voting without biometric verification iii. same serial numbers on "pink	1,787

	sheets" with different results iv. absence of presiding officers or assistants' signatures on "pink sheet" v. same polling station code with different results	
26	Exclusive instances of 28 locations which were not part of the twenty-six thousand and two (26,002) polling stations created by the 2nd Respondent prior to the December 2012 elections for purposes of the elections but where elections took place	9,757
	Grand Total	**4,670504**

21. **Petitioners contend that these four million six hundred and seventy thousand five hundred and four votes have been rendered invalid by reason of the above violations and irregularities and accordingly ought to be annulled.**

22. Petitioners say that upon the annulment of the votes in the eleven thousand nine hundred and sixteen (11,916) polling stations, the following votes ought to be deducted from the respective votes declared in favour of the presidential candidates:

1. John Dramani Mahama **3,101,590**
2. Henry Herbert Lartey 21,134
3. Nana Addo-Dankwa Akufo-Addo **1,473,346**
4. Papa Kwesi Nduom 33,416
5. Akwasi Addai Odike 4,817
6. Hassan Ayariga 14,520
7. Michael Abu Sakara Forster 11,636
8. Jacob Osei Yeboah 10,045

23. Petitioners say when these figures are annulled and deducted from the total votes declared by the Chairman of 2nd Respondent on 9th December 2012, the results that ought to be returned are as follows:

	EC DECLARED	**VOTES TO BE ANNULLED**	**NEW VOTES**	**% OF VOTES**
John Dramani Mahama	5,574,761	**3,101,590**	**2,473,171**	**39.1**
Henry Herbert Lartey	38,223	21,134	17,089	0.27
Nana Addo Dankwa Akufo-Addo	5,248,898	**1,473,346**	**3,775,552**	**59.69**
Papa Kwesi Nduom	64,362	33,416	30,946	0.49
Akwasi Addai Odike	8,887	4,817	4,060	0.06
Hassan Ayariga	24,617	14,520	10,097	0.16
Michael Abu Sakara Forster	20,323	11,636	8,687	0.14

Jacob Osei Yeboah	15,201	10,045	5,156	0.08
Total	**10,995,262**	**4,670,504**	**6,324,758**	**100.0**

24. **Petitioners say that in some instances, votes earned by the 1st Petitioner were unlawfully reduced whilst, at the same time, votes of the 1st Respondent were illegally padded with the sole purpose of procuring the victory of the 1st Respondent in the 2012 December Presidential Elections**.

25. When due account is taken of the statutory violations as well as of the gross and widespread irregularities and malpractices, and the necessary deductions effected from the votes wrongfully credited to 1st Respondent by the 2nd Respondent and the nullification as required by law of the results declared at the polling stations where these substantive infractions occurred, **1st Respondent did not obtain the total of more than fifty percent (50%) of the valid votes cast as required by Article 63 (3) of the Constitution in order to become President, and accordingly ought not to have been declared President.**

26. Petitioners say that all of the irregularities and electoral malpractices captured above were nothing **but a deliberate, well-calculated and executed ploy or a contrivance on the part of the 1st and 2nd Respondents with the ultimate object of unlawfully**

assisting the 1st Respondent to win the 2012 December Presidential Elections.

27. The Petitioners say that, in **consequences of these statutory violations and infractions, as well as the irregularities and malpractices, the results declared by 2nd Respondent in favour of 1st Respondent were far in excess of the valid votes cast in his favour, thereby subverting the sovereign will of the electorate contrary to the preamble of the Constitution, Article 1 (1) and Articles 42 and 63 (3) of the Constitution, 1992"**

RESPONSE BY THE RESPONDENTS

All the Respondents herein filed their amended answers.

1ST RESPONDENT'S AMENDED ANSWER

The substance of the 1st Respondent's answer is to the effect that the 2nd Respondent declared the results of the 2012 Presidential Election Results at a press conference which was widely carried on radio and television on 9th December 2012 and same was thus published in a gazette notification in the *Declaration of President – Elect Instrument, 2012 (C. I. 80) on 11th December, 2012.*

The 1st Respondent further stated in the amended answer **that the basis of the declaration of the results by the 2nd Respondent was the aggregate of total valid votes cast, which was 10, 995, 262.**

Whilst the 1st Respondent generally denied the basis of the Petitioners claims and contentions in all the grounds urged on this court in paragraphs 20-27 of the amended petition, the 1st Respondent specifically denied all the grounds of the Petition and put the Petitioners to strict proof thereof.

In order to put matters in proper perspective, I deem it quite appropriate to refer to in detail and in extenso the specific answers of the 1st Respondent as contained in paragraphs 16 (a), (c), (i), (ii), (iii) (iv) (e) (f) (g) (h) (i) (j) and also paragraphs 17 (d) (i) (i or j), 17B, 20, 21, 26, 27 (a) and (d) as follows:

16. "The 1st Respondent denies paragraph 20 and ground 1 of the 2nd Amended Petition generally and puts petitioners to strict proof of the statements and allegation contained therein.

a. 1st Respondent does not admit paragraph 20 grounds 1 (a), and 1 (b) of the petition and puts petitioners to strict proof of the averments contained therein.

c. The first Respondent shall contend further, or in the alternative, as follows:

i. **Fingerprint verification is not the only means of verification permissible under the law, in terms of Article 42 of the 1992 Constitution, failure or the inability (if at all) of eligible voters to undergo fingerprint verification as a result of the breakdown of equipment and/or for any other reason not attributable to them cannot constitute the basis for denying such voters of their constitutional rights to vote, and have their votes counted.**

ii. That any electoral laws and/or directives, the effect of which would be to invalidate the votes of such persons, who had properly presented themselves at polling stations to vote, and **had been duly identified as registered voters in the biometric voters register, would be inconsistent with Article 42 of the Constitution, and therefore, unconstitutional;**

iii. That 1st Petitioner had, or ought to have had polling and/or counting agents at the various polling stations who were part of the prescribed voter identification processes prior to voting. The said polling and/or counting agents having participated in that process and, having, after public and transparent counting and/or collation, certified the results of the polling stations and/or Constituencies, by signing without protest, the polling returns, had thereby represented to the whole world

that the declared results accurately reflected the outcome of the election in the respective polling stations and/or Constituencies.

iv. **That the 1st Respondent shall contend therefore that the allegations contained in the said paragraph 20 grounds 1 (a) and 1 (b), even if true (which the 1st Respondent denies) did not affect the declared results of the elections**.

e. In further response to paragraph 20 ground 1 (d) of the petition, the 1st Respondent says that **all authentic** "pink sheets' reflectgenuine results of lawfully supervised voting at various pollingstations.

f. 1st Respondent states further that, **assuming without admitting, that some polling stations had the same code numbers, that fact alone would not invalidate the declared results of supervised elections in those polling stations and the votes validly cast.**

g. The 1st Respondent therefore denies paragraph 20 ground 1 (e) of the 2nd Amended Petition, and, in further denial, repeats Paragraphs 16 (e) and 16 (f) herein. The 1st Respondent shall also contend that the allegations contained in the said

paragraph 20 ground 1 (d), even if true (which the 1st Respondent denies), did not affect the declared results of the elections.

h. The 1st Respondent does not admit Paragraph 20 ground 1 (f) of the 2nd amended petition and puts Petitioners to strict proof of theallegations contained therein. **The 1st Respondent states that, anyhow, to the knowledge of the Petitioners and their polling and/or counting agents the results that were declared at the various polling stations were the product of painstaking, public and transparent sorting and counting and/or collation (and sometimes re-counting) at the various polling stations and collation centres with the full participation of 1st Petitioner's accredited polling and/or counting agents, who did not protest at the declared results at the time of their declaration.**

i. In further response to paragraph 20 ground 1 (f) of the 2nd amended petition, the 1st respondent says that assuming, without admitting, that 2nd Respondents officers omitted to sign declaration forms, **such omission cannot operate to invalidate the lawful exercise by eligible voters of their fundamental rights under Article 42 to vote in supervised elections in the affected areas. The 1st**

Respondent also repeats paragraph 16 (c) (iii) herein in further response.

j. The 1st Respondent shall also contend that the allegations contained in the said paragraph 20 ground 1 (f), even if true (which the 1st Respondent denies), did not affect the results of the elections.

17. (d) The 1st Respondent states further that, assuming, without admitting, that in some instances, different polling stations had the same serial numbers, that fact alone would not invalidate the declared results of supervised elections in those polling stations. The 1st Respondent shall also contend that the allegations contained in the said paragraph 20 ground 2 1 (b), even if true, did not affect the declared results of the elections.

i. Further or in the alternatives, the 1st Respondent states that the results of the election in each polling station were declared openly and publicly, and the votes credited to each candidate arising from the declared results are matters of public knowledge and verifiable. **Therefore, granted that there may have been conflict between the words and figures stated on the "pink sheets", that did not affect the declared results of the elections.**

j. The 1st Respondent states in further response to Paragraph 20 Ground (1) (f) that the results of the election were publicly declared at the various polling stations and Constituencies and are matters of public knowledge. To the knowledge of the Petitioners and their polling and/or counting agents, the results that were declared were the product of painstaking, public and transparent sorting and counting and/or collation (and sometimes recounting) at the various polling stations and collation centres with the full participation of 1st Petitioner's accredited polling and/or counting agents, who did not protest at the declared results at the time of their declaration.

17B. The 1st Respondent states in further response to the said paragraph that the results declared in all polling stations throughout the country (as reflected on all genuine "pink sheets"), were the product of properly supervised elections in which the Petitioners and the NPP, their political party, together with their polling and/or counting agents participated; **and that in all cases, voting was done on the basis of a biometric voters register, made available to all the political parties prior to the elections.**

20. The 1st Respondent denies paragraph 22 of the 2nd Amended Petition and puts Petitioners to strict proof of the statements contained therein. The 1st Respondent states in further

response **that the invitation by the Petitioners to annul votes from 11,916 polling stations constitute an attempt toundermine the fundamental rights of Ghanaians under Article 42 of the 1992 Constitution, and should be rejected by the Honourable Court as completely lacking any basis in law and/or fact.**

21. The 1st Respondent denies paragraph 23 of the 2nd amended petition and puts petitioners to strict proof of the statements contained therein. The 1st Respondent states in further response to the said paragraph that the statements and calculations contained therein completely lack any basis in law and/or fact and should be wholly rejected by the Honourable Court.

26. The 1st Respondent denies paragraph 27 of the Petition and puts Petitioners to strict proof of the allegations and statements contained therein. **The 1st Respondent states in further response that it is rather the Petitioners who, by the present Petition, are seeking to subvert the Constitution, undermines the integrity of 2nd Respondent and the whole electoral system and the sovereign will of the people of Ghana by demanding from the Honourable Court an order annulling the**

results of the exercise of their fundamental rights under the Constitution.

27. In general response to the Petition, the 1st Respondent states as follows:

a. That it was acknowledged by all observers, domestic as well as international, that the conduct of the elections had been generally free and fair as well as transparent.

b. That the whole Petition lacks merit and should be dismissed.

In essence the 1st Respondent stated quite emphatically that the basis of the Petitioners claims is the product of double counting in numerous instances.

2ND RESPONDENTS 2ND AMENDED ANSWER

The 2nd Respondent explained the basis of the Petitioners claims of differences in the electoral register given to their party the NPP, vis-à-vis the total registered voters on the electoral calendar in copious terms as spelt out in their paragraph 8 of their amended answer.

8. In answer to paragraph 14 of the 2nd amended petition, the 2nd respondent says that the total number of registered voters that it forwarded to all the political parties, including the NPP, was

14,031,793 as explained in paragraph 6, above. **The figure of 14,158,890 registered voters stated in the declaration of results was an error**. The correct number of registered voters **(14,031,793)** was duly posted on the 2nd respondent's website. In this context, it is important to emphasise that this error has no bearing whatsoever on the total votes cast in the election and, consequently, the valid votes obtained by each candidate. **The error would only affect the turnout percentage and change it from 79.43% to 80.15%.**

In order to set the records straight, the 2nd Respondent stated the correct results as declared by the Chairman of the 2nd Respondents as follows:

12 (ii) Total votes declared as cast in favour of the contesting presidential candidates

1.	John Dramani Mahama	**5,574,761**	**5 0.70%**
2.	Henry Herbert Lartey	38,223	0.35%
3.	Nana Addo-Dankwa Akufo-Addo	**5,248,898**	**47.74%**
4.	Papa Kwesi Nduom	64,362	0.59%
5.	Akwasi Addai Odike	8,877	0.08%
6.	Hassan Ayariga	24,617	0.22%
7.	Michael Abu Sakara Forster	20,323	0.18%
8.	Jacob Osei Yeboah	15,201	0.14%
		14,158,880	**100%**

In order to put in proper perspective, the specific answers of the 2nd Respondent's it is deemed proper to set out verbatim their answers to the specific grounds of the petitioners' allegations. These answers are spelt out in paragraphs 15, 15 (a), 16, 17, 18, 18 (a), 19, 20, 22 and 24 thereof.

15. The 2nd respondent denies paragraph (a) of ground 1 of the 2nd amended petition and says, in answer thereto, **that registered voters who were not successfully verified were turned away from polling stations and at the about 400 polling stations in which the verification process faced challenges (slowness or malfunction of equipment) on December 7, 2012, voting continued the following day when functioning verification machines were made available.**

A Press Release was issued by the 2nd respondent on this. Further, the 2nd respondent says that the Commonwealth Observer Group, in its report (page 36) on the Ghana 2012 Presidential and Parliamentary Elections, made the following recommendation:

"The Electoral Commission should review the exceptions to the current practice on the use of the biometric verification device to minimize the number of elderly people being refused their vote due to the difficulty in matching fingerprints".

15 (a) That, upon being served with the further and better particulars

provided by the petitioners following the Orders of this Honourable Court, dated February 5 and 7, 2013, the 2nd Respondent made an examination and analysis of its records, in particular the Statements of Poll and Declarations of Results for the Office of President ("Pink Sheet") for the polling stations listed in the particulars supplied by the Petitioners (which the 2nd Respondents found to be less than the 11,916 claimed by the Petitioners). **The analysis confirmed that no voters were allowed to vote without verification at any polling station. The Pink Sheets used for the 2012 Election were designed and printed before the decision was taken, at the instance of the NPP, that at each polling station every person should be biometrically verified before being allowed to vote. Thus, the Pink Sheets contained Question C3 as follows**:

"What is the number of ballots issued to voters verified by the use of Form 1C (but not by use of BVD)"

In view of the late decision regarding verification, all Presiding Officers, during the training exercise, were instructed to leave Question C3 blank as verification would be carried out for each voter at the polling station. Given that 26,002 Polling Agents had to be recruited by the 2nd Respondent, some of who were carrying out such duties for the first time and that the biometric register was being used in Ghana for the first time, it did happen, in a

number of cases, that Question C3 was mistakenly filled. However, this did not affect the number of votes validly cast and counted in public. The 2nd Respondent therefore maintains that the Petitioner's request that the number of votes cast at the polling stations listed by them should be nullified is entirely without merit and should be refused.

16. In answer to paragraphs (c) (d) and (e) of Ground 1 of the 2nd amended Petition, **the 2nd Respondent says that each polling station had a name and a unique code**. Further, the 2nd Respondent says that the examination and analysis it conducted upon receipt of the further and better particulars supplied by the Petitioners showed that **(a) Wrong Codes were quoted by the Petitioners in the said particulars; and (b) where a polling station used for the Presidential and Parliamentary Election was also used for Special Voting (by Security Personnel, etc.) that polling station kept the same code number, though the results of the Special Voting and the results of the voting on December 7 and 8, 2012 were given separately.** Thus, the request to invalidate the votes of the polling stations as requested by the Petitioners should be refused as being unjustified and entirely without merit.

17. The 2nd Respondent denies paragraph (f) of Ground 1 of the 2nd

amended Petition and says that upon being served with the further and better particulars provided by the Petitioners following the Orders of this Honourable Court dated February 5 and 7, 2013, **it conducted an examination and analysis which showed that: of the 2,009 Pink Sheets that the petitioners claimed to be unsigned 1,099 were in fact, signed by the Presiding Officer at the polling station or, at the instance of the Returning Officer, at the Collation Centre; 905 were unsigned, representing 3.5% of the total number of Pink Sheets nationwide; and 1,989 Pink Sheets, representing 99% of the number claimed to be unsigned, were signed by the Polling or Counting Agents of the candidates. Thus, the 2nd Respondent maintains that the request by the Petitioners that votes cast at the said polling stations are invalid and should be deducted is without merit and should be refused. It should also be noted that when several pages of paper impregnated with a carbon are used in order to have several copies of each page, it could happen that if the person signing or writing thereon does not press hard enough on the paper, the signature or writing could appear faint or illegible on some of the pages.**

18. The 2nd Respondent says that the particulars set out in Ground 2 of the 2nd amended Petition are a mere repetition of those set out in Ground 1 of the 2nd amended petition and that the particulars

provided by the Petitioners did not cover the **11,916** Polling Stations mentioned in the 2nd Amended Petition. **The findings of the examination and analysis carried out by the 2nd Respondent, upon receipt of the particulars provided by the Petitioners in this regard, showed that there was not one single instance where the total votes cast exceeded the number of voters on the register of the polling station.** The 2nd Respondent denies Ground 2 (a) of the 2nd amended Petition and affirms that voting in the 2012 Election took place in 26,002 polling stations all of which were located in Ghana. The 2nd respondent requests this Honourable Court to Order the Petitioners to comply with the Court's Rulings of February 5 and 7, 2013 by providing particulars of the alleged other 28 locations.

18(a) **In the preparations for the 2012 elections, the 2nd Respondent estimated that it would receive between 12 and 18 nominations of Presidential candidates. The 2nd Respondent, accordingly, decided to issue to each polling station, for the purpose of the Presidential Election, two sets of Statement of Poll and Declaration of Results Forms ("Pink Sheet") in two booklets, each bearing the same serial number and each booklet containing 9 carbonised sheets (for candidates 1 to 9; and for candidates 10 to 18, respectively) in order to ensure that each booklet would not be too thick and, would not thereby render the carbonization ineffective.**

At the close of presidential nominations eight valid presidential nominations were received by the 2nd Respondent. (It is on record that Mr. T. N. Ward-Brew, Nana Konadu Agyeman-Rawlings (Mrs), Mr. Kofi Akpaloo and ProphetNkansah unsuccessfully challenged, in the High Court, the 2nd Respondent's "rejection" of their nomination papers and that Mr. Kofi Wayo and Madam Ekua Donkoh had attempted to file Presidential Nomination Forms) thus, each polling station needed, for the Presidential Election with eight presidential candidates, only one booklet. Had two or more of the above-mentioned "potential" Presidential candidates successfully submitted their Nomination Forms each polling station would have needed two booklets. As each booklet, even if it bore the same serial number as another booklet, would have the name of the polling station and its unique code written on the forms it contained, the 2nd Respondent issued the second booklets for use at polling stations for the Presidential Election. As clearly shown in the further and better particulars provided by the Petitioners, where the serial numbers were identical, the names of the polling stations and their codes were different. The 2nd respondent therefore denies the allegation in ground 2 that the procedure established by it required each polling station to have a unique serial number and urges this Honourable court to reject the Petitioners' contention that votes

recorded in any two polling stations on pink sheets with the same serial numbers should be invalidated.

19. As regards ground 3 of the 2nd amended petition, the 2nd respondent notes that in the 2nd amended petition, the word "exclusive" has replaced the ubiquitous "aggregate" in the tables in the petition filed on 28/12/2012. However, the 2nd respondent maintains that there is no indication of how the number of votes were arrived at in the table. Moreover, the 2nd respondent's examination and analysis, mentioned above, shows clearly that there is no justification for the deduction requested by the Petitioners and mentioned in paragraph 21, 22, and 23 of the 2nd amended petition.

20. As regards paragraph 24 of the 2nd amended petition and the particulars thereof provided by the petitioners in the Affidavit sworn to by Fred Oware and filed on 03/02/2013, in opposition to the application by the 3rd respondent for further and better particulars, the 2nd respondents **examination and analysis shows that of the three instances listed by the Petitioners, one was correct and involved a transposition error at the Collation Centres stating "17" instead of "97" votes (a difference of 80 votes) and the other two instances being entirely wrong**.

22. Prior to the declaration of the results of the Presidential Election by

the Chairman of the 2nd Respondent, representatives of the NPP, in the presence of the National Peace Council, made representations to the Chairman of the 2nd Respondent claiming that there were discrepancies between the results declared at the polling stations in the seven constituencies listed below, and the results as declared by the 2nd Respondent:

- For the **Techiman North Constituency**, which has 77 polling stations Declaration Forms for 56 polling stations were presented:

- For the **Kimtampo South Constituency** which has 107 polling stations, Declarations Forms for 84 polling stations were presented;

- For **Lower Manya Krobo Constituency** which has 112 polling stations. Declaration Forms for 85 polling stations were presented;

- For **Upper West Akyim Constituency** which has 76 polling stations, Declaration Forms for 61 polling stations were presented;

- For **Yilo Krobo Constituency** which has 124 polling stations, Declaration Forms for 96 polling stations were presented;

- For **Berekum West Constituency** which has 44 polling stations, Declaration Forms for 45 polling stations were presented; and

- For **Yendi Constituency** which has 93 polling stations, Declaration Forms for 96 polling stations were presented.

  It should be kept in mind that all Agents (of candidates) present at each polling station, were given copies of the certified results of the polling station, based on the information presented by the representatives, as set out above, **it was clear that the representatives had presented incomplete or inaccurate constituency data to sustain the allegation of discrepancies which the 2nd respondent considers to be the heart of this suit. Under the circumstances, the Chairman of the 2nd Respondent declined to halt the declaration of the results since unreliable evidence had been provided to him.**

24. The 2nd Respondent maintains that the 2nd amended petition is without merit and prays this Honourable Court to dismiss it.

3RD RESPONDENT'S ANSWER

In substance, the answer of the 3rd Respondent is not different from that of the 1st Respondent, save that the answer of the 3rd Respondent is much more detailed than that of the 1st Respondent.

In terms of details which are different from those of the 1st Respondent, I will set those out and avoid a repetition of those that are similar in content and substance.

On general observations and commentary on the entire petition, the 3rd Respondent stated in paragraph 26 and 27 as follows:-

26. 3rd Respondent states that not only are the grounds for challenging the validity of the Presidential elections of the 7th and 8th days of December, 2012 as contained in paragraphs 20 of the 2nd amended petition unfounded, **particulars of the categories of alleged irregularities set out by Petitioners clearly overlap and, therefore, adding the votes in these categories as the Petitioners have done amounts to double/multiple counting and is part of a pattern of obfuscation resorted to by Petitioners to create an appearance of a real issue when there is none**.

27. 3rd Respondent further states that, in bringing this Petition before the Honourable Court, Petitioners are acting in bad faith and that the Petition is frivolous, vexations and an abuse of the process of this Honourable Court.

SETTLING OF MEMORANDUM OF ISSUES AND PRACTICE DIRECTIONS ISSUED BY THE COURT DATED 2ND APRIL 2013

Following the inability of counsel for the parties in the case to file and agree upon a memorandum of issues as directed by the Court, the Court on the 2nd day of April, 2013 settled the memorandum of issues based on the pleadings filed before the Court. These are:

1. **Whether or not there were violations, omissions, malpractices and irregularities of the Presidential Election held on the 7th and 8th December, 2012**

2. **Whether or not the said violations, omissions, malpractices and irregularities, if any affected the outcome of the results of the elections.**

DIRECTIONS ON MODE OF TRIAL

The Supreme Court on the same 2nd day of April, 2012 issued the following directions on the mode of trial aimed at expediting the hearing of the petition and to reduce the time spent by witnesses if any that will be called by the parties to testify in the trial. Out of abundance of caution, I quote verbatim the specific orders made by the Court in this respect.

"*To expedite the determination of this case, the trial will be by affidavits. However, the parties themselves may lead oral evidence. Oral evidence by any other person may be allowed where compelling reasons therefore are given. Accordingly, the Petitioners should file their affidavits of the witnesses they propose to rely on in proof of their case on or before 7th April, 2013". The Respondents should likewise file the affidavits of their witnesses within 5 days from the service upon them of the Petitioners said affidavits. Cross-examination and re-examination of all the affidavits may in the discretion of the Court be allowed."*

In pursuance of the above directives, the Petitioners, acting through the 2nd Petitioner, Dr. Mahamadu Bawumia filed on the 27th of April, 2013 an affidavit together with all the exhibits they intend to rely on to establish their case.

Out of abundance of caution, I deem it appropriate at this stage to refer specifically to paragraphs 42 through to 67 of the affidavit sworn to by the 2nd Petitioner, already referred to supra.

2ND PETITIONERS SWORN AFFIDAVIT

42. **"That in combining these multiple categories statistically,**

care was taken to avoid double counting. This was achieved by making sure the various categories of irregularities are mutually exclusive so that no polling station where an irregularity occurred could belong to more than one category.

43. That the constitutional and statutory violations, irregularities and malpractices which constitute the basis of this petition have been classified into twenty-four (24) distinct and mutually exclusive categories **in which no polling station can belong to more than one category, thereby avoiding double counting.**

The Specific Combination of Constitutional and Statutory Violations Irregularities and Malpractices

44. That there were **320 polling stations** where exclusive instances of the constitutional and statutory violations of **over voting occurred**, and can be found on the same pink sheets. This completely vitiated all the **130, 136 votes** cast in those polling stations. Attached herewith and marked as **Exhibits MB-C, MB-C-1 to MB-C-319** are photocopies of the pink sheets of the polling stations where these infractions occurred.

45. That there were **122** polling stations where instances of combined

constitutional and statutory violations in the nature of: (i) **over-voting** and (ii) **voting without biometric verification occurred**, and can be found on the same pink sheets. This completely vitiated the **45,497 votes** cast at those polling stations. Attached herewith and marked as **Exhibits MB-D, MB-D-1** to **MB-D-121** are photocopies of the pink sheets of the polling stations where these infractions occurred.

46. That there were **374 polling stations** where instances of combined constitutional and statutory violations and irregularities in the nature of**:(i) over-voting;** (ii) **voting without biometric verification**; and (iii) **same serial numbers on pink sheets with different results occurred, and can be found on the same pink sheets**. The combined effect of these infractions completely vitiated the **147,032** votes cast in those polling stations. Attached herewith and marked as **Exhibits MB-E, MB-E-1 to MB-E-373** are photocopies of the pink sheets of the polling stations where these infractions occurred.

47. That there were **66 polling stations** where instances of combined constitutional and statutory violations, malpractices and irregularities in the nature of: (i) **over-voting;** (ii) **voting without biometric verification**; (iii) **the same serial numbers on 'pink sheets'; with different results** and (iv) **absence of signatures of the presiding officers or their assistants on pink sheets occurred,**

and can be found on the same pink sheets. The combined effect of these infractions completely vitiated the **32, 469 votes** cast in these polling stations. Attached herewith and marked as **Exhibits MB-F, MB-F-1 to MB-F-65** are photocopies of the pink sheets of the polling stations where these infractions occurred.

48. That there were **20 polling stations** where instances of combined constitutional and statutory violations, malpractices and irregularities in the nature of: (i) **over-voting**; (ii) **voting without biometric verification**; and (iii) **absence of signatures of the presiding officers or their assistants on pink sheets occurred, and can be found on the same pink sheets**. The combined effect of these infractions completely vitiated the 9,408 votes cast in these polling stations. Attached herewith and marked as **Exhibits MB-G, MB-G-1 to MB-G-19** are photocopies of the pink sheets of the polling stations where these infractions occurred.

49. That there were **882 polling stations** where instances of combined constitutional and statutory violations, malpractices and irregularities in the nature of; (i) **over-voting** and (ii) **the same serial numbers on pink sheets with different results occurred, and can be found on the same pink sheets**. The combined effect of these infractions affected the **397,532** votes cast in those polling stations. Attached herewith and marked as **Exhibits MB-H, MB-H-1 to MB-**

H-881 are photocopies of pink sheets of the polling stations where these infractions occurred.

50. That there were **196 polling stations** where instances of combined constitutional and statutory violations, malpractices and irregularities in the nature of (i) **over-voting**; (ii) **same serial numbers on pink sheets with different results**; and (iii) **absence of signatures of the presiding officers or their assistants on pink sheets occurred, and can be found on the same pink sheets**. The combined effect of these infractions vitiated **91, 129 votes.** Attached herewith and marked as **Exhibits MB-J, MB-J-1 to MB-J-195** are photocopies of pink sheets of the polling stations where these infractions occurred.

51. That there were **71 polling stations** where instances of combined constitutional and statutory violations and malpractices in the nature of **(i) over-voting and (ii) absence of signatures of the presiding officers or their assistants on pink sheets occurred**, and can be found on the same pink sheets. The combined effect of these infractions vitiated **31,561 votes**. Attached herewith and marked as **Exhibits MB-K, MB-K-1 to MB-K-70** are photocopies of pink sheets of the polling stations where these infractions occurred.

52. That there were **379 polling stations** where exclusive instances of **voting without biometric verification** occurred and can be found on the pink sheets. The combined effect of this infraction vitiated

134,289 votes. Attached herewith and marked as **Exhibits MB-L, MB-L-1** to **MB-L-378** are photocopies of pink sheets of the polling stations where these infractions occurred.

53. That there were **1,068 polling stations** where instances of

combined statutory violations and malpractices in the nature of: (i) **voting without biometric verification; and (ii) same serial numbers on pink sheets with different results occurred, and can be found on the same pink sheets**. The combined effect of these infractions vitiated **408,837 votes**. Attached herewith and marked as **Exhibits MB-M, MB-M-1 to MB-M-1,067** are photocopies of pink sheets of the polling stations where these infractions occurred.

54. That there were **185 polling stations** where instances of combined

constitutional and statutory violations, malpractice and irregularities in the nature of: (i) **voting without biometric verification**; (ii) **absence of signatures of the presiding officers or their assistants on pink sheets occurred, and can be found on the same pink sheets**. The combined effect of these infractions vitiated **72,953 votes**. Attached herewith and marked as Exhibits **MB-N, MB-N-1 to MB-N-185** are photocopies of pink sheets of the polling stations where these infractions occurred.

55. That there were **59 polling stations** where instances of combined

constitutional and statutory violations in the nature of: (i) **voting without biometric verification;** and (ii) **absence of signatures of the presiding officers or their assistants on 'pink sheet' occurred, and can be found on the same pink sheets.** The combined effect of these infractions **vitiated 19,816 votes**. Attached herewith and marked as **Exhibits MB-O, MB-O-1** to **MB-O-58** are photocopies of pink sheets of the polling stations where these infractions occurred.

56. That there were **6,823 polling stations** where exclusive instances of the **malpractice of same serial numbers on pink sheets with different results took place.** The combined effect of these infractions vitiated **2,614,556 votes.** Attached herewith and marked as Exhibits MB-P, **MB- P-1 to MB-P-6,822** are photocopies of pink sheets of the polling stations where these infractions occurred.

57. That there were **907 polling stations** where instances of combined constitutional and statutory violations and malpractices in the nature of: (i) **same serial numbers on pink sheets with different results; and (ii) absence of signatures of the presiding officers or their assistants on pink sheets occurred, and can be found on the pink sheets.** The combined effect of these infractions vitiated **365,676 votes**. Attached herewith and marked as **Exhibits MB-Q, MB-Q-1 to MB-Q-906** are photocopies of pink sheets of the polling stations where these infractions occurred.

58. That there were **310 polling stations** where exclusive instances of constitutional and statutory violations in the nature of: **absence of signatures of the presiding officers or their assistants on pink sheets occurred, and can be found on the pink sheets**. The combined effect of these infractions vitiated **112,754 votes**. Attached herewith and marked as **Exhibits MB-S, MB-S-1 to MB-S-309** are photocopies of pink sheets of the polling stations where these infractions occurred.

59. That there were **3 polling stations** where exclusive instances of the irregularities and malpractices of polling stations with **same polling station codes and different results occurred, and can be found on the pink sheets**. The combined effect of these infractions vitiated **687 votes**. Attached herewith and marked as **Exhibits MB-T, MB-T-1 and MB-T-2** are photocopies of pink sheets of the polling stations where these infractions occurred.

60. That there were **2 polling stations** where instances of combined malpractices, statutory violations and irregularities in the nature of: (i) **same serial numbers on pink sheets with different results;** (ii) **voting without biometric verification**; and (iii) **polling stations with same polling station codes and different results occurred**, and can be found on the same pink sheets. The combined effect of these infractions **vitiated 581 votes**. Attached herewith

and marked as **Exhibits MB-U** and **MB-U-1** are photocopies of pink sheets of the polling stations where these infractions occurred.

61. That there were **12 polling stations** where instances of combined malpractices and irregularities in the nature of: (i) **same serial numbers on pink sheets with different results; and (ii) polling stations with same polling stations codes and different results occurred, and can be found on the same pink sheets.** The combined effect of these infractions vitiated **4,710 votes.** Attached herewith and marked as Exhibits **MB-V, MB-V-1 to MB-V-11** are photocopies of pink sheets of the polling stations where these infractions occurred.

62. That there were **4 polling stations** where instances of combined constitutional and statutory violations, malpractices and irregularities in the nature of: (i) **same serial numbers on pink sheets with different results; (ii) absence of the signatures of the presiding officers or their assistants on the pink sheets; and (iii) polling stations with same polling stations codes and different results occurred, and can be found on the same pink sheets.** The combined effect of these infractions vitiated **1,261 votes**. Attached herewith and marked as **Exhibits MB-W, MB-WI, MB-W-2 and MB-W-3** are photocopies of pink sheets of the polling stations where these infractions occurred.

63. That there were **8 polling stations** where instances of combined

constitutional and statutory violations, malpractices and irregularities in the nature of: (i) **over-voting**; (ii) **same serial numbers on pink sheets with different results: and (ii) polling stations with same polling stations codes and different results occurred, and can be found on the same pink sheets**. The combined effect of these infractions vitiated **3,167 votes**. Attached herewith and marked as **Exhibits MB-X, MB-X-1 to MB-X-7** are photocopies of pink sheets of the polling stations where these infractions occurred.

64. That there were **2 polling stations** where instances of combined

constitutional and statutory violations, malpractices and irregularities in the nature of: (i) **voting without biometric verification**; (ii) **absence of signatures of presiding officers or their assistants on the pink sheets; and (iii) polling stations with same polling station codes and different results occurred, and can be found on the same pink sheets**. The combined effect of these infractions vitiated **671 votes**. Attached herewith and marked as **Exhibits MB-Y and MB-Y-1** are photocopies of pink sheets of the polling stations where these infractions occurred.

65. That there were **4 polling stations** where instances of combined

constitutional and statutory violations, malpractices and irregularities in the nature of: (i) **over-voting** (ii) **same serial numbers on pink sheets with different results** (iii) **absence of signatures**

of the presiding officers or their assistants on the pink sheets; and **(iv) polling stations with same polling stations codes and different results occurred, and can be found on the same pink sheets.** The combined effect of these infractions vitiated **2,105 votes**. Attached herewith and marked as **Exhibits MB-Z, MB-Z-1 to MB-Z-3** are photocopies of pink sheets of the polling stations where these infractions occurred.

66. That there were **2 polling stations** where instances of combined constitutional and statutory violations, malpractices and irregularities in the nature of: (i) **voting without biometric verification;** (ii) **same serial numbers on pink sheets with different results (iii) absence of signatures of presiding officers or their assistants on the pink sheets; and (iv) polling stations with same polling station codes and different results occurred, and can be found on the same pink sheets**. The combined effect of these infractions vitiated **793 votes**. Attached herewith and marked as **Exhibits MB-AA** and **MB-AA-1** are photocopies of pink sheets of the polling stations where these infractions occurred.

67. That there were **23 locations**, which were not part of the **twenty-six thousand and two (26,002) polling stations** created by the 2nd Respondent prior to the December 2012 elections for purposes of the elections but where voting took place. The total number of votes cast in those locations was **9,685**. Attached herewith and marked as

Exhibits MB-AB, MB-AB-1 to MB-AB-22 are photocopies of pink sheets of the polling stations where these infractions occurred."

The Petitioners then listed the method used by them in arriving at their conclusion that specific numbers of votes of each candidate ought to be annulled. This methodology is spelt out in paragraph 70 of the said affidavit which states as follows:-

70. "That the votes that ought to be annulled from the declared results of each of the candidates were determined by the following method:

a. All the polling stations where the violations, irregularities and malpractices occurred were identified.

b. To avoid double counting, the violations, malpractices, and irregularities were classified into 24 mutually exclusive categories.

c. For each of the categories of infringements, all the votes declared in favour of each of the candidates at the affected polling stations by the 2nd Respondent were totalled.

d. The total obtained above by each candidate was then subtracted from the overall total declared by the 2nd Respondent for the specific candidate to arrive at the new total valid votes for that candidate.

e. The new totals and the resultant percentage for each candidate represent what the 2nd Respondent should have declared as the results of the presidential elections."

Even though the Petitioners have since revised the number of polling station results they seek to annul from the original 11,842 to the current figure of 10,119 the depositions in the affidavit refer to the original 11,842 polling stations.

It would appear from paragraphs 73, 74, 75 and 76 of the affidavit of the 2nd Petitioner that the Petitioners have classified the multiple constitutional and statutory violations, malpractices and irregularities into 4 broad classifications.

These are as follows:

1. **Over voting** which occurred in **2,065 polling stations** in which case the 1st Petitioner will obtain **49.3%** whilst the 1st Respondent obtains **49.1%** of the valid votes cast.

2. Voting without biometric verification which occurred in **2,279 polling stations** in which case the 1st Petitioner will obtain **49.38%** whilst the 1st Respondent will obtain **49.13%** of the valid votes cast.

3. **Use of same serial numbers for different polling stations with different results in the 10,533 polling stations where these**

occurred will lead to the 1st Petitioner obtaining 57.55% of the votes whilst the 1st Respondent will obtain **41.1%** of valid votes case.

4. **Absence of signature of the presiding officers** in the **1,826** polling stations where these occurred will lead to the 1st **Petitioner to obtain 49.03% of the votes whilst the 1st Respondent will obtain 49.45% of the valid votes cast.**

The Petitioners therefore prayed that the combine effect of all the above violations be brought to bear on the outcome of the 7th & 8th December 2012 elections such that the 1st Respondent ought not to have been declared as the elected President, rather it ought to have been the 1st Petitioner.

In consequence of the depositions in the affidavit of the 2nd Petitioner, they sought the following reliefs from this court:

a. **"That John Dramani Mahama, the 1st Respondent herein was not validly elected President of the Republic of Ghana.**

b. **That Nana Addo Dankwa Akufo-Addo, the 1st Petitioner herein, rather was validly elected President of the Republic of Ghana, and**

c. **Consequential orders as to this court may seem meet."**

AFFIDAVIT OF JOHNSON ASIEDU-NKETIA PURSUANT TO THE DIRECTIVES OF THE COURT DATED 2/4/2013 FOR AND ON BEHALF OF THE 1ST AND 3RD RESPONDENTS

Mr. Johnson Asiedu-Nketia, aka General Mosquito, the General-Secretary of the N.D.C swore to a joint affidavit on behalf of the 1st and 3rd Respondents.

Even though the depositions in the affidavit are not materially different from the material particulars of the answers by the 1st and 3rd Respondents referred to supra, I think it will be prudent to still refer to some material particulars in extenso to indicate the vehemence of the denials of the petitioners case by the 1st and 3rd Respondents.

In this respect, the affidavit of Johnson Asiedu-Nketia answered the various heads of claim as follows in paragraphs 15, 15A, 15B, 15C, 15D, 15E, 15F, 16, 17, 22 (a) (b) (c) (d).

15. "Regarding each of the heads of claim, I say as follows:

15(a) Over-Voting

i. In respect of all the pink sheets exhibited on over-voting, in no instance are the Petitioners alleging that the valid votes cast exceed number of registered voters at the polling station.

ii. What the Petitioners are alleging to be instances of over-voting are in reality **patent clerical**, and **sometimes, arithmetic errors in recording**, **which have no material effect on the actual votes publicly cast, sorted, counted and recorded**.

iii. A number of the pink sheets do not support in any manner the allegation of over-voting.

15 (b). Voting Without Prior Fingerprint Biometric Verification

i. For the first time during elections, the 2nd Respondent used fingerprint biometric verification machines as well as a biometrically compiled register. The fingerprint verification machines in certain instances were found not to be functioning and as a result of delays occasioned by having no remedy faults in these machines during the voting exercise 2nd Respondent adjourned the polls to the next day to enable it to deal with the problems on the fingerprint verification machines. **To the best of my knowledge, based on accounts of our agents at the polling stations, no voter voted without prior biometric verification.**

ii. My attention has been drawn to paragraph 31 of the affidavit of the 2nd Petitioner alleging that certain votes were annulled at a

collation center in the Northern Region, I have been advised by Counsel and believe that, if indeed it did happen, that annulment was unlawful. In any event, as this is not an issue arising from the pleadings in this case, I am advised and verily believe that this is not an issue before this Honourable Court.

iii. The affidavits sworn to by our polling agents and filed before this Honorable Court confirm that in all the polling stations in respect of which they swore their respective affidavits, voters were biometrically verified before they were permitted to vote.

iv. **I have also been advised by counsel and believe that biometric verification cannot be restricted to fingerprint verification and that if as a result of equipment failure, any voting occurred without a voter having undergone fingerprint verification but the voter was otherwise verified in terms of the biometric register this was not wrongful**.

v. The 1st Respondent's statement referred to by the Petitioners that where there were still challenges with the fingerprint verification machines voters be allowed to vote without prior fingerprint verification, reflected his view of the constitutional rights of Ghanaian citizens, **which I am advised by Counsel and verily believe is the correct statement. In any event the statement of 1st Respondent was not the basis of any**

decision of officers of 2nd Respondent in conducting the elections.

15 (c) Absence of Signatures of Presiding Officers on Pink Sheets

i. In all instances in which the Petitioners allege that the Presiding Officers did not sign pink sheets, the Petitioners do not challenge the results documented on the said pink sheets. Indeed, their own polling agents had, in most cases, signed the declared results without having raised any complaints.

ii. **I am advised by Counsel and verily believe that the neglect or failure of Presiding Officers to sign the pink sheets, whether by oversight or for any other reason, cannot be a basis for annulling lawfully cast votes. Otherwise Presiding Officers would be able, by design, to disenfranchise voters by failing or refusing to sign declaration forms.**

15(d) Pink Sheets With the Same Serial Numbers Having Different Results

It would appear that the allegation under the head of claim is based on a lack of appreciation of the nature and role of serial numbers on pink sheets. **It is polling station codes, and not serial numbers, that are used in identifying polling stations.** 2nd Respondent has given

sufficient explanation to this head of claim in its amended answer to the 2nd amended petition.

We note that the Petitioners do not allege that voting did not take place at any of the polling stations that they claim are affected by the allegation. I note also that, at those polling stations, the polling/counting agents of the 1st Petitioner duly signed the pink sheets, which are the products of lawfully supervised elections.

15 (e) Different Results on Pink Sheets Having the Same Polling Station Code

i. I note that the Petitioners do not allege that voting did not take place at those polling stations. In addition to the unique codes, polling stations can also be partially identified by their names; so that assuming that the Petitioners were correct (which I deny) the names of the polling station would have provided sufficient distinguishing point for the particular polling station.

2nd Respondent has explained that where polling stations have been used for special voting which preceded the general voting, two separate results would appear on the pink sheets with the same polling station code, one representing the results of the special voting, and the other those of the general voting. Anyhow, I maintain that each pink sheet represents the genuine results of

supervised election, and the polling/counting agents of the 1st Petitioner duly signed them.

15(f) Unknown Polling Stations

i. I was in court when the Counsel for the Petitioners indicated that they were restricting this allegation to the 22 polling stations they identified on the basis of the orders of the court to supply further and better particulars. Counsel for the Petitioners confirmed they no longer were making claims in respect of 28 polling stations as they originally alleged. The Affidavit of 2nd Petitioner now refers to 23 polling stations meaning there is one polling station in respect of which further and better particulars have not been supplied as ordered by the court.

ii. We have also checked the details of the polling stations provided by the Petitioners, and have found that their confusion arose, in some instances, out of the wrong spelling of the names of the polling stations and, in others they misquoted the polling stations. In some cases, the polling stations were used for special voting. All the polling stations exist and were all part of the 26,002 polling stations that were created by 2nd Respondent for the conduct of the December 2012 elections. Anyhow, the pink sheets exhibited by the Petitioners in respect thereto reflect the genuine results of

supervised elections, signed by the Petitioners' and 1st Respondent's polling/counting agents.

iii. I attach to this affidavit, marked Exhibit "Jan 5", an analysis of the details relating to the Petitioners' allegation. The 2nd and 3rd columns show the details provided by the Petitioners in their allegation. The 4th and 5th columns show the correct details of the polling stations. The 6th column shows the Constituencies under which the polling stations falls.

16. In general response to the various allegations made by the Petitioners, I say that, in most of the polling stations in respect of which the Petitioners have made claims, their own polling/counting agents signed without complaint the pink sheets and **the current complaints are merely the afterthought of bad losers clutching at straws. The Petitioners only started complaining long after the results had been declared at the various polling stations and when the overall trend nationwide began to show that 1st Petitioner would lose the elections. Indeed on December 8, 2012, after the President had said that voting should be allowed without prior fingerprint biometric verification, Boakye Agyarko, the Campaign Manager of the 1st Petitioner, gave a press conference to inform the country about the NPP's impression of the conduct of the elections so far. He stated that the elections were the most transparent, credible and peaceful elections**

ever held in Ghana, and that the 3rd Respondent and I, should not attempt to challenge the results.

17. This Petition is an act of bad faith and a brazen attempt by the Petitioners to find some reason to question the validity of the December 7 and 8 Presidential Elections after they lost.

22. After the declaration of the results, representatives of the NPP have made changing allegations about the alleged irregularities and malpractices, which they claim accounted for their defeat, including the following:

a. The results declared in favour of 1st Petitioner had been swapped with those declared in favor of 1st Respondent;

b. That results declared in favour of 1st Respondent had been unlawfully increased between the collation centres and the strong-room and that the results that came to the strong-room and declared by 2nd Respondent did not reflect those recorded at the various constituency collations centres;

c. That at certain polling stations the declared results in words were different from those in figures in a manner that favoured 1st Respondent;

d. That 1st Respondent had conspired with 2nd Respondent to steal votes for 1st respondent.

Based upon the above depositions, the 1st and 3rd Respondents prayed the court that the Petition is wholly unmeritorious and lacks in substance.

2ND RESPONDENTS AFFIDAVIT PURSUANT TO THE DIRECTION OF THE COURT DATED 2ND APRIL, 2013 SWORN TO BY AMADU SULLEY DEPUTY CHAIRMAN OF THE COMMISSION

It should be noted that, in this petition the position of the 2nd Respondent, as the constitutionally mandated body in charge of organizing and or conducting elections in Ghana is paramount.
I will therefore devote some time to an analysis of the case as is contained in the detailed affidavit sworn to by the 2nd Respondents.

In this regard therefore, I think it is pertinent to refer in extenso to some relevant portions of the affidavit sworn to by Amadu Sulley and referred to supra.

The relevant portions of the said affidavit are paragraphs 3, 6, 13, 14 and 15 of 2nd Respondents Affidavit sworn to by Amadu Sulley on 16-4-2013.

3. "The manner in which the 2012 Elections were conducted, as

described in paragraph 14 of the 2nd amended answer filed on behalf of the 2nd respondent on April 3, 2013, and the participation of representatives of all the political parties in the procedures followed in the Constituency Collation Centres and in the 2nd Respondent's Headquarters (Strong Room), makes it impossible to falsify the votes cast and to conceal such falsification. By the same token, it is impossible to make a false allegation of falsification and to sustain such an allegation.

6. In the petition, the Petitioners are now seeking to overturn the

results declared by the 2nd Respondent on the grounds of irregularities and malpractices in six "main categories". Each of those categories have been effectively refuted by the 2nd Respondent in its answer filed on 07/01/2013; its amended answer filed on 27/02/2013; its Analysis of the Further and Better Particulars provided by the petitioners application, the response filed on 12/02/2013 by the 2nd respondent to the Interrogatories submitted by the Petitioners and the Supplementary Affidavit filed on the 2nd Respondent on 01/04/2013 regarding the alleged 28 unknown polling stations.

13. Paragraph 34 of the 2nd Petitioners affidavit is false. Polling Stations are identified by their names and their unique Polling Station Codes. The serial number on a Polling Sheet is NOT a security feature.

Further, this matter has been fully explained in paragraph 18 (a) of the 2nd Respondent's 2nd amended answer.

14. Paragraphs 36 to 68 contain inconsistencies and are denied. The 2nd Respondent says that the Petitioners are fastening onto errors, committed **in the completion of pink sheets, by Presiding Officers that do not benefit any particular candidate or affect the number of valid votes cast at polling stations.**

15. The reliefs sought by the Petitioners are without merit and the Honourable Court is requested to dismiss their petition."

From the above depositions of the 2nd Respondent, which should be jointly read with the depositions contained in the affidavit of Johnson Asiedu-Nketiah, sworn to on behalf of the 1st and 3rd Respondents, already referred to supra, it should be clear that all the Respondents vehemently deny in substance the claims of the Petitioners.

There are some preliminary observations and comments that I would wish to make in the case before I address the points of substance posited in the issues.

PRELIMINARY COMMENTS AND OBSERVATIONS

It has already been noted that, this Presidential Election Petition is the first of its kind in the legal annals of this country. Several persons have therefore commented on the procedure that was adopted by the Court. Most of the comments compared the swiftness of the Kenyan Supreme Court in dealing with a similar election petition challenge in that country as opposed to the near snail pace approach adopted by us in the Ghana Supreme Court.

This therefore calls for discussions of some constitutional and statutory provisions germane to the Ghana situation.

CONSTITUTIONAL PROVISIONS ON CHALLENGE OF VALIDITY OF PRESIDENTIAL ELECTION

Article 64 (1) (2) and (3) of the Constitution, 1992 provides:-

64. (1) "The validity of the election of the President may be challenged only ***by a citizen of Ghana*** *who may present a* ***petition*** *for the purpose to the Supreme Court* ***within twenty-one days*** *after the declaration of the result of the election in respect of which the petition is presented.*

(2) A declaration by the Supreme Court that the election of President is not valid shall be without prejudice to anything done by the President before the declaration.

(3) The Rules of Court Committee shall, by constitutional instrument, make rues of court for the practice and procedure for petitions to the Supreme Court challenging the election of a President."

From the above provisions, it is certain and clear that, in the first place, any challenge to the validity of the election of a President can only be filed after the declaration of the results of same by the Electoral Commission. This means that, the Chairman of the Electoral Commission, who is the returning officer for the Presidential election must have declared the results by a President Elect Instrument pursuant to article 64 (9) of the Constitution 1992.

Secondly, any person desirous of challenging the declaration of a person as a President by the Electoral Commission has to do so within 21 days of the declaration of the said result.

Thirdly, it should be noted that, by the provisions in article 64 (2) of the Constitution 1992, a clear intention has been indicated that the pendency of a challenge to the validity of the election of a person as a President cannot stop the President from acting in that capacity as a President. That is the purposive way in which the said provisions should be interpreted such that there will not be any vacuum in the running of affairs of the state.

That explains the rationale why the constitutional provisions in article 64, clause 2 does not invalidate any action taken by the President before the declaration by the Supreme Court on the validity or otherwise of the election of the President.

Finally, article 64 (3) mandates the Rules of Court committee to make constitutional instruments to regulate the conduct, practice and procedure of petitions to the Supreme Court seeking to challenge the election of a President.

It was in pursuant of the said provisions that the Supreme Court (Amendment) Rules, 2012 C. I. 74 was promulgated.

In order to illustrate the point made supra, it is pertinent to refer to the preamble to C. I. 74 which reads thus:

> *"In exercise of the powers conferred on the Rules of Court Committee by clause (4) of article 33, clause (3) of article 64 and clause (2) of article 157 of the Constitution, these Rules are made this 9th day of January, 2012.".*

As the title of the C.I. 74 indicates, it is an amendment of the *Supreme Court Rules, 1996 C.I. 16* as amended by the *Supreme Court (Amendment) Rules, 1999 (C. I. 24).*

C.I.74

This instrument reiterates the constitutional provisions in article 64 (1) and (2) of the Constitution 1992 already referred to supra.

RULE 69A

This rules states that a respondent has 10 days within which to raise a preliminary objection or file an answer to the petition. Thus, if the petitioner has 21 days to file a petition after the declaration of the result, then the respondents have 10 days after service to either file an answer or raise a preliminary objection.
Considering the fact that the petition may not be served on the same date that is filed, then there is the possibility that valuable time may again be lost in service which may even be by substitution as provided for under *Rules 68 B, sub-rules 4 and 5 of C. I. 74.*

As a country, if we are desirous of proceeding in the express highway (fast lane) approach to the determination of such petitions by the courts, then it is my opinion that appropriate legislation must be passed to reflect that phenomenon. The blame must not be put at the door posts of the courts for the snail pace approach, but with the enabling constitutional provision and rules of procedure. These provisions and rules certainly need to be amended to make room for expedition, without sacrificing efficiency. This is because, there is an adage in which I believe which states that, ***"Justice***

hurried, is justice buried". It must also be noted that, the Constitution which was promulgated and enacted and came into force on 7th January 1993 must be considered as a constitutive act of the people of Ghana which affirmed and endorsed priceless principles and precepts which must be honoured and respected.

ELECTRONIC SERVICE – RULE 69 B

Even though the rules provide for electronic service, it is a pity that in this modern I.C.T world, we have not been able to implement this provision. I believe the time is ripe for the full and effective utilization of the rules of I.C.T not only in our mode of service of documents, but more importantly in our scheme of work and also adduction of evidence before the court.

It is in respect of the above that I regret the inability of the Court to heed the many applications by the Petitioners to adopt I.C.T methods of adduction of evidence which unfortunately were not granted. It is my wish and hope that in future, steps would be taken to ensure a smooth blend of I.C.T with our procedural rules, just as the live telecast of proceedings was handled progressively to allow all Ghanaians and the world at large to watch these proceedings.

On the whole, it should be noted that C. I. 74 was passed with expeditious and fast disposal of petitions commenced under it as its philosophical underpinnings. This explains why provisions were made for the court to

give its decision not later than 15 days from the close of the hearing of the petition.

Again it is instructive to note that, the day to day sitting including Saturdays, Sundays and public holidays and no review of final decision including the opening of the Court registry on all days including Saturdays and Sundays are all designed to ensure expedition. Unfortunately, some of the above provisions i.e. sitting on public holidays and no review have been shot down by the Supreme Court at the instance of a plaintiff.

I have had to deal at length with the above constitutional provisions as well as Rules of Court applicable in dealing with presidential election petitions to drum home the fact that there is the need to make for further radical reforms in our laws if we are to achieve what has been done elsewhere i.e. the Kenyan experience.

PRACTICE DIRECTION

In this respect, I think the Court acted with the necessary dispatch when it gave the practice directions on the 2nd April 2013. In retrospect, I think the court should have been more radical in content by not allowing unnecessary cross-examination of the parties who gave depositions in their affidavits. Even though I concede that these cross-examinations were very useful and gave us a lot of insight into the case before the Court, am of the

opinion that in future, learned counsel should be limited by allotting time for the cross-examination and arguments on motions and objections. This will definitely eliminate over elaboration, repetitions and excessive playing to the gallery especially the television cameras.

INTERLOCUTORY RULINGS

During the course of hearing this petition, several interlocutory rulings were delivered which on hindsight I thought should have been otherwise decided in order for this Court to do substantial justice and move the petition faster. I will refer only to a few.

1. THE RULING ON MOTION TO PRODUCE DOCUMENTS FOR INSPECTION AND DISCOVERIES

This application was filed by the Petitioners seeking an order from the Court directed at the 2nd Respondents to produce for their inspection and copy being made thereof of the following:

i. The results collation forms for all the 275 collation centres for the Presidential elections.

ii. The declaration forms that is the pink sheets for all 26,002 polling stations.

On the 7th of February 2013, this Court by a unanimous decision dismissed the Petitioners motion for production and inspection of the documents referred to supra.

Even though the court made it clear in the ruling, that it was premature at the time it was applied for, the Petitioners never brought it up again for re-consideration. Perhaps if it had been brought up again, it could have been favourably considered.

Why am I of the view that it could have been favourably considered?

i. The 2nd Respondents are the constitutional body charged with the conduct of all pubic elections in Ghana.

ii. They are therefore the custodians of all the original documents being requested for by the Petitioners.

iii. The explanation by the 2nd Respondent's in their answer that the legibility of the duplicate copies of the pink sheets which the political parties including the Petitioner's have is the problem. This therefore makes it necessary that the 2nd Respondent's who have the originals should have been made to produce them for the parties and the Courts to apprize themselves of the original copies. *Exhibits E.C 11 A1, E.C. 11 A2 and E. C. 11A* which are all copies of original pink sheets that the 2nd respondent was made to tender

speaks volume. These exhibits exposed the lack of credibility in some of the conduct of the 2nd respondent's during the last December 2012 presidential elections in view of the discrepancies between those originals and duplicate pink sheets.

iv. Besides, evidence adduced by the Chair of the 2nd Respondent Dr. Afari-Gyan, is to the effect that collation forms are not given to the political parties as with pink sheets. Therefore if the petitioners had access to the originals of these documents, they could have revised the number of pink sheets and polling stations they were contesting.

As a matter of fact, now that evidence has been concluded in the matter, am of the considered opinion that, in future, in all Presidential election petition hearings, the Electoral Commission should be mandated to produce for inspection all the documents being contested by the Petitioners. This will help solve problems of ineligibility or otherwise of "pink sheets" exhibited by the petitioners.

This is very important because, as the custodian of the original copies of these primary documents, the 2nd Respondents owe a duty to the good people of Ghana to make a clean breast of the documents if they really do not have any skeletons in their wardrobes to hide, reference the Exhibits E. C. 11A - E.C 11A2 series referred to supra.

For example, the explanation that some pink sheets were signed at the collation centres by the Presiding Officer's at the instance of the Returning Officer's when same was detected in the absence of the political party agents speaks volumes.

If indeed the pink sheets had been signed at the collation centres, then perhaps those complaining might have revised their stand. Since the duty of the courts in any case, is to do substantial justice these points should be well noted.

Secondly, because of the problems of ineligibility of duplicate copies, the originals if produced will be legible, then the problem could have been solved, and the doubts about some figures which we encountered on the pink sheets would not have arisen.

ATTEMPT BY 2ND RESPONDENTS TO TENDER COLLATION SHEETS

In the course of the testimony by Dr. Afari Gyan, an attempt was made by him to introduce some collation forms which was objected to and upheld by this court. Then further during the trial, it came to light that some polling stations like the *"Finger of God",* "*Juaso Court Hall"* and others had more than one pink sheet, and in some cases triple pink sheets, reference exhibit X, which are pairs of serial numbers appearing more than once and exhibit Y, duplicate polling station codes.

When the 2nd Respondent's, rightly in my view sought to tender the collation sheets for those constituencies for the Court to be satisfied that not more than the required number of pink sheet results were taken into account in the collation for those constituencies, the objection was again upheld. This denied the 2nd respondents the opportunity to explain that not more than one pink sheet was used to collate the results.

I am however of the opinion that, those objections were upheld because the court had previously denied the Petitioners the same opportunity when they first sought to introduce them into the case. For purposes of consistency, the court persisted in its previous ruling by denying the introduction of the collation sheets.

For now, doubts have been created in our minds as to whether the ***Exhibit Y,*** type of situation actually found their way into the collation of the results and therefore the declaration made by the 2nd Respondent in favour of the 1st Respondent could have been based on exaggerated and duplicated figures. But luckily these doubts have now been erased in our minds by *exhibits X, Y* and *E.C 11* series.

Similarly, when the 2nd Respondent's also sought to introduce pink sheets from Ashanti Region during the cross-examination of the 2nd Petitioner, Dr. Bawumia an objection was raised and upheld by the Court which denied the opportunity to the Respondent's to tender pink sheets from the stronghold of the petitioners. If indeed there were similar malpractices and

or irregularities and constitutional violations in other parts of the country, then equity would have demanded that uniform rules of application be made to apply to all such infractions of the law.

In this instance, if the 2nd Respondent had been directed to produce at least pink sheets that are being contested for by the petitioners, those pink sheets would have been in evidence or at least before the court, and no legitimate objection would have been raised. After all, *"What is good for the goose is also good for the gander".* However, because of prior rulings in the case, the court has been left with no opportunity to examine the bonafides of the other claims.

If the above documents, had been tendered, they could have helped the Court to determine whether the December 7th and 8th Presidential elections were completely flawed and bereft of any legitimacy or not.

I believe as a people and country, we will take a cue from these procedural lapses and make amends in future cases if they should arise.

2. AMENDMENT OF PETITION

I am also of the view that it is not for nothing that the Constitution 1992 and C.I. 74 provide that the petition challenging the validity of an election should be filed within 21 days after the declaration of the results by the Electoral Commission.

If therefore, a Petitioner has not been able to comprehensively assemble all the allegations which he intends to use for the petition within the 21 days at his disposal, such a Petitioner should not be permitted to amend his case as and when he discovers new evidence after the 21 days has lapsed. This definitely contributed to delay in the petition hearing.

JOINDER OF THE NATIONAL DEMOCRATIC CONGRESS (NDC)

Even though the Court has derived much assistance from Counsel for the NDC Mr. Tsatsu Tsikata for his incisive cross-examination, I am of the considered opinion having reflected on the provisions of the Constitution 1992, the Supreme Court Rules 1996, C.I. 16 and C. I. 74, already referred to, that there is really the need for such petitions to be expeditiously dealt with. I am therefore of the considered view that in future, political parties as entities should be left out of such petitions as happened when this court granted the application for joinder of the National Democratic Congress.

The attempt by the Petitioners in including their Party Chairman in the petition as a 3rd Petitioner I dare say was one of the factors that motivated the 3rd Respondents to seek to join.

Once the beneficiary of the declared election result is one of the Respondents, to wit the 1st Respondent and as at now belongs to a recognised political party, i.e. NDC, what has to be done is for the party to arrange the legal representation for the President such that the fortunes of the party are not compromised.

I am making these observations because I am of the view that valuable time was equally lost when the application for the joinder was made. Similarly, the many spurious applications made by persons claiming to be members of the NDC to join the suit to protect their votes also engaged valuable time of the Court. But for the pro-active ruling delivered by this court to deal with all such applications, the systematic and strategic manner in which the applications were being filed and fixed for hearing could have further derailed the hearing of this petition.

There is therefore the need for appropriate amendments to be made to the rules of Court to explicitly deal with and prevent joinder of such corporate entities like political parties and other individuals who do not have a direct beneficial interest in the outcome of the election.

BURDEN OF PROOF

There is no doubt that the petitioners are very much aware of the standard of proof that lies upon them as petitioners to discharge the evidential burden to enable them convince the court as is required by law, reference *sections 10, 11(1) and 12 (1) of the Evidence Act, 1975 NRCD 323*.

This sections stipulate that the burden of persuasion which the obligation of a party requires to establish a requisite degree of belief concerning facts in the mind of the court to prevent a ruling being made against him on an issue is by proof by a preponderance of probabilities.

In giving teeth to the above provisions of the Evidence Decree, my respected brother, Ansah JSC in the case of ***Takoradi Flour Mills v Samir Faris [2005-2006] SCGLR 882, at 900*** stated authoritatively concerning this burden of proof in civil matters as follows:-

> *"It is sufficient to say that this being a civil suit, the rules of evidence requires that the plaintiff produces sufficient evidence to make out his claim on a preponderance of probabilities, as defined in section 12 (2) of the Evidence Decree, 1975 (NRCD 323). Our understanding of the rules in the Evidence Decree, 1975 on the burden of proof is that in assessing the balance of probabilities, all the evidence, be it that of the plaintiff, or the defendant, must be considered* ***and the party in whose favour the balance tilts is the person whose case is the more probable of the rival versions and is deserving of a favourable verdict."***

Throughout the trial of this case, this duty and standard of the burden of proof which the law has put on a plaintiff, in this case the petitioners, has not been lost on them.

All the respondents agree with the proposition of the law on the burden and standard of proof that lies on the petitioners to sustain their petition.

See for example the written address of learned counsel for the 1st Respondent, Tony Lithur when he stated thus:

"The law is settled that the party who bears the burden of proof must produce the required evidence of the facts in issue that has the quality of credibility for his claim to succeed. (See sections 10 (1) and (2) and 11 (1) and (4) of the Evidence Act, 1975 (NRCD 323). Thus, in ***Ackah v Pergah Transport Limited & Others [2010] SCGLR 728****, Her Ladyship, Mrs. Justice Sophia Adinyira, JSC succinctly summed up the law, at page 736 as follows:"*

> *"It is a basic principle of law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail...****It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that, on all the evidence, a reasonable mind could conclude that the existence of a fact is more reasonable than it's non-existence****. This is the requirement of the law on evidence under section 10 (1) and (2) and 11 (1) and (4) of the Evidence Act, 1975 (NRCD 323)"*

Learned counsel for the 1st Respondent, continued his address on this issue in the following terms:-

"Election petitions have their own dynamics in relation of proof. In the Nigeria election case of ***Abubakar v Yar'Adua [2009] ALL FWLR (Pt. 457) 1 SC,*** *the Supreme Court of Nigeria held* ***that the burden is on the Petitioner to prove, not only non-compliance with the electoral***

law, but also that the non-compliance affected the results of the election.

In the same vein, in the Canadian case of ***Opitz v Wrzesnewskyi 2012 SCC 55-2012-10-256****, the Canadian Supreme Court tersely held, by majority opinion, that:*

> ***"An applicant who seeks to annul an election bears the legal burden of proof throughout…"***

Also, in ***Col. Dr. Kizza Besigye v Museveni Yoweri Kaguta & Electoral Commission, Election Petition No. 1 of 2001***, the majority of the Ugandan Supreme Court Justices held as follows:

> *"…the burden of proof in election petitions as in other civil cases is settled.* ***It lies on the Petitioner to prove his case to the satisfaction of the Court. The only controversy surrounds the standard of proof required to satisfy the Court."***

Continuing his submissions in the written address, learned counsel stated as follows:

> "*It should be noted that, if a legal rule requires a fact to be proved, the court must decide whether or not it happened. In the recent case of* ***Re B [2008] UKHL 3,*** *Lord Hoffman aptly stated the position, using mathematical analogy thus:*
>
> *"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary*

system in which the only values are 0 and 1. ***The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carried the burden of proof. If the party who bears the burden of proof fails to discharge it, a value 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."***

The above statement is therefore quite authoritative and conclusive of the issue of burden of proof.

Learned Counsel for the 3rd Respondent, Tsatsu Tsikata, in his written address on the subject, made similar remarks as follows:-

"It is essential to proving the case of the Petitioners that they not only clearly establish the legal basis on which they ask this honourable Court to annul votes of millions of votes, which would deprive these citizens of their constitutional right to vote, ***but also that they clearly establish the factual basis on which they have brought the petition.*** *This requires that the pink sheets that they reference in the relevant paragraphs of the affidavit must be available to the Court and to the other parties. It is submitted that based on the uncontested evidence of the referee, KPMG, the Petitioners have failed to make available the pink sheets claimed to be made available in the affidavit of 2nd Petitioner, for this reason alone their petition must fail. "*

Learned counsel for the 3rd respondent then drew references to a number of things why in his opinion the Petitioners have failed to discharge the burden that lay upon them in proof of their petition.

Notable among these is the changing face of the number of pink sheets they rely upon which according to counsel has been disproved by the *KPMG report*.

Another instance is the fact that, the pink sheets upon which the petitioners relied entirely for the proof of their case is itself dependent upon several other primary sources of evidence like ***polling station voters register***, ***the polling station biometric machine the record of ballot papers issued to the polling station***, just to mention a few.

The input on the burden and standard of proof by learned counsel for the 2nd Respondent, Mr. James Quashie-Idun was not different in content from the 1st and 3rd respondents. In essence, whilst acknowledging the fact that it is the petitioners who have the burden to discharge in establishing the proof of their case, he argued that they failed woefully to discharge that burden. This is because, the only evidence the petitioners proffered in proof of their many allegations are the pink sheets. According to Mr. Quashie-Idun, the pink sheets perse cannot prove the case for the petitioners without resort to the primary records which learned counsel for the 3rd respondents referred to.

It is definitely not in dispute that the petitioners have made the statements of Poll and Declarations of results – *"Pink Sheets"* as the bedrock or alter ego of their case.

I have examined in detail the characteristics of a pink sheet, elsewhere in this judgment. Suffice it to be that, evidence abounds conclusively in this case that it is the pink sheets that are used to tally results on the constituency collation sheets at the constituency collation centres.

These are in turn transmitted to the 2nd respondent's strong room and used for the purpose of declaration of the results. I am fairly well convinced that a similar procedure was used in the declarations of the 2012 presidential election results.

In my opinion, whenever the petitioners have through a pink sheet, cast doubts on the authenticity or correctness of a result declared at a polling station, for purposes of the principle of producing evidence on the balance of probabilities, as provided for in *sections 10, 11 and 12* of the *Evidence Act, 1975, NRCD 323,* that duty appears to have been discharged until an explanation is given as to why it ought not to be presumed to have been discharged. The only institution or body that can give such an explanation is the 2nd respondent.

As a matter of fact, from the evidence, the only record of the election given the contesting parties are the pink sheets. If therefore an issue arises about this or that polling station in relation to it's pink sheets which have been produced by the party upon whom the burden lies in law, then under

such circumstances, the burden would be deemed to have shifted to the respondents, especially the 2nd respondent to call evidence in rebuttal.

KPMG

It is also an undeniable fact that the petitioners case in respect of the pink sheets has been changing consistently like the face of a cameleon. Indeed from an initial figure of ***11,916*** pink sheets which they claimed they filed, to a reduced number of 11,138, then to the KPMG counts of the following:

1. ***13,926*** - actual number of pink sheets counted from the Registrar's set. Out of this, 8675 are unique.

2. ***9,856*** were counted from the presiding Judge's set.

3. ***1,545*** pink sheets initially unidentified.

4. **10,119 as per Table 1A of the volume 2A page 160 of the address are the number of pink sheets the petitioners now claim to be relying upon.**

They give a breakdown of this as follows in their address:

Registrar's set (KPMG)	**-**	**7999**
Registrar's remarks (KPMG)	**-**	**690**

President's set (KPMG)	**-**	**804**
President's remarks (KPMG)	**-**	**60**
Respondents cross examination exhibits	**-**	**566**

Table 1A of Volume 2A of the address also lists **9,095** pink sheets on page 302 thereof as the total number of pink sheets the respondent's prefer, whatever that means.

Table 4 on page 287 of volume 2 of the address also lists 287 pink sheets as the pink sheets that were duplicated by the petitioners.

All the above go to prove that the petitioners were not consistent with the number of pink sheets they relied upon. However, once the settled figure of 10,119 pink sheets, is far lower than their original 11,926 and also the 10,119 appear to be based somewhat on actual physical count of exhibits by KPMG, then for purposes of admissibility the petitioners must be deemed to be within the remit of what they originally claimed to be contesting.

Evidence abounds on record of several exhibited pink sheets which were deleted by the petitioners from the original list that they were relying upon. This explains why I have stated elsewhere in this judgment that being the first of its kind in Ghana, there is the need for this court to define rules of

procedure in determination of such cases. **This will definitely be in tandem with Rules 69 c (4) (8) and (9) of C. I. 74 which gives power to the Supreme Court to inquire into and determine the petition, by leave of the court cross-examine and re-examine a party who has sworn an affidavit before the court, and the examination or recall of a witness for re-examination by the court**.

These are all novel provisions upon which the court may have to issue practice directions for the purposes of giving practical effect and demonstration to some of the above provisions.

Finally it has to be observed and noted that, since most of the crucial and critical primary sources of authentic records of any election are in the possession of the 2nd respondents, it should be clear that such documents must be easily made available to the court and by necessary implication to the contesting parties to solve issues of authenticity and genuineness of records when these arise from the hearing of an election petition.

With the above general comments, and the observation that the petitioners have to some extent provided credible evidence in the nature of evidence on the face of the pink sheets, it remains to be seen how they can succeed in proof of the various heads of claims of violations, malpractices, irregularities, etc. These must as it were then be aligned to the resolution of the memorandum of issues settled for and agreed to by the parties in order for a determination of the issues involved.

WHAT THEN IS THE CASE OF THE PETITIONERS

Dr. Bawumia, the 2nd Petitioner, in his testimony on the 17th day of April 2013 summarised the case for the Petitioners thus:-

> *"In our examination and analysis of the pink sheets in the areas of over-voting, in voting without biometric we found constitutional and statutory violations in the areas of over-voting in voting without biometric verification and in the presiding officer or the assistant not signing the results before declaration as required by law. We also found irregularities and violations in the areas of the large use of duplicate serial numbers on polling stations forms and duplicate polling stations codes. In our examination, we also found polling stations which we could not trace to the list of 26,006 polling stations provided by the 2nd respondent for the conduct of the election. My Lords, on the fact of the pink sheets, we also found evidence of a bloated voters register. So these were the broad irregularities, the constitutional and statutory violations, malpractices that we found in our examination of the pink sheets."*

The above summed up the various categories of constitutional and statutory violations, malpractices and irregularities that the Petitioners highlighted in their evidence before the court. These are:

1. Over-voting

2. Voting without biometric verification

3. No presiding officer signature on the pink sheets as required under the Constitution

4. Multiple use of duplicate serial numbers of pink sheets for polling stations.

5. Use of different results on pink sheets having same polling station code.

6. Non-existent 22 polling stations outside the 26,002 recognised ones or unknown.

7. Bloated voters register

CONSTITUTIONAL BASIS FOR CHALLENGING PRESIDENTIAL ELECTION

Before I proceed to deal with the above categories, let me deal briefly with a preliminary issue. This is the Constitutional Basis for challenging presidential results.

Undoubtedly, article 42 of the Constitution, 1992 provides as follows:-

"Every citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections or referenda".

This right has been conferred on all citizens of Ghana who have the qualifications stated therein, i.e.

i. Must be Ghanaian citizen

ii. Must be 18 years of age or over

iii. Must be of sound mind

These are the basic constitutional qualifications that will entitle a person who satisfies them to be entitled to be registered and thereafter to exercise that right to vote.

What must be noted is that, even though the said right may be said to be absolute in some respects, it does not confer an automatic right on a Ghanaian citizen of 18 years and over, to just walk into a polling station during an election and demand to exercise that right.

The constitutional right to vote enshrined in article 42 of the constitution 1992 is itself contingent upon some other factors, like being registered to exercise the right as a voter.

Article 45 (a) (b) (c) (d) (e) and (f) deals with the functions of the Electoral Commission such that it is empowered to compile the register of voters and to revise it at such regular intervals as may be determined by law.

Article 46 of the Constitution guarantees and preserves the independence of the Electoral Commission, whilst article 46 gives the Commission the power to divide the country into constituencies for purposes of parliamentary elections.

Article 51 of the Constitution 1992, actually confers on the Electoral Commission to make rules and regulations for the conduct of its functions. For the avoidance of doubt, the article provides as follows:-

> *"The Electoral Commission shall, by constitutional instrument, make regulations for the effective performance of its functions under this constitution or any other law, and in particular, for the registration of voters, the conduct of public elections and referenda, including provision for voting by proxy".*

It is therefore clear that, the provision of the right to vote in article 42 whilst appearing to be absolute, is itself contingent upon the rules and regulations made by the Commission for the conduct of the elections.

For example, if in the exercise of its functions, the Commission has advertised for registration of persons qualified to vote within a certain time duration and at designated polling stations, any qualified prospective voter who fails to avail himself of that opportunity to register, during that period and at a designated station cannot expect to exercise the right to vote, because he himself failed to exercise the right to be registered. It is thus to be clearly understood that, even though the Constitution 1992 has conferred on Ghanaian citizens, the right to vote, it is contingent upon certain other factors, the non occurrence of which will deny any qualified and prospective voter the chance and right to vote.

I articulated these positions clearly in my opinion in the case of *Ahumah Ocansey v Electoral Commission, Centre for Human Rights and Civil Liberties (CHURCIL) v Attorney General & Electoral Commission, consolidated [2010] SCGLR 575,* especially at 580 as follows:-

> *"Whilst the 1992 Constitution per article 42 allows all citizens of Ghana of eighteen years and above and of sound*

mind including prisoners both remand and convicted the right to be registered to enable them vote in public elections and referenda, there is still the need for a legislative framework within the confines of the Constitution (reference article 51) to regulate, control, manage and arrange the effective exercise of that function to ensure that the Electoral Commission is not stampeded into taking hasty decision which would result into chaos and confusion. Whilst the Tehn-Addy case is authority for the proposition that every sane Ghanaian citizen of eighteen years and above had the automatic right under article 42 of the 1992 Constitution, to be registered as a voter, the instant case is authority that irrespective of the provisions of section 7 (5) of PNDCL 284 remand and convicted prisoners confined in a legal detention centre have the right to be registered as voters for the conduct of public elections in Ghana subject to the Electoral Commission making the necessary legislative arrangements to take care of the control, management and regulatory regime of such an exercise.

Commenting further on the effect of articles 42, 45 (a) and 51 all of the Constitution 1992, I stated at page 662 of the above case as follows:

"In the instant suit, the words in article 42 which are germane to the entire suit have to be read together with the relevant and consistent provisions of the Constitution as a

whole and, in particular, articles 45 (a) of the 1992 Constitution, which mandates the Electoral Commission to compile the register of voters and revise it as such periods as may be determined by law; and also article 51, which also mandates the Electoral Commission to make regulations for the effective performance of its functions under the Constitution or any other law. It is important to note that article 51 specifically mentions functions like the registration of voters, conduct of public elections and referenda, etc."

The above opinion clearly establishes the principle that I have labored to explain above on the constitutional right to vote. What has to be taken into serious consideration is the fact that, no constitutional or statutory law can be effective if it does not take into consideration the existing conditions and circumstances of the society for which it was enacted or for whose benefit it was made.

In this instance, the maxim, *"ex facto jus oritur"* literally meaning *"out of the facts, grows the law"* has to be made to apply because if the Judges knew their facts very well such as I have labored to explain in this case, then an attempt to interprete the Constitution will help develop it into a living and organic document.

It is in pursuance of the above interpretation of the powers granted the Electoral Commission that the following legislations had been enacted to

govern, control and regulate various aspects of the 2012 Presidential and Parliamentary elections.

i. *The Public Election (Registration of Voters) Regulations, 2012 (C. I. 72) and*
ii. *Public Elections Regulations, 2012 (C. I. 75) already referred to supra.*

As far as I understand article 42, and 51 of the Constitution 1992, any prospective and qualified voter, who first refused to comply with C. I. 72 and did not register under that law cannot exercise the constitutional right to vote.

Secondly, having exercised the constitutional and statutory right to be registered, such a prospective voter must comply with C. I. 75 during the conduct of the elections if he wants his vote to be valid.

It should be noted that, any infractions of the laws in C. I. 72 and C. I. 75 in particular may render invalid the votes cast by a constitutionally qualified voter.

I have had to deal with this subject at some length because it appears to me that all the respondents are of the view that, because the right to vote is a constitutional right, no court, not even this Supreme Court has power to invalidate the exercise of

that right when infractions are made not of the voters making but of administrative officials.

I am of the considered opinion that such a way of thinking is not only absurd but will completely defeat the provisions in article 64 (1) of the Constitution 1992 which provides for the challenge of the validity of the election of a President.

I think, it will also be tidy at this point to tie in the submissions of learned counsel for the 1st Respondent in the concluding stages of his written address in which he chastised the petitioners of not exhausting the administrative procedures before rushing to court.

Out of abundance of caution, let me reproduce the said submissions of learned counsel for the 1st respondent on this point as follows:

> *"Respectfully, Your Lordships, we take the view that the nature of this Honourable Court's Article 64 jurisdiction to adjudicate disputes relating to presidential election is such as with the greatest respect, ought to be exercised with circumspection. Indeed, it is our considered opinion that it requires significant judicial deference to the Electoral Commission on a wide range of issues.*
>
> *We take the respectful view that the true intent and purport of the broad grant of jurisdictional power under Article 64 is that its exercise must be subject to the overarching constitutional scheme, including the balance of institutional*

roles and the need to guard against excesses. On this basis, we invite your Lordships to exercise judicial restraint and to defer to the Electoral Commission on matters that touch and concern the exercise of its core functions.

In the specific context of this case, the fact that Your Lordship have had to painstakingly pore over pink sheets for months and listen to tedious testimony on technical aspects of elections could havebeen avoided if the Petitioners were compelled to settle their grievances, in the first instance, through the administrative process available for redress before initiating their petition. In this way, all that Your Lordships would have been required to do in the exercise of your power under article 64 of the Constitution would have been to review the decision of the Electoral Commission in line with the constitutional standard of review under article 23 of the Constitution and decide whether or not it was reasonable and in accord with the requirements imposed by the Presidential Elections Act and the Public Elections Regulations."

At this stage, let me quote also verbatim the provisions of article 23 of the Constitution which provides as follows:-

Administrative Justice

"Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements

imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal".

Evidence abounds in this Court that the first point of call by the Petitioners was to send a letter of complaint to the Chairman of the 2nd Respondents in which they catalogued a number of irregularities and sought his intervention.

Exhibit N.D.C 43, which is a petition to the 2nd respondents by the petitioners which was tendered by Counsel for the 3rd respondents through the 2nd petitioner on 14th May 2013.

"The Returning Officer *9th December 2012*
Presidential Election 2012
Electoral Commission
Accra

Dear Sir

RE: REQUEST FOR AN AUDIT OF VERIFICATION MACHINES AND RECOUNT OF THE PRESIDENTIAL BALLOT

I write as Chairman of NPP to express concerns of our Party over the conduct of this year's general election, particularly with regards to the Presidential poll. I am doing so because I believe that the proper conduct and declaration of results of a credible process is the surest way to promote the peace and stability of our democratic nation.

I have attached here a copy of a statement I have issued, that has set out in detail our concerns.

I ask that you consider the widespread and systemic abuse of the electoral process, witnessed across the country and aided by H.E the President, John Dramani Mahama's statement for people to vote even if not verified by the machines, which is clearly unlawful, some of which are cited in our attached statement.

We request that you, as the Returning Officer of the Presidential Elections,

(i) Cause an audit of the Verification Machine to establish that it tallies with Constituency Collated signed results and

(ii) Order a re-collation of the presidential ballot at the constituency level to help establish the credibility and accuracy of this year's Presidential election.

This in my view would assist considerably to allay public anxiety, which is growing hour by hour and due to the announcements being made in the Ghanaian media. It would also obviate any legal and protracted judicial proceedings on the issues and permit the resolutions of our concerns promptly, to enable due declaration to be made.

In the light of the above concerns, we request for an immediate meeting with your good self to find a resolution to these matters before you announce the results of the 2012 elections.

Yours truly,
Jake Otanka Obetsebi-Lamptey
National Chairman, New Patriotic Party"

In the light of the above scenario, it is my opinion that, the Petitioners were pushed to this court albeit prematurely by the indecent haste of the Chair of the 2nd Respondent who took less than a day to address the concerns raised in the above petition and asked the petitioners to go to court.

Perhaps, if the 2nd Respondent had exercised a little bit of tolerance and discretion which are hallmarks of the type of office which the Chairman occupies, the quick resort to this court may have been avoided.

It should also be clear to all and sundry that time begins to run immediately the Presidential Elections results have been declared by the chairman of the Electoral Commission. This is further buttressed by article 64 (1) which provides a 21 day period within which the petition to challenge the election of the President must be presented. As far as I am concerned, the petitioners having been pushed to the wall by the 2nd Respondent, they then had to act timeoulsy to ensure that time does not run against them. In the circumstances I am unable to accede to learned Counsel for 1st Respondent, Mr. Tony Lithur's submissions in this respect,

questioning the proprietary or improprietary of the request considering the independent nature of the Electoral Commission vis-à-vis the Administrative bodies intended in article 23 of the Constitution 1992.

I am of the firm conviction that, the petitioners have lawfully and validly invoked this courts jurisdiction under article 64 (1) of the Constitution 1992 and this court rightly assumed jurisdiction in the matter.

I cannot but agree with the petitioners that in a petition of this nature, for the reasons stated hereunder, this Court can declare as invalid the election of any candidate as a President of Ghana, as the quotation from the written address of learned Counsel for the Petitioners, Mr. Philip Addison clearly depicts as follows:-

> "**REASONS TO DECLARE INVALID THE ELECTION OF A CANDIDATE AS PRESIDENT**

(a) The candidate declared elected as President of Ghana at the presidential election did not, in fact, obtain more than fifty percent (50%) of the total number of valid votes cast at the election;

(b) There has been non-compliance with or violations of the Constitution, the Regulations or any other law relating to the conduct of the election and that the non-compliance/violations affected the result of the election;

(c) The election was tainted by the perpetration of a corrupt, or other

criminal act, misconduct or circumstances which reasonably could have affected the outcome of the election;

(d) The candidate declared elected as President of Ghana was at the time of the election not qualified or disqualified for election as President of Ghana in terms of article 62 of the Constitution."

OVER-VOTING

Regulation 24 (1) of C. I. 75 provides as follows:

"*A voter shall not cast more than one vote when a poll is taken"*

When the above provision is compared with the entries in columns A,B & C that are required to be filled in on the pink sheets by the Presiding Officers before the commencement of polls and in the case of Column C after polls but before counting, then a somewhat clearer picture of what exactly over voting means can be imagined. This is because, if columns A,B and C are entered correctly on the pink sheets, then the number of ballots issued to the polling station will be known, the range of the serial numbers of the ballot papers will also be known as well as the number of voters on the polling station register, including the number of ballots issued to voters on the polling station register.

In column B for example, the number of voters on the polling station register will be stated and filled in together with those on the proxy list. The total number of the two items will give the total number of voters eligible to vote at the polling station.

If therefore at the end of the polls any of the following scenario does occur, then something irregular has occurred.

1. The total valid votes cast as found in the ballot box exceeds total number of ballots issued out.

2. The total valid votes cast as found in the ballot box exceeds the total number of voters on the register eligible to vote at that polling station.

Is this the phenomenon that is called over voting? In this case, the petitioners, speaking through Dr. Bawumia, the 1st and 3rd Respondents, speaking through Johnson Asiedu Nketia, and Dr. Afari Gyan for the 2nd respondents have all given their own definitions of what is over voting. I will therefore look at all these various definitions and attempt to see if a common thread runs through them.

DR. BAWUMIA'S DEFINITION

"Q. Can you tell the court what you mean by over voting?

A. Over voting comes in two forms. ***Essentially we have a principle of one man one vote as we have in the Constitution in the laws of Ghana. The two forms of over voting.*** *First, over voting would arise if the total votes in the ballot box as* ***recorded on the face of the pink sheets*** *exceeds the voters register at the polling station as recorded on the face of the* ***pink sheet****. Secondly, over*

voting would arise if the total votes in the ballot box as recorded on the face of ***the pink sheets exceed the total ballots issued*** *to voters recorded in Section C1 and C2 including proxy voters. So the total votes in the ballot box if they exceed the number of voters you have given ballot to, to vote then there is over -voting. So if hundred people line up and you issue them 100 ballots and you count at the end of the day and you find 150 ballots in the ballot box, then you have over voting.* ***I must add that this phenomenon of over voting was one that the 2nd respondent was very emphatic on before the election. The Chairman of the 2nd respondent made it very clear and for good reason, that if the ballots are counted at the end of the day and it is found that even one ballot exceeds what was issued by voters verified to vote,the results of that polling station will be cancelled.*** *My Lords this was because if that happens even if you have one ballot above what was issued, then the integrity of the entire voting process at that polling station is compromised. And yet my Lords the 2nd respondent not only made this clear but actually put this into practice during the 2012 elections."*

From the above quotation of 2nd Respondent's testimony on 17th April 2013, the following significant scenarios emerge for consideration. These are

i. If the total votes in the ballot box as recorded on the pink sheets exceeds the voters register as recorded on the pink sheets, then there is over voting.

ii. The second scenario is when the total votes in the ballot box as recorded on the face of the pink sheets exceed the total ballots issued to voters as recorded in columns C1 and C2 including proxy voters then there is over-voting as well.

In order to understand this second scenario, it must be clear what C1 and C2 refers to. The C1 and C2 are columns in the Ballot Accounting section of the pink sheet, normally referred to as the C column. This is to be filled in at the end of the poll but before the commencement of counting.

C1 is to the following effect – **what is the number of ballots issued to voters on the polling station register?**

C2 has the following question – **what is the number of ballots issued to voters on the Proxy Voters List?**

If this is the state of what the 2nd Petitioner meant by over-voting, then why did learned counsel for the 1st Respondent state thus in his address

"On what constitutes over voting, the 1st Respondent states as follows:-

> *"There is some divergence of opinion between the parties about what constitutes over-voting. Petitioners claim there are three definitions. The first one is the situation* ***in which the ballots in the sealed box exceed the number of registered voters in a particular polling station. That definition is accepted by all the parties.***

Dr. Afari-Gyan describes that situation as the classic definition of over-voting. That is where the agreement ends

Petitioners define over-voting further to include a situation in ***which the ballots in the ballots box exceed ballots issued at the polling station. The third definition is the situation where the issued ballots exceed the number of registered voters.“***

On the other hand, learned Counsel for the Petitioners, Philip Addison, in his address to the Court gave the following two scenario's as the classical instances of over voting which 2nd Petitioner referred to:

i. *Firstly, it is eminently clear that*, ***where all the number of people duly registered to vote at a particular polling station turn up on election day to vote, (and this can be discovered from the number of ballots issued); the number of ballots found in the box at the end of the polls cannot be more than the number of voters registered to vote at that polling station.”***

The above is quite straightforward and is a common sense approach to the issue.

The second instance of over voting raised by learned Counsel for Petitioners is as follows:-

(2) *"Where a number less than the number of registered voters at a particular polling station show up to vote (and this can also be determined from the number of ballots issued)* ***it goes without saying that the number of ballots found in the box at the close of the polls should not be more than the number of ballots issued to the voters."***

In real terms, this second scenario is only a natural deduction from the first one stated supra and it logically flows from it.

To put matters in proper perspective, I think it will be very beneficial for our purposes if we consider in some detail the evidence and the explanation of Dr. Afari Gyan on what he meant by classical definition of over voting alongside that of the witness for the 1st and 3rd respondents, Johnson Asiedu-Nketia.

BEGINNING WITH DR. AFARI GYAN

Q. Oh yes my Lords the classical definition of over votes is ***where the ballots cast exceed the number of persons eligible to vote at the polling station or if you like the number of persons on the polling station register that is the classical definition of over voting.*** *Two new definitions have been introduced there is nothing wrong with that but I have problems with this new definition proposed and the problem I have with both definitions is that they*

limit themselves ***visibly to what is on the face of the pink sheet as I understand the definition.***

Q. Definition by?

A. The petitioners of the two definitions of over voting, where the number of ballot exceed issued the number of voters as indicated on the pink sheet that is the definition.

Baffoe-Bonnie: Dr. all this while we are dealing with the pink sheets in one breath the pink sheet is your reference point so in this case just let's limit ourselves, I heard you say is an excess votes or something

Witness: I said when you see there will be an excess of votes.

Baffoe-Bonnie: So it will not be an over voting

Witness: Well you see clear how you call it, this is why I have problem with this definition ***is that it limits itself exclusively to what is on the face of the pink sheet, what if what is on the face of the pink sheet as we have seen.***

Dotse: Before you proceed you were giving us the problems with the two new definition of over voting. Can you finish the problem associated with the two new definitions?

Witness: ***I have a general problem with any definition of***

over voting that limits itself exclusively to what is on the face of the pink sheet because what is on the face of the pink sheet.

Witness: *My Lords we have just seen an instance where on the face of the pink sheet the Presiding Officer said he was given 4 votes whereas in fact upon close scrutiny he was given 325 votes so any definition of over voting that limits itself suggests to me personally that you are saying so to speak* ***that the face of the pink sheet never is and might be an error on the face of the pink sheet.*** *If there is an error on the face of the pink sheet it can be corrected by reference to the register itself so my problem is that this definition does not make any reference whatsoever to the register which is the based document for the conduct of the elections that is my problem.*

Dotse: *Who does the correction you are talking of?*

Witness: *Well if I were to read this document that one that said 4 and has given the serial range suggest that he has been given 325 and has actually conducted an election involving 198 people then I would be incline to take the 325 as the correct representation and not the 4.*

Baffoe-Bonnie: *In that case the correction is done by recourse to other*

figures on the pink sheet which you say can also be wrong, but in the other case what you are saying is that you have to make recourse to the register which means that for example the accounting information: what is the number of ballot issued to voters on the polling station register, you see we have a situation where we have the polling station register and we have the question which says the number of people who have been issued with but if you have to make recourse to the register to find out whether the number voting is actually over and above the number registered then we don't even make room for people dying or people not voting, on the voters register you may have 100 and we may actually have and as you have rightly aware with your 34 years or so you will realize there is hardly ***a 100% voting in any situation so if you say that over vote is only when it is above the number of people in the register that is duly something your****...*

Witness: *Your Lordship I have not said over voting is only when I*

said that was the classical definition now we have adopted a new technology ***I was going to go on to that and we spent a lot of money in buying that technology and that technology should help us modify our definition of over voting that I am saying, I am making technical point when you limit***

it only to what is on the face of the pink sheet then I have a problem with it."

THEN JOHNSON ASIDEU-NKETIA'S DEFINITION

This is the definition of over voting by the witness for 1st and 3rd respondents, Johnson Asiedu Nketia.

Q. What is your response to those allegations as made by the petitioners?

A. My Lord I can state that there was nowhere in all the 26,000 polling stations where over voting took place.

I am saying this because we have ***come to know over voting to mean an occurrence where the number of votes found in the ballot box exceed the number of people who are entitled to vote at that polling station. So that clearly is my understanding of over voting and I do not have any indication of this happening in any of the 26,002 polling stations which were involved in the 2012 elections.***

Q. You heard the 2nd petitioner also indicate that over voting is where the ballots that are tallied at the end of voting for each candidate where those exceed the number of ballots issued in a polling station?

A. I have heard about it but that was my first time of hearing over

voting being defined that way in all my 34 years experience in election in this country.

Q. *In respect of the over voting allegation, you also heard the 2nd petitioner testified in relation to pink sheets where no number has been entered in the column about ballots issued at a particular polling station, where no number was present, it was blank. What do you have to say to that?*

A. *Yes my Lords.* ***This must be as a result of some clerical error because ballot papers are issued and then voting takes place, then the box is opened at the close of voting, counting takes place, sorting takes place, the tallies are made and the agents of the parties attest to the results that are obtained, they certified the results that are obtained and my Lords I think that if no papers were issued then the election could not have taken place at all****. So I think that must be a clerical error and at all material times, there are processes where people who are dissatisfied or parties who are dissatisfied with the outcome can lodge a specific complaint about what they are dissatisfied with on the spot and action is taken subsequently on those complaints. And I am not aware of any polling station where such complaints have been lodged besides what were tendered about five or so polling stations by the 2nd petitioners."*

Based on the above pieces of evidence, learned Counsel for the 1st Respondent, Tony Lithur submitted very forcefully that with the introduction of new technology, to wit biometric verification, whilst it would be worthwhile to look at new definitions of over voting as stated by the petitioners, it would be wrong to limit the extent of the newer expanded definitions to entries made on the pink sheets alone, without looking at Polling station register, the machines and conduct of the elections. According to learned counsel, if wrong entries are made on the pink sheets, **a phenomenon learned counsel admitted has been demonstrated to have happened during the trial**, it would be wrong to disenfranchise voters thereby.

It is however very significant to note that there has been an admission of occurrence of entries on the pink sheets which learned Counsel conceded are errors. **What then is to be done to those entries, since they were the basis of the declaration of the results by the 2nd respondents?**

In an attempt to offer some explanation as to how this phenomenon of wrong entries which are errors are to be handled, Dr. Afari Gyan testified as follows:-

> *"2nd Respondent in his evidence on 3rd June stated thus on issue of over voting:*

Q. *You mentioned in your evidence some of the errors that were committed by Presiding Officers in completion of the pink sheets. Do you have a general comment on that?*

A. *My general comment will be that the errors must be looked at very closely in order to be able to reveal their true meaning. I must say that at the end of the day, it is the Electoral Commission that appointed these people, these officials and we are prepared to take responsibility for their actions.* ***But errors are to bedistinguished from intentional wrong doing.*** *A mistake is something that can be detected and corrected and we all make mistakes. So why we take responsibility for their actions, so that we will keep in mind, may be all of us make one mistake or the other in the course of our work, but I will also hope that the candidates will take responsibility for the agents they appoint.*

Witness: ***Let me put it in a very short sentence. If I notice on the face of the pink sheet that there appears to be excess votes, I will subject the situation to very close scrutiny before I take firm determination as to what to do.***

Q. *Where there is an excess of votes in the ballot box in comparison with what is written on the pink sheet as the votes issued to the polling station, what would be your reaction when you see such a pink sheet?*

A. *As I said just a moment ago, I will subject the situation to very close scrutiny. There are a number of things that will have to be done. I will not assume that the Presiding Officer had done anything directly or wrongly, I will seek to redo what was supposed to have beendone,* ***I will look at the ballot papers to find out whether all of them fall within the serial range of the ballot issued. I have narrated some of these things before that I will go through the things that I mentioned. But I must tell you that, I must do everything possible to make sure that indeed, there are excess votes because we are dealing with not abstract numbers but votes of people who have a constitutional right to take part in the choice of their leaders."***

Based on all the above pieces of evidence, learned Counsel for the 1st Respondent finally concluded his submission thus:

"It is clear that, Petitioners have taken a very unsustainable and unrealistic position in respect of what would constitute over voting. Their position is that you look only to the form and not the substance. In doing so, they discount any other source of information, including the primary sources from which one can verify the information on the voting accounting section of the pink sheet. In fact, they make no allowance for any clerical or arithmetic errors on the part of officials of 2nd Respondent in filling the said ballot

accounting section, and, according to them, whatever information is on the voter accounting section is sacred. In the words of 2nd Petitioner.

"You and I were not there, the evidence is on the face of the pink sheet."

Learned Counsel for the 1st Respondent then referred to the Canadian case of **OPITZ** and quoted from pages 38 and 39 of the report to draw necessary comparison, to the effect that, the imperfections of the Presiding officers in filing the forms should therefore not result in the annulment of the votes of the affected polling stations affected by the error entries.

"Juxtaposing the evidence in this case with the Canadian case, this is what the 1st Respondent's state:

This situation is not different from the one described by Dr. Afari-Gyan in relation to the temporary officers that 2nd Respondent employs to run general elections. The imperfections of the Presiding Officers in filling the forms should therefore not result in the annulment of the votes at the affected polling stations. Indeed on pages 38 and 39 (paragraph 57) of the Opitz case the Canadian Supreme Court held that

> "*In our view, adopting a strict procedural approach creates a risk that an application under Part 20 could be granted even where the result of the election reflects the will of the electors*

who in fact had the right to vote. ***This approach places a premium on form over substance, and relegates to the back burner the Charter right to vote and the enfranchising objective of the Act.*** *It also runs the risk of enlarging the margin of litigation, and is contrary to the principle that elections should not be lightly overturned,* ***especially where neither candidates nor voters have engaged in any wrongdoing****. Part 20 of the Act should have be taken by losing candidates as an invitation to examine the election records in search of technical administrative errors, in the hopes of getting a second chance".*

Learned Counsel continued as follows:

"*By contrast, if a vote cast by an entitled voter were to be rejected in a contested election application because of an irregularity, the voter would be irreparably disenfranchised.* ***This is especially undesirable when the irregularity is outside of the voter's control, and is caused solely by the error of an election official".***

SUBMISSION OF 2ND RESPONDENT

On his part, learned Counsel for the 2nd respondent, James Quashie-Idun referred copiously to the definitions of over voting and the statutory definitions as well as the classical definition of Dr. Afari Gyan already referred to supra. Learned Counsel also referred to *Regulation 36 (2) (a) of C. I. 75* to buttress his point in addition to *Regulation 24 (1) of C. I. 75*

already referred to supra and of particular importance to the submission of learned Counsel for the 2nd Respondent is his reference to exhibits EC 8, EC9 and EC10 which were all tendered by the 2nd respondent's witness Dr. Afari-Gyan to debunk the allegations of over voting in some three polling stations.

Learned Counsel also reiterated the earlier contentions of the 1st and 3rd respondents to the effect that the evidence offered by the petitioners on their 2nd definition of over voting which is based entirely *"on the face of the pink sheets",* are based only on errors made in completing the ballot accounting part of the pink sheets.

Counsel concluded that if any over-voting had occurred, it would have been detected during the counting of votes and the Polling agents would have protested. Since there were no protests, Learned Counsel concluded that there were no instances of over voting and urged this head of claim to be dismissed.

SUBMISSION BY COUNSEL FOR 3RD RESPONDENTS

Even though the submissions of learned Counsel for the 3rd respondent Tsatsu Tsikata are not fundamentally different from the other respondents, there are some striking differences which I need to highlight.

In the first place, the phenomenon of blank portions in the C and sometimes D columns of the pink sheets had been highlighted. **In this respect I cannot but agree with learned counsel for the 3rd**

respondent that it is wrong to deduce that any blank on column C or D amounts to over voting.

However, what has emerged from the very extensive and rigorous cross-examination of Dr. Bawumia by Counsel for 3rd respondents is that, there were indeed entries on some of the pink sheets of the polling stations which on the face of it gave the impression that there was over voting. But the respondents contend that these are only clerical errors.

Secondly, learned counsel made reference to exhibits of polling station pink sheets outside the range of exhibits mentioned in the affidavit of the 2nd Petitioner. **So far as I am concerned, the real issue for determination is whether there was any instance of over-voting as denoted by the definition of over-voting and whether those particulars exhibits i.e. polling station pink sheets had been captured by the KPMG report**, and is also part of the range of exhibits mentioned in the affidavit.

If it is captured by the KPMG report, then this Court would have to determine whether that instance of over voting affected the declaration of the results, or constituted mere errors which only go to form and not to substance.

Thirdly, it has to be noted that, the evidence of the petitioners on over voting is really not based on directly accusing anyone of voting more than once as is prohibited by law, but solely on the basis of entries made on the pink sheets.

Learned counsel for the 3rd respondents, made his strongest attack to this phenomenon of over voting in a very skating and concluding remark which I consider as inappropriate use of language as follows:-

> *"The cavalier approach of the 2nd petitioner towards the votes of citizens, which makes him eager, for instance, to have votes cancelled because of his dogmatic view that it is figures on the pink sheets that should be taken and not words, is totally at odds with the significance that our Lordship have given in many cases before this Court to the importance of protecting the right to votes of the citizens of Ghana. Seefor instance* ***Tehn-Addy v A.G. & Electoral Commission 1997-98 1 GLR 47, Apaloo v Electoral Commission 2001 – 2002 and Ahumah-Ocansey v Electoral Commission & Others****, already referred to supra."*

Whilst not downplaying the constitutional significance of the above cases, it must also be observed that, the importance of entries made on the pink sheets should also not be glossed over as being of no significance. This is because, if my understanding of the evidence on record is anything to go by, then entries made on the pink sheets, which constituted the primary source upon which constituency collation centre results were collated and transmitted to the 2nd respondents strong room in Accra and which formed the basis of the declaration of the Presidential results by the Chairman of the 2nd respondent which are under challenge in this Court then the pink sheets, cannot be treated lightly, except in cases where it is clear that the pink sheet entries are errors which can be corrected by reference to other more

authentic primary sources which may include entries on the pink sheets itself, the polling station register and the B.V.D.

The ***Apaloo v Electoral Commission*** case referred to supra, is authority for the proposition that once the Electoral Commission has published Constitutional Instruments numbers C.I. 12 and C.I. 15 respectively which had regulations dealing with identity cards used in an election and under which the 1996 elections were held, there being no distinction between photo I.D. and thumbprint cards, the subsequent publication by the Electoral Commission of a Gazette Notice, containing directives limiting the I.D cards to be used for the 2000 election to photo I.D cards only constituted an indirect amendment of relevant portions of regulations in C. I. 12 and C. I. 15 and this was held to be ultra vires articles 51 and 297 (d) of the Constitution 1992.

This Apaloo case is also authority for the proposition that the authority given to Presiding Officers and their assistants to verify and check the identity of prospective voters cannot be delegated to candidates agents, highlighting the maxim of *"delegatus non potest delegare".* Delivering his opinion in this case, my very respected brother, Atuguba JSC made the following pronouncements.

> *"The ascertainment of the identity of a prospective voter is part of the conduct of public elections* ***and as the constitution places that duty on the Electoral Commission, it can only do so by itself and its proper agents… To surrender the judgment of the Presiding Officer as to the identity of a voter to the***

candidate's polling agents, is in effect, to delegate that function to those agents, contrary to articles 45 (c) and 46 of the Constitution."

It can therefore be seen clearly that despite the fact that the Supreme Court upheld the constitutional right of the prospective voter of his right to vote and was prepared to protect that right, the protection was done in tandem with the other statutory provisions that the Electoral Commission was permitted by article 51 of the Constitution to enact i.e. C.I. 12 and C. I. 15 respectively.

In the instant case, it would appear that once the directives of what constitutes over voting are in Regulation 24 (1) of C. I. 75, the Courts also have a duty to purposively look at the effect of those provisions and the constitutional right to vote.

Similarly, it should be noted that, the *Tehn-Addy v Electoral Commission case* is also authority for the proposition that the right of a citizen to register is an inalienable right which the Supreme Court observed the Electoral Commission failed to register the plaintiff therein and therefore enforced it.

I will however be comfortable with a proposition which states that since the right of a citizen to vote is constitutionally guaranteed by and under the Constitution, that right must always be protected and defended to ensure that participatory rights which are part of our democratic rights via the electoral process is well guaranteed and secured.

In this case, the rights of the voters in the December 2012 presidential election did not come under threat, and is still not under any threat. The plaint of the petitioners is to invite this Court to annul results on the basis of entries on the face of the pink sheets of what appears to them to be infringements under the law. Is this a legitimate request or claim? I think so. **But this Court must be in a position to distinguish between clear instances of over voting which arise from clear breaches of the law in *Regulation 24 (1) of C. I. 75* as against errors made by the presiding officers in the filling of the pink sheets etc**. For example, if it is clear on the pink sheet, that instead of stating the correct number of ballot papers that had been issued to a polling station as 350 made up of (2) 100 booklets (2) 50 booklets and (2) 25 booklets making 6 booklets in all, the Presiding officer merely states 6, but gives the range of serial numbers from which the correct figure of 350 can be deduced then it would be wrong to use such an entry to annul results.

In such an instance, once the information to correct the error made on the pink sheet can itself be gotten from the pink sheet, then it should be perfectly legitimate to use such an information to correct the error.

In situations of this nature the number of registered voters, and those who actually were issued with the ballot would have exceeded the number 6 wrongly filled in on the pink sheet. **Any mechanical interpretation of the entries on the pink sheets will not only be absurd but lead to incongruent results and consequences.**

The Court should however use information on the face of the pink sheets to correct this latent error. However, if the information to correct the error on the pink sheet cannot be verified from the pink sheet, and that figure had been used to declare the result, and if the wrong result has had an effect on the declared result, then it should be possible to annul it, if there are no credible primary sources of evidence like the polling station register to be used to cross-check such an error entry.

In view of all the above discussions **I will define over voting to mean an instance where total votes cast as found in the ballot box exceeds the total number of ballots issued out to voters at that particular polling station.**

So far as I am concerned, this definition should encompass all other definitions be they classical or otherwise. This is because, votes cast as found in the ballot box, be they valid or rejected votes would have been issued based first after the voters have been verified by the machine and also based on the polling station register. **Thus, assuming there is a 100% turn out at a particular polling station, then the votes cast as found in the ballot box will not and should not exceed, first the ballots issued out and also total number of voters on the register at that particular polling station including proxy voters.**

It is only when there is a consistency between the entries on the pink sheets and the primary sources which formed the basis upon which the entries have been made and these include the polling station register, ballots issued to the polling station and the

results as counted and declared that the entries on the pink sheets can be said to be impeccable and not subject to any variation, change or correction.

It has to be noted that, it is also possible to have a broad based definition of over-voting which will link the total votes cast as found in the ballot box with the number of voters on the polling station register. This is because, whilst the number of voters on the polling station register is the maximum number of persons entitled to vote at a polling station, the number of ballots issued out to voters on the polling station register, represents the actual ballots issued out to voters who turned out to vote.

This broad based definition will allow situations where the Presiding officer has not made a diligent count of the ballots issued out or did not fill in column C1 on the pink sheet to enable that determination to be made using that formula.

What should be noted however is that, no matter what definition is applied, the value is the same. The only problem is that, if a Presiding officer has refused and or neglected to fill in column C or C1 in particular, or columns A, B, C or D as has been found by me to have happened in some cases, then the polling station voters register and the record of ballots issued to this polling station remain the only authentic sources by which the issue or phenomenon of over-voting can be verified.

For purposes of transparency, I believe the time has come for the 2nd respondent's to come out with a Constitutional Instrument to regulate and direct the officers it engages for the conduct of elections in the country,

such that more severe sanctions than is currently applicable in *PNDCL 284, section 30 (a) & (e)* can be applied to them when flagrant and inexplicable infractions occur in their performance of their official duties has been proven to have happened.

This phenomenon has become very critical because of observations I have made in a very detailed study and analysis of pink sheets stated in Table 10A of volume 2B of the Petitioners address which is List of pink sheets the Petitioners have relied on to prove the instances of over-voting, describing them as (Respondents preferred Data Set) whatever that means.

In this examination, I found out that there were some clear instances of over-voting. This resulted after comparison of the entries in C1 to Total Votes in ballot box. Wherever there was an irregularity, resort is made to other columns in the C column in order to account for the ballots.

When the ballots issued out cannot be reconciled with the ballots found in the box using all available means of verification on the pink sheet, then the conclusion is reached as an over- vote.

Secondly, the study and analysis revealed that there was either wrong addition made of the entries on the pink sheets, or there was error on the pink sheets. In such a situation, I think the errors have to be corrected if possible by reference to primary sources of information.

Thirdly, there are instances where one can observe that the entries have not been completed, or errors made in the filling process. Here again, if the

evidence to correct the errors can be gotten from the pink sheet, or from records available to the polling station, then it should be used.

Perhaps this explains the reason why it is desirable for such concerns to be raised at the polling station with the view that they be corrected at the polling station.

This is by no means an endorsement of the view that this Court has no jurisdiction in the matter. It is clear from the Constitution 1992 and the Presidential Election Act, 1992, PNDCL 285 that this Court has jurisdiction alongside C. I. 16 as amended by C. I,. 74 to question such infractions of election regulations.

Fourthly, entries on some of the pink sheets clearly create serious doubts about the authenticity of entries on the pink sheets. This is because even though the pink sheets are photocopies, you see instances of fresh writing on them and other entries which make it doubtful for it to qualify as an over-vote. **In this and other instances, the production of the original pink sheet would have solved the problem.**

In the fifth place, there were simply blanks in all the columns except A or B and the results. What happens in instances like this? The guess is anybody's that such pink sheets cannot be relied upon.

In the sixth instance, the writing on the pink sheets are clearly ineligible in some of the columns or the entire sheet, apart from the results. Sometimes, the results are also not clear. In such cases, since we rejected an earlier application for the original pink sheets to be provided by the 2nd

respondents, the writings on the pink sheets remains ineligible. The Petitioners unfortunately have to be declared as not having proven their case in such instances.

Finally, in some instances, the observation is that the interpretation put on the pink sheets by the Petitioners has been found to be clearly wrong and untenable.

In retrospect, I am of the considered view that, taking the sheer numbers of the affected pink sheets in this category into contention, it would have been proper for the court to have ordered an Audit of the pink sheets, in this over voting and indeed the other categories, in order for the count of all pink sheets that qualify to be considered in line with the definition stated supra. This would have been consistent with the request of learned counsel for the petitioners, Mr. Addison who raised the issue on 23rd May 2013 but did not pursue it.

One would ask, what will be the effect of such an audit? In my mind, the effect of such an audit will be to detect if for instance out of the number of pink sheets the petitioners allege in this category of over voting – reference tables 10 and 10A in volume 2B of Petitioners address, pages 298-328 and 330-358 which gives the list of polling stations where over-voting occurred, in general and also using the respondents preferred Data set respectively those that indeed qualify under this definition can be identified without any reservations.

Taking all the above factors into consideration, it would have been fairly easy to tally the number of votes as far as my eyes can see in this over-

voting category and decide the figures that are to be annulled in respect of the 1st Petitioner and the 1st Respondent. But there is a key determinant in the analysis on the pink sheets which may affect any tally for any of the candidates. These are the entries in the C3 column of the Ballot Accounting section on the pink sheets. As I have indicated elsewhere in this judgment, there appears to me to have been sufficient indication from the 2nd Respondent's to the presiding officers not to fill in the C3 column because of opposition from the political parties. As a consequence Form I C which was going to be the yardstick used to fill in that column was not even distributed to any of the polling stations.

As a result, I am of the considered view that, in order for any meaningful tally of the votes in this category of over -voting to be properly made, any entry in the C3 column which was used as a basis for this conclusion as an over-vote has to be deleted. It will therefore be difficult, if not impossible for me, considering the time constraints to make these detailed and thorough analysis before coming out with the tally in the judgment.

In these circumstances whilst upholding the principle of over-vote as a phenomenon capable of having votes annulled, I will hasten slowly with the following as a roadmap.

All pink sheets in Table 10A of volume 2B of the petitioners address pages 330-358 already referred to supra, which are the pink sheets identified and classified by the petitioners as being in this over-voting category, using the Respondents preferred Data Set, (whatever that means) have to be sorted out.

In this instance, an audit will have to be made, to clean the pink sheets in that Table 10A, by ensuring that the following conditions have been met:-

1. That all the pink sheets have been captured by KPMG.

2. That all the pink sheets where the C3 column was used as a phenomenon to denote this instance of over-voting should be deleted and cleaned.

3. The residue of the pink sheets in Table 10A referred to supra are those pink sheets that are to be tallied for the 1st Petitioner and the 1st Respondent respectively and the total votes therein annulled from their aggregates.

That is the only way by which my judgment will be consistent with my decision on the C3 column.

For now, my decision on the over-voting category is that in so far as the entries on the pink sheets constitute over voting in line and consistent with relevant statutes, and the definition of over voting as has been stated supra, those votes on the pink sheets that qualify under this definition and clean up exercise under the road map agenda should be annulled after due examination. In all other cases, where the entries on the pink sheets indicating over -voting are errors in the filling of those pink sheets and the information on the primary source is clear and verifiable to correct the errors then no over-voting occurs. In such instances, there is no over -voting.

VOTING WITHOUT BIOMETRIC VERIFICATION

The Petitioners state in their opening address on the above issue as follows:-

> *"Voting without biometric verification is also linked to the protection of the integrity of the electoral process as well as to the principle of universal and equal adult suffrage. It is to ensure that only persons entitled and properly accredited to vote exercise their franchise in accordance with the law."*

I have already discussed the ingredients of what the constitutional right to register and vote in public election means as contained in article 42 of the Constitution 1992. There is no need to re-argue and discuss the same points here. Suffice it to be that, pursuant to the above constitutional rights and those of the Electoral Commission to make rules and regulations governing the conduct of public elections in Ghana, C. I. 72 and C. I. 75 have been enacted.

It is therefore pertinent to consider some of the relevant provisions of C. I. 75 as follows:-

> "**Definition under Regulations 18 (1), 47 (1) (3) and 34 (1) (c) all of C. I. 75**

Regulation 18 (1) of C. I. 75 makes it mandatory for every polling station to be provided with a biometric verification device. It reads:

*"The returning officer **shall** provide a presiding officer with: (a) a number of ballot boxes and ballot papers; (b) **a biometric verification equipment**; and (c) any other equipment or materials that the commission considers necessary."*

Regulation 47 (1) of C. I. 75 defines a "biometric verification equipment" to mean:

…"a device provided at a polling station by the (Electoral) Commission for the purpose of establishing by fingerprint the identity of the voter".

Regulation 30 of C. I. 75 reads:

(1) A presiding officer may, before delivering a ballot paper to a person who is to vote at the election, require the person to produce (a) a voter identification card, or (b) **any other evidence determined by the Commission, in order to establish by fingerprint or facial recognition that the person is the registered voter whose name and voter identification number and particulars appear in the register.**

(2) The voter shall go through a biometric verification process.

Regulation 34 (1) of C. I. 75 lists the specific grounds upon which voting can be adjourned:

*"Where the proceedings at a polling station are interrupted or obstructed by (a) riot, open violence, storm, flood, or other natural catastrophe, or (b) **the breakdown of an equipment, the presiding officer shall in consultation with the returning officer and subject to the approval of the Commission, adjourn the proceedings to the following day."***

From the above legislation, it is clear that before a qualified and registered voter is given the ballot to exercise his or her franchise, the Presiding Officer shall perform all of the following functions:-

i. Require the voter to produce an identity or any evidence to establish finger print or facial recognition that the prospective voter has his name on the register.
ii. Thereafter, the voter shall go through a process of biometric verification process.

It is to be further noted and observed that, so important is this issue of biometric verification that Regulation 34 (1) of C.I. 75 states several reasons some of which are *"force majeure"* or *the* breakdown of a

biometric equipment as some of the reasons to adjourn polling at a station to the next day.

As was rightly stated by the Petitioners, biometric verification is basically the fact of verifying that a person is whom he says he is and it is a unique way of indentifying some distinct biological traits of the person. **For now, it appears the biological verification process produces the true identity of the person no matter the methodology that is used.**

It is therefore re-assuring that Dr. Afari Gyan in his cross-examination on 10th June 2013 stated in answer to questions germane to the above issue as follows:

Q. Would you agree that BVD device reinforces the principle of one man, one vote?

A. Yes my Lord I would agree that it reinforces and it enhances it.

Q. The BVD device also keeps account of successful verifications?

A. My Lord it does

Q. And therefore if election officials do what they are supposed to do, nobody can vote more than once?

A. My Lords that will be correct

Learned Counsel for the Petitioners in re-emphasising this issue of biometric verification as a pre requisite before the exercise of one's right to

vote and in an attempt to show that the 2nd Respondent properly enacted C. I. 75 referred this Court to a number of local and foreign cases, some of which are:

1. **Apaloo v Electoral Commission [2001-2002] SCGLR I**

2. **D.P.P v Smith [1988] UK HL 11 (12 July 1990)**

3. **Anderson v Celebreeze 460 U.S. 780 (1983)**

4. **New National Party v Government of the Republic of South Africa & Others (CCT9/99) 1999 ZACC5, 1999 (3) S.A 191, 1999 (5) B CLR 489, (13 April 1999)**

5. **Norman v Reed 502 US 279, 288 – 289**

6. **Mackay v Manitoba 1989 2 S.C.R 357 at 361-362**

7. **Asare-Baah III v A. G & Electoal Commission [2010] SCGLR 463 at 470-471 per Wood C.J.**

8. **Republic v Tommy Thompson Books Ltd. [1996-97] SCGLR 804 at 851**

9. F. Hoffman – La Roche & Co v Secretary of State for Trade & Industry [1974] 2 A.E.R 1128 HL

10. The Australian case of Commonwealth v Tasmania (The Tasmania Dam Case) 158 CLR. 1

11. William Crawford v Marion Country Election Board 553 US (2008)

12. See also Ahumah-Ocansey v Electoral Commission, Centre for Human Rights and Civil Liberties (GHURCIL) v A. G. & Electoral Commission – Consolidated, already referred to supra.

13. Gorman v Republic [2003-2004] 2 SCGLR 784

14. The Indian Supreme Court case of A. C. Jose v Sivan Pillai & others 1984 SCR (3) 74 at 75 paras 86 H-89G

15. Bush v Gore 531 U.S 98 148 L.ED 2nd 388

16. U.S case of Moore v Ogilvie, 394 U.S. 814, 89 S. CT. 1493, 23 L. Ed. 2d 1 1969

17. Canadian Supreme Court case of R v Oakes, 1986 Can. LII 46 (SCC) 1986 S.C.R. 103 at 136

The gist in some of the above cases is that, despite the grant of the right to vote which in most cases is a constitutional right, the Electoral Administrator, in this case the 2nd Respondent, has an equal constitutional and statutory duty and right to make rules and regulations for the proper conduct of such an election.

Thus, where the regulations enacted by the 2nd Respondent, in this instant, C.I. 72 and C. I. 75 have been properly and validly enacted by the legislature in accordance with the requirements of the Constitution reference article 11 (7) (a) (b) and (c) of the Constitution, 1992, it possesses all the trappings of validity. As such these subsidiary legislations must be read alongside the Constitution to give meaning and content to it. It was certainly in this context that the Supreme Court spoke with one voice through Prof. Ocran JSC of blessed memory in the ***Gorman v Republic case***, supra as follows:-

> "*However, we must always guard against a sweeping invocation of fundamental human rights as a catch-all defence of the rights of defendants. People tend to overlook the fact that the Constitution adopts the view of human rights that seek to balance the rights of the individual as against the legitimate interest of the community. While the balance is decidedly tilted in favour of the individual, the*

public interest and the protection of the general public are very much part of the discourse on human rights in our Constitution."

It must therefore be well understood that, once the enactment of C.I. 72 and C.I. 75 have not been proven to have infringed the rights of persons or any constitutional provisions protecting the rights of citizens to vote, those provisions must be given their full legal effect and force.

The other cases also reiterate the fact that the Electoral Administrative bodies must exercise their mandate whenever required within the framework of constitutional provisions, statutory in respect of substantive or subsidiary legislation and exercise their discretion only when the law so directs or permits. The powers of the Electoral bodies are not meant to supplant the Constitution and the law, but rather to supplement them. Since I have not noticed anything unconstitutional about the provisions in C.I. 75 on biometric or face only verification before voting, I am not interested in discussing the other cases save those that are relevant in some other core areas of relevance.

I have to come to the above conclusion despite the submissions of the 1st and 3rd Respondent's to the contrary on this issue. Learned counsel for the 1st Respondent's in his written address stated as follows:-

"On 1st Respondent's arguments on non legal effect of biometric verification

> Your Lordships, the claim by the Petitioner's that there has been a violation of the rules relating to biometric verification is based on an opportunistic reliance on sub-regulation (2) of Regulation 30 which provides that: "(2) The voter shall go through a biometric verification process." Notwithstanding that this sub-regulation does not define what view from the definition of biometric verification equipment in Regulation 47 that it means the process of verifying the identity of a voter by establishing by fingerprint the identity of the voter.
>
> Even if this extrapolation were correct, we submit that within the broader context of our electoral laws, a more expansive notion of biometric verification is necessary in order to give meaning to the right to vote as guaranteed by the Constitution. The restrictive approach being put forth by the Petitioner's harbors the potential of nullifying or impairing the right of ordinary citizens who cannot be verified biometrically by finger print to vote. For example, persons who are lepers, or have coarse fingers due to farming or other manual labour or double amputees cannot vote by reason of this restrictive meaning of biometric verification."

With the greatest respect, I do not accept the above submissions and I reject them. This is because it seeks to give election officials undue discretion which reliance on biometric verification sought to remove by making our electoral process more transparent.

The contention of the Petitioner's which has been denied by the Respondents, is that there had been many instances of people voting

without biometric verification as is evident on the face of the pink sheets. The 2nd Respondent in particular has stated that, having examined all the pink sheets in this category, their analysis confirmed that no voters were allowed to vote without verification at any polling station.

This is in direct contrast to the evidence of Dr. Afari Gyan that it could be possible for all prominent persons like Chiefs to vote without a biometric verification. I must concede, that this statement coming from the Electoral Commission Chairman is very unfortunate and completely nullifies the effect of the provisions of Regulations 30 (1) and (2) of C. I. 75, which states that ***"The voter shall go through a biometric verification process."***

This in effect means that, every prospective voter, must go through the process of biometric verification before casting his or her vote. Any votes that are therefore found to have been cast without this biometric verification stands the risk of being nullified.

Based on the above analysis, the Petitioners concluded their submissions on this aspect of the case by stating as follows:-

> *"It is our respectful submission that, when the account is taken of all the circumstances surrounding the conduct of the elections and the inconsistent and implausible answers given by Dr. Afari-Gyan, petitioners have on the balance of probabilities proved that voting*

without biometric verification occurred in various parts of the country, contrary to the electoral laws of Ghana. It is the further contention of the petitioners that, indeed, question C3 was deliberately put on the pink sheet by the 2nd respondent because in the December 2012 elections the 2nd respondent's officers were given discretion to dispense with biometric verification contrary to the law. This is borne out by Exhibit G, (The Biometric Verification Device (BVD) User Manual, 2012 Presidential and Parliamentary Elections) pages 16 and 20 tendered on 13th June 2013 by Counsel for Petitioners through the Chairman of the 2nd Respondent, Dr. Afari-Gyan. Thus, it is the aggregate of information entered in C3 on the pink sheet that gives the total number of persons who voted without biometric verification, contrary to the law."

Based on the above, the Petitioners in Table 11A of volume 2B of their address have a list of Polling Stations where they allege there was voting without biometric verification – respondents preferred Data-Set (whatever this means).

By this table 11A on pages 406-437 of Volume 2B, the Petitioners want this court, to annul 221,678 votes of the 1st Petitioner, whilst also annulling 526,416 votes of the 1st Respondent.

The 1st Respondent's response to the claims of the petitioner's was swift and vehement. Learned Counsel for the 1st Respondent, Mr. Tony Lithur, stated in his written address as follows:-

"In the face of consistent absence of any proof of complaint in prescribed manner at any level of the electoral system of the irregularity alleged, (and this is the instance of voting without biometric verification) it is submitted that the entries in C3 could not by themselves form a sound basis for annulling votes cast by eligible voters."

In further support of the above submissions, learned Counsel argued that, from the evidence of the 2nd Petitioner during cross-examination by the counsel for the 1st and 3rd Respondents, it came to light that the evidence on this issue of voting without biometric verification was at best confusing, based on pink sheets entries. According to learned Counsel, once the 2nd Petitioner admitted not having received any evidence of voting without biometric verification at any polling station which recorded 100% of such voting without verification the allegations must not be accepted.

Learned Counsel therefore referred the Court to bits and pieces of evidence during the cross-examination of 2nd Petitioner. The evidence on this issue was based on same entries in Column C1 and C3 of the pink sheets and according to respondents, this is not logical. These are the bits and pieces of the evidence of 2nd Petitioner under cross-examination on the issue of voting without biometric verification.

Q. "I am suggesting to you that nobody in the 2012 election (voted)

whose name and identity has not been checked through the biometric verification?

A. My Lords I was not at those polling stations all we can say is on the face of the pink sheet this number of people voted without biometric verification.

Q. Before the election presumably every polling station had biometric fingerprint verification machine. At least in every polling station?

A. Yes those that worked.

Q. I believe the hullaballoo started when it was discovered that some of the verification devices were not functioning properly?

A. I think the hullaballoo started when the machine was not functioning properly and **1st Respondent asked that contrary to the law people should be allowed to vote without biometric verification**.

From the evidence on record, the confusion on this issue of voting without biometric verification has been highlighted in the column C3 on the pink sheets.

According to the 2nd Respondent's witness, Dr. Afari Gyan, the Presiding Officers were all under strict instructions not to fill in that column. However, an examination of the pink sheets has revealed that some of the Presiding Officers did not carry out this instruction and filled this column C3 even though they did not have the requisite Form 1 C which was to be used to fill in that column.

Eager to find out the method by which this directive to the Presiding Officers was conveyed, I made an intervention which Dr. Afari Gyan answered thus:-

"Dotse: "For the purpose of clarity so how were the presiding officers to fill in that C3 column?

Witness: No, we told them that they should put zero because they wouldn't have even the means, yes to fill.

Dotse: Was it communicated to them verbally or you wrote to them with copies to all the parties?

Witness: Erm, well, I don't know whether we wrote to them but we did make it part of the training."

From the above, it is clear the 2nd Respondents did not recall writing to their Presiding Officers or just instructing them verbally.

In any case, no further evidence was solicited by any of the parties in this case, and so we take it that, that part of the evidence that they made those instructions on not filling column C3 an integral part of the training of the presiding officers substantially, stands unchallenged and must be accepted. Reference cross-examination of Dr. Afari Gyan by learned Counsel for the petitioners on 6th June 2013.

Learned Counsel for the 3rd Respondent, launched a systemic attack on this phenomenon of voting without biometric verification. Because of the clarity

of thought and detailed references to the evidence of Dr. Afari-Gyan as a basis for the creation of the C3 column, I will quote it in extenso:-

> *"The witnesses for the Respondents denied that the entries on the pink sheets in respect of C3 were evidence of voting without biometric registration. They insisted that many of those entries were clerical errors. The most decisive testimony in relation to this head of claim was that given by Dr. Afari-Gyan, the Chairman of 2nd Respondent in evidence-in-chief. He stated that the column C1 was not required to be filled in at all by Presiding Officers. According to him, that column was created to take care of those voters who had been registered by 2nd Respondent during the biometric registration exercise that preceded voting, but whose biometric data had, unfortunately, been lost as a result of some difficulties that 2nd Respondent had encountered.*
>
> *As an election administrator, he thought his duty was to give every such person the chance to cast his ballot. 2nd Respondent therefore devised this facility to allow such persons to vote without going through biometric verification.* ***They would be required to fill in Form 1C before voting. When the idea was mooted to the political parties, they all rejected it. He therefore gave instructions that the Form 1C should not be sent to the polling stations. The C3 column was therefore not supposed to be filled.***

"....C3 was put there in an attempt to take care of those people who through no fault of theirs would have valid voter ID cards in their possession but whose names will not appear on the register and therefore could not vote. ***But let me add that when we discussed this with the political parties, some of them vehemently said no, that we will not allow any persons to be verified other than by the use of verification machine. I am just explaining why the C3 came there. The parties said no and we could understand that argument that this facility is not given to one person, it is being given to every presiding officer.*** *So you are given this facility to 26,002 and it is possible to abuse it. So we do not want it and we agreed that that facility would not be used. Unfortunately, the forms had already been printed, these are offshore items, so we could not take off the C3. And what we said, and we have already said this in an earlier communication, was that we will tell all the presiding officers to leave that space blank because they had already been printed and there was no way that we could take it off. And that explains the origin of C3 on the pink sheet. It was a very serious problem."*

This account of the origin of the column C3 on the pink sheet was not challenged by Counsel for the petitioner's in cross-examination.

Figures in the C3 column of the pink sheet, such as the same figure in C1 being found in C3, also showed the difficulties that occurred with this column as it was filled in according to how a Presiding Officer interpreted it. 2nd Petitioner who did not fill in the pink sheets was in no position to testify about the understanding of the Presiding Officers which went into filling that part of the pink sheet."

The explanation of the Electoral Commission Chairman to me makes sense. I would however have expected that such a decision not to use the C3 column would have been communicated to the Presiding Officers in a written form. However, as stated supra, that piece of evidence was not challenged and it has therefore settled the matter.

CONCLUDING REMARKS ON THE BIOMETRIC VERIFICATION

I have already stated that I find Dr. Afari-Gyan's explanation on the C3 column on the pink sheets which is to this effect *"what is the number of ballots issued to voters verified by the use of Form 1C (but not by the use of BVD)* quite convincing and reasonable under the circumstances.

It must be noted that, during the testimony of Dr. Afari-Gyan, he attempted to explain how the BVD machine can be used to store data on all those persons who voted at a particular polling station and explain how the BVD machine works. An objection was taken by learned counsel for the petitioners Mr. Addison to this evidence. However, by a majority decision of 7-2, the objection was over ruled.

Proceeding further, Dr. Afari Gyan then explained as follows:-

"*We had the machines brought to our headquarters in Accra and verified the information and downloaded the data and made print out of the information on the biometric verification machine."*

After this explanation, Dr. Afari Gyan then sought to tender the printout of this information from the BVD.

However, learned counsel for the petitioners, Mr. Addison objected and following the discourse that ensued as captured by part of the proceedings of 3rd June 2013, this is what transpired as per the records.

"Addision: My lords we object to the tendering of this document. This is a *document that can be produced by anybody, there is nothing on the face of this document which shows that it is an original that comes from a particular BVD machine. In any event, this evidence takes the petitioners by surprise. We have stated our full case, we have filed our affidavit to which we attached a number of pink sheets pursuant to the order of this court dated 2nd April 2013. The 2nd respondent has had the opportunity to controvert the issues raised in our pleadings and affidavit. Nowhere in its response was there any statement that BVD machines have been recalled from various parts of the country and that they were going to tender print outs of these machines to contradict information provided by the petitioners. My lords, more importantly, these matters were not put to our witness when he was in the box and therefore they are trying to conduct a new case behind our back. Again it violates the*

order of this court on the 2nd April, they have not attached it to their affidavit neither is there any indication in their affidavit. My lord I would like to refer your lordships to the Evidence Act 1975 Section 52(C) and it provides: COUNSEL READS OUT....

Dotse: Mr. Addison, I am not an IT specialist but I stand to be corrected. Where there is a dispute on the pink sheets and as we are been told, some data has been captured by the BVD during the exercise, that is the voting and if as is been sought to be done, the document is an accurate record of what transpired during the polls, do we have the expertise to be sure that the data captured by the machine is correct because in these matters, that is why I believe Ghana opted for the BVD and we cannot just throw it off like that, we must make use of it in times of crisis or in times of dispute like this...

Quashie-Idun: My lord I would first wish to say that there is a distinction between admissibility of a document and the weight to be attached to it and much of what my learned friend says the goes to the weight not the admissibility of the document. Secondly, there is no surprise, when they were saying that people were not biometrically verified, what they mean other than verified by the machine. So there is no surprise, they know the machine is there and they are saying it was not used. When we were filing our affidavit we did not know the evidence that was going to be led by them...

By court: By a majority of 7 to 2, Atuguba and Akoto-Bamfo, JJSC dissenting, the objection is sustained. Document marked as Exhibit R5."

As can be seen from part of the proceedings just referred to, an opportunity to match the data allegedly captured from the BVD with the allegation that some people voted without biometric verification was lost. This resulted into the rejection of the document which was subsequently marked as Rejected 5.

This document R5 supposedly contains a list of persons who were captured as having been verified by the BVD during voting at the polling station. Other printouts could have been produced and compared with the number that voted at the Polling Stations to match this allegation of voting without biometric verification but since that document was rejected at the instance of the Petitioners I cannot look at it.

But I can make the necessary inference and deductions. Having lost this opportunity, I think it is inconceivable to disregard Dr. Afari Gyan's explanation especially as the evidence on record has not been challenged.

The 2nd Respondent's have maintained some consistency in their explanation of the origins of the C3 column on the pink sheets, reference paragraph 15 (a) of the 2nd respondents amended answer.

Secondly, the petitioner's themselves in Exhibit NDC 43, which is the letter authored by the 3rd Petitioner dated 9th December 2012 and addressed to

the Chair of the 2nd respondent emphatically requested for *"Audit of verification machines and recount of Presidential Ballot".*

Even though I have already quoted this letter in extenso for purposes of emphasis, I would want to refer to the following relevant portions again:- it states:

> "*We request that you, as the Returning Officer of the Presidential Elections; (i) cause an audit of the verification machine to establish that it tallies with constituency collated signed results".*

The above is ample proof that, the petitioner's themselves recognise and admit the use of the verification machine to establish the tallies of the election results. This is the main reason why I have stated that, it was wrong first for learned counsel for the petitioner's to have objected to the tendering of the print outs from the Biometric machines to verify anomalies whilst they themselves had requested for it as far back as 9th December 2012.

Perhaps, at that time, because of the contemporaneous nature of the request and the conclusion of the election being almost at the same time, they did not think about the problems of tampering with the machines.

However, there are certain things and practices as a nation we ought to have confidence and trust in its administration, and a typical one is this biometric verification device. Once we asked for it and it was provided, at huge cost, we must accept it and learn to rely on it for the verification that it was meant to provide.

The no biometric verification therefore in my estimation fails in its entirety.

As a matter of fact, if one considers the number of pink sheets where the C3 column was inadvertently filled in, as apposed to those instances where it was not filled in, the impression is that, the instruction not to fill in the C3 column was honoured more in the observance than in the breach, I will therefore give the benefit of the doubt to the 2nd respondent's and accept their explanation.

This is because of the presumption of regularity which presumes that the instructions to the presiding officers was regular on the face of it, no contrary evidence having been led on the matter see *section 37 of Evidence Act NRCD 323*. In circumstances like this, it is critical to consider the write up on page 16 of Exhibit E. C. 2, tendered on 24/4/2013 which is a Guide to Election officials, column D on the said page states as follows:-

> *"Record the number of ballots issued to voters on the polling station register by checking the number of ticks on the voters register.(for this biometric register tick against the barcode) Adding the figure obtained from the ticks in the proxy register should equal the number of ballots in the ballot box on the assumption that each voter issued with a ballot paper cast a ballot. The ticks on the Names Reference List must also equal the ticks on the main voters register"*

The above constitute the procedure that Presiding Officers are to follow at each polling station. If there should be an irregularity on the face of any pink sheet, which should give a contrary opinion to the effect that there were some instances where voting without biometric verification was

permitted, the first place to verify this will be the polling station documents referred to in the quotation supra.

Another contention by the 2nd petitioner, despite his sterling performance in the witness box which I find puzzling is that, all entries made in CI – wrongly should equal zero or dash.

See for example, table 10B of the petitioners address, volume 2B pages 360-363 where a list of polling stations where CI equals zero or blank. In this instant, votes of 28,805 for the 1st Petitioner, and 62,576 for the 1st Respondent are to be annulled.

Having considered this analysis vis-à-vis the evidence of Dr. Afari-Gyan on why the C3 column was initially created but later abandoned at the insistence of the political parties, I am left in no doubt that the whole contention of voting without biometric verification has not been properly made out. I will therefore for this and other reasons stated elsewhere in this judgment, reject this voting without biometric verification as not having been properly made out by the Petitioners. It is accordingly dismissed.

NO PRESIDING OFFICER SIGNATURE CATEGORY

In order to drum home the constitutional significance of the issue of this contentious *"No Presiding Officer signature on the Pink Sheets"* it is perhaps pertinent to quote verbatim how the provisions are articulated in the Constitution.

Article 49 provides as follows:

49 (1) At any public election or referendum, voting shall be by secret ballot.

(2) Immediately after the close of the poll, the Presiding Officer shall in the presence of such of the candidates or their representatives and their polling agents as are present ,proceed to count at that polling station, the ballot papers of that station and record the votes cast in favour of each candidate or question

(3) The Presiding officer, the candidates or their representatives (and in the case of a referendum,the parties contesting or their agents and the polling agents if any shall then sign a declaration stating

a. the polling station; and

b. the number of votes cast in favour of each candidate or question;

and the Presiding Officer shall there and then, announce the result of the voting at the polling station before communicating them to the returning officer."

Regulation 36 of C. I. 75 contains provisions to the like effect as has been stated in article 49 of the Constitution supra.

The Petitioners contend that in a number of polling stations, **the presiding officers refused, neglected or omitted to sign the pink sheets thereby constituting a breach of the constitutional provisions in article 49 (3) of the Constitution.**

In order to properly understand how these views have been articulated by the Petitioners, it is pertinent to quote in extenso their written submissions on the matter. They contend as follows:

> *"It is especially significant to note that, indeed, article 49 is the only occasion on which details of voting at elections and referenda are specifically spelt out in the Constitution itself. In all other situations, the power to determine the manner in which elections shall be conducted is left to the 2nd respondent to regulate through the enactment of regulations pursuant to article 51. It is obvious that the Constitution itself recognises that activities at the polling stations are at the bedrock of the democratic system of governance, hence the need for specific regulation of same by the Constitution, rather than being left to determination by the Electoral Commission. The mandatory provisions in article 49 have an even greater significance when due account is taken of the Preamble to the Constitution. Serving as the spirit within which the Constitution is enacted, the Preamble operates as the yardstick by which the tenets of good governance ought*

to be measured. In this vein, it is humbly submitted that any conduct on the part of a person which militates against the attainment of the principles spelt out in the Preamble ought to be jettisoned by this Honourable Court. When regard is had to the Preamble, this Honourable Court will find that the Principle of Universal Adult Suffrage, as well as the commitment to establish a framework of government in accordance with democratic principles, run through the Preamble. It is our further respectful submission that, this being the case, any provision in the Constitution which aims at advancing or regulating the conduct of public elections and referenda in order to realise the goals of the Preamble must be respected and enforced by this Court."

It must therefore be noted that, any constitutional provision, especially one that deals with the ground rules for the exercise of our democratic choice of our leaders in pursuit of the principles of universal adult suffrage is not to be taken for granted.

Furthermore, if due consideration is given to the pride of place that the Constitution occupies in the laws of Ghana as the Grundnorm or basic law, then such provisions should not be treated with careless and reckless regard. In my opinion, and I dare say the opinion of all those who have due regard to the principle of Constitutionalism, the Constitution 1992 must be regarded and considered as sacrosanct.

As such it must be given it due pride of place in the scale of laws of Ghana as article 11 of the Constitution stipulates. This article puts the *Constitution* first among the laws of Ghana and in descending order to *Acts of Parliament*, *Constitutional Instruments* and others of similar nature, *the existing law* and the *common law*.

It is in this respect that I wish once again to quote excerpts from the written address or submission of learned Counsel for the petitioners, Mr. Philip Addison on the philosophical underpinnings of the provisions in article 49 of the Constitution. He writes:

> "**PHILOSOPHICAL UNDERPINNINGS OF THE REQUIREMENT OF PRESIDING OFFICERS SIGNATURE AS PROVIDED FOR IN ARTICLE 49 (3) OF THE CONSTITUTION 1992**
>
> *It is the humble contention of the petitioners that, save in certain instances where it can clearly be demonstrated that*

the subject matter in question properly belongs to the class of matters that can aptly be classified as having been consigned to the exclusive authority of a particular branch of government, like parliamentary proceedings (as held by this Court in the cases of Tuffuor v. Attorney-General [1980] GLR 637 CA and J. H. Mensah v. Attorney-General [1996-97] GLR 320), every provision in the Constitution is to be enforced by this Honourable Court. This is what is contained in the principle of the enforceability of the Constitution. The Constitution, being the primary law, serves as the yardstick for good governance and the standard by which the actions of all persons, particularly public officers, are to be measured. It is for this reason that article 3(4) entrusts every citizen with the duty to defend the Constitution, after article 2 (1) has also accorded unto the citizen a right to bring an action in the Supreme Court for the enforcement of the Constitution. This was the effect of this Honourable Court"s decision in New Patriotic Party v. Attorney-General [1993-94] 2 GLR 35 where the Court held that every provision in the Constitution is capable of enforcement by the Supreme Court. In so holding, the Court stated that the doctrine of "political question" was inapplicable in Ghana, because, under articles 1, 2 and 130, all issues of constitutional interpretation were justiciable by the Supreme Court. The Court, further stated that, in any event, the

Constitution itself was a political document, since every matter which arose from it for interpretation or enforcement was bound to have a political dimension.

The signing of declaration forms by the presiding officers, apart from being in fulfilment of a constitutional duty, is also to authenticate the results of the elections. It is submitted that any announcement of the results of the polls, when same have not been recorded and duly signed in accordance with article 49, will render the subsequent communication of the results to the returning officer unconstitutional, null, void and of no effect. This is because the returning officer, before acting on the declaration containing the results of the polls at a particular polling station, must be satisfied and ensure that the constitutional requirement of a signature on the declaration form has been discharged, and that the pink sheet is, in truth, the act or deed of the official representative of the Electoral Commission, i.e. the presiding officer at the polling station.

In direct contrast to the above submission, learned Counsel for the 1st Respondent, Mr. Tony Lithur, in his written address on the subject, recounted in extenso the evidence led by the 2nd Petitioner, Dr. Bawumia during cross-examination on the subject and the evidence in chief of Mr. Asiedu-Nketia the witness of the 1st and 3rd respondents and made the following submissions:

"The Constitution doesn't provide a remedy for the breach of the provisions. In resolving the issue, we invite Your Lordships to adopt the purposive approach. Under article 49 of the Constitution the duty of the Presiding Officer to sign the declaration form is preceded, first, by a count of the votes validly cast, followed by the recording of the tallied results (article 49 (2)). In the present instance, the Presiding Officers had performed those duties, and the complaint by the Petitioners is not about the counting, the tallying or the recording of those votes.

It is significant to note that under article 49 (2), the duties of the Presiding Officer as stipulated above, are required to be performed by him in the presence of polling agents. One of the objects of Article 49 is, therefore, transparency. There is no allegation by Petitioners in respect of this head of claim that, in undertaking his duties in respect of the count and recording of the tallied votes, the processes undertaken by the Presiding Officer were not transparent."

After interrogating several issues learned Counsel sought protection under the submission that, since the voters at those particular polling stations have not been alleged to have committed any wrong during the voting, they should not be penalized for the acts of the Presiding Officers.

Learned Counsel therefore enumerates in my view what are very weighty and serious issues for the consideration of this Court. These are as follows:

> *"In resolving the issue, therefore, we invite your Lordships to take into consideration the following factors:*

a. *Petitioners do not allege that the voter has committed any unlawful act;*

b. *Voters had no control over the acts and omissions of the Presiding Officers.*

c. *Petitioners do not allege collusion between the voter and the Presiding Officers, or indeed between the Presiding Officers and any candidate or political party;*

d. *They do not allege misconduct on the part of the Presiding*

   Officers, indeed it would have been counterproductive on the part of Petitioners to allege willfulness on the part of the Presiding Officer because then that would make Petitioners the beneficiaries of such misconduct, if their claim in this regard were upheld;

e. *There are no allegations of willfulness on the part of the Presiding Officers.*

f. *The Polling agents of the candidates signed their respective portions of the pink sheets in accordance with Article 49 (3) of the Constitution;*

g. Petitioners are not alleging any other head of claim in respect of the polling stations that have the exclusive irregularity;

h. Petitioners do not challenge the results that were tallied and declared at those polling stations;

i. petitioners have not complained in prescribed manner, either at the polling stations or at the constituency collation centers, about the conduct of the elections or the declaration of the results.

Learned Counsel concluded his submission on this point by referring to a quotation from *Halsbury's Laws of England, 4th Edition, Volume 15 (4) at paragraph 670* and also quoted a passage from the Canadian case of ***Ted Opitz v Borys Wrzesnewskyj [2012] SCC 55*** to support their contention.

> **"***No election is to be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the appropriate election rules. If it appears to the tribunal having cognizance of the question that the election was conducted substantially in accordance with the law as to the elections, and that the act or omission did not affect the result. The function of the court in exercising this jurisdiction is not assisted by consideration of the standard*

of proof but, having regard to the consequences of declaring an election void, there must be a preponderance of evidence supporting any conclusion that the rule was affected."

This position is in accordance with persuasive authority. In the ***Orpitz case***, (supra), it was held on page 42 (paragraph 66) as follows:

"By contrast, if a vote cast by an entitled voter were to be rejected in a contested election application because of an irregularity, the voter would be irreparably disenfranchised. This is especially undesirable when the irregularity is outside of the voter's control, and is caused solely by the error of an election official."

Learned Counsel for the 3rd Respondent, Mr. Tsatsu-Tsikata in his written address also made similar submissions in terms as referred to supra. The only difference is that he combined the role of the party agents alongside those of the presiding officers and the effect of other subsidiary legislations on the *"no presiding officer signatures"* phenomenon, in C. I. 75.

In effect, the thrust of Mr. Tsikata's submissions on this point is briefly that, once the party agents of the Petitioners have signed the pink sheets in accordance with the constitutional and statutory requirements, they must be deemed to have accepted the results as declared to be correct and consistent with all requisite laws and regulations.

On this point, Mr. Tsikata specifically submitted as follows:-

"It is worth emphasizing that what is certified by the candidate's agents includes certifying that the poll was conducted in accordance with the laws and regulations governing the conduct of the elections". In almost all of the exhibits filed as attachments to the affidavit of the 2nd Petitioner, the agents of the 1st Petitioner were present and their signatures on the pink sheets on which Petitioners rely constitute admissions of regularity of the election results. On the face of their own documentary evidence, therefore, the Petitioners are confronted starkly by these admissions made on their behalf at the polling stations. There is also evidence that these admissions were repeated at the constituency collation centres where these results were entered on the collation sheets and signed off again by representatives of candidates."

Concluding his submissions on this matter, learned Counsel invited the Court to reject the invitation to the Court to annul votes of citizens of Ghana who exercised their constitutional right to vote in the 2012 Presidential elections by relying on pink sheets which he considered unreliable.

On his part, learned Counsel for the 2nd Respondent, Mr. James Quahsie-Idun, the main respondent i.e. Electoral Commission, whose conduct formed the basis of the violations had a very brief comment to make to the following effect:-

"*In response to the Further and Better Particulars submitted by the Petitioners on this subject, and in Exhibit P, tendered by the Chairman of the 2nd Respondent on 8th July 2013, the 2nd Respondent maintained that out of the 905 pink sheets that were not signed by the Presiding Officer, 99% were signed by the Polling Agents of the Petitioners. Dr. Afari-Gyan admitted the obligation of the presiding officers to sign the declaration of results but stated that where he omitted to sign but the Polling Agents signed, the 2nd respondent considered it acceptable for the purposes of the declaration of the results. In this context, reference is made to paragraph 19 above to emphasise the fact that votes at each Polling Station were counted and declared in public. We respectfully urge your Lordship to conclude that on the evidence presented, there is no basis to annul the votes of any Polling Station on the basis of the absence of the signature of a Presiding Officer. The Petitioners have not shown how that affected the outcome of the elections.*"

The above is the entire submission of the 2nd Respondent on the subject. What is not in dispute is that, indeed, some of the Presiding Officers who are agents of the 2nd Respondent at the polling stations did not sign the pink sheets.

Secondly, there is evidence on record from the 2nd Respondent that, when some of the Returning Officers detected the phenomenon of the non signing by the Presiding Officers at the collation centres, they as it were

called the erring Officers to order and requested them to sign. It should however be noted that, at that stage, all the party agents must have left with their unsigned copies of the pink sheets by those Presiding Officers.

Thirdly, it must be noted that, any results declaration form that is not signed by the Presiding Officer is in breach of article 49 (3) of the Constitution 1992.

The issue that begs for an answer is whether the failure of the Presiding Officers to sign the results declaration form (pink sheets) being a constitutional requirement was a violation, omission, malpractice or irregularity of the Presidential election held on 7th and 8th December 2012 **and whether these affected the outcome of the results of the elections.**

What is the purpose of the provisions in article 49 of the Constitution being inserted therein instead of leaving it for the Electoral Commission to make rules and regulations as provided for in article 51, 63 (2) and 65 of the Constitution 1992?

The draft proposals and report of the 1992 Constitution do not provide any answer.

It is however safe to surmise that it might be due to our turbulent political history in the past especially where there has been allegations of ballot stealing and stuffing and other electoral malpractices prevalent in the 1st Republic and thereafter.

It is therefore safe to conclude that it is an attempt to entrench that part of our constitutional democracy by protecting the integrity of the ballot from the very foundations of the law, that is the Constitution.

Indeed, if one considers, the provisions of article 49 (1) which guarantees that in all public elections in Ghana, voting shall be by secret ballot, the above deduction of protecting the integrity of the polls cannot be gainsaid.

For example, if there are allegations that during an election, at a particular polling station, the casting of the ballot was not secret, that will definitely be an infringement of the Constitution. Even though the consequences of a breach of that provision has not been provided, a Court of law such as this Supreme Court, vested with powers under article 2 (1) and (2) of the Constitution 1992 to enforce and or interprete all or any of the provisions of the Constitution as the Supreme law of Ghana as has been provided in article 1 (2) of the Constitution 1992 cannot sit idly and do nothing.

Indeed, there are other provisions in the Constitution which makes general provisions about the doing or performance of an event or conduct, without necessarily providing the mechanisms for enforcement and or provide sanctions for breach of those provisions.

For example, article 144 (7) provides that, the office of a Justice of the Superior Court shall not be abolished while there is a substantive holder in office.

In that respect therefore, even if Parliament should enact a law to abolish any of the levels of the Superior Courts, whilst there is a holder of that office, such a conduct will be declared unconstitutional if an action is commenced to that effect. This is irrespective of whether the holders of the office acquiesced in it or not.

It is in this respect necessary to regard the Constitution 1992 as a sacrosanct document capable of biting to enable it have sanctity and honour.

Besides, it must also be assumed rightly that the Constitution did not want to leave these provisions contained in article 49 to the whims and caprices of any institution or body of persons to meddle and toy with that is why such detailed provisions on procedure at voting during public elections have been made. If these provisions in article 49 are compared with the provisions in article 63 and 65 of the Constitution 1992, the difference in approach is clear and without doubt. Being an entrenched provision, article 49 cannot even be amended by a party with an overwhelming majority in Parliament, unless by a referendum.

In article 63 (2) (a) and (b) the Electoral Commission has been granted enormous powers to make by constitutional instrument regulations to prescribe the conduct of Presidential elections including the date of the election inter alia.

Article 65 on the other hand prescribes that the Electoral Commission shall by constitutional instrument make regulations for the conduct of the presidential elections generally as stated in article 63.

In this respect therefore, it is quite clear that the provisions in article 49 are so precise and mandatory that it requires no other meaning other than what has been attributed therein. That is why this particular provision is one of the few entrenched provisions.

It has been forcefully argued by all the Respondents that because the Party agents have signed the pink sheets, and the results declared after they had been sorted and counted in public, the complaint of the petitioners is not well founded and must be dismissed.

Reference has already been made to the locus classicus case of ***Tufuor v Attorney General [1980] GLR 637*** and I think I need to refer to it here again. See also the case of **J. H. Mensah v Attorney General [1996-97] SCGLR 320**.

Sowah J.A, (as he then was) made a notable pronouncement when he spoke on behalf of the Court of Appeal, sitting as the Supreme Court in the Tufuor v A.G. case as follows:-

> ***"...The decision of Mr. Justice Apaloo to appear before Parliament cannot make any difference to the interpretation of the relevant article under consideration unless that decision is in accordance with the postulates of the Constitution. It is indeed the propriety of the decision which is under challenge. This court does not think that any act or conduct which is contrary to the express or implied***

provisions of the Constitution can be validated by equitable doctrines of estoppel. No person can make lawful what the Constitution says is unlawful. No person can make unlawful what the Constitution says is lawful. The conduct must conform to due process of law as laid down in the fundamental law of the land or it is unlawful and invalid..."

The above statement is binding on this court and I find no cogent reason to depart from it. Besides, the Court in the **Tufuor v A.G.** case also justified its statement with the following explanation which is hereby adopted as my own words.

"Neither the Chief Justice nor any other person in authority can clothe himself with conduct which the Constitution has not mandated. To illustrate this point, if the Judicial Council should write a letter of dismissal to a Judge of the Superior Court of judicature and that Judge either through misinterpretation of the Constitution or indifference signifies acceptance of his dismissal, can it be said that he cannot subsequently resile from his own acceptance or that having accepted his dismissal, he is stopped by conduct or election from challenging the validity of the dismissal? This Court certainly thinks not. The question whether an act is repugnant to the Constitution can only be determined by the Supreme Court. It is that Court which can pronounce on the law."

And since it is to this Supreme Court that the Petitioners have come to for the interpretation and enforcement of the breach of this article 49 (3) of the Constitution 1992, I hold that notwithstanding the conduct of the Petitioner's agents in signing the pink sheets that act, cannot clothe the unconstitutional conduct of presiding officers in not signing the pink sheets with constitutionality.

Quite recently, the Supreme Court in two landmark decisions upheld the supremacy of the Constitution in the hierarchy of legal norms and laws in the legal system and stated that these principles have to be preserved and jealously guarded.

See the unreported cases of ***Martin Amidu v The Attorney-General and 2 others*** *(a.k.a The Woyome case) S.C. No. J1/15/2012 dated 14th June 2013* and ***Martin Amidu v Attorney-General and 2 others***, *(a.k.a Isofoton case) S.C J1/23/2013 dated 21st July 2013.*

ROLE OF PARTY AGENTS

The Respondents have in their combined responses urged this Court to consider the position of political Party Agents endorsement of the pink sheets and purposively interprete that part of the constitution to give validity to the non-signing of same by the Presiding Officers.

STATEMENT OF POLL FOR THE OFFICE OF PRESIDENT OF GHANA – FORM EL 21B AND THE DECLARATION – FORM EL22B – REFERRED TO AS PINK SHEETS

An examination of the uncompleted pink sheet gives a very vivid and clearer vision of the real intention and effect of the non-signature of a Presiding Officer on a pink sheet.

1. Column A:- Ballot Information

The indication at the top of the column A, is to the effect that it is to be filled in at the start of the poll. The two questions stated therein really become relevant when this is considered in context. These are:

i. What is the number of Ballots issued to this polling station?
ii. What is the range of serial numbers of the ballot papers issued to the polling station?

The question which any critical mind should ask before proceeding any further with the examination of the information on the pink sheet, is to ask who is responsible for the filling in of the questions on the pink sheet.

Undoubtedly, this is to be the sole duty of the Presiding Officer. Indeed Regulation 17, sub-regulation (2) states the following inter alia, as the duties of the Presiding Officer:

a. setting up the polling station;
b. taking proper custody of ballot boxes, ballot papers, biometric verification; equipment and other materials required and used for the poll;
c. Filling the relevant forms relating to the conduct of the poll;
d. supervising the work of the polling assistants;

e. Attending to voters without identify cards;
f. Attending to proxy voters;
g. Maintaining order at the polling station;
h. Undertaking thorough counting of the votes;
i. Announcing the results of the election at the polling station, and
j. conveying ballot boxes and other election materials to the returning officer after the poll.

On the other hand, sub-regulation 3 of Regulation 17 states that, a polling assistant among other duties shall work under the supervision of the Presiding Officer in charge of the polling station.

On Polling Agents, Regulation 19 sub-regulation (2) states as follows:-

> "*A candidate for Presidential election may appoint one Polling Agent in every polling station nationwide."*

Sub-regulation (3) of Regulation 19 of C. I. 75 which spells out the role of a Polling Agent of a candidate states as follows:-

> *"An appointment under sub-regulations (1) and (2) is* ***for the purpose of detecting impersonation and multiple voting and certifying that the poll was conducted in accordance with the laws and regulations*** *governing the conduct of elections".*

Sub-regulation (4) of Regulation 19 which is also relevant states as follows:-

> *"A Presiding Officer shall give a polling agent the necessary access to enable the polling agent to observe election proceedings at a polling station."*

In view of the provisions of Regulation 17 and 19 as referred to supra concerning the functions and roles of a Presiding Officer and his assistant vis-à-vis those of the Polling Agents of the candidates, it is clear that whilst it is the duty of the Presiding Officers to manage, control and be responsible for all activities connected with the poll which includes the filling in of the pink sheets, the candidates agents are merely to OBSERVE the election proceedings at the polling station and certify at the end of the poll that it was conducted in accordance with the laws and regulations governing the election.

From the questions in column A, and the clear provisions of regulation 17 (2) (c) of C.I. 75, it is clear that it is only the presiding officer or in his absence, his assistant who can fill in and answer those questions.

Column B

This is a continuation of column A, to the effect that it has to be filled in at the start of the poll by the Presiding Officer. The questions therein stated are:-

1. **What is the number of voters on the polling station register?**

2. **What is the number of voters on the proxy voters list?**

3. **What is the total number of voters eligible to vote at this polling station? B1 plus B2**

Column C

This column C to me is a very important and critical part because this is the ballot accounting section of the pink sheets. It states at the top as follows:-

"(To be filled in at END of the poll before counting commences)"

Questions in this column are as follows:-

1. **What is the number of ballots issued to voters on the polling station register?**

2. What is the number of ballots issued to voters on the Proxy Voters List?

3. What is the number of ballots issued to voters verified by the use of Form IC (but not by the use of BVD)?

4. What is the total number of **spoilt** ballots?

5. What is the total number of **unused** ballots

6. What is the total of C1, plus C2, plus C3 plus C4? This number should equal A1 above.

Since Form 1C was not distributed to the Polling Stations C3 was not to be filled in.

Column D

This is significant in the sense that, whilst it is a detailed account of rejected ballots, it also indicates that this is to be filled in at the **end** of poll after counting is completed.

It should be noted that, despite all the above important questionnaire that the Presiding Officer is expected to fill in on Form EL 21 B, which is one half of the pink sheet, no provision is made for the signature of the Presiding Officer to authenticate the said information provided by him on the forms. It is also to be further noted and observed that, Forms EL 21B and 22B have been joined together and must accordingly be read together as one document in order for the full meaning and understanding of same to be made.

The next item or column on the pink sheet is the Presidential Election – Polling Station Results Form.

Here, the names of the candidates are in one box, with indications as to their party or independent status in another box, then votes obtained in figures and in words are also in different boxes.

At the end of this column are columns A , B and C for Total Valid Votes for Column A, Total Rejected Votes from D6 above for B, Total Votes in Ballot Box (A+B) for C.

It must again be noted that in all these, there is no indication for signature.

The Declaration is the place indicated on the pink sheet for the signatures of the Presiding Officer and the Polling Agents of the candidates.

The words opening on this Declaration are important and is worthy to be quoted in full. It states: *"We, the undersigned, do hereby declare that the results shown above are a true and accurate account of the ballots in this polling station".* Immediately after this comes the Names of Presiding Officer, His Signature, Date and Time before the names of the Polling Agents, their party affiliation or status, signature and reasons if they refused to sign.

The point at issue here is that, since by law, the Presiding Officer is the Officer required and mandated by law under Regulation 17 (2) (c) of C. I. 75, to fill in the columns on the pink sheets, i.e. columns A, B, C, and D on

the pink sheets, as well as the results declaration, the signature of the Presiding Officer is mandatorily and constitutionally required to authenticate not only the results, but also the filling of the forms as required by law.

Thus any pink sheet, which has not been signed by the Presiding Officer lacks this crucial authentication and must be rejected as not satisfying the requirements of the Constitution and the law.

The difference in weight between the role and functions of the Presiding Officers and the candidates' agents is so clear that any attempt to equate the two, and to raise the candidates signatures to the level of the Presiding Officer signature is not only to undermine the constitutional provisions on this issue as enshrined in the Constitution 1992, but also crucify the bedrock upon which the democratic foundations of the representative Government that the people of Ghana have embarked upon since January 7th 1993. That position has been made clear in the ***Tufuor v A. G***. case already referred to supra.

As a consequence, I am of the very considered view that, not having signed and authenticated the entries made by them on the pink sheets, the non signature of same by the Presiding Officers has invalidated the offending pink sheets, and to that extent, by virtue of article 49 (3) of the Constitution 1992, same are declared null and void, and of no effect. The result therefore is that all

votes at all the polling stations where this phenomenon of no presiding officer signature has occurred is hereby annulled and or cancelled. If they are annulled, then all votes attributed to any candidate at those polling stations will be deducted from the total tally.

If however, they are cancelled then the polls will have to be re-run in those particular polling stations.

In the opening pages of this judgment, I referred to a statement attributed to **Benjamin Cardozo** a former associate Justice of the U.S. Supreme Court in which he wrote that in deciding a case that there is no precedent for the Judge to follow, what does he do?

In seeking to reach a decision that may become a precedent for the future, I have to be consistent and logical in my legal reasoning.

It has been urged upon this court, that since the voters in the offending polling stations did not commit any wrong, it will be a denial of their rights if their votes should be annulled for the failure of a public officer in the performance of their duties.

If the results of this category of no presiding officer signature as has been upheld by me to be annulled, are annulled as ordered then the problem that will arise is what criteria and number of pink sheets that are to be affected?

This question is relevant in view of the mess that had been created by the Petitioners in their use of polling station pink sheets in their analysis of the various categories.

I am however aware that the Petitioners in volume 2B of their appendix to their address, in their table 12 A, have a list of polling stations indicating List of Presiding Officers signature, (*Respondents preferred Data Set).*

The assumption I believe is that, this list in table 12A is devoid of the many instances of mislabeling, and use of Exhibits outside the range of exhibits marked in the affidavit of 2nd Petitioner and also devoid of the duplications and or triplication that some of the pink sheets of the Petitioners have become notorious for. I also believe that all the pink sheets in this category have been counted by KPMG and are therefore in the KPMG unique count.

Using this table 12A, the votes that are attributed to the 1st Respondent, are 382,088 whilst those of the 1st Petitioner are 170,940. See page 497 of Volume 2B of the address. Subject however to verification and scrutiny based on the KPMG unique count. To prevent double use of polling station results that are to be cancelled, care must be taken to ensure that only the residue of the polling stations that have not been affected by over-voting category are to be affected in this category. Since I am of the view that, it is more equitable to cancel the results of the polling

stations in this category and order a re-run in only those polling stations, I will go for that option.

What then is to be done to the Presiding Officers who failed woefully to perform this sacred constitutional duty as is stated in article 49 (3) of the Constitution 1992?

The resolution of this issue will involve a discussion of the Canadian case of ***Opitz v Wrzesnewskyi 2012 SCC 55-2012-10-25***6 to determine its applicability. Learned Counsel for the 3rd respondents has referred this Court to a quote in the Canadian case of Opitz just referred to supra which states as follows:-

> "*The practical realities of election administration are such that imperfections in the conduct of elections are inevitable. A federal election is only possible with the work of thousands of Canadians who are hired across the country for a period of a few days or, in many cases, a single 14 hour day. These workers perform many detailed task under difficult conditions. They are required to apply multiple rules in a setting that is unfamiliar. Because elections are not everyday occurrence, it is difficult to see how workers could get practical on the job experience. The current system of electoral administration in Canada is not designed to achieve perfection, but to come as close to the ideal of enfranchising all entitled voters as possible.* ***Since the system and the Act are not designed for***

> *certainty alone, Courts cannot demand perfect certainty. Rather, Courts must be concerned with the integrity of the electoral system.* This overarching concern informs our interpretation of the phrase "irregularities that affected the result" **opinions of Rothstein and Maldaver JJ**

In the Ghanaian context, the Chairman of the Electoral Commission Dr. Afari-Gyan in his evidence in chief also lamented over the fact that all the Presiding officers and their assistants, including even the Returning Officers, who all play very critical roles in the electoral administration are temporary staff of the Electoral Commission.

According to him, these are recruited only some few weeks to the date of the election and given some form of training.

My examination of some of the contentious pink sheets, which were identified and upon which some cross-examination has been conducted upon in court has revealed that some of the Presiding Officers appeared to be illiterates and know next to nothing. They do not only have very bad writing skills, but cannot express themselves in simple language and even denote figures in words correctly. I will in this context blame the appointing authorities of such low caliber of staff.

It is in this respect that I think the Electoral Commission Chairman, Dr. Afari Gyan cannot escape blame. My observation is that, Dr. Afari Gyan

appeared to have concentrated his oversight responsibility at the top notch of the election administration, thereby abdicating his supervisory role at the grassroots or bottom, where most of the activities critical to the conduct of elections are performed.

In this instance, he even appeared not to be conversant with some of the basic procedural steps and rules that are performed by his so called temporary staff. So far as I am concerned, Dr. Afari Gyan has cut a very poor figure of himself, and the much acclaimed competent election administrator both nationally and internationally has evaporated into thin air once his portfolio has come under the close scrutiny of the Courts.

Can the Canadian Supreme Court observations be relevant and applicable in Ghana?

Taking a cue from his testimony on the subject, and bearing in mind the wealth of experience Dr. Afari-Gyan should have gained since 1993, I am of the considered view that he cannot entirely escape blame for the many infractions of the Returning Officers, Presiding Officers and their assistants and to some extent their printers. To that extent, I will hesitate in applying hook, line and sinker the observations of the Canadian Court in the *OPITZ case,* bearing in mind that there was a powerful dissent in that case.

I also observe that, whilst the *Presidential Election Act, 1992 PNDCL 285*, does not contain any provision of criminal sanctions on breach of election

duties, it's sister Act, *Representation of the People Law, 1992 PNDCL 284*, has adequate and detailed provisions stipulating criminal sanctions for breach of all electoral regulations.

I also observe that, article 49 of the Constitution 1992 in its entirety does not provide any sanctions for the breach of any of it's provisions mentioned therein.

In this respect, I will like to make reference to section 30 (a) and (f) of PNDCL 284 referred to supra.

These sections provide as follows:

> (*30) An election Officer, clerk, interpreter or any other person who has a duty to discharge,* ***whether under this Act or otherwise,*** *in relation to an election, and who*
>
> *(a) makes in a record, return or any other document, which is required to be kept or made in pursuance of this Act or of the Regulations, an entry which that person knows or has reasonable cause to believe to be false, or does not believe to be true, or*
>
> ***(f) without reasonable cause acts or fails to act in breach of official duty,***
>
> *commits an offence and is liable to a fine not exceeding five hundred penalty units or to a term of imprisonment not exceeding two years or both the fine and the imprisonment."*

I am of the opinion that, considering the fact that, the issue in contention here is Presidential elections, there should be a higher requirement of compliance of election officials to their duty than is required in other instances.

I will therefore urge the application of the sanctions provided for in this section 30 of PNDCL 284 to any breach of article 49 (3) of the Constitution. This is because the conduct of the presiding officers in not signing the pink sheets amounted to a failure to act in the performance of their official duties as provided for in section 30 (a) and (e) of PNDCL 284 I will further direct that aside the punishment of a fine and imprisonment, the 2nd respondents should as a matter of policy blacklist all such offending presiding officers to prevent them from ever acting for the 2nd respondents in future. This I believe will serve as a deterrent.

Finally, I will also recommend that, henceforth, the Electoral Commission should apply merit based criteria to the appointment of their key electoral staff, albeit temporary to avoid the appointment of people who appear to be crass illiterates.

To conclude this matter, I will state that even though I find the Canadian case of **OPITZ** quite instructive, I am of the considered opinion that having appprized myself of the facts of that case, it is wholly inapplicable under the circumstances of this election petition. This is precisely because the infractions alleged by the petitioners here are based on constitutional and statutory violations and or irregularities, not so much on the voter not

being qualified to vote, or properly identified as is the case of the no biometric identification, no vote (N.B.N.V) phenomenon.

In view of all the above discussions, I will uphold the petitioner's claims under the category of Presiding officers not signing the pink sheets.

DUPLICATE SERIAL NUMBERS ON PINK SHEETS

Learned counsel for the Petitioners, in his address on the above head of claim submitted that, one of the methods by which the 2nd Respondent's has sought to guarantee the security of the election materials by avoiding the substitution of election materials by unscrupulous persons who might be determined to compromise the electoral process was to secure the integrity of the electoral process as follows:

> *"One of the means by which the 2nd respondent has over the years sought to do this, alongside other measures, has been to pre-emboss electoral materials with unique serial numbers. This is to ensure that specific electoral materials, so far as possible, are used only once at every polling station and also to detect the introduction of forged materials into the electoral process. Thus, for example, the ballot papers have serial numbers embossed on them to ensure that each ballot paper is unique in its identity. The series equally ensures that ballot papers are allocated to constituencies and polling stations in accordance with serial numbers known to the 2nd respondent. In the same way, in order to*

avoid the threat of replacement of official ballot boxes with unofficial ballot boxes, the ballot boxes officially used by the 2nd respondent have embossed on them serial numbers. Even the tamper proof envelops, into which presiding officers at polling stations put all election materials post announcement of the results at the poll, have serial numbers in order to enable detection of any attempt to replace an authentic tamper proof envelope with a counterfeit one. It should be noted that, in each of these examples the serial numbers come already embossed on the article from the manufacturers/printers. It would, accordingly, be astonishing, if not self defeating, where the primary record of the election, which are the pink sheets, on which results are declared, has no serial number as a security feature to prevent substitution or forgery of such critical electoral materials."

The above statement had been re-emphasised supra in paragraph 56 of the affidavit sworn to by the 2nd Petitioner in which reference has been made by the Petitioner's to **6,823 polling stations** where they claimed exclusive instances of the malpractice of same serial numbers on pink sheets with different results took place.

It must be noted that, this category of malpractice is by far the largest category and it was therefore not surprising that the petitioners devoted some valuable and quality time to this phenomenon.

What then is the evidence in support of this? Dr. Afari-Gyan who testified for and on behalf of the 2nd respondent admitted in his testimony the use of some pink sheets with duplicate serial numbers. Admittedly, the evidence given by the petitioners in their MB P – series of exhibit supports the use of pink sheets with duplicate serial numbers.

What is the meaning of this? In effect, what this means is that, a pink sheet, which has a number embossed on it from the printing stage 0002895 for *Ghartey Hall Block "B" U.E.W* polling station in the Effutu Constituency in the Central Region will have the same corresponding serial number on another pink sheet for another polling station in a constituency either within the same region or another region. The evidence however showed that this phenomenon of same serial numbers was duplicated in different regions, not same region and constituency.

In effect, whilst the number on the pink sheets for these two polling stations are the same, the polling station name and code are different.

However, according to the petitioners, there is an assumption that, the numbers on the pink sheets are generated serially and so ought to be unique to a particular polling station.

In circumstances like the above scenario that I have given, the results attributable to each polling station as per the pink sheets are different, with different presiding officers and party agents.

However, the Petitioners contend that as an electoral material, it must have a unique security feature which is the number embossed on it from

the printing press, and once this number has been generated, it is unique and applicable to only one polling station. They therefore contend that the widespread use of duplicate serial numbers of pink sheets is a malpractice for which reason results of all the polling stations in which this phenomenon was manifested must be annulled.

In order to understand the basis of this claim, it is perhaps useful at this stage to quote the words of Dr. Afari Gyan when he testified on 10th June 2013 as follows:-

Q. "Dr. Afari Gyan, we will go to the duplicate serial number, the alleged duplication of serial numbers. You heard the evidence of Dr. Bawumia the duplication of serial numbers should result in an annulment of the votes on all polling stations where the same serial number exists for two polling stations on the pink sheet.

A. My Lords, I strongly disagree with that.

Q. Can you tell us why?

A. Well, in the first place the serial numbers that you find on the pink sheets are not even generated by the Electoral Commission. They are generated by the firm or company that printed the pink sheets. Also unlike in the case of ballot papers, where the law requires that we print numbers, there should be a number on every ballot paper, ***I have seen no reference in the Constitution or a Stature or an Instrument to a serial number of the pink sheet. The serial number is important only to the extent that it allows us to***

keep count of the number of pink sheets produced. *The pink sheets are distributed randomly and the serial number printed on the pink sheet. It has absolutely no relevance to the compilation and declaration results. We identify our polling stations by their unique code and by their names and in fact throughout this trial so far I have never heard anybody identify a polling station. If two polling stations have the same serial number that will in no way affect*

Q. Do you mean two pink sheets. Two pink sheets with the same

number for different polling stations, it will not have any effect whatsoever on the validity of votes cast. Why?

A. Each of the two polling stations will have a different code and a

different name. There will be two different presiding officers and two different sets of officials, there will be two different sets of candidate's agents and there will be two different results entirely. ***So I see no problem, and when the results are taken from the polling station to the collations center, they are dealt with on the basis of polling stations codes and not serial numbers.*** *So I do not see the basis for the allegations surrounding the serial numbers. I see no basis at all."*

All the respondents have denied the allegations of the petitioners on the duplicate serial numbers with such vehemence that, the issue calls for thorough analysis and understanding. For example, learned counsel for the 2nd respondent, James Quashie-Idun in his very brief but incisive written

submission stated on this duplicate serial numbers on pink sheets as follows:

> "*Your Lordship, this category can properly be described as the weakest link in an already weak chain".*

On his part, learned counsel for the 3rd Respondent, Tsatsu-Tsikata in his written statement stated on this malpractice as follows:-

> "*Indeed, there is no basis whatsoever for a number printed on the pink sheet which was not generated by the Electoral Commission and which was not known to the political parties as a distinguishing mark of polling stations, to be used retroactively to disenfranchise millions of innocent voters."*

Even though I am not comfortable with the explanations of Dr. Afari-Gyan, in his evidence on the duplicate serial numbers as has been reproduced verbatim, the petitioners have to my mind not discharged the burden of proof that lies upon them in such cases as has been stated supra.

I have previously quoted in extenso, the written statement of learned counsel for the petitioners Philip Addison on this point, wherein he asserts strongly that it should be desirable that pink sheets with specific numbers should be assigned to specific polling stations as is done with codes and ballot papers.

It would have been quite easy for me to accede to the contention of the petitioners if they had led evidence to establish that, in the past elections, or at least the last 2008 presidential elections, all

"pink sheets" **had serial numbers embossed on them which were assigned specifically to particular polling stations. In that respect, there would have been an established practice that, the number embossed on the** ***"pink sheets"*** **is assigned to a polling station just as a polling station code is assigned using a regional alphabet followed by the numbers, i.e. constituency identification number, and the unique polling station number which all make up the unique code.**

No evidence whatsoever on this matter has been led by the petitioners, to establish such a practice. In circumstances where the petitioner's have failed with any degree of certainty to establish that, it had been the practice of the Electoral Commission to assign the numbers on the pink sheets to polling stations making them a unique feature, the case of the petitioner's must fail in this respect.

For now, what has been established as the practice in our electoral process and administration is that, the following are the security checks and features that are attributable to a polling station and by which it is known.

1. Name – though this may be similar e.g. E.P. Primary School or C.M.B Shed, Finger of God etc.

2. **Unique Polling Station Code** – by which the region, constituency and polling station are clearly identified making it really unique.

3. Ballot papers – the serial numbers on the ballot papers are unique to a polling station in the sense that, no two polling stations can have and use the same ballot papers with same serial numbers.

REFORMS

The importance of the Statement of Poll and Declaration of Results forms, *"pink sheets"* has informed me to suggest a number of reforms in our electoral process, including better management of the ***"serial "***numbers on these pink sheets.

It really does not make sense for the Electoral Commission Chairman, Dr. Afari Gyan to state that it is the printers who generate the numbers on the pink sheets in order for them to keep count of the number of pink sheets they have printed. This is not only absurd but also exposes the Electoral Commission as lacking any control mechanism to really check the actual number of pink sheets delivered to them.

For example, if a printer generates his own numbers from say 0000001 and goes on to 9,000,000, whilst in actual fact, the physical count is less than the quantity the Electoral Commission paid for, then the Electoral Commission would have been short changed.

Dr. Afari Gyan to me, was not convincing on this point at all, just as he was on many other issues. But for the weakness in the petitioners case on this issue, I would have dismissed the Electoral Commission's explanation as not being reasonable.

It is for this and other reasons stated in this judgment that I am of the view that there are indeed urgent reforms needed in our electoral process and administration.

In the first place, it does appear to me that there is the need for the *Inter Party Advisory Committee (IPAC)* to consider legislation to legitimise the use of serialized pink sheets in just the same way as there are unique polling station codes. Does it not matter that, the pink sheets, which form the primary documents upon which election results are declared by the Electoral Commission are not serialized to prevent their multiple use and abuse as was apparent in some few cases in the December 2012 Presidential elections?

In order to give validity and raise our elections to a higher pedestal, I think it will not be a bad idea if IPAC and indeed the entire country will consider proposals aimed at legislation to ensure that, security features are enhanced on the pink sheets, to make them identifiable to a particular region, constituency and polling station just as it is with the polling station codes.

Even though the above suggestion is likely to be a strain and an added burden on the Electoral Commission, it is better to put such a stringent requirement on them, than to live with the type of mess that was created by the lack of control in the printing, marking, distribution and use of the pink sheets.

Secondly, since the Electoral Commission Chair, who is the returning officer for the presidential elections was not present at the polling stations and could in any case not be present thereby lending credence to the 2nd petitioners oft quoted statement of *"You and I were not there"* a lot of caution and circumspection ought to be exercised in anything that has to do with reliance on entries on the pink sheets.

This is because, if the pink sheets for now remain the only authentic, valuable and credible document upon which the results are declared, then everything has to be done to ensure their sanctity, credibility and legitimacy. Situations, such as those recounted by Dr. Afari-Gyan about how pink sheets for the December 2012 elections were ordered, printed and distributed are so bizarre that it could have been a recipe for disaster. Urgent steps should therefore be taken to reform the electoral landscape promptly to ensure a clean, fair and a level playing ground.

I am making these suggestions against the background of the explanation given by Dr. Afari Gyan as the basis for the printing of two (2) sets of pink sheets. Even though the reasons are not credible and lack candour, the claims of the petitioners about the widespread use of the duplicate serial numbers category to perpetuate most of the malpractices and violations have not been well made out.

For instance, if it is because of the late settlement of the issue of the actual number of contesting presidential candidates that led to the printing of the two sets of pink sheets thereby accounting for the duplications, then only one set could have been used, since the other set of candidates never had the green light. Besides, the names of the candidates on the first set of printed pink sheets, is the same as the second set. This therefore has exposed the Electoral Commission as not being candid in their explanation.

It is possible that something sinister could have been the basis behind the printing of the two sets of pink sheets. But since a court of law such as this Supreme Court does not deal with speculation and conjecture in a serious and volatile matter as disputed presidential election results, it is better to err on the side of caution than to yield to assertions which have not passed the litmus test of proof on the balance of probabilities as has been discussed elsewhere.

My concluding remarks on this matter of duplicate serial numbers on the pink sheets is that, once the petitioners have failed to prove the existence of an established practice in the use of assigned specific serial number on pink sheets to poling stations in past presidential elections and their further inability to also prove that these resulted into the massive malpractices they alleged in this category save for the isolated instances, mentioned

supra, I reject the invitation being made to this court to annul votes in this category. It is accordingly rejected.

SAME POLLING STATION CODE RESULT ON DIFFERENT PINK SHEETS

The petitioners have based their contention on the malpractice of same polling station code results on different pink sheets on Table 14 in volume 2B of their address.

The petitioners rely also on the testimony of Dr. Afari-Gyan when he said in court on 30th May 2013 as follows:-

> "*The code is unique; first in the sense that no two polling stations ever have the same number or code. It is also unique in the sense that the code is consciously crafted to contain information that directs you to the location of the polling station. And the system we use is alpha-numeric; that is to say, it combines the letters of the alphabets and numbers; and the system is a letter followed by 6 digits and it may end or may not end with another letter."*

As I have started supra, there is incontrovertible evidence that polling station codes are unique to each polling station and the occurrence of

multiple results as per pink sheets in some few polling stations can indeed only be the work of the *"Hand of God".*

In this respect, the petitioners tendered a number of exhibits through Dr. Afari-Gyan and I will refer in this instance to exhibits S and Y just to mention and rely on a few.

It is also interesting to observe that, Dr. Afari-Gyan was emphatic during his testimony that no one polling station should have more than one pink sheets. In answer to a question, Dr. Afari-Gyan put it bluntly as follows:-

> "*I am saying that no polling station should have two pink sheets."*

The petitioners do not accept the explanation of the Electoral Commission Chair that this discrepancy may have occurred as a result of special voting having taken place at those polling stations thereby explaining the occurrence of the two pink sheets, or the splitting up of the polling station into two due to its size.

This court in order to do justice will have to give meaning and content to *Regulation 21, sub regulation 11 of the Public Elections Regulations, 2012 (C. I. 75)* which deals with special voting procedures and other matters. It provides thus:-

> "*The returning officer shall at the end of the special voting*

a. *Ensure that the ballot boxes are kept in safe custody after the poll has closed.*

b. *Ensure that the ballot boxes are sealed with the seals of the commission and candidates who wish to add their seal; and*

c. *Arrange for the ballot boxes to be opened at the time of the counting of the votes cast on the polling day and the ballot papers shall be counted in the same manner as those contained in the ballot boxes used on the polling day."*

Regulations 35 (7) and 36 (1) (2) and (3) of C.I. 75, deals with the manner in which the votes are counted at a polling station in any general election. The votes in a special voting are also to follow the same pattern stated in the C. I. 75 referred to supra.

It should be noted that, after the sorting out of the ballots into valid and rejected categories, the votes are then counted and the votes obtained by each candidate are registered against their names and rejected ballots are also recorded after which the results are announced.

I believe this is the procedure that the counting of the special voting is to follow. If that is the case, then there must be an indication by which the special voting is to be indicated to denote it separately from the general voting.

The address of learned counsel for the 2nd Respondent, Mr. Quashie-Idun on this issue is very terse. As stated earlier, it deals with the issue of special voting and split polling stations.

The evidence also unfolded that where polling stations are split, they are denoted as A & B. However, in the Table 14, which the petitioners have attached to their address, this distinction is not well made out. **For example,** ***L/A Primary School Mame Krobo East A*****, which are numbers 5 and 6 on the Table 14, all have one polling station code number E. 261001A in all the two instances with no indication that it is a split polling station.** The same phenomenon is exhibited in respect of *St. Emmanuel Nursery/Primary School Zenu* indicated in numbers 9 and 10 on the Table and there is no indication that it is a split polling station.

Then there is the infamous *Juaso Court Hall* indicated in numbers 11 and 12 and the *Finger of God* which has really turned into the *"Hand of God"* features prominently in numbers 20 and 21 all in Table 14 but most of these stations had been deleted in Exhibit Y.

My understanding and appreciation of the above analysis is that, there was indeed no indication whatsoever as to whether the polling stations were used as a split polling station in which case I presume they ought to be identified as A & B to prevent confusion.

This conclusion is irrespective of the submission of other learned counsel for the 1st and 3rd Respondents who all base their positions on the testimony of Dr. Afari-Gyan on the splitting of large polling stations and use of the polling stations for special voting.

In the absence of clear proof that the duplicated polling station codes with different pink sheets results have either been used for special voting or split into two, I am inclined to accept the petitioners' claims that the 2nd respondent used the said phenomenon in clear violation of accepted practice in electoral process and as spelt out in C.I. 75. However, if one considers the deletion of certain polling stations from this category as is evident from Exhibit Y, which is headed Duplicate Polling Station Codes, where these pairs of numbers 3, 4, 7, 8, 11 and 12 are deleted then the basis of the claims has somehow been eroded. In this respect, the petitioners themselves had deleted 2 polling stations each of Juaso Court Hall, Finger of God Church, Kubekro B and Kalpohin S.H.S A.

There is also the observation that some of the remaining polling stations on Exhibit Y have already been captured in the no Presiding Officer category. To prevent double count, I will not give any further consideration to this category.

UNKNOWN POLLING STATIONS

Ground 2 (a) of the petition is to the effect that presidential elections were conducted in 22 locations which did not form part of the 26,002 polling stations created by the 2nd respondent for purposes of the December, 2012 elections.

The 2nd petitioner was however candid in his evidence that a polling station apart from its name is also identified by the unique code which is special to the polling station. Nonetheless, the petitioners contend that elections were held in these 22 locations by the 2nd Respondent in the December 2012 elections outside the official list of the 26,002 polling stations designated by the 2nd respondent contrary to C. I. 75. The petitioners rely on a list prepared by them in Table 15 of volume 2B of their address to this court.

I have tried to examine whether this list of 22 locations is additional to the 26,002 or is part of the 26,002 but only that they are not known to the petitioners as per the list supplied them by the 2nd respondent. My examination has revealed that the 22 locations form part of the 26,002 designated polling stations.

The 2nd respondent's argued very forcefully that, because the petitioners sent agents to those 22 *"unknown"* polling stations, they should be stopped from questioning their lawful existence.

The 1st and 3rd respondents responded to this head of claim by relying on exhibit EC3 which is a letter signed by the 1st petitioner among others tendered by the 2nd respondent that party agents were indeed appointed by the petitioners to those 22 locations.

In view of the serious doubts that have been cast on the authenticity of those exhibits 1 will not rely on them.

It will be recalled that, on 15th April 2013 Johnson Asiedu Nketia, the General Secretary of the National Democratic Congress, who testified on behalf of the 1st and 3rd respondents, swore to an affidavit which is quite revealing. In substance, the depositions contained in paragraphs 15F, under the heading ***UNKNOWN POLLING STATIONS (i) (ii) and (iii)*** show clearly that the basis of the petitioners claims under this category has not been well founded or grounded.

In essence, what the depositions, together with an exhibit *"JAN 5"* which was attached, contained details of the constituencies with the variations in their names and mistakes in mislabeling which positively depict that the petitioners have no case. Out of abundance of caution, it is useful to reproduce the relevant portions of the said affidavit referred to supra in extenso for the full force and effect of the conclusion reached that this head of claim ought to be dismissed.

(i) "*I was in court when the counsel for the petitioners indicated that*

they were restricting this allegation to the 22 polling stations they identified on the basis of the orders of the court to supply further and better particulars. Counsel for the petitioners confirmed they no longer were making claims in respect of 28 polling stations as they originally alleged. The affidavit of 2nd Petitioner now refers to 23 polling stations meaning there is one polling station in respect of which further and better particulars have not been supplied as ordered by the Court.

(ii) We have also checked the details of the polling stations provided by the petitioners, ***and have found that their confusion arose, in some instances, out of the wrong spelling of the names of the polling stations and, in others, they misquoted the polling station codes. In some cases, the polling stations were used for special voting. All the polling stations exist and were part of the 26,002 polling stations that were created by the 2nd Respondent for the conduct of the December 2012 elections. Anyhow, the pink sheets exhibited by the petitioners in respect thereto reflect the genuine results of supervised election signed by the Petitioners and 1st Respondent's polling/counting agents***

(iii) I attached to this affidavit, marked exhibit "JAN 5" an analysis of the details relating to the Petitioners' allegation. The 2nd and 3rd columns show the details provided by the petitioners in their allegation. The

4th and 5th columns show the correct details of the polling stations. The 6th column shows the constituencies under which the polling stations falls."

I have looked at Table 15, prepared by the petitioners as an explanation to their address in Volume 2B. I have compared the polling station codes in that Table 15 with the particulars contained in the affidavit of Asiedu Nketia sworn to on 15th April 2013 already referred to with the Exhibit JAN 5 and I am satisfied that the polling station codes are the same for all the 22 locations.

In respect of some of the names, there are some similarities. I am therefore unable to accede to the request of the petitioners to annul results in this category. This claim by the petitioners is accordingly dismissed.

OTHER ALLEGATIONS ABANDONED BY PETITIONERS

Since the petitioners have evinced a clear intention not to proceed with the allegations of padding and reduction of votes save in one polling station as well as the allegations on STL issue, no time whatsoever will be spent in dealing with these.

BLOATED VOTERS REGISTER

There is no doubt, that the Petitioners claim of a bloated voters register has been admitted by the 2nd respondents in paragraph 8 of their second amended answer.

The explanation for this phenomenon has been attributed to error. Explaining further, the 2nd respondent stated that this error resulted in the figure of 14,158,890 instead of 14,031,793 being announced as the total registered voters who turned out for the 7th and 8th December 2012 presidential elections.

They however state that the error would only affect the turn out percentage and change the percentage from 79.43% to 80.15%.

The error effect is really very negligible and but for the credibility effect it has on the 2nd respondent's as an electoral administrator I will not give it any serious thought.

However, if I consider the effects of Exhibits U and V, which are final voters register for Adaklu constituency, polling station code number D090201, (Adaklu Torda in the Volta Region) and for Afadjato-South constituency, polling station code number D170901, E. P primary school respectively, then the fine attributes of the biometric registration as the panacea to the double and or multiple registration is a far cry from being over.

Refer also to instances of double registration which occurred in the registration of prospective voters conducted outside the country for those working in Foreign Missions, International Organisations and those studying abroad.

However, since the effect of these infractions in the registration exercise has not been proven to have had any effect on the final outcome of the election, I will dismiss them, as I hereby do.

CONCLUDING REMARKS

This Court has set down two issues in the memorandum of issues it had settled for the parties. These are as follows:-

i. Whether there were violations, omissions, malpractices and irregularities
of the Presidential election held on 7th and 8th December 2012 and

ii. Whether or not the said violations, omissions, malpractices and irregularities, if any affected the outcome of the results of the elections.

Having reviewed the entire pleadings and the evidence in this case, there is absolutely no doubt in my mind that there have been some violations, omissions, malpractices and irregularities of the Presidential elections held on the 7th and 8th December 2012.

What must be noted is that, even though these infractions were not proven to have been orchestrated by either the 1st or 3rd Respondents, but by the agents of the 2nd respondents, once they are infractions which have been established in some instances, I will uphold them. This is pursuant to

powers conferred on this Court under article 64 (1) and (2) of the Constitution, 1992.

The resolution of the second issue is somewhat difficult to resolve. This is because, it has to be determined whether these violations, omissions etc, affected the outcome of the results.

In a vast majority of the categories, I can conclusively say that they have had no effect on the outcome of the elections whatsoever. However, when cumulatively put together, the said violations may affect the outcome of the elections.

My decision on the

i. **Duplicate Serial numbers;**

ii. **Voting without biometric verification; and**

iii. **Unknown polling station categories;**

iv. **Duplicate polling station results**

is that I reject those claims outright and no consequence arises. They are therefore dismissed.

However, since I have upheld in its entirety the *"No presiding officer signature category"*, albeit with a different and much reduced set of pink sheets, I must admit these may affect the outcome of the results of the presidential elections. See Table 12A of Volume 2B of petitioners address referred to above and my conclusion on this category as stated in the main body of the judgment.

The petitioner's relief one will therefore be granted in respect of the ***No Presiding Officer Signature Category*** in terms of my decision as is contained in the main body of the judgment.

Similarly, the petitioners would be deemed to be successful in respect of their relief one in the over-voting category in terms as shall be determined using the road map as indicated in the main body of the judgment during the audit of the affected pink sheets.

Relief two is however accordingly dismissed. In respect of relief three, and in view of my decision in the over voting and no presiding officer signature category, and subject also to the total tally of votes in these two categories that the audit shall disclose, where the total tally of votes in the said category, reduce the total votes attributed to the 1st Respondent to fall below the 50% plus one percentage, then in that case in line with constitutional provisions in article 63 (3) I will direct that there should be a re-run of the presidential elections in only the affected polling stations between the 1st Petitioner and 1st Respondent.

Subject to the above decision, the petitioners claims stand dismissed.

To me the lessons in all these for the 2nd respondent's as an institution is very important. As an electoral administration body, the 2nd respondent's and I dare say the political parties who are major stakeholders have a duty to review our entire electoral system with particular reference to entries on the pink sheets. This has become very critical in view of the many errors, that have become a routine feature of the pink sheets.

If it is understood that, these pink sheets are the documents that are used to declare the results if no objections are raised, then the method of recruitment, training and general orientation of the staff that fill those forms at the polling stations, be they temporary or permanent engaged in performing critical core functions on election day has to be revised.

Similarly, I will also appeal to the political parties or candidates to ensure that those persons they engage as agents to observe the elections at the polling stations are not only loyal and dedicated party persons, but persons who are competent enough to understand the implications of the recordings on the pink sheets and the sequential nature of the said recordings.

I will also take this opportunity to congratulate the parties and their Counsel for their conduct and assistance to the Court. This was despite the fact that, even though tension was initially very high with loss of

confidence and trust among the Lawyers, with the passage of time, those barriers were removed and the case progressed apace to its conclusion.

Today's judgment is a victory I believe once again for Ghana's democratic credentials, to wit, the rule of law and our pursuit of governance related issues. Let me therefore conclude this judgment with my favorite childhood poem of Lord Alfred Tennyson ***"THE BROOK".***

"I am sometimes really amazed at whether Lord Tennyson had in his mind rivers and streams like the Volta, Dayi, Tordze or Onyasia when he wrote "The Brook" which I believe many people were made to memorise in their basic school.

Since I find the words therein very apt and useful for the closing pages of this judgment, I have decided to use them by adopting it to our local situation.

I come from haunts of coot and hern,
I make a sudden sally
And sparkle out among the fern,
To bicker down a valley.
By thirty hills I hurry down,
Or slip between the ridges,
By twenty thorps, a little town,
And half a hundred bridges...

The little town might well be Accra.

I chatter over stony ways,
In little sharps and trebles,
I bubble into eddying bays,
I babble on the pebbles.

With many a curve my banks I fret
By many a field and fallow,
And many a fairy foreland set
With willow-weed and mallow.

I chatter, charter, as I flow
To join the brimming river,
For men may come and men may go,
But I go on ever.

And I add, for NPP and NDC may come and go, but Ghana goes on forever as a country.

I wind about, and in and out,
With here a blossom sailing
And here and there a lusty trout
And here and there a grayling,

And if I may substitute Tilapia for the trout that will be more meaningful

And here and there a foamy-flake
Upon me, as I travel
With many a silvery waterbreak
Above the golden gravel,

And draw them all along, and flow
To join the brimming river,
For men may come and men may go,
But I go on for ever.

And I add that individual political giants may come and go,
but we as citizens of Ghana continue with our lives

I steal by lawns and grassy plot,
I slide by hazel covers;
I move the sweet forget-me-nots
That grow for happy lovers.

I slip, I slide, I groom, I glance,
Among my skimming swallows;
I make the netted sunbean dance
Against my sandy shallows.

I murmur under moon and stars
In brambly wildernesses;
I linger by my shingly bars;
I loiter round my cresses;
And out again I curve and flow
To join the brimming river,
For men may come and men may go,
But I go on for ever.

And I add that as Nkrumah, Busia, Limann, Rawlings,
Kufuor and Mills have all come and gone, but we as
Ghanaians will go on forever

It is a happy thought that the brook in our context, the Volta goes on for ever: but we come and go."

In this respect, I will liken the river in the poem to the Volta and other rivers and streams mentioned supra. The Volta flows from the North by different tributaries until it is dammed at Akosombo.

Thereafter it flows swiftly through to another Dam at Kpong and flows thereafter through the turbines to the dry savanna lands through Adidome, Sogakope until it enters into the sea at the estuary at Ada.

Is it not a joy to realise that whilst the Volta flows into the sea every second and in the process loses its identity, the phenomenon of its flowing down through its tributaries in to the sea goes on forever.

I will therefore entreat all my countrymen and women to bear this happy thought about the brook, which goes on forever, but we the players, i.e. those of us who benefit from the brook we come and go. Life must definitely continue to go on forever despite the reverses we suffer one way or the other.

GOD BLESS GHANA.

(SGD) J. V. M. DOTSE

JUSTICE OF THE SUPREME COURT

ANIN YEBOAH, J.S.C

The petitioners herein by an amended petition dated the 8/02/2013 claimed the following declaratory reliefs:

i. A declaration that John Dramani Mahama, the 2nd Respondent herein was not validly elected president of the Republic of Ghana.

ii. That Nana Addo Dankwa Akufo-Addo, the 1st Petitioner herein was validly elected President of the Republic of Ghana.

iii. Consequential orders as to this court may seem meet.

The facts of this matter appear not to be in any serious controversy as the events culminating to this petition were not disputed by the parties herein.

THE FACTS:

Ghana went to polls to elect a president on the 7th and 8th December 2012. The presidential election was constested by eight candidates. The first petitioner herein Nana Addo Dankwa Akufo-Addo was the candidate for the New Patriotic Party whereas the first respondent His Excellency John Dramani Mahama was the candidate for the National Democratic Congress. The second respondent herein who under Article 45 of the Constitution is the sole constitutional body charged to

conduct elections declared the first respondent herein as winner of the presidential election. The first respondent obtained 5,571,761 votes representing 50.7% of the valid votes cast thereby satisfying the constitutional requirement under Article 63(3) of the Constitution. The first petitioner obtained 5,248,898 votes representing 47.74% of the valid votes cast. The contestants obtained votes as follows:

(1) John Dramani Mahama	--5,574,761	50.70%
(2) Dr.Henry Herbert Lartey	--88,223	0.35%
(3) Nana Addo Dankwa Akufo-Addo	--5,248,898	47.74%
(4) Dr Papa Kwesi Nduom	--64,362	0.59%
(5) Akwai Addai Odike	--8,877	0.08%
(6) Hassan Ayariga	--24,617	0.22%
(7) Dr.Michael Abu Sakara Forster	--20,323	0.18%
(8) Jacob Osei Yeboah	--15,201	0.14%
	10,995,262	**100%**

Pursuant to the declaration of the results by the second respondent that the first respondent had obtained 50.7% of the valid votes cast, the petitioners invoked our jurisdiction under Article 64(1) of the Constitution by this

petition challenging the validity of the election of the first respondent on several grounds captured in the petition. Some of the grounds were, over-voting, lack of signatures on the declaration forms by the presiding officers, lack of biometric verification of voters, and duplicate serial numbers, unknown polling stations and duplicate polling station code.

The respondents resisted the allegations of electoral improprieties catalogued by the petitioners by stoutly denying all the allegations of improprieties leveled against the second respondent. Reading the answer of the second respondent to the petition, it became clear that the second respondent never admitted any of the irregularities or electoral improprieties leveled against it and maintained throughout that the election was conducted fairly and devoid of any such lapses as contended by the petitioners. The answers of the other respondents were supportive of the line of defence of the second respondents.

It must be pointed out for a fuller record in such a monumental case that this petition was initially against the first two respondents. The third respondent, however, successfully applied for and obtained an order for joinder making them the third respondent to this petition. Pursuant to the order for joinder, the third respondent proceeded to lodge its answer to the petition.

Several interlocutory applications were made to us in course of the proceedings (apart from the other for joinder) in the form of further and better particulars, interrogatories, production and inspection of documents etc. These interlocutory applications in my view narrowed the scope of the trial.

At the applications for directions stage, the parties raised several issues for the court to determine. However, this court mindful of the pleadings and the nature of the reliefs sought `imposed' only two issues on the parties for determination of this petition. These issues were couched as follows:

i. Whether or not there were violations, omissions, malpractices and irregularities in the conduct of the presidential elections held on 7th and 8th of December 2012; and

ii. Whether or not such violations, omissions, malpractices and irregularities, if any, affected the outcome of the said election.

At the application for directions stage, parties were directed to file affidavits and annexed any relevant evidence they intended to rely on during the trial within a specified time frame. It was also ordered that irrespective of the fact that the court had ordered filing of affidavits, parties were at liberty to give evidence through their representatives. All the parties gave

evidence through their representatives and several exhibits were tendered through them.

BURDEN OF PROOF:

Under the Evidence Act, NRCD 323 of 1975 a party who bears the onus of proof has, an obligation to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court.

According to Thayer in Preliminary Treatise on Evidence at The Common Law page 355, the nature of the burden is as follows:

> **"The peculiar duty of him who has the risk of any given proposition on which parties are at issue - who will lose the case if he does not make this proposition out, when all has been said and done".**

It has been urged on this court that the evidential burden has not been discharged by the petitioners. Writing on this topic, Professor Rupert Cross in his invaluable book: Cross and Tapper on Evidence, 12th Edition states at page 122 as follows:

> **"An evidential burden is not a burden of proof. It determines whether an issue should be left to the trier of fact, while the persuasive burden determines how the issue should be decided".**

In this petition, however, the burden of proof is squarely on the petitioners. In an election in which results were officially published, the results must be deemed as correct and any person challenging same ought to prove that it wasn't so. Another point worthy of mentioning is that, the second respondent, which is the only statutory body constitutionally charged to conduct such elections in its official capacity must be presumed to have regularly performed its official functions as it did in this case. This common law position is statutorily supported by section 37(1) of the Evidence Act, NRCD 323 of 1975. The presumption of regularity therefore holds in favour of the second respondent.

Another common law principle to guide jurists in ascertaining which party bears the burden of proof is this: which of the parties will lose if no evidence is called. From the nature of the reliefs sought and the pleadings in this case the petitioners will lose if no evidence is called. Under section 17(1) of the Evidence Act NRCD 323 of *1975,* the petitioners obviously bear the burden of producing evidence to establish that the election was fraught with the irregularities they complained of. Applying basic common law principles and the Evidence Act, it appears that the burden of proof is squarely on the petitioners. This was indeed acknowledged by the petitioners in their written address submitted to the court at the close of the case.

STANDARD OF PROOF:

The petition is simply a civil case by which petitioners are seeking to challenge the validity of the presidential elections. From the pleadings and the evidence, no allegations of fraud or criminality were ever introduced by

the petitioners. The standard of proof of allegations in civil cases is proof by preponderance of probabilities. It is only when crime is pleaded or raised in the evidence that the allegation sought to be proved must be proved beyond reasonable doubt. See **ARYEH** & **AKAKPO** v **AYAA IDDRISU (2010) SCGLR 891** and **FENUKU** v **JOHN TEYE (2001-2002) SCGLR 985.** The fact that this petition is brought under Article 64 of the 1992 Constitution does not make any difference in the applicability of the standard of proof. The allegations in the petition that were denied by the respondents in their answers to the petition ought to be proved as required in every case. The fact that the petition is a constitutional matter is also entirely irrelevant. The standard of proof in all civil cases is the usual standard of proof by preponderance of probabilities and no more.

From the various written submissions on record, none of the parties has raised any question or issue as to any higher standard of proof required to be applied in a purely civil litigation of this nature.

THE EVIDENCE

The second petitioner's evidence followed the order for filing of further and better particulars of the petition. In lengthy evidence covering several days in the witness-box, the second petitioner was subjected to rigorous and far-ranging cross-examination by all the counsel for the respondents. His evidence, however, touched on virtually all the irregularities or violations leveled

against the second respondent. It must be pointed out at this stage of this delivery that from the pleadings no allegations of electoral improprieties or irregularities were made against the first and third respondents herein. It does appear that the presence of the first respondent is simply based on the fact that he was the sole beneficiary of the allegations of electoral irregularities and improprieties leveled against the second respondent.

The petitioners, pursuant to an order of this court filed several Statements of Poll for the Office of President of Ghana which shall be referred to in this delivery as Pink Sheets for the polling stations which results appeared to be in controversy. In course of the evidence of the second petitioner it became clear that the number of pink sheets filed was in doubt. It is part of the official records of this petition that learned counsel for the first respondent wrote to the Registrar to demand extra pink sheets which he claimed had not been served on him. Learned counsel for the third respondent made similar complaints of not having been served with the exact number of the pink sheets allegedly filed by the petitioners in support of their case. This controversy also affected the second petitioner. In his evidence, the second petitioner said on oath that by his affidavit they were to lead evidence to cover 11,842 polling stations, but ended up with 11,221 polling stations. This did not end there as according to him 83 polling stations were later deleted to reduce the number of polling stations to 1 1,138. The second petitioner, however, ended up saying that the petitioners were relying on 11,842 pink sheets. This was in his evidence under cross-examination on 9/05/2013.

As the confusion raged on about the figures, this court made an order for the appointment of official referee to count the total number of pink sheets filed by the petitioners. The referee, KPMG came out with the figure of 8,675 as the total number of polling stations that were uniquely identified in course of the counting of the pink sheets. Upon filing its report to the court, the official referee gave evidence through its representative. It turned out during cross-examination of the official referee's representative, one Nii Amanor Doodo that the total number of 13,926 were exhibits that they counted and out of that 1,545 were not eligible so that reduced the number to 12,381.Out of this number the exhibit numbers appearing once came up to *9,504* and the polling station codes also appearing once came up to 5,470.

I must confess that I was very uncomfortable with the way and manner this highest court of the land was left unassisted by the second respondent in whose custody the original pink sheets are kept. It appeared from the reports of the official referee that as many as 1,545 of the pink sheets supplied by the petitioners as filed exhibits were not legible. In a serious matter in which the mandate of the entire voters of this country is being questioned through a judicial process one expected the second respondent as the sole body responsible for the conducting of elections to have exhibited utmost degree of candour to assist the court in arriving at the truth. Surprisingly, the second respondent opted for filing no pink sheets leaving this court unassisted and thereby placing reliance only on the pink sheets supplied to the agents of the petitioners at the various polling stations in issue. Why the second respondent elected to deny a court of law in search of the truth in a monumental case of this nature is beyond my

comprehension. I think this must be deprecated in view of its constitutional autonomy granted to it to perform such vital functions under the constitution for the advancement of our democratic governance. The second respondent strongly resisted an Application to produce Documents for inspection filed by the petitioners The Results Collation Form which are in the exclusive custody of the second respondents were never exhibited, indeed not a single constituency collation form was before the court This court was thus left to consider only the pink sheets supplied by the petitioners which were copies of the original.

Section 163(1) of the Evidence Act NRCD 323 offers some assistance in relying on the pink sheets which were supplied to the petitioners by the second respondent's agents at the various polling stations affected by the petitioner. The section states as follows;

> **"An "original" of a writing is the writing itself or any copy intended to have the same effect by the person or persons executing or is issuing it"**

This definition of " original" above , takes care of section 165 of the Act which states as follows:

> **"165. Except as otherwise provided by this decree or any other enactment, no evidence other than an original writing is admissible to prove the content of writing"**

From the evidence led there was no quarrel with the exhibits in the form of pink sheets provided by the petitioners as regards their admissibility. To go further, section 166 of the same Act provides as follows:

"166 A duplicate of a writing is admissible to the same extent as an original of that, unless

A genuine question is raised as to the authenticity of the original or the duplicate; or

In the circumstances it would be unfair to admit the duplicate in lieu of the original"

I have said earlier that the respondents, especially the second respondent who gave only copies of the pink sheets of the various polling stations did not doubt the authenticity of the any of the pink sheets. As it was given only in the normal official business of the second respondent, a strong presumption is raised as to its authenticity under section 37(l) of the Evidence Act.

I have taken time to discuss the admissibility of the pink sheets under the laws as it stands now for the simple reason that the pink sheets appear to be the only evidence which emanated from the various polling stations which are in controversy before this court. As pointed out earlier, none of the three respondents ever, even faintly, doubted the authenticity of any of the pink sheets. On record copies of same had been served on parties pursuant to the applications for directions before the second petitioner gave evidence on oath. In the absence of any allegations challenging any of the pink sheets I find as a fact that they clearly represented the official records of whatever took place at the various polling stations throughout the country with particular reference to the areas in controversy. The presumption of its regularity and authenticity are clear. Throughout the

proceedings the court, the parties and the official referee appointed by the court relied on the various pink sheets as representing the official records of the polling stations. It may be argued for judicial purpose that the pink sheets only raise a rebuttable presumption in favour of those who tendered them, that is, the petitioners. Assuming that it was so no evidence, contrary to and inconsistent with what appeared on the pink sheets was led to rebut any presumption of regularity and authenticity. In any case, on the authorities of **YORKWA** v **DUAH (1992-93) GBR 278 CA** and **FOSUA** *&* **ADU POKU** v **ADU POKU MENSAH (2009) SCGLR 1,** the court have established the principle of law to the effect that `wherever there was in existence a written document and oral evidence over a transaction, the time-honored principle is that the court was to lean favourably towards the documentary evidence, especially if it was authentic and the oral evidence conflicting'.

In my respectful opinion, save the pink sheet that fell into the category of over-voting, no attempt was made by second and indeed, other respondents for that matter, to rebut the presumption raised in favour of the petitioners. The details of their evidence would be addressed later in this delivery.

In the petition, the further and better particulars supplied by the petitioners and the evidence catalogued the alleged irregularities,

malpractices and violations into six categories. It would, in my opinion for the sake of clarity be appropriate to refer to them in detail:

a. Widespread instances of over-voting

b. Widespread instances of voting without prior biometric verification

c. Widespread instances of absence of the signatures of presiding offices or their assistance on the Declaration forms known as the 'Pink Sheets'.

d. Duplicate serial numbers

e. Unknown polling stations

f. Duplicate polling station codes

OVER - VOTING:

A look at all the statutes governing elections in this country including even the Constitution is bereft of the definition of over-voting. The Peoples Representative Law PNDCL 284 of 1992, Cl 75 and any other statutes, touching on elections have not defined over-voting. In course of his evidence, the second petitioner who gave evidence for and on behalf of the other petitioners stated that over-voting may occur when the total number of votes cast exceeded the number of ballots issued to voters. Another

instance of over-voting is when the total number of votes cast in the polling station exceeded the number of registered voters at that particular polling station. The representative of the first and third respondent, Mr. Johnson Asiedu Nketiah disagreed with the second petitioner on the definition. He was of the view that over-voting would occur only when the total number of votes cast exceeds the registered voters for the polling station in controversy. This definition of over-voting by Mr. Johnson Asiedu Nketiah was supported in its entirety by the second respondent who gave evidence as the Electoral Commissioner himself when he said that a classical definition of over-voting is when the total number of votes cast exceed the total number of registered voters. This so-called classical definition prompted my brother Baffoe-Bonnie JSC to question him whether this definition holds as there would never be hundred percent turnout in any elections. The second respondent's representative, that is, Dr. Afari-Gyan insisted on this definition. However, when he was subjected to rigorous and far-ranging cross-examination he admitted that certain pink sheets qualified to be declared as over-voting notwithstanding that the total number of votes did not exceed the registered voters in some polling stations.

It must also be pointed out that in course of his evidence the second petitioners admitted that some of the pink sheets which he initially considered as over-voting were not indeed so. Under

cross-examination the second petitioner had to admit out of candour that some were arithmetical errors which did arise out of the filing of the figures on the affected `pink sheets'.

The lack of any statutory definition presents an invidious situation for the court to decide the fate of several polling stations which the petitioners have presented to us to annul the votes on the simple but cogent grounds that the results had been compromised and that there was clear want of transparency at the affected polling stations. Under this category of over-voting the representatives of the first and third respondent was of the view that in course of the voting a 'foreign material' may be found in the ballot box to lead to over-voting. I must confess that I found it *very* difficult to agree with him how a so-called transparent electoral process could be so. In any case he was not re-examined on what a `foreign material' meant and I can safely presume that a `foreign material' may be some material that is foreign to the ballot paper in the ballot box or something different from the ballot papers in the ballot box.

In my opinion, over-voting may occur when the total number of ballot papers issued to voters at a particular polling station is exceeded by the total number of ballot papers in the ballot box. Secondly, it may occur when the total number of ballot papers in the ballot box exceeds the number of registered voters on the polling station register. To define overvoting by limiting it to the

second part of the definition would not hold in that it is a fact of history that it is always impossible to get a hundred percent, turnout at any public elections. For the purpose of this delivery I shall limit myself to the first definition of over voting.

The latter one put forward by the second respondent which was supported in its entirety by the representatives of the first and third respondents would not be helpful.

Assuming without admitting that there is merit for considering the other definition put forward by the respondents, it cannot be pointed out that both definitions in principle are against the idea of allowing one person to have more than one vote. This in my view would run counter to the preamble of the constitution which talks of "The principle of universal adult suffrage" which guarantees to the citizen qualified to vote only once in every election. I am of the opinion that in the exercise of the right to vote if it turns out that an individual has voted more than once as required under the constitution in an election, the whole electoral system is compromised by the abuse of that right. In the local case of **TEHN ADDY V ELECTORAL COMMISSION & OR [1996-97] SCGLR 589** Acquah JSC [as he then was] made the following observation in his opinion at page 594 when he pointed out the onerous duty imposed on the second respondents as follows:

> **"Article 45 entrusts the initiation, conduct and the whole electoral process on the Electoral Commission and article 46 guarantees the independence of the commission in the**

performance of its task. A heavy responsibility is therefore entrusted to the Electoral Commission under article 45 of the constitution in ensuring the exercise of this constitutional right to vote"

Under regulation 24(1) of Public Elections Regulations 2012 C.l 75, no voter should cast more than one vote. It states as follows;

24(1) <u>A voter should not cast more than one vote when a poll is taken</u>
It is therefore unconstitutional and contrary to regulations 24(1) of Cl 75 for one person to be allowed to cast more than one vote. It must be pointed out for further clarity that the Public Elections Regulations 2012, Cl 75 was enacted pursuant to powers conferred on the second respondent under article 51 of the constitution which provides as follows: **51."The Electoral Commission shall by constitutional instrument make regulations for the effective performance of its functions under this constitution or any other law and in particular for registration of voters , the conduct of public elections and referenda including provision for voting by proxy"**

Apart from the principle of Universal Adult Suffrage boldly stated in the preamble to the constitution, Cl 75 which regulates elections also grants "statutory injunction" against the abuse of electoral process when one voter cast more than one vote as required by law. As the second respondent failed to prevent the abuse of electoral process it stands to

reason that its own regulations governing the elections was clearly breached when it recorded several instances of over-voting as

presented by the petitioners It is a clear case of illegality proved to my satisfaction on the evidence presented to this court in the nature of documentary evidence, that is, the pink sheets. Donaldson J [as he then was] in **BELIVIOR FINANCE CO LTD** v **HAROLD G. COLE** & **CO [1969] 2 ALL ER 904** said at page 908 as follows:

> **"Illegality, once brought to the attention of the court, overrides all questions of pleadings including any admissions made therein"**

It should also be noted that all elections here and elsewhere, especially in constitutional democracies are regulated by statutes. It is within the limits of the statutes that elections elsewhere and in this country are conducted. In the very recent case of **REPUBLIC V HIGH COURT (FAST TRACK DIVISION) ACCRA; EX-PARTE NATIONAL LOTTERY AUTHORITY (GHANA LOTTO OPERATORS ASSOCIATION & OTHERS INTERESTED PARTIES)** [2009] SCGLR 390 at 397 the worthy president of this court ATUGUBA JSC said:

> **"It is communis opinio among lawyers that the courts are servants of the legislature. Consequently any act of a court that is contrary to a statute such as Act 722 s 58(1)-(3) is unless expressly or impliedly provided a nullity"**

The question is if a court of law does not give effect to the law who will?

In the above-cited case, Date Bah JSC, one of the most illustrious and lucid exponents of our contemporary judiciary said at page 402 as follows;

"No judge has authority to grant immunity to a party from consequences of breaching an Act of parliament . But this was the effect of the order granted by learned judge. The judicial oath enjoins judges to uphold the law, rather than condoning breaches of Acts of parliament by their orders. The end of the judicial oath set out in the second schedule of the 1992 constitution is a follows: `I will at all times uphold preserve protect and defend the constitution and laws of the Republic of Ghana: ... is entirely inconsistent with any judicial order that permits the infringement of an Act of Parliament"

In my respectful opinion any attempt to endorse a clear illegality in the nature of over-voting which is contrary to and inconsistent with our constitution and the constitutional instrument made thereunder would itself be unconstitutional in the sense that it would defeat the principle of Universal Adult Suffrage stated in our constitution.

I am of the opinion that no matter the number of votes involved that may constitute over-voting; it is a clear illegality and should not be endorsed by a court of law, more so by the highest court of the land. I will therefore proceed to annul all votes which were proved by the petitioners to be so. The figures and the polling stations would be addressed later in this delivery.

NO SIGNATURE OF PRESIDING OFFICER

It is part of the case for the petitioners that some of the polling stations' statement of poll and Declaration of Results for the office of the President form known in these proceedings as the Pink Sheets were not signed by the presiding officers of the polling stations affected . It should be clear beyond question that on this allegation of fact the parties did not join issue The only disagreement on this issue was the legal effect of the lack of signature of the presiding officers at the polling stations involved. It has been argued vigorously in the closing address of the petitioners that it amounted to a serious irregularity as it was a clear breach of a constitutional provision. This provision is Article 49(l) (2) and (3) of the constitution which states as follows:

49(l) At any public election or referendum, voting shall be by secret ballot.

(2) Immediately after the close of the poll, the presiding officer shall, in the presence of each of the candidates or their representatives and their polling agents as are present proceed to count at that polling station, the ballot papers of that station and record the votes cast in favour of each candidate in question.

(3)The presiding officer, the candidate or their representatives and, in the case of a referendum, the parties contesting or their agent and the polling agents if any, shall then sign a declaration stating

(a)The polling station; and

(b)The number of votes cast in favour of each candidate in question; and the presiding officer shall, there and then, announce the results of the voting at that polling station before communicating them to the returning officer.

It has been argued and indeed maintained throughout these proceedings that the signature of the presiding officer at the polling stations appear to be mandatory and failure on the part of the presiding officer to sign the pink sheets is tantamount to electoral irregularity in the form of constitutional violation.

The respondents stoutly denied the effect of no signature by the presiding officer. In his evidence on 27th May 2013, this was what the representative of the first and third respondents said in his evidence-in-chief:

Q. You are also aware that reference has been made to pink sheets on which there is no signature of the presiding officer at the polling station?

A. Yes my Lord I am aware of that allegation.

Q. What is your response to that?

A. My Lord it is true that we are all trained by the 2nd Respondent that at the close of poll after sorting and tallying votes to the candidates you have all the party agents including

the presiding officers who must sign then there is a declaration then after the declaration each party agent is given a copy of the pink sheet and the presiding officer has a duty of conveying the results of the polling stations to the collation centre. So my Lord I am aware that there is requirement that the presiding officer must sign.

Learned counsel for the petitioners subjected his evidence to crossexamination on this part of the evidence-in-chief.

He said under cross examination as follows:

Q. Are you aware that there are several instances where the presiding officer did not sign the pink sheets?

A. Yes I have seen some instances where the presiding officer did not sign.

Q. And your agents brought you several pinks sheets where the presiding officer had not signed?

A. Yes I have seen some of them

Q These are your well trained agents?

A. Yes

Q. And they did not see that the presiding officer failed to sign was a malpractice?

A. My Lord the agents are not to direct the presiding officer about how they do their work. It is the presiding officer who invites the agents to come and testify. So anytime the agents disagree with the way and manner the work has been done, they cannot, compel the presiding officer to do it, but they will raise an objection if they think that would affect the outcome of the results. But in this case, the signature or lack of it of a presiding officer does not affect the results; it cannot add votes to any of the contestants.

The representative of the second and third respondents in further answers

to the questions put to him under cross examination said:

> **"So it can only be a matter of omission because I cannot see anybody who will finish his work, invite others to come and attest to his work and then proceed to declare results, proceed to transmit the declared results to the collation centre. And I am sure if the presiding officers had time to revise their analyses they would have detected this and correct it".**

This was part of his answers under cross-examinations on the same 27/05/2013.

On the part of the second respondent who conducted the elections in controversy, the lack of signature of presiding officers on the various polling stations amounted to a mere irregularity if I understood him. For a more detailed evaluation of the relevant evidence on this issue I refer to

the evidence of Dr. Afari Gyan under cross-examination by counsel for petitioners.

Q. One of the reasons you gave for the non signature of the presiding officer is that the presiding officer could be influenced not to sign?

A. My Lord I have not given any reasons for the presiding officers not signing.

Q. You did not say that the presiding officer could be influenced, you never said that?

A. What I said was that we should be worrying because if we are not, the presiding officer could be induced not to sign simply because he wants to achieve a desired result.

Q. So rather you said that they could be induced not to sign for a desired result. First of all what will that desired result be?

A. My lords I would not know.

Q. And who could induce the presiding officer?

A. Anybody who is an interested party.

Q. Could the presiding officer also be induced to enter wrong figures?
A. I guess anybody could be induced to do anything.

In an answer to a question by learned counsel for the third respondent the witness said that:

> **"Our conclusion, as a commission, is that the very fact of the presiding officer not signing will not injure any particular**

candidate and therefore we accept the validity. You see, I don't know what you lawyers mean by malpractice. In election language that will not be a malpractice unless you can show that the reason why the presiding officer did not sign was because he wanted to favour or to injure somebody. In other words, it is a simple irregularity".

Q. In fact Dr. Afari Gyan , you would agree that if presiding officers had the ability by not signing to make the votes of people not count that will actually be a danger to the rights of people who have queued to vote, would you not?

A. My lords, I would agree because somebody could be prevailed upon not to sign.

I think all the respondents against whom this allegation of no signature of the presiding officer has been made agree that it was a mere irregularity. It is to me the duty of the court to form an opinion what would be the legal effect of lack of signature of the presiding officer .I have already quoted above the constitutional provisions under Article 49 clauses 1,2 and 3.

In interpreting a provision of a statute and constitutions for that matter, at times it would assist the court for guidance if reference is made to the law as it then stood before the coming into effect of the provisions under consideration.

Perhaps it may be very useful for a moment to embark on a journey into constitutional history of this country in the search for clues to know how a constitution of this country should have this provisions entrenched in under Article 290(1) (e) to render it not vulnerable to easy amendment by Parliament. It is clear from a close reading of the 1960 Republican constitution that no such provision existed.

In both the *1969* and 1979 constitutions, this country never had any similar provisions whereby the presiding officer of a polling station was given constitutional duties of this nature in such a serious matter which determines the fate of public elections and referenda. A search into the proceedings of minutes of the Consultative Assembly dated the 17th of March 1992 would yield some clues. The contributions from J.C Amonoo-Monney and Mr Muhammed Mumuni on this issue appears to be very instructive and invaluable.

The requirement of the presiding officers signature on polling stations declaration forms or Pink Sheets emerged as a constitutional requirement for the first time in our post-republican constitution of 1992. As a country with a desire to entrench democracy based on universal adult suffrage and transparency and accountability the framers of the 1992 constitution had cause to debate and insert this very important provisions in the constitution. Care must be taken to avoid any attempt to multiply words through linguistic manipulations to deny it effect as a constitutional provision, entrenched for a purpose.

It has been vigorously argued and urged on us by citation of leading cases like **TEHN ADDY** V **ELECTORAL COMMISSION ; CENTRE FOR HUMAN RIGHTS AND CIVIL LIBERTIES (CHURCIL) V ATTORNEY-GENERAL AND ELECTORAL COMMISSION** [consolidated] [2010] SCGLR 575 that any rejection of the votes cast by voters in the exercise of their constitutional rights as enshrined in the constitution on the grounds that the presiding officer at any polling station did not sign will be contrary to the constitutional rights of the individual to cast a valid vote. Both cases appear to support the argument that nothing should be done to deny any qualified Ghanaian his constitutionally guaranteed rights to vote at public elections. I must place it on record that I was a member of the panel which delivered the judgment in the **AHUMAH-OCANSEY** case 'supra' on the interpretation of Article 42 of the constitution.

I said as follows at page 676:

> **"However, Article 42 which is under interpretation is a constitutional provision and, indeed an entrenched one which stands on its own. Under Article 42 of the constitution, it is a constitutional right which the framers of our constitution have entrenched in the constitution to be enjoyed as a basic tenet to democratic governance in electing our leaders. No wonder the preamble of our constitution talks of the principle of universal Adult suffrage"**

I came to the conclusion in the above case in support of the opinions of my worthy colleagues including the Chief Justice to make it abundantly clear that prisoners ought to vote in public elections and should be registered to exercise that fundamental constitutional right. Reference were indeed made to the **TEHN ADDY'S** case by members on the panel to support the constitutional right vested in the Ghanaian who is qualified to vote to be registered to vote.

In this case, it is not the case that those electorates who would be affected by any ruling adverse to their rights to vote were denied their rights to vote. They voted in the normal course of the elections on the days the elections were held. The only point raised against their votes is that the presiding officers who were enjoined by the constitution to sign the Pink Sheets did not sign them. The right to vote in my respectful opinion is not just limited to voting but to have the vote counted. In the case of **UNITED STATES** V **CLASSIC** 313 US 299 it was said that:

> **"the right to participate in the choice of representative for congress includes the right to cast a ballot and to have it counted at the general election whether for the successful candidate or not".**

I recognise, like it was done in the **TEHN ADDY'S** case, the individual's constitutional right to vote and to have the vote counted as a constitutional right. My only problem is that the requirement of the signature of the electoral officer which is also a constitutional requirement is seriously in issue.

On this, the case of **MILWAUKEE SOCIAL DEMOCRATIC PUBLISHING Co** V **BURGLESON,** 255 US 407 comes to mind. In that case the court was of the opinion that constitutional rights should not be fritted away by arguments so technical and unsubstantial.

Before I proceed to form an opinion on this vital issue of constitutional importance affecting the rights of the voters whose votes were cast in the normal course of the elections, I think it would not be out of place for me to examine in detail the role of the presiding officer whose lack of signature on such a vital electoral document has sparked controversy. Apart from Article 49 of the Constitution which deals with the role of presiding officer in an election, nowhere in the constitution is presiding officer mentioned. However, Article 51 of the constitution mandates the second respondent to make regulations for elections and referenda. It is a fact of electoral history that several of such regulations were made by the second respondents prior into the coming into force of the current one which is: Public Election Regulations, 2012 (CI 75). Regulation 17 spells out the functions of the Presiding officers and polling assistants.

The nature of this case is such that I have to quote ad longum the official duties of the presiding officer under regulation 17(1) of C.I 75: 17 (1) The commission shall appoint

(a) a presiding officer to preside at each polling station; and

(b) a number of polling assistance that the commission may consider necessary to assist the presiding officer in carrying out duties.

(2)The duties of the presiding officer include

(a) setting up the polling station ;

(b) taking proper custody of ballot boxes, ballot papers, biometric verification equipment and other materials required and used for the poll;

(c) filling the relevant forms relating to the conduct of the poll;

(d) supervising the work of the polling assistants;

(e) attending to proxy voters;

(g) maintaining under order at the polling station;

(h) undertaking thorough counting of the votes;

(i) announcing the results of the election at the polling station; and

(j) conveying ballot boxes and other election materials to the returning officer after the polls.

From the functions imposed by the instrument on the presiding officer, it stands out clearly that virtually all the administration and even including security matters for the smooth running of the polls are vested in the presiding officer. The constitutional duties imposed on the presiding officer apart from signing a declaration stating the polling station and the number of votes cast in favour of each candidate also includes announcing the results .It stands

to reason that he is deemed as the representative of the Electoral Commissioner at the polling stations. In my respectful opinion the signatures of the polling agents and the representatives of the political parties at the polling station may be dispensed with as from the available Pink sheets most of the political parties never presented their representatives or polling agents at many polling stations.

From the evidence on record apparent on the pink sheets many political parties did not send agents or representatives to many of the polling stations. None of the parties herein is making a case out of that, in that, the interpretation one can put on Article 49(3) is that political parties are not bound under the constitution to send agents to the polling stations. Their absence at any polling station and for that matter not signing any pink sheets as representatives or agents of the political parties would not amount to any irregularities or malpractice in the electoral process. A close reading of regulation 19 Of C.1 75 that is The Public Elections Regulations 2012, in my view shows the limited vote the polling agents play at the polling stations. The polling agent does not have any major role to play in course of the elections. It is clear under regulation 44 of C.l 7 that the non-attendance of the polling agent shall not invalidate the act or a thing done The role of the polling agent is to detect impersonation and multiple voting and certifying that the poll was

conducted in accordance with the laws and regulations governing elections.

The constitutional duties imposed on presiding officers at polling stations as regards the result of elections are repeated in C.I 75 under regulation 36.The presiding officer is enjoined to sign the declaration stating the name of the polling station, the number of votes cast in favour of each candidate, and the total number of rejected ballots, before proceeding to announce the results to the public. The signature of the presiding officer is mandatory in the constitution and the regulations made thereunder which is under consideration.

Some statutory provisions may express the performance of an act in several forms. It may be permissive or mandatory. The courts in Ghana have shown remarkable consistency in this regard. As far back as1972 in the case of **REPUBLIC** V **DISTRICT MAGISTRATE ACCRA; EX PARTE ADIO** [1972] 2 GLR 125 CA, the Court of Appeal was of the view that as the town clerk who was mandatorily required by paragraph 19 of Act 54, sched.Vll to affix a notice before a premises could be sold to recover rates owed or intention to occupy that premises, had not done so the sale was quashed on the grounds that a mandatory statutory condition was not performed.

In all statutes, the courts apply mandatory provisions as expected and failure of non-compliance are not waived in some circumstances The current constitution has been interpreted in line with the time-honoured principle that mandatory provisions must be respected. In **A-G** V **FAROE**

ATLANTIC COMPANY LTD [2003-05] GLR 580, Date-Bah JSC said at page 601 as follows:

> **"The plain meaning of clause 5 of article 181 of the constitution 1992 would appear to be that where the government of Ghana enters into " an international business or economic transaction " it must comply with requirements, mutatis mutandis, imposed by article 181 of the constitution. Those requirements clearly include the laying of relevant agreement before parliament in terms of clause (1) of Article 181 of the constitution, 1992. And under clause (2) of article 181 of the constitution 1992, the agreement is not to come into operation unless it is approved by a resolution of parliament"**

Article 181 clause 2 is a as follows:

(2) An agreement entered into under clause (1) of this article **shall** be laid before parliament and shall not come into operation unless it is approved by a resolution of parliament.

Effect of this mandatory provision has always being recognized in recent cases of **MARTIN ALAMISI AMIDU** V **A-G &ORS** (unreported) suit No. J 1 /15/2012, a recent decision of this court is also in point.

In the **FAROE ATLANTIC** case, Akuffo JSC said at page 613:

> **"Had the court of Appeal considered article 181(5) of the constitution, 1992 critically, it might have realized that, taking**

into account its language the overall effect is that, as with loans, international business or economic transactions to which the government is a party also require parliamentary authorization shall be required for certain transactions, then any transactions to which the provisions are applicable that is concluded without the authorization of parliament cannot take effect".

I have quoted at length the dicta of this court's esteemed jurists to demonstrate the effect of mandatory provisions in statutes and the constitution for that matter. The current Interpretation Act which is in operation provides further support.

Section 42 of Interpretation Act, Act 792 of 2009 is as follows:

"42. In an enactment the expression "may" shall be construed as permissive and the empowering and the expression "shall" as imperative and mandatory".

The question that I respectfully ask is simply this:

If in an ordinary statute **shall** should be construed as imperative and mandatory, what interpretation should we place on the same word shall if it appears in our constitution and calls for construction?

I am of the firm view that the framers of the constitution inserted the word shall there for a purpose and should be construed as imposing a

mandatory duty on the presiding officers to perform their statutory duty which appears clearly as a condition for the declaration of the results at the polling stations. When there is clear breach of mandatory provisions of a constitution it must be so declared and no effect is given to the act performed in breach of the provisions in issue.

As the constitution is the supreme law, equitable defences of estoppels, etc would obviously be inapplicable See **TUFFOUR** V **A-G [1980] GLR** 637.The forceful argument that the agents of the various parties including that of the petitioners signed in my respectful opinion would not matter. Learned counsel for the first respondent has urged on this court that as the presiding officer counted the votes and the results properly tallied, entered onto the declaration form and declared by the presiding officer the court must adopt a purposive approach to the interpretation of Article 49(3) and should not invalidate the results for lack of signature by the presiding officers. It was also urged on us that the polling station agents did not protest in any prescribed manner as required by electoral laws and further, it would accord with preserving the votes of the Ghanaian voters if the court should resolve this issue in favour of the respondents under Article 42 of the constitution on which the two landmark cases of **TEHN ADDY** and **AHUMAH-OCANSEY** supra, were decided by this very court.

I have considered the issues raised by counsel for the first respondent on this issue of lack of signature of the presiding officer. It appears the submissions of other counsel for the other respondents support his views which he has seriously pressed on this court.

My personal view is that Article 42 which gives every qualified citizen of Ghana the right to vote in public elections cannot be read in isolation in this case. Every right conferred on the citizenry is regulated by the constitution. A citizen of Ghana who is eighteen years and above and of sound mind cannot go to a polling station and cast a vote without going through the procedure of registration laid down by law. Even the voting at the polling station which ultimately ends up with sorting out ballot papers for valid and invalid votes, announcement of results after the necessary entries on the pink sheets are all statutorily regulated.

In my opinion, the article under consideration, that is, Article 49(3) is very clear and unambiguous it is trite law that when the provision of a statutes and constitution for that matter is clear and unambiguous it is not the duty of a court of law under the guise of interpretation to scan the provision to interpret the clear and unambiguous provisions. This has been the position of the law since the oft-quoted case of **AWOONOR-WILLIAMS** v **GBEDEMAH [1970] CC 18** was decided.

If the fundamental law of the land which is the constitution has entrenched Article 49(3) to make it a constitution precedent for the validity of the election results, I am of the view that effect must be given to it notwithstanding the fact that Article 42 preserves the right to vote.

My position on this issue may be seen by some jurist as not preserving the

right conferred by Article 42 but a judge's duty is to uphold the

constitution which is the supreme law of the land. I always remind myself

that some citizens who queued to vote may have their votes annulled under the circumstances by applying Article 49(3). But as it has been said in several cases that provision of the constitution must be upheld in all times. In the case of **HOME BUILDING & LOAN ASSOCIATION** V **BLAISDELL**

290 US 398 at 483, Justice Sutterland had this to say:

> **"I quite agree with the opinion of the court that whether the legislation under review is wise or unwise is a matter with which we have nothing to do. Whether it is likely to work well or work ill presents a question entirely irrelevant to the issue. The only legitimate inquiry we can make is whether it is constitutional. If it is not, its virtues, if it have any, cannot be invoked to accomplish its destruction. If the provisions of the constitution be not upheld when, they pinch as well as when they comfort then must as well be abandoned" [emphasis mine]**

My constitutional duties would be fulfilled as a judge if I enforce the constitution. Our judicial oath taken on our appointment as judges enjoins us to at all times uphold the constitution which is the supreme law as clearly stated in the second schedule to the 1992 constitution .

If Article 49(3) would work injustice against the citizenry who registered, queued and voted, it is regrettable that I cannot in upholding the very constitution engage in any manipulation of language and deny its effect when it has been thrown to us for the first time ever in the history of this

court . I will uphold the constitution and proceed to give effect to it by annulling the votes cast which were not, on the face of the pink sheets, signed by the presiding officer to reflect what actually took place at the various polling stations involved .

The arguments that the agents signed and the result publicly declared by the presiding officers would not hold as in my opinion there is a clear breach of a vital constitutional provision which is a condition precedent to the declaration of the results involved in the affected polling stations.

VOTING WITHOUT BIOMETRIC VERIFICATION DEVICES

This is yet another ground on which the petitioners are seeking to annul votes cast. The petitioners in their pleadings and the further and better particulars supplied made available several Pink Sheets which they claim support their allegation that some votes did not go through biometric verification process.

It is their contention that under regulation C.I 75 of 2012 a voter must go through biometric verification to make his votes valid. The said regulation states as follows:

30(1) A presiding officer may, before delivering a ballot paper to a person who is to vote at the election, require the person to produce

(a) A voter identification card or

(b) Any other evidence determined by the commission

In order to establish by fingerprint or facial recognition that the person is the registered voter whose name and voter identification number and particulars appear in the register.

The voter shall go through a biometric verification process.

It is a fact of history in our electoral process that this is the first time in Ghana that biometric verification process was introduced in public elections. A short trip into history since 1992 in my respectful view will suffice. In 1992 a ballot box was not transparent for any voter to see what was in it. Voters cast their votes without any voter identification card provided the voter did register at a particular polling station, he or she could vote. Voters' identification and transparent ballot boxes were later introduced but voters' identification cards were initially limited to few areas in Ghana. Another development which emerged was the introduction of voters' identification card for all registered voters in Ghana. Perhaps the last one is the introduction of biometric verification machine process, which was hitherto unknown in our electoral process. Its introduction, as said above is supported by C.I 75 of 2012.

In my respectful view the issue of voting without biometric verification could be resolved by determining whether indeed some voters were not biometrically verified and secondly, whether or not lack of the biometric verification should lead to the annulment of votes cast. The petitioners contend that some voters did not undergo any verification as required under the regulation as it then stood. The respondent deny vehemently this

allegation of lack of biometric verification. Like any other denials in civil litigation it calls for proof by preponderance of probabilities. On this issue, it is clear that the petitioners bear the burden of proof to satisfy this court that indeed some voters were not biometrically verified as pleaded in their pleading based on which further and better particulars of the allegations were filed later.

The respondents, to be precise, the second respondent said the challenges which emerged from the use of the biometric verification machines were later successfully overcame and nobody voted without biometric verification and therefore there was no breach of the regulations.

The pink sheets in evidence to prove this issue of no biometric verification necessitates a closer evaluation of the rival testimonies.The evidence of the second petitioners is to the effect that the entries made by the presiding officer is column C3 of the pink sheets which is obviously the ballot accounting column provided a basis to support their allegation. The petitioners are of the view that column provided a basis to support their allegation. The petitioners are of the views that column C3 represents the same details on the voter identification cards captured by the second respondent and duly issued to those who were biometrically registered. That column was intended to, as it were, capture the number of those who voted at the elections with the aid only of their voters identification cards and did not obviously go through prior fingerprint

verification as required by C.I 75. In the opinion of the petitioners any entry of figures made by the presiding officer in that column represents the number of voters who did not undergo biometric verification before voting. In his evidence on this issue the second petitioners again relied exclusively on the pink sheets to make his case. No wonder in several answers to questions he said:

"You and I were not there"

In his answers to questions under cross-examination from counsel for the first respondent these are some of the answers:

Q In all instances that you alleged people voted without biometric verification you are not suggesting for a moment that somebody voted whose name was not in the voters register. Are you?

A We are suggesting that the face of the pink sheets indicates a number of people who voted without biometric verification.

Q. This is a direct question, you cannot evade it and I am asking you a direct question. Are you alleging that anybody voted who was not qualified to vote?

A. I wasn't at the polling station so I can only go by what is on the face of the pink sheet.

These answers to probing question from the first respondent's counsel shows how the petitioner was relying, as it were, exclusively on the materials on entries on the pink sheets.

In his evidence, the first respondent's representative, Dr. Kwadwo Afari Gyan said by way of denial that the entries on the pink sheets in respect of C3 were evidence of voting without biometric verification . He further insisted that those entries were clerical errors and that column C3 was not required to be filed at all by the polling station presiding officers. He continued in is evidence that column was placed there to cater for those voters who had been registered by the electoral commission during the biometric registration exercise before the voting but whose biometric data had got missing as a result of some difficulties that the electoral commission had encountered. He went further to say that as he wanted to give everybody the opportunity to vote he devised this facility to allow those persons to vote without going through the biometric verification and that would involve the filling in form 1 C before one could vote. According to the witness this proposal was rejected outright by political parties; and he instructed that Form 1 C should not be sent to the polling stations and that the C3 column was not supposed to be filled by the Presiding Officers. Dr. Afari Gyan said in details as follows;

"C3 was put there in an attempt to take care of those people who through no fault of theirs would have valid voter ID cards in their possession but whose names will not appear on the register and therefore could not vote. But let me add that when we discussed this with the political parties , some of them vehemently said no,

that we will not allow any person to be verified other than by the use of verification machine. I am just explaining why the C3 came there. The parties said no and we could understand that argument that this facility is not given to one person, it is being given to every presiding officer, so you are given this facility to 26,002 and it is possible to abuse it. So we do not want it and we agreed that facility would not be used". Unfortunately, the forms had already been printed, and these forms are offshore items, so we could not take off C3. And what we said, and we have already said this in our earlier communication was that we will tell all the presiding officers to leave that space blank because they have already been printed and there was no way that we could take it off. And that explains the origin of C3 on the Pink Sheets .It was a serious problem".

I have gone very far to quote the crucial evidence of the second respondent on this matter of no biometric verification. In his view C3 was not to be filled but they were filled by some presiding officers. The case of the petitioners on this matter, as pointed out earlier in this delivery, is only limited to the entries on the face of the pink sheets and no more. The second respondent on this issue tendered Exhibit EC 2 on 24th April 2013. Exhibit EC 2 is: A guide to Election officials' E lection 2012 Presidential and parliamentary Elections.

This book or manual as one may call it, was prepared by the second respondent to guide the public on voting procedure On the face of the pink sheets or the statement of poll for the office of President of Ghana the C column of which C3 should be filled or not to be filled is designated as the Ballot Accounting (To be filled in at END of the poll before counting commences).If indeed this was what was officially used to train the presiding officers it does not contain C3 but on the right hand side of it a provision is made for C3 to be filled . On the left hand side column it commences from C 1, C2, C3, C4, C5 and C6.

At C6 it is stated thus:

What is the total of Cl, C2, plus C3, plus C4? (This number should equal A.1 above) Why the deletion of C3 appeared on the left hand side and was stated on the right hand side is incomprehensible to me. Whether it was as a result of bad printing was not explained. When it was printed and how the training was done as regards this problem is still shrouded in doubt.

My problem is that these pink sheets cumulatively form mass documentary evidence amassed by the petitioners. They were filled and given to the agents of the parties after the close of polls. The only contribution from the agents in generating pink sheets at a polling station is that they sign the form if they are present. If they also want to protest formally, this they could do,

and no more. The pink sheet to me is under the exclusive control of the presiding officer from the time polls start till after he has signed them and issued them out. This is a statutory document required by law and even under the constitution to be signed by the presiding officer. It stands to reason that if entries are made thereon, prima facie, the entries are deemed as the official recordings of whatever took place at the polling station and no more. I do not think that any of the parties to this petition will dispute the fact that the recordings on the face of the pink sheets are deemed to reflect what the presiding officer in his official capacity recorded at the polling station for the declaration of the results. This is a documentary evidence of a transaction very serious and vital in every respect. To me it raises a strong presumption of regularity and satisfies, in my view the best evidence under the circumstances provided the evidence is admissible.

I do not find any objection to the admissibility of the pink sheets. **In J.SABA**

& **Co LTD V WILLIAM [1969] CC 52 CA** it was held as follows:

"MAJOLGBE V LARBI has been considered by this court in its judgment in the recent case of the Republic v Asafu-Adiaye No 2 [1968] CC 106 CA in which it was held that the dictum quoted above is no authority for the proposition that a judicial tribunal cannot decide an issue on the evidence of one witness or on the oath of one person against that of another"...

When the statement therefore refers to an averment capable of proof in some positive way, e.g. by producing document it can only mean such an averment as by its very nature requires to be proved by than a mere assertion on oath. What evidence is required to prove an averment can only depend on the nature of the averment"

The evidence by the presentation of the pink sheets by the petitioners in my opinion raises prima facie evidence of what officially took place at the various polling stations. In my opinion the petitioners have discharged the burden of proof as none of the pink sheets supplied in respect of lack of biometric verification attracted any objection on admissibility. The respondents who on the pleadings and the evidence doubted what is officially recorded on the pink sheets must satisfy this court that the recordings are incorrect or suffer from any defects known to admissibility of evidence. As regards the second respondents whose agents, that is the presiding officers, prepared, signed and issued the pink sheets to the petitioners agents at the various polling stations they are estopped from denying their authenticity. Under section 26 of the Evidence Act, NRCD323 of 1975 the law is clearly stated as follows

"26" Except as otherwise provided by law including a rule of

equity, where a party has, by his own statement, act or omission,

intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon that belief,

the truth of that thing shall be conclusively presumed against that party or his successors in interest".

From the evidence of the second respondent's representative he relied on all those pink sheets to declare the results and he cannot just deny its contents. He is bound by the entries on the face of the pink sheets. I find his explanation as most unsatisfactory in that he could not indeed tell the court when and by which means it was officially made known to the presiding officers not to fill C3.If he was in serious doubt , a court of law must not leave this vital evidence led in rebuttal to guess or conjecture. I am aware of the submissions from counsel for the first and third respondents that this evidence on the C3 was left unchallenged by counsel for petitioners.

I accept the proposition of law that when evidence led against a party is left unchallenged under cross-examination the court is bound to accept that evidence, see **AYIWAH** V **BADU [1963] 1 GLR 86, NARTEY** V **VRA [1989-90] 2 GLR 368** and **TAKORADI FLOUR MILLS** V **SAMI FARI [2005-06] SCGLR 882,** but it was clear that Dr.Afari Gyan who gave evidence on this issue was just conjecturing and it would be a sad day for me to believe such evidence, more so when throughout his evidence under-examination be demonstrated want of credibility. I find that the respondents, especially the second respondent who led evidence to rebut a documentary evidence prepared by his duly authorized agents failed to lead credible evidence to rebut the presumption of regularity of officials acting in their statutory capacity and performing their constitutional duty. The evidence on the face of the pink sheets that there were no biometric

verification has not been rebutted by the second respondent as required by law in civil cases .I find as a fact that the petitioners have proved that the entries show conclusively that those voters were not verified biometrically .On this I cannot rest without citing the case of **HAWKINS V POWELLS TILLERY STEAM COAL Co LTD [1911] 1 KB *988,996*** where **Buckley LJ** said:

> **"When it is said that a person who comes to court for relief must**
>
> **prove his case, it is never meant that he must prove it with absolute**
>
> **certainty. No fact can be proved in this world with absolute**
>
> **certainty. All that can be done is to adduce such evidence as that**
>
> **the mind of the tribunal is satisfied that the fact is so. This may be**
>
> **done either by direct evidence or by inferences from facts. But the matter must not be left to rest in surmise, conjecture or guess".**

In my opinion the various affidavit filed against this issue of lack of biometric verification do not in the least rebut the documentary evidence duly prepared by the second respondent's agents, signed by them and duly used for the declaration of the results which is in controversy. I feel that this is not the type of evidence needed to rebut the presumption of regularity raised in favour of the pink sheets covering lack of biometric verification.

Having found that the clear regulation has been flouted by the second respondent, I will uphold the claim of the petitioners on this category and proceed to annul votes cast without the biometric verification as required by law.

UNKNOWN POLLING STATIONS, DUPLICATE POLLING STATION CODES, AND DUPLICATE SERIAL NUMBERS

These categories in my view could be dealt with together. I had a draft copy of the opinion of my esteemed brother Dotse JSC on these remaining categories. I took time to have detailed discussion with him on his draft. It appeared that my learned brother had put a lot of industry in preparing his opinion on these categories of electoral irregularities or malpractices. I find his reasons very convincing in law based on the evidence adduced before us by the parties. I am in support of the reasons canvassed by him for the dismissal of these categories and I cannot multiply words to justify my agreement with him. I therefore, like my brother proceed to dismiss these categories as not proved by the standard expected of a suitor.

CONCLUSION

Before I rest my opinion on this petition, I must comment on the point raised by learned counsel for the first respondent who argued that the petitioners did not exhaust the remedies available by petitioning the second respondent herein. I have considered the evidence on record and it appears that the petitioners presented a petition to the second respondent

to postpone the declaration of the results. This, the second respondent declined. He said it was unmeritorious and according to Dr. Afari Gyan, the evidence supplied to him later by the petitioners' party was woefully insufficient to justify the postponement of the declaration of the result. I have taken time to refer to this point raised in his closing address as I think he was the only counsel who raised this point and therefore calls for attention on the part of this court which owes counsel a duty to comment on it.

I deferred the computation of the voters whose votes were to be annulled under the three categories fully discussed by me earlier on in this judgment. It has become very difficult in the computation of the figures as pointed out earlier in that there were changes in the figures on several occasions and the KPMG report as the report of the only official referee was not conclusively helpful. It must be pointed out that when parties filed their respective addresses the petitioners compiled a data and had it served on counsel for the respondents. These data contained the list of Pink Sheets used in this petition and those deleted. It is on record that these data were served on the respondents for their study before the court invited oral submissions from counsel. It turned out that no question was raised against the data submitted by the petitioners. It probably may not be an accurate representation of the exact figures from the pink sheets filed in this petition. However, I have noticed that all the pink sheets captured in the date were in the KPMG report which was accepted by the court as the official record of pink sheets to be considered by this court which had also taken care of pink sheets not legible as well as others that suffer from other deformities.

On the several pink sheets that fell within the category of No Signature, the invalid votes which were declared as annulled by me would be 659,814 out of which the first petitioners' annulled votes would come to 170,940 whereas that of the first respondent would come to 382,088. It does appear that his would reduce the first petitioner's valid votes to 5,077,958 whereas that of the first respondent's would come up to 5,192,673. It must be pointed out that other contestants obtained insignificant numbers.

However, neither the first petitioner nor the first respondent would obtain fifty per cent plus as required under the constitution as the first petitioner's percentage votes would be 48.68% whereas that of the first respondent would be 49.78% of the total valid votes cast.

As regards over-voting the first petitioner's votes after annulment of the invalid votes would be 5,040,176 forming a 48.88% of valid votes whereas that of the first respondent would be 5,112,667 making a percentage of 49.59% of the valid votes cast.

On no biometric verification, the invalid votes to be annulled against that of the first petitioner would be 221,678 leaving his valid votes to 5,027,220 and making a percentage of the total valid votes cast stand at 49.14% in percentage terms, whereas the first respondent's total annulled votes would come up to 526,416 leaving him with 5,048,345 and a percentage of 49.35% of valid votes cast.

THE ISSUES: I do not think that from the evidence of the petitioners, both documentary and oral, any one would doubt that the petitioners failed to

prove multiple irregularities, malpractices and statutory violations against the second defendant. I am of the firm conviction that issue (1) was proved to my satisfaction by the available evidence on record and I accordingly proceed to resolve same in favour of the petitioners.

On Issue (2), I find from the evidence that given the number of votes affected by the violations, omissions and malpractices and the irregularities appear to be such that they impacted adversely on the results, I would also resolve issue (2) in favour of the petitioners.

I would have readily proceeded to grant the reliefs sought in its entirety but the ONLY problem is that from the available evidence, the widespread violations, omissions and malpractices appeared to be of such proportions that it would not be proper for me to declare the first petitioner as winner of the elections in controversy in terms of the reliefs sought. I find the malpractices, omissions and violations enormous which rock the very foundation of free and fair elections as enshrined in our constitution which was itself breached through over-voting, lack of presiding officer's signature and lack of biometric verification which takes its validity from Article 5l of the very constitution.

I would therefore grant the relief (i) in view of the evidence led and decline to grant relief (ii). I, however, as consequential order, order the second respondent to organize an election to elect a president as I cannot rely on an election which was seriously fraught with all the malpractices,

irregularities and statutory violations proved in this petition to declare the first petitioner as having been duly elected.

Before I rest my delivery, I would want to point out that so much reliance was placed on the Canadian case of **OPTIZ** V **BORYS WRZESNEWSKYS [2012] SCC 55.** It must be pointed out that this Canadian case which was cited by all must be read within its own context for its persuasive value. It was decided on the legislation as it then stood, that is, Canada Elections Act, S.C 2000, C9, SS. 524 (1) (b), 531(2) involving an electoral petition in which a candidate in federal election was defeated by margin of twenty-six votes alleging irregularities.

No matter the persuasive effect of this decision which was split, care must be taken not to allow foreign decisions to persuade us when our own legislations or constitution are placed before us for interpretation. In the case of **SAM NO.2** V A-G **[2000] SCGLR 305,** Her Ladyship Justice BanfordAddo JSC cautioned us in the following words at page 315:

> **"In interpreting our constitution, it is important that the constitution should be interpreted in the light of its own wording and not by reference to their constitution in other jurisdictions, for example, that of the United States. Our constitution is peculiar to us and we must therefore interpret it in accordance with its clear words as well as its spirit.**

Therefore cognizance must be taken only of the expressed provisions in our constitution and in accordance with the clear intentions of the drafters of the constitution. No reliance should be placed on the requirements of the constitutions in other jurisdictions, whose constitutions are structured to suit their individual needs"

With this admonition at the back of my mind, I am done.

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

BAFFOE-BONNIE JSC:

On the 7th and 8thdays of December, 2012, Ghanaians went into general elections to elect 275 members of parliament and an Executive President and Vice President. The Elections were conducted by the second respondents, a constitutional body vested with the exclusive powers to conduct public elections in Ghana. The Parliamentary elections though, had its own problems, is not the subject of this petition. So any reference to the December Election in this judgment, unless otherwise contrarily stated, is a reference to the 2012 Presidential Elections in Ghana.

The Executive Presidency was contested by 8 persons and their running mates who, by law, would be designated Vice-President when such person is so elected. Seven of the candidates were sponsored by Political Parties, namely:

1. National Democratic Congres(NDC)JOHN DRAMANI MAHAMA,
2. New Patriotic Party (NPP)NANA ADDO DANQUAH AKUFFO-ADDO,
3. Convention People's Party (CPP) DR MICHAEL ABU SAKARA FOSTER,
4. Peoples National Convention(PNC)HASSAN AYARIGA,
5. Great Consolidated People's Party(GCPP),DR.HENRYHERBERT LARTEY;
6. Progressive People's Party (PPP) Dr. PAPA KWESI NDUOM
7. UNITED FRONT PARTYAKWASI ADDAI ODIKE

One person JACOB OSEI YEBOAHstood as Independent candidate.

On the 9th of December, the second respondent, per its ChairmanKwadwoAfariGyan, who is constitutionally designated as the returning officer of the Presidential Elections, declared the NDC's John DramaniMahama, duly elected as President with a 52 per centum majority, and the NPP's Nana AddoDankwaAkuffo-Addo, as runner-up with 47 percentum of the votes. The declaration, showing positions and percentage of votes won has been gazzeted as C.I. 85.

Feeling aggrieved, the 1st petitioner, Nana AddoDankwahAkuffo-Addo, who stood on the ticket of the New Patriotic Party as presidential candidate, his running mate, Dr.MahamaduBawumia,and Jake ObetsebiLamptey, the Chairman of the New Patriotic Party, filed a 33-paragraph petition challenging the declaration by the 2nd of the 1st respondent as the validly elected president. The reliefs that the petitioners seek are:

1. a declaration that John DramaniMahama was not validly elected as president of the Republic;

2. a declaration that Nana AddoDankwahAkuffo-Addo, the 1st petitioner, rather was validly elected president of the Republic of Ghana; and

3. consequential orders as to this court may seem meet.

The petition had initially been brought against the President elect and the E.C. but the NDC was joined to the action as a third party on the basis that they sponsored the 1st respondent, and were therefore necessary parties. Their application to join was approved by a 6to 3 majority. After the initial pleadings, amendments, further amendments and a host of interlocutory applications from all parties, which said applications included an application for further and better particulars, an application to serve interrogatories, etc, the case was finally set down for hearing.

After sifting through a mass of pleadings the Court set the following two issues down for trial:

1. Whether or not there were irregularities, malpractices, and/or statutory violations in the conduct of the December 2012 Presidential Elections; and

2. Whether or not these irregularities, malpractices and statutory violations, if any, substantially or materially affected the outcome of the December 2012Presidential Elections.

Giving further directions as to the mode of trial the court decided that trial was going to be by affidavit evidence and that parties could give viva voce evidence and be cross examined. Witnesses who filed statements may be cross examined with the leave of the court.

THE PETITIONERS' CASE

It is the case of the Petitioners that during the conduct of the December 2012 Presidential Elections, there were several irregularities, malpractices, omissions and commissions and downright violations of statutory provisions including constitutional provisions that were pervasive in a significant number of polling stations throughout the nation. These anomalies were such that certain number of polling stations totaling about 11,138 (specifically identified), should have their results annulled. Some of the anomalies pointed out by the Petitioners were as follows:

1. Failure of the Presiding officer of the polling station to sign the declaration of the results;

2. The use of Pink Sheets with Duplicate Serial numbers;

3. Allowing some people to vote without Biometric Verification; and

4. Over voting.

Two other in fractions were also isolated ie. Pink Sheets of Unknown polling stations, and Polling stations with duplicate pink sheets. But the second petitioner sought to abandon these when he said the numbers involved in those two infractions were not significant to affect the outcome of the elections.

FAILURE OF THE PRESIDING OFFICER TO SIGN DECLARATION FORMS (PINK SHEETS)

It is the case of the petitioners that, anumber of polling stations pink sheets were not signed by the presiding officers as required by law and so all those polling stations should have their results annulled and the figures so annulled be deducted from the results as declared. They claim that if the votes are annulled for this constitutional or statutory violation alone the results as declared will be affected. It is their case that the use of the word 'shall' in a document connotes a mandatory situation as against 'may' which is permissive. And when it is used in a no less statute as the constitution of the State, anything done contrary to what shall be done is a violation that cannot be saved.

The 2nd respondent put up three defences to this claim.This is what they said in their response to the petition;

The 2nd Respondent denies paragraph(f) of ground 1 of the 2nd Amended Petition and says that upon being served with the further and better particulars provided by the Petitioners following orders of this honorable court dated February 5 and

7, 2013, it conducted an examination and analysis which showed that: of the 2,009 pink sheets that the Petitioners claimed to be unsigned, 1,099 were in fact, signed by the Presiding officer at the polling station or, at the instance of the Returning Officer at the Collation Centre; 905 were unsigned, representing 3.5% of the total number of pink sheets nationwide; and 1,989 pink sheets, representing 99% claimed to be unsigned were signed by the Polling or Counting Agents of the candidate. Thus, the 2nd Respondent maintains that the request by the Petitioners that votes cast at the said polling stations are invalid and should be deducted is without merit and should be refused. It should also noted that when several pages of paper impregnated with carbon are used in order to have several copies of each page, it could happen that if the person signing or writing thereon does not press hard enough on the paper, the signature or writing could appear faint or illegible on some of the pages.

In addition to this Counsel has also submitted that the absence of the signature of the presiding Officer is not sufficient to annul the votes of persons who have exercised their franchise under the constitution, particularly in a situation where the accredited representatives of the parties or the candidates have duly signed to authenticate the regularity of the conduct of the polls. The right to vote as guaranteed under the constitution is paramount and not only must it ensure that persons qualified to vote exercise it, but it must also be ensured that peoples' votes once regularly exercised are not annulled on the basis of technicalities. Failure to sign by the presiding officer ought to be seen as an irregularity that does not affect any party or conduct of the polls. The call for annulment of votes under this head is therefore misplaced.

THE USE OF PINK SHEETS WITH DUPLICATE SERIAL NUMBERS

It is the case of the Petitioners that the Pink Sheets were imported into the country with numbers embossed on each pink sheet to differentiate it from any other pink sheets. In that case each pink sheet should bear a different serial number in all 26002 polling stations in the country. However this was not done. They detected that out of the over 11000 pink sheets reviewed, over 10000 had their counterparts or duplicates used instead of their “original” pink sheets. This was done because the second respondents had intentionally imported more pink sheets with the view to manipulating the results of the polls. The use of counterpart pink sheets instead of different pink sheets for each polling station is an irregularity which should lead to annulment of votes in all polling stations affected, in this case about 10,000 plus polling stations with a total voter population of over 2.5 million voters.

The response of the second respondent to this claimis that the petitioners claim has no basis and not well founded. Yes it is true that each pink sheet has a different number, but they are not in series and therefore not serial numbers properly so called. The numbers are not security numbers that can be used to track the polling stations in which they are actually used. So any pink sheet with any number can be sent to any region, constituency or polling station. Pink sheets are packed at random and their distribution does not follow any pattern in terms of the numbers embossed on them.

Rather, when the pink sheets are sent to the regions thence to the constituency and polling stations, they are blank. It is when they are filled in that the polling station codes become the identifying marks and reference points.For example, when one picks a pink sheet with a number likeA170202 written in the polling station code number column, even without reference to the name one can say that this pink

sheet comes from a constituency in the western region. The letter A is western region, the first two digits are constituency codes and then polling station etc .In effect a pink sheet is not identifiable by the number embossed on it but rather by the polling station code written on it. So whether two pink sheets bearing the same embossed numbers are used by two different polling stations either in the same region or in different regions it doesn't matter and definitely cannot call for the annulment of ballots validly cast. This category should also be dismissed.

VOTING WITHOUT PRIOR BIOMETRIC VERIFICATION.

For the first time in the history of elections in this country, the 2012 general elections was supposed to be conducted with identification of potential voters by biometric verification. The nation spent a lot of time and energy registering eligible voters biometrically. Biometric registration involved taking the finger prints of eligible voters in addition to facial recognition. In the round up to the elections a lot of inter party discussions took place and it was finally decided that voters who could not be biometrically verified on the election day would not be allowed to vote even if they had their names in the register. There appeared in the political landscape the popular slogan "NO VERIFICATION, NO VOTING." C.I.75 reg 30(2) supportedthisslogan. The constitutionality of this CI is being challenged in court, so I will stay off discussion on this for now.

Be that as it may, constitutionality or otherwise, all the parties went into the general election with the understanding that no verification, no voting.The whole concept of biometric registration and verification before voting had been introduced as a way of reducing to the barest minimum, if not eradicate completely, the incidence of claims of double voting and impersonation that crop up after every election. It was supposed to increase transparency and enhance

people's acceptability of the election results.Indeed at one of the numerous press conferences the electoral commissioner made it clear that at the end of the polls, where the votes cast exceed the number of persons verified to vote by even one vote, the results of the said polling station will be cancelled. Based on this understanding, some voters were turned away from some polling stations and were not allowed to vote because they could not be verified. But as borne out by some of the pink sheets at a number of polling stations reviewed by the petitioners, some people were allowed to vote without prior biometric verification. In fact in quite a number of cases recordings on the pink sheet indicated that all voters voted without prior biometric verification.

The response of the respondents, particularly the EC, was that no persons voted without biometric verification as agreed on by the parties before election day. And that the entries found in the pink sheets which creates the impression of people voting without prior biometric verification, were wrongly made and part of the administrative lapses that did not affect the conduct of the polls. That the respective polling agents signed at the various polling stations without any excuse belies the claim that any electoral irregularity went on.

OVER VOTING

The petitioners claim that there were indications that in quite a number of polling stations there was over voting. And this is evident on the face of the pink sheet. The petitioners give three main definitions of over voting:

1. Where the ballots found in the ballot box exceed the number of ballot papers issued to the polling station;

2. Where the ballot papers found in the ballot box exceed the number of persons REGISTERED to vote in the polling station; or

3. Where the ballots found in the box exceed the persons actually verified to vote, i.e.those registered and actually appearing at the polling station, verified and given ballot papers to vote and actually voting.

According to the petitioners all these figures are verifiable from the face of the pink sheets. The votes in all such polling stations should be annulled and same deducted from the overall votes garnered by the parties. Statistically, this infraction alone could lead to a change in political fortunes of the two.

The respondents disputed this three tier definition and said the classical definition of over voting is where the ballot papers actually exceed the number of persons actually registered at the polling station. Even then when it comes to over voting the pink sheet may not be the primary or only source of information. And that if figures on the pink sheet indicates that the ballot papers found in the box actually exceed the figure written for the number of registered voters, one will have to cross check from the actual register of the polling station. It might well be that the presiding officer might have made a mistake when writing the figure of number of registered voters.

In their estimation there was no over voting and therefore this category should also be rejected.

ANALYSIS

Before going into the evidence given by the parties in support of their respective cases, there are some three subject areas that I want to get out of the way. Their impact on the substantive matter before the court will be seen in the course of delivery.

BURDEN OF PROOF

I must begin the analysis of this case with the statement that in spite of its nature and despite all the emotions that this case has aroused, the rules and procedure for arriving at the conclusion of this case, unless specifically spelt out by C.I. 75are still the same. So who bears the burden of proof and the burden of persuasion and what is the degree or standard of proof? Generally speaking, this depends largely on the case, that is, the facts averred and therefore the facts in issue. In the absence of express or statutory provisions to the contrary, the ordinary rules that obtain in civil causes or matters should apply. Generally, the burden of proof is therefore on the party asserting the facts, with the evidential burden shifting as the justice of the case demands. The standard or degree of proof must also necessarily be proof on the preponderance of the probabilities

In the case of**Ackah v Pergah Transport Limited & Others [2010] SCGLR 728**, my very able sister Mrs. Justice Sophia Adinyira, JSC, summed up the law on the burden of proof in civil cases, at page 736, as follows:

"It is a basic principle of law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail….It is trite law that matters that

are capable of proof must be proved by producing sufficient evidence so that, on all the evidence, a reasonable mind could conclude that the existence of a fact is more reasonable than its non-existence. This is the requirement of the law on evidence under sections 10 (1) and (2) and 11(1) and (4) of the Evidence Act, 1975 (NRCD 323).”

Even though election petitions seem different it has been held that the laws relating to the burden of proof and standard of proof are the same as those in civil cases.In the Nigerian election case of **Abubakar v Yar'Adua [2009] All FWLR (Pt 457) 1 SC**, the Supreme Court of Nigeria held that the burden is on the Petitioner to prove, not only non-compliance with the electoral law, but also that the non-compliance affected the results of the election.

In the same vein, the Canadian case **of Opitz v Wrzesnewskyi2012 SCC 55-2012-10-256,** the Canadian Supreme Court held, by majority opinion, that:

“An applicant who seeks to annul an election bears the legal burden of proof throughout…”

Also, **in Col. Dr. KizzaBesigye v MuseveniYoweriKaguta& Electoral Commission, Election Petition No. 1 of 2001**, the majority of the Ugandan Supreme Court Justices held as follows:

“…the burden of proof in election petitions as in other civil cases is settled. It lies on the Petitioner to prove his case to the satisfaction of the Court. The only controversy surrounds the standard of proof required to satisfy the Court”.

As to how this burden of proof is discharged see the cases of Majolagbe vLarbi 1959 GLR1`90 AT PG 192 where OllennuJ repeating his dicta from the case of Khoury v Richter(unreported)said;

"Proof in law is the establishment of facts by proper legal means. Where a party makes an averment capable of proof in some positive way, eg by producing documents, description of things, reference to other facts, instances or circumstances, and his averment is denied, he does not prove it by merely going to into the witness box and repeating that averment on oath, or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the court can be satisfied that what he avers is true"

It bears emphasis therefore that unless the burden shifts the petitioners bear the burden of proof on all matters raised and the standard of proof is on the preponderance of probability

DEFINITIONS

Elections are complex systems designed and run by fallible humans. Thus, it is not surprising that mistakes, errors, or some other imperfection occurs during an election. Because absolute electoral perfection is unlikely and because finality and stability are important values, not every error, imperfection, or combination of problems supports an election contest, voids the election, or changes its outcome. This court must spend sometime to determine whether votes affected by minor irregularities are nonetheless valid, and if so, separating them from the votes that are invalid because they are tainted by more serious irregularities.

As indicated in the opening pages of this ruling, the claim of the petitioners is based on allegations of irregularities, malpractices and downright constitutional

violations. These anomalies are such that they cannot be glossed over and that if they are taken into consideration it would affect the fortunes of the contestants.

Irregularity is defined by the Oxford Advanced Learners Dictionary as follows

"**Activity or a practice which is not according to the usual rules, or not normal: *alleged irregularities in the election campaign*"**

Malpractice on the other hand is defined **as "careless, wrong, or illegal behavior while in a professional job.**

Constitutional violation is where a person goes against, or refuses to obey a provision in the constitution.

From the various definitions it can be seen that while constitutional violations and malpractices are all irregularities, not all irregularities may be constitutional violations or malpractices.

The petitioners have isolated essentially four main irregularities as having affected the elections. While conceding that the isolated irregularities,and even more irregularities might have occurred, the respondents assert that these irregularitiesare essentially administrative lapses or infractions that did not affect the conduct of the polls.

While answering questions under cross examination, Dr. Afari Gyan,the Electoral Commissioner and principal respondent in this case said, there were several irregularities that occurred during the elections, even more than the petitioners have catalogued, but the test should always be whether the irregularities affected the conduct of the polls.

The word irregularity is defined as activity or practice which is not according to the usual rules or not normal. What in effect this means is that when a thing is done not in the regular way it is irregular. For example, if election is expected to begin at 7.00am and it begins at 8.00am or later as happened in several places all over the country during the 2012 December elections, there was an irregularity; if the presiding officer is expected to sign as the constitution mandates, though it is a constitutional violation, it is also an irregularity; when a person knowingly votes twice against the law, though it is a malpractice, it is an irregularity. Etc.etc.

According to the petitioners when such irregularities occur in any polling station it brings the results of such polling station into disrepute and the election in that station becomes tainted or compromised. The results of such polling station should be annulled and not added to the regularly taken results to taint it. An irregularity is an irregularity and the results should be seen in the same light.

While conceding that there can be many irregularities,it is obvious that not every irregularity necessarily affects the conduct of the polls and therefore should call for an annulment of results. For example starting an election at 10am instead of 7am is an irregularity, but unless it can be proved that the late start of the polls was deliberately done to give one party or candidate an advantage over another, or even deliberately done to deny some voters the right to vote to the gain or to the detriment of a particular party, such an irregularity cannot, or ought not be used to annul a regularly taken poll. So, as asserted by the 2nd respondent, the test should be whether an irregularity affected the conduct of the polls. Incidentally the petitioners seem to think otherwise.

ARICLE 42 OF THE CONSTITUTION AND ANNULMENT OF VOTES

Article 42 of the 1992 constitution provides as follows

"Every citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda"

The petitioners claim that as a result of some irregularities, an aggregate number of votes TOTALLING OVER 4 MILLION ARE TAINTED AND THEREFORE SHOULD BE ANNULLED. Not only should the votes be annulled, the court should go ahead and declare the winner of the general election based on the UNTAINTED VOTES. This I daresay is a very bold request for which this courtwill need a lot of convincing to grant!

To annul a vote is an act of disenfranchising a person and therefore a really big legal issue and can only be resorted to if a voter engages in an election malpractice For example PNDC law 284 as amended,provides as follows

Section 29 UNAUTHORISED VOTING

A person who knowingly votes

(a) At an electionat which that person is not entitled to vote, or

(b) More than once at an election,

Commits an offence and is liable on conviction to a fine not exceeding 500 penalty units or to a term of imprisonment not exceeding 2 years or both the fine and the imprisonment, and is disqualified for a period of five years from the date

of the expiration of the term of imprisonment, from being registered as a voter or voting at an election

An annulment of votes or for that matter disenfranchisement must therefore be traceable to an offence by the voter. If eligible Ghanaian citizens, ie qualified and registered, go to queue for so many hours to exercise their constitutionally granted right to vote, and, assuming their votes become tainted through no fault of theirs, but through administrative lapses, then it is my strong and considered opinion that they cannot be disenfranchised with the annulment of their votes. The least the petitioners could ask for is CANCELLATION of the results. Where it is proved that the identified administrative lapses affected the Conduct of the Polls, then voters in such places must be given the second chance to exercise their franchise if cancelling their votes, can seriously impact the outcome of the general election. By so doing, governance will be carried out by persons elected by majority of the people ready and willing to exercise their constitutional right to vote, and not by a small minority of the people, as is being advocated for by the Petitioners.

Article 1(1) of the Constitution1992 provides as follows;

> "***The Sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner and within the limits laid down in this Constitution."***

The only way of actualizing this provision is to guarantee universal adult suffrage. The right to vote as guaranteed by the constitution is paramount and in Ghana this right has been specifically protected. The cases of **TehnAddyv Electoral**

Commission [1996 97 SCGLR 589and **Ahumah Ocansey V Electoral Commission; Centre for Human Rights & Civil Liberties(CHURCIL) v Attorney General & Electoral Commission (consolidated) 2010 SCGLR 575** are landmark decisions in the protection of the right to vote.

TheAhumahOcanseycase emphasised that this right to vote is so fundamental that even prisoners, or persons incarcerated for offending the society, unless specifically debarred from voting are entitled to exercise their right to vote. In that case the electoral commission was seeking to rely on a portion of C.I. 12 reg 1d which, together with section 7(5) of the PNDC LAW284, had the potential of disenfranchising prisoners by reason of residence. The Attorney General argued that once the impugned law affected prisoners who had offended society, it was alright. This Court refused to buy into this argument and ruled per Georgina Wood CJ that;

"……the attorney general's counter argument that the impugned legislation is reasonably required in the public interest, in that access to prisons must be restricted, and further that violators of the law must be punished, kept away from the public, under lock and key, disenfranchised and not to have any say in who governs them. These, counsel contend, do serve as their just deserts for causing pain and suffering to others. In short counsel contends the legislation meets the opportunity test. THIS ARGUMENT, EXAMINEDIN THE BEST OF LIGHTS I AM AFRAID, WOULD HAVE no place in participatory democracy, with the guaranteed rights that are enshrined in the constitution"

In the Tehn-Addy case, commenting on the paramountcy of the constitutional right to vote, this is what Acquah JSC(as he then was) said

" ….In order to give meaning and content to the exercise of this sovereign power by the people of Ghana, article 42 guarantees the right to vote to every sane citizen of eighteen years and above. The exercise of this right of voting, is therefore indispensable in the enhancement of the democratic process, and cannot be denied in the absence of a constitutional provision to that effect"

Per curiam (i) A heavy responsibility is … entrusted to the Electoral Commission under article 45 of the Constitution, in ensuring the exercise of the constitutional right to vote. For in the exercise of this right, the citizen is able not only to influence the outcome of the elections and therefore the choice of a government but also he is in a position to help influence the course of social, economic and political affairs thereafter. He indeed becomes involved in the decision-making process at all levels of governance."

The right of prisoners to vote was the subject for comment in the Canadian case of ***Sauvé v Attorney-General of Canada, the Chief Electoral Officer of Canada and the Solicitor-General of Canada*** **[2002] SCR 519; 2002 SCC 68,**

"The right of every citizen to vote, guaranteed by s. 3 of the Canadian Charter of Rights and Freedoms, lies at the heart of Canadian democracy. The Law at stake in this appeal denies the right to vote to a certain class of people – those serving sentences of two years or more in a correctional institution. The question is whether the government has established that this denial of the right to vote is allowed under s. 1 of the Charter as a 'reasonable limit …demonstrably justified in a free and democratic society.' I conclude that it is not. The right to vote, which lies at the heart of Canadian democracy, can only be trammeled for good reason. Here the reasons offered do not suffice."

In the course of the judgment in the Ahumah Ocansey case reference was made to several cases both local and foreign to support the principle that once a right, like the right to vote, is guaranteed in the constitution, then unless there is an absolute need to do the contrary, any legislation that seems to take away this guaranteed right must be viewed with circumspection and frowned upon.

Though the right to vote seems on the surface not to be what is in issue in this petition, it actually is at the center. What the petitioners are seeking to do is to annul the regularly cast votes of some citizens of Ghana. From the authorities and analysis above, it is clear that not only must the courts ensure that voters' guaranteed right to vote be protected but that that right when regularly exercised must be protected. Guaranteeing a person's right to vote without ensuring that the right once exercised is protected is as bad as preventing him from exercising his right to vote. On this basis a call for the annulment of votes must be actually backed by credible evidence of legal infraction on the part of the voter and not on administrative lapses

IN the case of **OPITZ V WRZESNEWSKYI SCC 55,(2012 3 SCR** cited by the respondents the Supreme Court of Cananada said at paragraph 56

"In our view adopting the strict doctrinaire approach creates a risk that an application under Part 20 could be granted even where the results of the election reflects the will of the electors who in fact had the right to vote. This approach places a premiumon form over substance and relegates to the back burner the Charter right to vote and the enfranchising objective of the Act."

Par 66 "

"By contrast, if a vote cast by an entitled voter were to be rejected in a contested election application because of an irregularity, the voter would be irreparably

disenfranchised. This is especially undesirable when the irregularity is outside of the voter's control, and is caused solely by the error of an election official."

It is my considered opinion that even if any or all the categories of irregularities as identified by the petitioners are upheld the results ought not be annulled, since the said infractions are not traceable to the millions of people who will be disenfranchised. But rather the results may only be CANCELLED as having being compromised or tainted by administrative lapses. In that case we should not cancel the whole Election (including the uncompromised parts), nor should the election be called based only on the remaining untainted votes, as being suggested by the petitioners, but the voters and polling stations whose votes are cancelled as a result of the administrative lapses must be given the second chance to exercise their constitutionally guaranteed right to vote before the final results are declared.

The petitioners' novel legal theory of annulling so called tainted votes that would permit a segment of the population ie. some 4 million voters, to be disenfranchised finds no place in a democracy built upon principles of inclusiveness, equality, and citizen participation. The right to vote and thereby partake in governance and decision making has been fought for by some democrats from of old. Some have paid the ultimate price to ensure that no category or class of people are disenfranchi*sed*. It is not too long ago that the blacks of South Africa were given the right to vote. The same thing applies to USA. In some countries women were given the right to vote not too long ago.We in Ghana have had the universal Adult suffrage since independence.Even though some countries prohibit prisoners from voting, in Ghana we don't. This is how far we have come in our quest for democratic governance. We should do everything possible to protect this right. And the least we could do is not to disenfranchise people through technical or administrative lapses over which they have no control.

It is my opinion that the basis of the petitioners' claim, i.e. the declaration of the First petitioner as winner after annulment of some 4 million votes, is completely flawed.

Now let us examine the various heads or categories of irregularities as isolated by the petitioners.

ABSENCE OF PRESIDING OFFICER'S SIGNATURE.

Article 49 sub clause 3 of the 1992 constitution reads;

"The presiding officer, the candidates or their representatives and in the case of a referendum, the parties contesting or their agents and the polling agents if any, shall then sign a declaration stating

a) The polling station; and

b) The number of votes cast in favour of each candidate or question.

And the presiding officer shall there and then announce the results of the voting at that polling station before communicating them to the returning officer."

In the light of this constitutional provision it is the contention of the petitioners that failure to sign by the presiding officer is an infraction that should lead to the annulment of votes. This is because according to them once the signing is mandatory the consequence is that the votes do not become valid without the signature.

I do not think so. Though the article makes signing mandatory, it does not prescribe any consequences for failure to sign. Looking at the said article critically, the word shall as used go to show the sequence of events or series of things that have to be done. And here the sequence is shall sign, shall there then announce the

results before forwarding same to the presiding officer.The article only uses the word shall to denote a series of things to be done and the sequence in which it should be done. Failing to do it the way suggested by the article makes it an irregular performance of duty. I*t is an irregularity that does not go to the roots.* Then the question that has to be asked are (1) has anybody been specifically adversely affected by this irregularity that should lead to an annulment or even cancellation of votes regularly cast?

This court's attention has been drawn to the recent decisions of this court, cases of where the court strictly interpreted shall in Aricle 181 of the constitution and concluded that failure to secure parliamentary approval for a loan is fatal as provided by the constitution.

See the recent cases of Faroe Atlantic. Martin Alamisi Amidu v Isofoton and Martin Amidu v Woyome

But a critical look at the wording of articles 181 will show clearly that there are differences in the wording. Article 181 (2) reads

"An agreement entered into under clause(1) of this article shall be laid before Parliament and shall not come into operation unless it is approved by a resolution of parliament"

The article carries in its belly its own sanctions. The agreement shall be laid in parliament and unless carried by resolution of parliament shall not come into effect. This is not the same asarticle 49 where no consequences are provided for failure to sign.To strictly interpret the word shall to mean mandatory and therefore its violation should lead to annulment of votes regularly cast, would lead to a serious absurdity. I am here persuaded by the modern purposive approach to interpretation where the intent rather than the bare words as used influence

interpretation. To this end the famous quote of Sowah CJ in the Case of is very much apposite here. He said

"A written Constitution such as ours is not an ordinary Act of Parliament. It embodies the will of a people. It also mirrors their history. Account, therefore ought to be taken of it as a landmark in a people's search for progress. It contains within it theiraspirations and hopes for a better and fuller life.

The constitution has its letter of the law. Equally the constitution has its spirit. ……Its language, therefore,must be considered as if it were a living organism capable of growth and development. Indeedit is a living organism capable of growth and development as the body politic of Ghana itself is capable of growth and development. A broad and liberal spirit is required for its interpretation.it does not admit of a narrow interpretation. A doctrinaire approach to interpretation would not do. We must take account of its principles and bring that consideration to bear, in bringing it into conformity with the needs of the time."

In theKuenyehiaV.Archer[1993-94 2 GLR525 AT 562 Francois JSC said,

"It appears that the overwhelming imperatives are the spirit and objectives of the Constitution itself, keeping an eye always on the aspirations of the future and not overlook the receding footsteps of the past. It allows for a liberal and generous interpretation rather than a narrow legalistic one. It gives room for a broader attempt to achieve enlightened objectives and tears apart the stifling straight jacket of legalistic constraints that grammar, punctuation and the like may impose,"

To strictly interpret this article the way the petitioners are seeking to do is to take the importance away from the voter and giving same to the persons who run the elections. If the absence of the single signature of the presiding officer can lead to the annulment of the votes of hundreds of thousands of voters, then the election ceases to be about the voters and shifts to the presiding officer. So that if a presiding officer, either from pressure of work, oversight, or plain mischief fails to sign, then fatally, hundreds of voters are disenfranchised. Again a corrupt politician needs only to team up with a few hundred presiding officers in an opponent's stronghold, and bingo! fortunes are turned. This will be carrying strict interpretation to absurd limits.

An affidavit filed by one of the petitioners' witnesses read;

I, Abdulai Abdul Hamid of House No. A77, Gunfong, Pong-Tamale, in the Northern Region of the Republic of Ghana, and teacher by profession, make oath and say as follows:

1. ***That I am a witness of the Petitioners herein and the deponent hereto.***
2. ***That I swear to this affidavit on the basis of information personally known to me.***
3. ***That on the 7th and 8th of December 2012, the Electoral Commission of Ghana conducted Parliamentary and Presidential Elections in Ghana.***
4. ***That at all material times I was the presiding officer at Temporary Booth Chief's Palace polling station at Pong-Tamale, in the Savelugu Constituency of the Northern Region of Ghana during the December 2012 Parliamentary and Presidential Elections.***
5. ***That I declared the results thereafter***

6. That subsequently on the 16th day of February 2013, I received a callon my cellular phone with number 0246933648 from one Salamatu Osman, an employee at the district electoral office of the electoral commission, via telephone number 0372091677.

7. That the said Salamatu Osman informed me that I had not signed the Statement of Poll and Declaration of results for the office of president("pink sheets"), and that she had been instructed by Mr. Ben, the District Electoral Officer, to invite me to attend the office in order to sign same.

8. That she further stated that the signature was necessary for the office to process the documents relating to the payment of my entitlements as a presiding officer in the December 2012 presidential and parliamentary elections.

9. That I proceeded on that basis innocently to sign the pink sheet for the 2012 presidential election.

Wherefore I swear to this affidavit in support"

This affidavit put in by the witness of the petitioners is self-explanatory. The witness did not sign the pink sheet at the polling station as required and he was later tricked by the representative of the 2nd respondent to sign.Ostensibly, this affidavit was put in to show that some pink sheets were not signed at the polling stations and that long after the results had been declared the 2nd respondent was clandestinely seeking to sign pink sheets. There were two other affidavits confirming the contents of this affidavit.

But the questions that these affidavits fail to answer are why didn't Mustapha, the petitioners own witness, sign the document at the polling station? Was it oversight, pressure of work or plain mischief because he had not been paid? And is he saying that the whole polling station results should be annulled because he forgot to sign as a result pressure of work or as away of protesting his not being paid?

It is my considered view and I hold that non-signing by the presiding officer is a mere irregularity that does not go to the root of the matter. It did not affect the conduct of the polls and therefore should not lead to the annulment or even cancellation of votes.

The petitioners claim on this ground is dismissed.

DUPLICATE PINK SHEETS

It is the case of the Petitioners that the Pink Sheets were imported into the country with numbers embossed on each pink sheet to differentiate it from any other pink sheets. In that case each pink sheet should bear a different serial number in all 26002 polling stations in the country. However this was not done. They detected that out of the over 11,000 pink sheets reviewed, over 10000 had their counterparts or duplicates used instead of their "original" pink sheets. This was done because the second respondents had intentionally imported more pink sheets with the view to manipulating the results of the polls. The total number votes being sought to be annulled under this so called irregularity is over 2.5 million.

The response of the second respondent to this claim is that the petitioners claim has no basis and not well founded. Yes it is true that each pink sheet has a different number, but they are not in series and therefore not serial numbers properly so

called. The numbers are not security numbers that can be used to track the polling stations in which they are actually used. So any pink sheet with any number can be sent to any region, constituency or polling station. Pink sheets are packed at random and their distribution does not follow any pattern in terms of the numbers embossed on them.

In their address the second respondent said this category can properly be described as the weakest link in an already weak chain. I couldn't agree more. Throughout the proceedings the petitioners failed to show how this so called irregularity affected the conduct of the polls. Yes it would have been better if only one set of 27000, or 28000 pink sheets were printed by one printing house and the pink sheets numbered from one to 28,000. Instead of 2 sets totalling 54,000 printed by 2 separate printers each numbered from 1 to 27,000. So what? Apart from the financial loss occasioned by the printing of the excess pink sheets, in what way did this affect the election? The petitioners failed to convince me about the veracity of their claim as far as this irregularity is concerned and I reject same.

OVER VOTING

The petitioners claim that there were indications that in quite a number of polling stations there was over voting. And this is evident on the face of the pink sheet. The petitioners give three main definitions of over voting

1 Where the ballots found in the ballot box exceed the number of ballot papers issued to the polling station;

2 Where the ballot papers found in the ballot box exceed the number of persons REGISTERED to vote in the polling station; or

3. Where the ballots found in the box exceed the persons actually verified to vote, i.e.those registered and actually appearing at the polling station, verified and given ballot papers to vote and actually voting.

According to the petitioners all these figures are verifiable from the face of the pink sheets. The votes in all such polling stations should be annulled and same deducted from the overall votes garnered by the parties.

The respondents disputed this three tier definition and said the classical definition of over voting is where the ballot papers actually exceed the number of persons actually registered at the polling station. Even then when it comes to over voting the pink sheet may not be the primary or only source of information. And that if figures on the pink sheet indicates that the ballot papers found in the box actually exceed the figure written for the number of registered voters, one will have to cross check from the actual register of the polling station. It might well be that the presiding officer might have made a mistake when writing the figure of number of registered voters.MrAsieduNketiah for the 1st and 3rd respondent denied the possibility of over voting and said this could be due to the presence of foreign object in the ballot box which is weeded out at the sorting out stage. In their estimation therefore there was no over voting and so this category should also be rejected.

I do not think the petitioners are describing overvote as objects found in the ballot box. I cannot see how a foreign object as described by the witness be counted as overvote. If an aggrieved votes tears off an A4 sheet and writes on it THEY ARE ALL GREEDY BASTARDS, and places same in the ballot box, it is a foreign object. This is not the type of paper that will feature in the petitioners overvote column. My understanding of the petitioners over votes is that it relates to the votes

declared for candidates and those rejected for cause. That will be A+B in the last column on the pink sheet against any of the columns already mentioned.

Seen this way I must say that that I agree with the petitioners definitions of over voting. But this expanded description of over voting is what runs the petitioners into problems and that led to the two often touted mantras; “you and I were not there” and “on the face of the pink sheet.”For example on one pink sheet the total ballots declared for the various candidates, and the rejected ballots were in the region of 800. But when it came to question A1 on the question paper which was “What is the number of ballots issued to the polling station”?, the answer was 10. This pink sheet was selected as one with over votes because of the enormous difference between the votes found in the box and the papers sent to the polling station. But if one looks at the very next question, which is “What are the serial numbers of the ballot papers sent to the polling station?”, the answer there clearly indicates that there were 10 booklets of 100 leafs each, making 1000. So though the first answer seems to suggest over voting, there really was no over voting if one looks at the document properly. And there were several pink sheets with this kind of problem. That is why Dr. Afari Gyan suggested that the pink sheet should be read as a document in full and not question by question as the petitioners seemed to be doing. But Dr. Bawumia preferred, “on the face of the pink sheet”.

Again because of the definition ascribed to the Over voting, any time the answer to questions AI, B1, and C1 showed a blank, it was set apart as over voting. The questions are,

A1 “What is the number of Ballots issued to the polling station?

B1 What is the number of voters on the polling station register?

C1 What is the number of ballots issued to voters on the polling station register?

The reason for this was that once any of these figures was blank one could not compare it properly with the total number of ballots in the ballot box. According to the petitioners this was deliberately done to hide over voting. There were hundreds of such pink sheets in the over voting category. The respondents on the other hand suggested that if any of these questions posted a blank answer, there were other sources where one could then to correct this. For example if B1 shows blank, the polling station has a register which can be referred to easily to ascertain the correct figure, so there was no need to rush to declare over votes on that account. Dr. Bawumia countered with his mantra, the pink sheet is the primary source of information at the polling station, and that on the face of the pink sheet blank means zero.

I have no doubt at all that the pink sheet is the primary source of information at the polling station, after all it is the information on the pink sheet that is collated and form the basis of any or final declaration. But I definitely do not agree that other sources may not be referred to for information if any doubt arises. Each polling station has the official register, and each polling agent has the polling station register. So if the question B1 has a blank, answer the correct figure is ascertainable from other sources. There should not be the rush to declare over votes just because on the face of the pink sheets the column shows blank.

I have noticed that the petitioners have identified some 180 pink sheets where C1=blank or C1=0. The votes tally on that list alone is over 93,000 votes.

There were also several pink sheets in this category which clearly on second look did not reflect over voting. While in the box, Dr Bawumia admittedto several such pink sheets which they had originally selected to contain over voting, actually did not reflect over voting upon second look. There were some pink sheets on which

errors had apparently occurred as a result of carbonation, For example there were some pink sheets on which in the figures column two candidates were said to have received 11, but in the words column it was “one”. It could be seen from the additions that “one” was used in both the words and figures columns, and that if eleven was used the total in both the figures and words columns would be wrong. The only plausible explanation for this 11 and “one” is that if the person filling the pink sheet wanted to deepen the figure 1 and the carbon shifted it would appear as a second 1 or 11 on the copy. So while the original copy would show a deepened 1 it would appear as 11 on the carbon copies.

However, aside of these many errors which may be described as clerical, there were also very many pink sheets which recorded cases of actual overvoting.ie where rejected ballots and valid votes put together were more than persons actually verified to vote. However sifting the ones actually affected by over voting from the many affected by the many clerical errors, one is left with very few pink sheets whose results will not impact positively on the outcome of the overall results. I will therefore dismiss the claim on account of this ground.

VOTING WITHOUT PRIOR BIOMETRIC VERIFICATION.

For the first time in the history of elections in this country, the 2012 general elections was supposed to be conducted with identification of potential voters by biometric verification. The nation spent a lot of time and energy registering eligible voters biometrically. Biometric registration involved taking the finger prints of eligible voters in addition to facial recognition. In the round up to the elections a lot of inter party discussions took place and it was finally decided that voters who could not be biometrically verified on the election day would not be allowed to vote even if they had their names in the register. There appeared in the political

landscape the popular slogan “NO VERIFICATION, NO VOTING.” C.I.75 reg. 30(2) this slogan. It reads

Red 30(2) The voter shall go through a biometric verification process.

The constitutionality of this CI is being challenged in court, so I will stay off discussion on this for now.

Be that as it may, constitutionality or otherwise, all the parties went into the general election with the understanding that no verification, no voting. The whole concept of biometric registration and verification before voting had been introduced as a way of reducing to the barest minimum if not eradicate completely, the incidence of claims of double voting and impersonation that crop up after every election. It was supposed to increase transparency and enhance people’s acceptability of the election results. Indeed at one of the numerous press conferences the electoral commissioner made it clear that at the end of the polls, where the votes cast exceed the number of persons verified to vote by even one vote, the results of the said polling station will be cancelled. Based on this understanding, some voters were turned away from some polling stations and were not allowed to vote because they could not be verified.

So prevalent was this phenomenon of turning away voters who could not be verified that the 1st respondent is on record to have made a plea in the electronic media for the 2nd respondent to review this policy to enable eligible voters be identified by other means other than by finger print. The basis of this plea, according to the release, was to avoid a situation where otherwise qualified citizens are disenfranchised just because a mere machine could not identify them. This plea, we are told, was not heeded to by the 2nd respondent and people were turned away by the machines.

It is the case of the petitioners however that the 2nd respondent while insisting on biometric identification in some places, at some polling stations people were allowed to vote without verification and in some cases everybody voted without biometric verification. According to the petitioners the evidence for this accusation can be found on the face of the pink sheet.

In the ballot accounting column (column c) of the pink sheet is a question

C3 What is the number of ballots issued to voters verified by the use of Form1C(but not by the use of BVD).

The petitioners have tendered quite a number of pink sheets on which this question had been answered with figures and even sometimes figures reflecting the total number of voters who cast their ballots in that polling station, indicating that every person voted without being verified by the biometric devise. To the extent that C.I 75 reg 30(2) says everybody must be verified by the BVD before casting their vote, and to the extent that some people were turned away either because the BVD had broken down, or the BVD could not detect their finger print, it was discriminatory to have allowed some other persons to vote without BVD. Therefore for purposes of equity, polling stations that had persons voting without BVD should have their votes annulled. These annulled votes should again be deducted from the votes declared for the various contestants.

The respondents agreed that the slogan NVNV was actually coined for this election and was indeed used. And that nobody voted without being verified by the BVD. The third respondent's representative Mr. Johnson AsieduNketiah actually opined that if anybody allowed any voter to vote without the BVD, then that person should be at 'Nsawam'(prisons) by now. The 2nd respondent confirmed this by saying that the agreement on the NVNV had been reached at an IPAC meeting and was

enforced to the letter. To this end, polling stations which had their BVDs breaking down, actually had replacements. Again in about 400 polling stations where BVDs could not be immediately replaced, the elections were postponed to the next day.

As to how come that the question C3 appeared on the pink sheet despite the agreement reached at the IPAC to strictly adhere to the NVNV slogan The 2nd respondent gave a lengthy explanation and concluded that the presiding officers were not required to fill in that column since everybody was supposed to use the BVD. All counsel for the respondents that the BVDs were used throughout and so the figures in C3 did not reflect what actually took place at the polling stations. They went to the extent of saying in some cases the figures in C3 had actually been lifted from somewhere and placed there. A lot of theories were propounded for the figures in C3. They concluded that apart from the face of the pink sheet, the petitioners had not given any other evidence of voting without BVD, and that their agents had signed without complaining. The petitioners had therefore failed to prove that voting took place without biometric verification.

I do not think that the petitioners failed to discharge the burden placed on them. As was said in the beginning like any civil action the petitioner bears the burden of proof. The onus was therefore on the petitioners to prove that some voters voted without going through the BVD. As said earlier the primary source of this election is the pink sheet. But it does not mean that other sources may not be referred to disprove writings on the document.The petitioners have pointed to the pink sheet as their informant that some people voted without prior biometric verification. The long explanation by the 2nd respondent flies in the face of the recordings on the pink sheets. They presiding officers were not expected to fill them because nobody was expected to vote without biometric verification. But they have filled them. Where did they get the figures from? If the figures reflecting that all voters at a

polling station voted without going through BVD was lifted, how about those pink sheets which show figures unrelated to any other figures on the pink sheet?

We are told that the BVDs still have embedded in their memories data reflecting the number of voters that were actually verified by each machine. These devices are still in the custody of the 2nd respondent. One would have thought that the memories of the BVDs could have settled this problem. But they never felt it necessary to tender them in evidence.

In the absence of any credible explanation it is my opinion that the petitioners have discharged the burden of proof placed on them. Inspite of the agreement on the NVNV, and despite reg 30(2) of CI 75, some people were allowed to vote without verification. Viewed against the backdrop that some people were actually prevented from voting because they could not be verified, to have allowed voting in some polling stations was discriminatory and should lead to cancellation of their votes.

I will therefore uphold the petitioners claim on this ground only to the extent that those voters that have their votes cancelled should have the chance to recast their votes lest they be disenfranchised.

To conclude I hold as follows

1 I dismiss the petitioners claim to annul votes on account of claim of duplicate serial numbers as frivolous

2 I dismiss the petitioners claim that votes should be declared invalid on account of the non-signing by the presiding officer. To disenfranchise hundreds of thousands of voters (through no fault of theirs) because a

presiding fails to sign will not have a place in modern democratic governance.

3 I uphold the principle that once overvoting is detected in a polling station the elections there are compromised and should be cancelled but the voters there should be given a second chance to cast their votes. However I find that in view of the admissions made by the 2nd petitionerwith regard to some pink sheets and the many clerical errors, I find that the number of pink sheets affected in this category has so reduced that they votes affected are not too significant to make any impact even if they are cancelled. I dismiss the claim on this ground too.

4 I hold that the petitioners have discharged the burden of proof on them that voting took place in some polling stations without prior biometric verification. This was discriminatory since other persons had been turned away for their inability to be verified. All those stations affected by this phenomenon should have their votes cancelled and the voters given a second chance to vote again.

(SGD) P. BAFFOE BONNIE

JUSTICE OF THE SUPREME COURT

GBADEGBE J.S.C :

On 7 December 2012, Ghanaians went to the polls in the exercise of their constitutional right to vote in the presidential and parliamentary elections. Although the elections were scheduled for one day only, as a result of the breakdown at some polling stations of biometric verification equipments that were being used for the first time in our election history, the elections continued at some polling centres the following day, 8 December 2012.The postponement of the elections and or its continuation the following day was not unexpected as indeed, regulation 34(1) b of Public Elections Regulations, 2012 (CI 75) made provision to cater for such an occurrence in the following words:

"Where the proceedings at a polling station are interrupted by the breakdown of the equipment the presiding officer shall in consultation with the returning officer and subject to the approval of the Commission, adjourn the proceedings to the following day."

It is thus not surprising that in the matter herein, no issue has been raised over the adjournment of the polls as the law had actually contemplated the likely occurrence of such an event and quite rightly in my thinking made ample legislative provision for it.

At the end of the elections, the Chairman of the Electoral Commission (the 2nd Respondent herein) in compliance with the law by means of an instrument under his hand dated 9 December 2012 declared the 1st Respondent herein as having been duly elected as President of the Republic of Ghana. From the results declared, it was plain that this was quite a keenly contested election. The said declaration was met with disquiet by the NPP whose candidate, the first Petitioner together with two others, the 2nd and 3rd Petitioners herein, or about 29 December 2012 initiated the petition herein by which the results declared in the presidential election is being challenged and in particular, a declaration sought that the 1st Petitioner herein was validly elected as president.

The matter herein has gone through a full scale trial as provided for in the Supreme Court Rules, CI 16 as amended by CI 74. It repays to mention that the

parties have made full compliance with the direction given by us at the hearing of the application for directions by filing the necessary processes that enabled the court to give directions for trial in the matter herein. The parties have also tendered their evidence after which they submitted written and oral speeches to the court. The delivery herein is an evaluation of the respective cases of the parties in aid of the court's determination of the controversy herein. I need mention that although the petition as issued by the petitioners named only the first and second respondents, following an application at the instance of the NDC, it was joined to the matter herein as a 3rd Respondent. The petition herein thus became a contest between the three petitioners on the one hand and the three Respondents on the other side of the aisle, so to say. I pause at this stage to commend counsel in the matter for the industry that they have exhibited in their effort to assist the court in the determination of this landmark case. I think that when the history of the evolution of our democracy comes to be written they would occupy a place in the hearts of many.

Before proceeding further, I think it important to observe that this petition, which is unprecedented in the life of the Fourth Republic presented the court and the parties with a unique opportunity to contribute to the development not only of substantive law but also the practice and procedure of the Supreme Court in so far as the exercise of its exclusive jurisdiction to determine questions raised concerning the validity of presidential elections are concerned. This is a huge task that is conferred on the court by article 64 of the 1992 Constitution that came into being after several years of military rule that spanned the last day of December 1981 to January 1993. The return to constitutional rule that was ushered in by the1992 Constitution brought to Ghanaians the opportunity that was wrestled from her people more than a decade previously to exercise the right to elect representatives and a president once in every four years. Before the 2012 elections, elections were held in 1992, 1996, 2000, 2004, and 2008. These elections have been in the main applauded by the international community as free and fair and Ghana had on account of these earned a place of pride as the forerunner of democracy in Africa.

The petition herein, in my thinking, seeks to call in question compliance by the Electoral Commission, the 2nd Respondent herein with the rules contained in the various laws-the 1992 Constitution, the Representation of the People Law, PNDC L 285 and its subsequent amendment by PNDCL 296, the Biometric Registration of Voters Regulations 2012, CI 72, and the Public Elections Regulations 2012, CI 75. In my view, contrary to the perception of some section of our society about the resort by the petitioners to court, it is healthy for our democracy as it seeks to ensure that the electoral rules were implemented at every stage of the electoral process thereby giving sanctity to the process. As elections are creatures of statute, the statutes that authorise their holding at stated intervals also provide for the procedures to be employed on Election Day as well as all matters reasonably connected therewith including the count of the ballots and the declaration of results at polling stations, constituencies and on the national plane. An election in this country therefore must be seen as the working of the various rules by which effect is given to the invaluable right provided for in article 42 of the 1992 Constitution in the words that follow shortly:

"Every citizen of Ghana of eighteen years of age and above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda."

It appears that for the purpose of the presidential elections the entire country constituted one constituency with the Chairman of the Electoral Commission, the body charged with the responsibility and conduct of all elections being the returning officer. At every polling station and constituency, however, there were election officials- presiding officers and agents of political parties and or candidates who together ensured that the rules of the game, so to speak, were implemented at every stage of the election process. The role of presiding officers and the polling or counting agents is provided for by law and serves the purpose of ensuring transparency in the elections and renders the results that are subsequently declared acceptable to the citizenry. While the general principles regarding elections are contained in the 1992 Constitution, the details of the processes involved are contained in PNDC L 284 (as amended by PNDCL 296), CI 72 and CI 75.

As elections derive legitimacy from the various laws that provide for their exercise, allegations that seek to challenge its regularity must to be good grounds derive legitimacy from the enabling laws. In my thinking, the 1992 Constitution in terms of the electoral process is clear on its face, its rationale is plain and the means employed through it and other statutes to secure its purpose is reasonable. In this connection, it is observed that the fact that other methods could have been provided for the purpose of achieving the constitutional objective is not a proper consideration for this court in so far as the issues that arise for our decision in this case are concerned. In this delivery therefore, I shall measure the various allegations that make up the claim of the petitioners against the applicable laws, and where such an examination reveals a departure from the said laws in a manner that undermines the basic principle on which our constitutional democracy is founded then its breach calls for remedies that are provided at law in order to give integrity and sanctity to the electoral process. In my opinion, although the claims made by the petitioners are of great import in our evolving constitutional democracy and is in keeping with the requirements of the rule of law, as a bye-product of law, however, the demands contained therein must have their source and resolution within the law. I think these considerations informed the settling of the two issues for trial in the petition on 2 April 2013 as follows:

"(A) Whether or not there were violations, omissions, malpractices and irregularities in the conduct of the presidential election held on the 7th and 8th of December, 2012.

(B)Whether or not the said violations, omissions, malpractices and irregularities, if any affected the results of the election."

In presenting their case, the petitioners categorised the irregularities on which they relied under broad heads in respect of which pink sheets (official declaration of results) were exhibited to depositions a that have the effect of evidence in these proceedings.Additionally, the 2nd petitioner offered oral testimony and was cross-examined by the respondents. Originally, the number of polling stations relied upon to sustain the petition were said to be 11,1915 but in answer to a

question in court on the last adjourned date, learned counsel for the petitioners said the total number of polling stations that formed the basis of their claim to have the presidential elections avoided are 10, 119. That answer is a clear indication that the number of pink sheets to be considered by the court in this matter is 10, 119.The designated categories are voting without biometric verification, over-voting, failure and or absence of signatures by presiding officers on pink sheets, duplicate serial numbers and voting at locations that were not-designated as polling stations.

The petitioners contended that the votes involved in these irregularities that were described to be widespread in nature amounted to over four million (4,670,504.) Regarding these votes it was also contended that having been obtained by means of violations, omissions, irregularities and malpractices, they ought to be annulled and that following such annulment, the first petitioner herein, Nana Addo Dankwa Akuffo -Addo by a simple arithmetical computation of the valid votes cast satisfies the requirements of the law to be declared as the President of the Republic of Ghana. Should these allegations be proved, they are weighty enough to have the consequence that the petitioners attribute to them. Not unnaturally, the first respondent, the alleged beneficiary of the widespread irregularities resisted those claims and contended that he was regularly elected as President of the Republic of Ghana. The 2nd Respondent who was responsible for the conduct of the elections made no admission of the issues rose in the petition and urged the court to uphold the declaration of 9 December 2012 made by its Chairman. The 3rd Respondent, NDC, on whose ticket the first respondent contested the disputed presidential elections, also prayed the court substantially to the same effect as the other respondents.

At the close of evidence in the matter herein, the questions for our determination turning on the issues that were set down for trial on 2 April 2013 require us to patiently inquire into the allegations submitted by the petitioners and the answers thereto by the respondents, and if proved, determine their effect on the results declared at the various polling stations to which they relate. As the case herein was fought on the evidence placed before us, our task in keeping with a long and settled line of authorities is to reach our decision on all the evidence on

a balance of probabilities. See: Sections, 10, 11, 12, 13 and 14 of the Evidence Act, NRCD 323 of 1975.This being a civil case, the petitioners bear the burden of leading evidence on a balance of probabilities. At this point, I venture to say that the effect of the acts on which the petitioners rely to sustain their action is one that must turn on a careful consideration of the applicable statutory provisions and so stated it would appear that our decision turns not solely on facts but a mixed question of facts and law. Our courts have over the years determined several cases in which decisions are based on a consideration of mixed questions of fact and law and as such this case does not present to us a challenge that is historical in terms of the evaluation of evidence. While the cause of action in the matter herein as previously indicated in the course of this delivery is historic, the approach to decision making is no different from what we have been doing all the time. The burden of proof in an election petition was recently considered in the Nigerian case of Buhari v Obasanjo (2005) CLR 7K, in which the Supreme Court said:

" The burden is on petitioners to prove that non-compliance has not only taken place but also has substantially affected the result……There must be clear evidence of non-compliance, then that the non-compliance has substantially affected the election."

Continuing, the Nigerian Supreme Court further said:

"He who asserts must prove such fact by adducing credible evidence. If the party fails to do so its case will fail. On the other hand if the party succeeds in adducing evidence to prove the pleaded fact it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party's adversary to prove that the fact established by the evidence could not on the preponderance of evidence result in the court giving judgment in favour of the party"

The recent Canadian case of Optiz v Wrzesnewskyj (2012) SCC 55-2012-10-256 similarly observed of the burden of proof as follows:

"An applicant who seeks to annul an election bears the legal burden of proof throughout……."

The case of Buhari V INEC [2008] 4 NWR 546 at 565 also affirms the above pronouncements on the burden of proof as follows:

"Where a petitioner makes non-compliance with the Electoral Act the foundation of his complaint, he is fixed with the heavy burden to prove before the court, by cogent and compelling evidence that the non-compliance is of such a nature as to affect the result of the election. He must show and satisfy the court that the non-compliance substantially affected the result of the election to his disadvantage."

Courts in these jurisdictions were not alone in expressing the burden of proof in an election petition in the above terms. In the recent presidential election dispute in Kenya numbered as Petition No 5 of 2013 and entitled…RAILA ODINGA v The INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND 3 Others AS CONSOLIDATED WITH PETITIONS NUMBER 3,Entitled: MOSES KIARIE KURIA and 2 Others v THE INDEPENDENT ELECTORAL COMMISSION and Petition no 4 Entitled: GLADWELL WATHONI OTIENO and Another vAHMED ISSACK HASSAN and 3 Others , the Supreme Court in an unreported judgment dated 30 March 2013 (the full reasons therefor being delivered on 16 April 2013) expressed itself substantially in the same words as follows:

"There is apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the court to determine whether a firm and unanswered case has been made.

We find merit in such a judicial approach, as is well exemplified in the several cases from Nigeria. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This

emerges from the long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumntur rite et solemniter esse acta: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of public authority's departures from the prescriptions of the law."

Although the above decisions are of persuasive effect only, I think that the exposition of the applicable burden of proof is in no way different from that required of petitioners in an election case having regard to the provisions of the Evidence Act, NRCD 323 particularly sections 10- 14 and I propose in this delivery to be guided thereby. Having stated the task of the court in terms of the claim before us, I now pass to consider the various categories of irregularities on which the petitioners claim to relief is based.

In opening the consideration, I shall commence with that category which in my thinking and indeed, on the petitioners' case raises issues regarding the largest number of votes that aggregate to a little below three million votes. The basis of this head of claim is that the 2nd Respondent in issuing out pink sheets on which the collated results at the various polling stations were declared did so in duplicates and in some cases in triplicates thereby affecting the integrity of the elections. According to the petitioners, the said pink sheets should have been unique to the polling stations and numbered serially so that no number was repeated at any of the over 26, 000 polling stations at which the presidential elections of 7th and 8th December 2012 was held. In the course of his evidence, the 2nd petitioner, who was designated by the first respondent as his Vice Presidential Candidate on the ticket of the NPP admitted under cross examination that the complaint relating to the serial numbers was not derived from any constitutional or statutory infraction but as the numbers were huge they were serious and inferentially must have affected the outcome of the elections.

It is observed straightaway in respect of this head of complaint that although with hindsight one might be tempted to appreciate the reasoning inherent in it, as elections are created by statute and contested on rules and regulations that are widely acknowledged by all, it is not competent for anyone to raise as a ground of

complaint a matter which is not known to the laws by which the elections were regulated. The contention regarding serial numbers though apparently attractive, appear to me on closer examination to be untenable. Interesting as the complaint relating thereto tends to be particularly in view of the numbers to which they are said to relate, the constitution and the subsidiary laws passed thereunder have provided very clear rules by which our elections are to be guided and it is only the non-observance of any of those clearly established rules that can properly come within the designation of an irregularity whether in the nature of an omission, violation or a malpractice. I think that the word irregularity is synonymous within the context of this case with the other words commonly associated with it in the claim before us. For a better understanding of the point being made in relation to the word "irregularity"(ies) and those associated therewith, reference is made to the use to which it is employed in ordinary language by a reference to the meaning as provided in Oxford Advanced earners Dictionary (International Student's Edition) at page 790 thus:

"an activity or practice which is not according to the usual rules, or not normal; alleged irregularities in the election campaign"

Similarly, the word "violate" as defined at page 1642 of the same Dictionary means "to refuse to obey a law, an agreement etc." And a "malpractice" means a wrong or illegal practice. In view of the fact that the associated words all mean that which is contrary to rules or laws, I propose in this delivery to use the word irregularity to refer to any such word. In doing so, I do not think that I do injustice to any of the parties as an irregularity is one whether called by the description a malpractice, violation and or an omission, the later which denotes failing to do that which should be done or lawful.

Further to the above, the evidence of the petitioners unfortunately did not place before the court in what manner the mere repetition of the slight number of duplicated pink sheets that was proved in evidence affected the declared results. There was no challenge to the fact that the results declared were in respect of elections held at designated polling stations. Also not in dispute is that there occurred no infraction or violation of any of the electoral laws. Added to these,

none of the results declared at any of the polling stations is under challenge. It is observed that the only features that the law insists on in relation to the ballots and elections are the serial numbering of ballot papers and the allocation of polling stations to each person on the electoral register such that no registered voter is enabled to exercise his franchise more than once in order to give real meaning to the right to vote that is provided for in article 42 of the 1992 Constitution. In my view, a fair reading of the constitutional provisions on the electoral processes reveals that it is premised on the right to vote according to one's choice. This necessarily implies that it is only when that right has been infringed by the arrangements put in place at any public elections that the results can be annulled. The category of irregularity under consideration does not come within the scope of the Constitution and indeed any other law in force in Ghana to which reference could be made. I think this should be enough to dispose of the grounds turning on serial numbers.

In my view if the actors in the political scene consider the issues arising from the serial numbers that have just been considered of some importance to the integrity of the electoral process then they should consider for the purpose of future elections the adoption either by way of an amendment to the existing regime of laws on elections, or by a clear understanding and or agreement between all the stakeholders in our electoral system that serial numbers of pink sheets be better protected in the same manner as is the case regarding ballot papers and polling stations. Until then, the complaint regarding serial numbers in the form that they have been revealed in the petition herein is a constraint that is unknown to the law and as such lacks the nature of an irregularity and accordingly, I am unable to yield to it as a legitimate ground.

I next turn my attention to the category which concerns over-voting. In the case presented to us in support thereof, the petitioners based their claim on two interpretations. The first one is when the number of ballot papers at the end of the elections exceeds the number of registered voters at the polling station. The second instance, it was contended arises when there is excess of ballot papers over the number of ballots issued at the polling station. To prove their claim of over voting, the petitioners relied on entries on the pink sheets at the end of the

elections at the various polling stations. No reference was made to the register of voters at any of the polling stations to sustain this ground of complaint. On the contrary, great reliance was placed on portions of the pink sheets which were required to be filled by the presiding officers in answer to questions numbered as A1, C1, C3 and C6. The questions that presiding officers were required to answer are as follows.

C1: What is the total number of ballots issued to voters on the polling station register?

C3: What is the number of ballots issued to voters verified by the use of Form 1C (but not by the use of BVD)?

C6 asks a question that provides a formula that adds C1, C2, C3 and C4 to get an aggregate that must be equal to A1, the total number of ballots issued to the polling station. From the two interpretations placed before us, it is clear that they each seek to protect the integrity of the electoral process. It is also plain that as the total number ballot papers issued at any polling station is based primarily on the registered list of voters both interpretations seek to ensure that no person is enabled to vote who is not on the register of voters. Although the word over vote and or over voting do not come within any of the specifications in the electoral laws, it does appear to me that as a matter of common sense, votes that come within any of the two interpretations are evidence of over votes. In support of their case, it looks to me that as the petitioners did not rely on the list of registered voters at the various polling stations, they relied mainly on the answer to C3- the total number of ballots issued to a particular polling station. I think that the exhibits in the MB-C series were offered to prove this. And in the evidence to sustain this head of irregularity, the petitioners case appears simply to be that whenever the ballots cast as found in the ballot box exceed the ballots issued then there is an over vote for which reason the results must be annulled. In this regard, great reliance was placed on the information contained in the pink sheets and in particular the space provided for ballot accounting.

In question C6 in the ballot accounting section of the pink sheets is a formula that aggregates C1, C2, C3 and C4 to reach a total that must be equal to the total

number of ballots issued to a station, A1.But from the available evidence, there are matters of great weight, which render it unreliable to rely on the second interpretation of over voting on which the claim of the petitioners is planked. When one carefully peruses the ballot accounting section of the pink sheets in evidence before us, the question numbered C6 has a formula provided by which the aggregate of C1, C2, C3, and C4 is to be equal to A1, the total number of ballot papers issued to the polling station. A careful reading of the sheet reveals that C5, unused ballots has been left out of the constituent elements of C6 that is to be equal in number to A1. In the face of this obvious error that was admitted by the Chairman of the Electoral Commission in the course of his oral testimony, it is interesting if not surprising that notwithstanding the absence of C5 which had the effect of making it impossible going by the formula provided to have C6 being equal to A1, most of the pink sheets were filled for the purpose of having C1 + C2+ C3+ C4 making up C6 that should be equal to A1.

As the formula provided in C6 is incorrect it stands to reason that when the question to which it relates is answered it cannot be right. I am of the opinion that this is in an area of arithmetic, this is a classic instance of the convergence of an answer in arithmetic converging with the oft quoted statement that you cannot put something on nothing as it cannot hold. Therefore, the objective sought to be attained by way of ballot accounting cannot be achieved. This, in my view renders the interpretation of over voting that leaves out unused ballots, C5 out of the equation not worthy of the great reliance that is sought to be placed on it. Clearly, in the midst of this many presiding officers must have transferred the missing information elsewhere in order to get a healthy balance sheet regarding the ballots at the end of the polls. In this regard, I am of the opinion that utilising the portion on the pink sheets for the purpose of ballot accounting is quite unreliable. One needs to be more than a human being to be able to achieve a balance on the sheet but many attempted to do this without taking account of C5. In the circumstances the question that arises is: Can the Court rely on the answers therein to determine over votes without a process of careful tally of the ballots cast? I think that in view of the incorrect formula and the consequences flowing from it one needs evidence beyond the pink sheets to prove the allegation of

irregularity to which they relate. The question of an over vote in the circumstances not being a matter that is plain from the face of the pink sheets is a matter which could be established only by evidence through a careful inquiry under the law through the process of ballot accounting to enable such ballots to be rejected.

Again from the question in C6, C1 and C3 are part of the elements to be added but as can be seen from C3 since no voter was to use form 1C at the polls, the answers filled therein must relate to persons already on the polling station register-C1. This means that at the end of the poll when they are added as the formula has provided, there would be double counting which might tend to create the impression of over votes although in fact the error is traceable to the questions posed on the pink sheets. In my view the pink sheets must if they are to be used in the 2016 election undergo a careful weeding out of the obvious errors to make it serve the purpose for which they were intended. The effect of these is that the claim to over votes cannot be made without going through the process of ballot accounting to eliminate the obvious errors that are intrinsic in the questions that are asked on the pink sheets and the answers thereto. It is in this regard that the role of the polling agents comes up for consideration.

In my opinion as agents for the petitioners who signed all the pink sheets in evidence without exception, although by Regulation 35 (4) they can withhold their signature and provide reasons therefore, their conduct in signing the declarations means that in their view that the entire process of voting was regular. These signatures bring into being the evidential attribute provided for in section 26 of the Evidence Act, NRCD 323 of 1975 which provides as follows:

“Except as otherwise provided by law, including a rule of equity, when a party has, by his own statement, act or omission, intentionally and deliberately caused or permitted another person to believe a thing to be true and act upon such belief, the truth of that thing shall be conclusively presumed against that party or his successors in interest in any proceedings between that party or his successors in interest and such relying person or his successors in interest.”

I think that having signed the declared results that were forwarded to the presiding officer of the disputed elections, the Chairman of the Electoral Commission that was acted upon in computing the results, the said conduct creates a conclusive presumption that by the clear provisions contained in section 24(1) has the following attribute.

"Where the basic facts that give rise to a conclusive presumption are found or otherwise established in the action, no evidence to the contrary to the conclusively presumed fact may be considered by the tribunal of fact."

By the rules of evidence, we are precluded from considering any other fact to the contrary. I also venture to say that issues relating to elections are intended to be quickly resolved and that the procedure laid down in Regulations 35-37 of CI 75 serves the purpose of ensuring that the votes counted satisfy the various rules laid down for the conduct of elections. It is observed that the estoppel in this case relates to a fact the occurrence on which the question of law turns and as such this pronouncement does not seek to lay down that when a question purely of a matter of law arises there can be no estoppel raised to relieve one from the consequences of for example illegality. In my view, when there is a statutory right in persons to withhold their signature from the validity of an act by objecting thereto, their unequivocal act in signing would operate to create an estoppel in the nature of "unattackable validity" as was said in the United States decision in the case of Holmberg v Jones, 7 Idaho 752, 758-759, 65 Pac 563, 564.

See also: (1) Armstrong v King, 281 Pa. 207, 126 Atl. 263.

Further, I have no doubt that, if indeed, there were over votes in the disputed elections as the petitioners allege by resort to the elaborate procedure under the Regulations they would have been discovered and rejected in the course of ballot accounting subject to the right of appeal that is conferred on an aggrieved party under Regulation 38 of CI 75. I do not think that it is proper for us to ignore the laid down procedures provided by the electoral laws in the absence of compelling evidence to the contrary. I think it is important that we give effect to the legitimate expectations of the law in this matter.

Closely linked with the above is the category placed before us in the nature of voting without biometric verification. According to the petitioners this was deductible from the answers to question C3. But, the unchallenged evidence of the Electoral Commissioner was to the opposite effect and destroys any value that one might wish to place on entries in C3 as Form 1C was by agreement with the political parties not to be used for voting. The evidence which is not controverted was to the effect that Form 1C was originally intended to be used by registered voters who though issued with ID cards had their biometric data lost due to no fault of theirs. I accept the explanation offered by the Chairman of the Electoral Commission as a genuine attempt to prevent the disenfranchisement of registered voters. It is therefore plain that those portions of the pink sheets were filled in error and cannot be the basis of any legitimate attack on the regularity of the polls as conducted.

Again, in the course of the trial it became clear that the process of biometric verification that was provided for in regulation 30 was captured by the verification equipment and as such the primary evidence on whether or not a voter was verified before voting was recorded therein. In such a case, I am surprised that the information regarding the important process of verification is sought to be proved by reference to C3 only. I am unable to accept that piece of evidence as the primary evidence as it is in its nature secondary. In order to be able to rely on the pink sheets as evidence of what they purport to be, the petitioners ought to have shown that the better or best evidence to which they relate are not available. See: Lucas V Williams & Sons [1892] 2 QB 113 at 116 Primary evidence, in my thinking relates to a fact from which legitimate inferences as opposed to conjecture might be made. For this purpose, even the originals of the pink sheets belong to the category of secondary evidence as the information they seek to prove is obtainable in the best form in the register of voters at polling stations and the biometric verification equipment. The record of list of voters verified by the biometric verification equipment is the primary evidence and it is the one from which the information contained in the pink sheets was made. Proof of that information to be of evidential value must satisfy

section 163 of the Evidence Act, NRCD 323 of 1975. I quote hereunder the said section in its entirety.

"(1) An original of a writing is the writing itself or any copy intended to have the same effect by the persons executing or issuing it.

(2) An original of a writing which is a photograph includes the photographic film 9 including a positive, negative or photographic plate) or any print made therefrom.

(3)If information contained in writing is stored in a manner not readable by sight, as in a computer or a magnetic tape, any transcription readable by sight and proved to the satisfaction of the court to accurately reflect the stored information is an "original" of that writing."

The purpose of the above rules is to enable the court as the trier of fact and in keeping with the prime duty placed on it under section 2 of the Evidence Act to decide all questions of fact. By not placing the best or primary evidence before the court, the petitioners have sought their inferences from the information that is available elsewhere to be the basis of our decision. But that is not sanctioned by law. The rule of evidence to which reference is made here is that inferences about irregularities can be drawn from facts, but not from inferences. As the said record of the voters verified at every polling station is available and capable of proof in the manner acceptable, I am unable to fall upon information from pink sheets that are based on some other primary source as evidence of irregularity.

There is yet another reason that renders the evidence of voting without biometric verification unproven. It is this. Pursuant to the court's direction as to the mode of tendering evidence in the matter herein, the 3rd Respondents had filed on its behalf several affidavits by persons who voted at various polling stations in the country. The content of those depositions that were on oath and constitute evidence in this matter was that before they went through the process of voting they had been verified in accordance with the requirements of regulation 30 of CI 75. The petitioners, who bore the initial burden of proof on the allegation of absence of biometric verification, unfortunately did not file any process that has the effect of challenging those depositions. The effect of this is that in the face of

the depositions by persons who actually voted at some of those polling stations and testified from their own knowledge to what actually they saw and participated in, the evidence of the 2nd Petitioner who was not at any of those polling stations cannot be preferred. I think it is a basic rule of evidence that in considering the credibility of a witness one of the factors to be taken into account is "the capacity of the witness to perceive, recollect or relate any matter about which he testifies". See: Section 80(2) d of the Evidence Act, NRCD 323 of 1975.

One question that the failure by the petitioners to make available a single affidavit from a person who was present at any of the polling stations continually brings up is why were they not called? Since the petitioners had polling agents at all the polling stations as appear from the pink sheets exhibited before us, the reasonable inference therefrom is that the said agents are available. It being so, the failures to have them testify to affidavits in support of the allegation of absence of biometric verification has a decisive evidential attribute. The circumstances of this case in as far as the positive allegation of absence of biometric verification is concerned is that those agents have a duty to speak in the face of the depositions made by witnesses for the Respondents and as such their silence has the effect of rendering the version testified to by their adversaries unchallenged and also deemed to be an admission. See: BESSELA v STERN (1877) 2 C P D 265.

Then there is the evidence that the disputed elections were postponed to a second day, 8 December 2012 at polling stations where the verification machines had broken down. A legitimate inference to be made from this unchallenged fact is that voting at all polling stations took place after biometric verification of those entitled to vote. In so holding, I do not disregard the fact that the elections that are disputed arose out of the exercise of official acts and are presumed by section 37 of the Evidence Act, NRCD 323 of 1975 to have been regularly conducted thus requiring any person who alleges to the contrary to lead credible evidence to sustain the allegation to the contrary.

The next category that I turn my attention to arises out of the failure or absence of presiding officers to sign the results declaration forms after the holding of the

polls in dispute. In support of this head of claim, the petitioners relied on article 49(1), (2) and (3) of the 1992 Constitution of the Constitution as follows:

"(1) At any public election or referendum, voting shall be by secret ballot.

(2) immediately after the close of the poll, the presiding officer shall, in the presence of such candidates or their representatives and their polling agents as are present, proceed to count, at the polling station, the ballot papers of that station and record the votes cast in favour of each candidate or question.

(3) The presiding officer, the candidates or their representatives and, in the case of a referendum, the parties contesting or their agents and the polling agents if any, shall then sign a declaration stating-

(a) the polling station; and

(b) the number of votes cast in favour of each candidate or question; and the presiding officer shall, there and then, announce the results of the voting at that polling station before communicating them to the returning officer."

A careful reading of the above provisions reveals quite clearly that the duty that it creates is not exclusive to only the presiding officer and involves not only the execution of the declaration of results but beyond that openly announcing the results and communicating them to the returning officer who is the Chairman of the Electoral Commission. In my view, the duty is collective and when an allegation turning on the absence of the signature of the presiding officer is raised in any proceedings subsequent to the declaration of the results as we are witnessing in the petition, the court must consider the nature of the irregularity in question in relation to the entire constitutional provision as well as other provisions of the Constitution on electoral laws in order to give a meaning that advances the purpose for which those provisions were made. It is not proper for the court to look at the act in isolation as the petitioners have invited us to do in these proceedings. In fact, in presenting their addresses in the matter herein reference was made only to the requirement regarding the signature of the presiding officer without any mention of the duty that is similarly placed on the polling agents and or representatives of the candidates. Perhaps, this was due to

inadvertence and I have no doubt that if learned counsel for the petitioners had considered the provision in question in its entirety, he would probably have come to the view that the meaning of the words that he pressed on us in this matter is not the true meaning. We are in this case confronted with the holding of presidential elections and it is of the utmost importance that nothing be done by this court that has the effect of disenfranchising the several voters who took part in the elections on grounds that are purely technical and administrative. The procedural approach that is urged on us by the petitioners does not commend itself to me and I prefer to adopt the substantive approach in a matter that touches and concerns no mean a right as the right to vote. Perhaps, because our electoral history has not had the experience of other jurisdictions where for several years a certain section of the population was not entitled to vote, we tend to take its conferment on us as a people lightly. The substantive approach has been adopted by many jurisdictions and indeed the majority in their judgment in the recent Canadian case of OPTIZ v WRZENEWSKYJ [2012} SCC 55-10-256 said it well and properly as follows:

"Lower courts have taken two approaches to determining whether votes should be invalidated on account of irregularities. Under the strict procedural approach, a vote is invalid if an election official fails to follow any of the procedures aimed at establishing entitlement. Under the substantive approach, an election official's failure to follow a procedural safeguard is not determinative. Only votes cast by persons not entitled to vote are invalid. The substantive approach should be adopted, as it effectuates the underlying Charter right to vote, not merely the procedures used to facilitate that right."

The approach adopted in the above case has also met with the approbation of courts in the United States of America where courts have held that although election statutes are mandatory and compliance is expected not all compliance failures automatically void an election, especially if the failure is not challenged until after the election. Accordingly, courts construe acts that are not challenged until after elections as directory, which allows the court to overlook harmless compliance failures unless one of the following conditions applies:

(a) explicit statutory language states that the provisions are mandatory,

(b)explicit statutory language specifies the election is voided because of the failure,

(c)the violation affected an essential electoral component, or

(d) the violation changed the election's outcome or rendered it uncertain.

See (1) Henderson v Maley, 806 P. 2d 626, 630 (Okla. 1991); (2) Don v Mc Cuen, 797 S. W. 2d 455, 456 (Ark. 1990); (3) D'Amico v Mullen, 351 2 Ad 101, 104 (R. I. 1976).

Similarly, in the area of legislation regarding requirements of the Constitution that utilise the word " shall", Courts in the United States of America have tended to hold that the mandatory requirement means substantial and not complete and literal compliance. See: (1) Louiseville Trust Co v Morgan, 180 Ky. 609, 203 S. W. 555; (2) Commonwealth v Griest, 196 Pa. 396, 416; (3) Armstrong v King, 281 Pa. 207, 126 Atl. 263. In my view, if such an interpretation could be given regarding the exercise by the legislature of a power conferred on it under the constitution to make laws on behalf of the sovereign people of the United States of America then by parity of reasoning as regards merely administrative acts such as the failure to sign pink sheets that do not raise any issue that calls in question the totality of votes declared at a polling station such a failure cannot operate to deprive the declared results of validity. I think to accede to this urging would be subversive of the right to vote and treating its exercise as not being as important as the breach to which the absence of signatures relate. The right to vote according to one's choice is in my opinion the fundamental pillar of our constitutional democracy and should not be trivialised.

The suggested approach has been given statutory endorsement in section 20 (2) (b) of Representation of People Law, 1992 PNDC law 284 as follows:

"Despite sub-section 1, where at the hearing of an election petition the High Court finds that there has been a failure to comply with a provision of this Act or of the Regulations, and the High Court finds

(1) that the election was conducted in accordance with this Act and Regulations, and

(2) that the failure did not affect the result of the election, the election of the successful candidate shall not, because of the failure be void and the successful candidate shall not be subject to an incapacity under this Act or the Regulations".

Although the court to which reference is made above is the High Court, the amendment to the law that is contained in PNDC Law 296 makes the application of section 50 of the law to cover all public elections. The said amendment, which was just to substitute and or insert new provisions in the original law, PNDC law 284 in section 2 (c) provide thus:

"by the substitution for the meaning of "election" in section 50 of the following-

"election" means any public elections"

From the amendment, it is plain that the previous meaning in section 50 of PNDC law 284 that meant "an election to elect members of Parliament" was at an end and that word thereafter refers to all public elections including presidential elections. It being so the substantive and or purposive approach in PNDCL 284 that I have earlier on referred to in this delivery has to guide us in our decision. I think that the law maker must have been inspired by the substantive approach in jurisdictions outside Ghana, which though not binding on us but of persuasive effect only were delivered in countries with a long and established history of of constitutional democracy .In my view the approach that considers the nature of the irregularity and its likely effect on the election is quite frankly preferable to the procedural approach that looks only at the breach of a provision without more. In fact, even in the rules of court of the High Court there has been since the coming into being of the High Court (Civil Procedure Rules), 2005, CI 47 a legislative shift from the purely technical approach to the substantive approach that is embodied in Order 81 of the Rules. This approach is purposive as it attempts to unravel the objective that the law was intended to achieve and to effectuate same. In the case of Ex parte Yalley [2007-2008] SCGLR 512 at 519, Georgina Wood JSC (as she then was) observed as follows:

"It is well established, that as a general rule, the correct approach to construing statutes is to move away from the literalist, dictionary, mechanical or grammatical to the purposive mode. Admittedly, there may be instances where the ordinary or dictionary or grammatical meaning of the words or phrases yield just results and there remains little one can do about that. Even so, it can be said that the purposive rule is embedded in the grammatical rule. In other words, the ordinary meaning projects the purpose of the statutory provision and so readily provides the correct purpose-oriented solution. Indeed, the purposive rule of construction is meant to assist unearth or discover the real meaning of the statutory provision, where an application of the ordinary grammatical meaning, produces or yields some ambiguous, absurd, irrational unworkable or unjust result or the like."

Several decisions of our courts have over the years adopted the purposive and or substantive approach to construction of statutes in our jurisdiction. Reference is made to a few such instances. (1) Tuffuor v Attorney-General [1980] GLR 367; (2) Asare v Attorney- General [2003-2004] 2 SCGLR 823; (3) Ampiah- Ampofo v Commission on Human Rights and Administrative Justice [2003-2004] 1 SCGLR 227; (4) Republic v Fast Track High Court; Ex parte Commission on Human Rights and Administrative Justice [2007-2008] SCGLR 213 .

These developments are not accidental but intended to emphasise the substantive approach in our jurisdiction. Therefore, in my thinking a mere breach of a constitutional provision does not by itself result in invalidating an election but it must be proved of the said non-compliance that it has materially affected the declared result at the election. The failure to sign the results sheets in question not having been proved in the slightest manner to have tainted the election or the results declared should be held to be directory and not mandatory. I do not think that we can adopt an approach to the interpretation of election laws that is not informed by the experience of jurisdictions that have a considerable jurisprudence that has facilitated the growth of strong and enduring democracies that we aspire to achieve. Democracy is an evolving phenomenon and elections cannot be perfect so when we are faced with the consideration of irregularities that are alleged to have occurred in an election, we should exercise a reluctance

in striking down every single vote just by reference to a provision of the law. On the contrary, the irregularity must have affected the integrity of the elections. The substantive approach serves the same purpose as the purposive approach to the interpretation of statutes that our courts have come to embrace in several decisions in this country. See: Fitch v Stephenson [2008] EWHC 501, Para 40

The interpretation of article 49 of the constitution that has been urged on us in these proceedings does not commend itself to me. That interpretation seeks to constitute presiding officers into a special class of actors in the electoral process. I am unable to understand that although they actually presided over the elections and the counting of the ballots and caused polling agents to sign the declaration of the results, which they thereafter openly announced to the public and had a copy thereof posted at the polling station by merely not signing the results sheets, the entire process that but for this singular act omission complied with the law should be invalidated. I think that such an approach is not rooted in shared common sense and undermines the entire process of elections by having innocent voters disenfranchised on purely technical grounds. It is observed that election statutes are to be construed liberally in order to give effect to the expressed wish of the electorate. It being so, rules that are provided to effectuate constitutional rights should not be applied purely technically as though they were mathematical formula. I am of the opinion that the evidence placed before us clearly points in the direction of a substantive approach unblinded by strict adherence to technicalities. After all, the presiding officers are known and available within the jurisdiction so if one may ask the question why they were not called to testify? Within the context of the entire role to be played by the presiding officers, the requirement to sign the results is directory and not mandatory; to hold otherwise would enable a purely administrative act that does not detract from the basic principles of an election to supersede the substantive exercise of the right to vote in the manner circumscribed by law.

Then there is the claim, which concerns voting at undesignated polling stations. The uncontroverted evidence before us is that the petitioners assigned poling agents to those polling stations. It being the case, I think that the elections held at those locations not having been proved to have suffered in the slightest degree

from any breach of the rules and regulations by which the presidential elections were held, there appears to be no substance in this ground. In my thinking, this ground like that turning on duplicate polling station code numbers raise no point of relevance for our consideration in these proceedings.

For these reasons, I am unable to yield to the reliefs set out in the petitioners' demands before us and proceed to dismiss same. In the result, the declaration under the hand and signature of the Chairman of the Electoral Commission dated 9 December 2012 and numbered as CI 80 is hereby declared valid.

(SGD) N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

V. AKOTO-BAMFO (MRS) JSC:

On the 9th of December 2012,Dr. Kwadwo Afari Gyan, the Returning Officer for the December 2012 Presidential Elections, and who represents the 2nd respondent in these proceedings, returned the 1st Respondent herein John Dramani Mahama, as having been validly elected President of the Republic of Ghana.

Thereafter, on the 11th of December 2012, the Declaration of President-elect Instrument 2012, C.I. 80 was published under the hand of the said Returning Officer.

Being naturally aggrieved, the Petitioners herein, Nana Addo Dankwa Akuffo, Addo Dr Mahamudu Bawumia and Mr. Jake Obetsebi- Lamptey; the Presidential Candidate, his running mate and the Chairman respectively, of the New Patriotic Party filed the instant petition praying, inter alia, that the election be declared invalid and for a further order declaring the 1st Petitioner the validly elected President of Ghana.

According to the petitioners, there were a number of constitutional and statutory violations, malpractices and irregularities in the conduct of the elections which affected the outcome.

The alleged violations were categorized under these heads:

1. Over voting.
2. Voting without biometric verification.
3. Absence of signatures of Presiding Officers.
4. Duplicate serial numbers on Pink Sheets.
5. Widespread instances of polling stations where different results were strangely recorded on different pink sheets bearing the same polling station codes.
6. Instances where voting took place in certain locations which could not be identified as part of the official list of 26,002 polling stations created by the Electoral Commission.

   On the 2nd of April 2013, these issues were set down for determination;

(1) Whether or not there were violations, omissions, malpractices and irregularities in the conduct of the presidential elections held on the 7th and 8th of December, 2012.

(2) Whether or not the said violations, omissions, malpractices and irregularities, if any, affected the results of the elections.

Black's Law Dictionary the 8th edition, defines the term irregularity as an act or practice that varies from the normal conduct of an action. In the Canadian Supreme Court case of Ted Opitz v Borys Wrzesnewskyj 2012 SCC 55, a contested election application, it was stated, 'the term 'irregularities' should be interpreted to mean failures to comply with the requirements of the Act, unless the deficiency is merely technical or trivial. For ''irregularities'' to have ''affected the result of the election'', they must be of a type that could affect the result of the election and impact a sufficient number of votes to have done so. Votes cast by persons not entitled to vote are irregularities that can affect the result of the election, because they are votes that should not have been cast. If the number of such votes equals or exceeds the winner's plurality, then the result of the election is affected and the election should be annulled."

A malpractice, on the other hand, connotes a wrong or illegal practice per the Oxford Advanced Learner's Dictionary.

According to Black's Law Dictionary, a violation is an infraction or breach of the law; the act of breaking or dishonouring the law; the contravention of a right or duty.

Before proceeding to consider the issues, I must commend Counsel for the industry, the tremendous amount of documentary evidence placed before us; the professional manner they were dealt with and the high standard of advocacy evidenced by the extensive oral and written submissions.

I am acutely aware of the national importance of this petition and the far reaching consequences this decision could have for this country.

Government, in a democratic system of governance, derives its life from the people and that sacred nexus is made manifest in the electoral system. Among the fundamental precepts in a democracy is the ability to hold periodic free and fair elections together with an effective judicial oversight, bearing in view however, that, as a basic principle, it should not be for the court to determine who occupies the highest office of the land, the presidency; it the preserve of the citizens,

Elections therefore offer the citizenry the opportunity to express their satisfaction or otherwise with an incumbent leader or a political party, it is no wonder that this challenge, arising out of the exercise of those rights, has caught the imagination of all Ghanaians.

THE BURDEN

The petitioners must lead evidence on the balance of the probabilities. In other words, they bear the burden of producing sufficient evidence from which a reasonable mind could conclude that the irregularities and violations did occur. It is only then that they could be said to have adduced evidence to the requisite degree, or that they had discharged the evidential burden borne by them. Sections 10, 11, 12 and 13 of the Evidence Act 1975, NRCD 323.

In Opitz v. Wrzesrewskys, supra, the Supreme Court held that an applicant who seeks to annul an election bears the legal burden of proof throughout.

In Buhari V Obasanjo 2005 CLR 7K, a Nigerian case, the Supreme Court stated: "The burden is on petitioners to prove that non-compliance has not only taken place but also has substantially affected the results……..There must be clear evidence of non-compliance , then that the non-compliance has substantially affected the election."

The Nigerian Supreme Court further said:

“He who asserts must prove such fact by adducing credible evidence. If the party fails to do so, its case will fail. On the other hand, if the party succeeds in adducing evidence to prove the pleaded fact it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party’s adversary to prove that the fact established by the evidence could not on the preponderance of evidence result in the court giving judgment in favour of the party.’’

Those principles were affirmed in these cases:

1. Abubakar v. Yar’ Adua 2009 All FWLR (pt-451 1 SC.
2. Col. Dr. **Kizza Besigye v. Museveni Yoweri Kagutai** & Electoral Commission, Election Petition N0. 1 of 200 It must be stated that these authorities are of persuasive effect only.

Generally, it is presumed that election results are valid; therefore the parties contesting the election have the burden of showing an irregularity or illegality sufficient to change or place in doubt the result of the election. Supreme Court of Georgia in Banker v. Cole 278 G.A 532

In Macraine v. Mullis 276 G.A 416, another decision of the Supreme Court of Georgia, it was held that in order to set aside an election “the Court required evidence to show that a sufficient number of persons voted illegally, or, were illegally recorded in the contest being challenged to change or cast doubt on the election.

Having regard to the fact that an election petition is essentially a civil matter, the commencement of which is by the filing of a petition, the normal civil rules of procedure, with the necessary legislative modifications, do apply. The system of pleadings, therefore, forms an integral part of any civil litigation.

Pleadings are written statements of the parties in the action. They are served by each party on the other, setting out the material facts on which each party relies.

Pleadings therefore do not only operate to define and delimit with clarity and precision the real issues in controversy between the parties upon which they can prepare and present their respective cases; and, upon which the court will be called to adjudicate between them, but serve the purpose of informing each party what is the case of the opposite party which he will have to prepare to meet before and at the trial. In Esso Petroleum Co. Ltd. V. Southport Corporation, (1956) A. C. 218 at 238, Lord Normand said "The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them"

In Hammond v Odoi V.C.R.A.C. Crabbe JSC pronounced on the function of pleading thus:

''Pleadings are the nucleus around which the case- the whole case- resolves. Their very nature and character thus demonstrate their importance in actions, as for the benefit of the court as well as for the parties. A trial judge can only consider the evidence of the parties in the light of their pleadings. The pleadings form the basis of parties and place fetters on the evidence that they would lead. Amendment is the course to free them from such fetters. The pleadings thus manifest the true and substantive merits of the case. And the reply is very much a part of the pleadings.''

Thus, in situations where there are deletions and reclassifications of the facts in dispute, in the course of the hearing, without the leave of the Court to amend; the party could be said to have breached some cardinal rule of pleadings.

I now proceed to consider the grounds raised.

OVER-VOTING

In the amended petition filed on 8-2-13, paragraph 20 Ground 2(a); the petitioner stated thus:

The results declared and recorded by the 2nd Respondent contained widespread instances of over-voting in flagrant breach of the fundamental constitutional principles of adult suffrage, to wit one man one vote.

On the Table provided under Ground 3, the figure of 128, 262, was set down as the number of ballots affected and therefore to be annulled.

In Paragraph 37 of the affidavit of Dr. Bawumia filed pursuant to the directions of the Court, appear the following:

"That while over-voting occurred in 2,065 polling stations representing 85%, over-voting took place along with NBV, DS, NS, and DP. It is only in 320 polling stations that the sole irregularity was over-voting."

In Paragraph 44 of the same affidavit however, 130,136 votes were said to have been vitiated by the over-voting phenomenon.

The KPMG Report, however, put the total of pink sheets counted in that category at 318.

Clearly in circumstances that the total number of polling stations under the category had been reduced by at least 2 by virtue of the KPMG Report; neither the 128,262 nor the 130,136 could have remained unchanged.

In Court Dr. Bawumia testified that there had been a number of deletions. He tendered various lists of deleted polling stations. Under Exhibit C-C1-C11, he listed 44 polling stations under this category as having been deleted.

These deletions would certainly have affected the number of votes to be annulled. Subsequent thereto another list of 704 polling stations was tendered as Exhibit D.

Included in that list were 48 more polling stations under the over-voting category.

Clearly the number of polling stations to be affected, and more importantly, the numbers of votes to be affected would see a reduction. One has to bear in mind that numbers are of the essence since they must be used to measure the effect of the irregularity, if any. In this instance however, one cannot determine with precision the number of votes in issue.

It bears stating that whereas the 2nd respondent denied that there was over-voting; the 3rd Respondent did not only deny but went further to assert that there were patent, clerical and sometimes arithmetical errors in the recording which had no material effect on the actual votes publicly cast, sorted counted and recorded (Paragraph 15(iii) of the affidavit of Johnson Asiedu filed on 15th April 2013).

WHAT IS OVER-VOTING?

The petitioners gave 2 definitions:

1. Where the total votes in the ballot box as recorded on the face of the pink sheets exceeds the voters' register at the polling station as recorded on the pink sheet.

2. Where the total votes in the ballot box as recorded on the pink sheets exceeds the total ballots issued to voters as recorded on C 1and 2.
3.

For the Respondents however, the phenomenon occurs where the ballot cast exceeded the number of persons eligible to vote at the polling station or numbers of persons on the polling station register.

Even though, in the main, both definitions placed emphasis on the Register and ballot paper; the Petitioners limit themselves exclusively to what appears on the face of the pink sheet, i.e. the Declaration Form,

Although it is not disputed that the pink sheet was the basic document for the elections it cannot, however, be said to be conclusive. It is important to note that an election is not an event, but a process and that the pink sheet derived its source from the Biometric Voters Register. It should therefore be the reference point for a discussion of any issue under this category.

I am fortified in this view by the fact that all the political parties were given copies of the voters register which the various polling agents of the major

political parties carried t to the polling stations on the days the elections were held. These pieces of evidence were not challenged.

Indeed it is common knowledge that the polling agents who were at the polling stations checked the names of persons who were verified and issued with the ballots. Having regard to their role as watchdogs to check impersonation, multiple voting and certification of the results (they had the right to protest by refusing to sign the pink sheet) as provided for under C. I. 75 Regulation 19 (3) coupled with the voting procedures, publicly sorting and counting etc; it would not be safe to rely solely on the entries on the face of the pink to establish the incidence of over-voting. Should any dispute arise as to whether persons who cast the ballot did exceed the number on the voters register, disregarding the register, the genesis of the pink itself will result in an error.

Indeed there was ample evidence that several errors were made by the presiding officers in making the entries. Many of the entries were made in error.

In some cases, columns were wrongly filled, others were left blank; while yet in others, the figures and words hardly matched. It was evident that some of the errors could simply be corrected by entering the figures in the right columns. Others were sheer were errors in the arithmetic.

Dr. Bawumia left the Court in no doubt that the petitioners were relying solely on the pink sheet to establish cases of over-voting, for, he averred that there were neither protests nor complaints lodged, in terms of the complaints procedures laid out in the governing statute at the polling stations.

In the proceedings of 7th May 2013, to the question by learned counsel for the 3rd Respondent

QUESTION: Was there any evidence of misconduct provided to you by any of the polling agents at the polling stations?

The 2nd Respondent delivered of himself thus:

ANSWER: The only evidence we have brought to Court is the over-voting on the face of the pink sheet.

He significantly admitted that they had no record of any person voting or attempting to vote twice.

Having regard to the fact that credible evidence was led to show that statistics of ballots issued by the 2nd Respondent to each Region, Constituency and Polling Station were provided to all the political parties whose agents were at the polling station and ticked the names of those verified (in these elections) I am of the view that over-reliance on the pink sheet in the face of errors detected clearly led to a dead end , for one cannot use wrong assumptions or data to arrive at the right conclusions. Certainly such multiple inaccuracies cannot be the basis for a finding that there was over-voting. Owing to the mistakes, the pink was manifestly unreliable as a basis for establishing the phenomenon of over voting.

The petition and the affidavit of Dr Bawumia carried 2 different sets of numbers. Deletions were made in the course of the hearing; the KPMG Report had a different figure.

Again, in Court Dr. Bawumia admitted that some errors were made in the computation. All these factors would have an effect on the numbers which, as already mentioned, are vital.

None of the polling agents made a report of any irregularity; no evidence was led on ballot box stuffing. And more importantly the ballots were cast and their polling agents attested to the results.

While the presiding officers obviously did make some mistakes and clerical errors, no mischief or advantage can be attributed thereto. Substantially the voting, counting and tallying of votes were carried to a high degree of accuracy.

Which polling stations were affected?

How many results have to be annulled?

These are questions that the petitioners failed to answer under this category. I would therefore decline the invitation to annul any votes under this category.

ABSENCE OF SIGNATURES

In paragraph 20 Ground 1(f) of the petition, the petitioners averred that there were widespread instances of the absence of the signatures of presiding officers or their assistants on the Declaration form.

The figure of 117, 670 were put down as the number of votes to be annulled as a result of this irregularity.

In the affidavit of Dr. Bawumia filed in pursuance of the directions of the Court, he averred in paragraph 39 that it was only in 310 polling stations that the sole irregularity was the absence of the requisite signatures. In paragraph 76 he testified that if this were the only irregularity, the 1st petitioner would have obtained 49.03% of the valid votes whereas the 1st respondent would have obtained 49%.

Essentially the respondents did not deny that in some cases the Presiding Officers failed to sign the pink sheets. Indeed the 2nd respondent tendered Exhibit SA4, a National Summary by Region Results of sheets not signed by the Presiding Officers. According to the said Exhibit, 905 of the pink sheets were indeed not signed by the Presiding Officers. Of the2009 of the pink sheets the petitioners claimed were not signed by the presiding officers, 1, 989 were signed by the agents of the candidates.

Having admitted that there were at least, 905 polling stations in which presiding officers failed to append their signatures, the petitioners were relieved of the duty to call further evidence on the issue.

Article 49 of the Constitution 1992 provides:

1. *At any public election or referendum, voting shall be by secret ballot.*
2. *Immediately after the close of the poll, the presiding officer shall, in the presence of such of the candidates or their representatives and their polling agents as are present, proceed to count, at the polling station, the ballot*

papers of that station and record the votes cast in favour of each candidate or question.

3. *The presiding officer, the candidates or their representatives and, in the case of a referendum, the parties contesting or their agents and the polling agents if any, shall then sign a declaration stating*

    (a) the polling station; and

    (b) the number of votes cast in favour of each candidate or question;

    and the presiding officer shall, there and then, announce the results of the voting at the polling station before communicating them to the returning officer.

Article 49 is couched in mandatory terms. Undoubtedly it is an entrenched provision, which can properly be amended in accordance with the procedure set out under Article 290 of the Constitution. Article 49 sets out in detail the duties of the presiding officers and the polling agents immediately after the close of the poll in any public election or referenda. Under Article 45(c)of the Constitution, the Electoral Commission is vested with the power to conduct and supervise all public elections and referenda.

Article 51 stipulates that the 2nd respondent shall make regulations for the effective performance of its functions; particularly for the conduct of public elections among others.

It is evident that even though Article 51 vests the power in the E.C to make regulations for the conduct of the elections; it is only under Article 49 that the steps to be followed by the presiding officers and the polling agents, after the close of the polls, are set out in detail.

Since the provision is couched in mandatory terms, clearly where the signature of the presiding officer fails to appear, it does not admit of any argument, on a literal interpretation, of the said article, that there has been a breach and therefore the results ought to be nullified.

However, it has been held in a long line of decisions that a strict, narrow, technical and legalistic approach to interpretation of the Constitution, the embodiment of our hopes and aspirations, must be avoided In Danso-

Acheampong v. AG and Abodakpi 2009 SCGLR 353, at 358 this Court, speaking through Prof. Date-Bah, stated:

> "These days, a literal approach to statutory and constitutional interpretation is not recommended. Whilst a literal interpretation of a particular provision may, in its context, be the right one, a literal approach is always a flawed one, since even common sense suggests that a plain meaning interpretation of an enactment needs to be checked against the purpose of the enactment, if such can be ascertained. A literal approach is one that ignores the purpose of the provision and relies exclusively on the alleged plain meanings of the enacted in question''.

In Tuffour V Attorney Gen. (1980) GLR 63 it was held that a national constitution must be given a benevolent broad, liberal and purposive construction so as to promote the apparent policy of its framers. See Asare V Attorney General 2003-2004 SCGLR 823 and Apaloo V Electoral Commission of Ghana 2001- 2002 SCGLR 1.

The right to vote is enshrined in the Constitution in Article 42 thereof. Universal Adult suffrage is, without a doubt, one of the pillars of our democracy. Significantly, article 42 is equally an entrenched provision. Article 290 (1) e

Was it the intention of the framers of the Constitution that persons who have exercised their rights under art. 42 by going through the electoral procedures, registered as voters, had their names on the register, participated in the election by casting their votes which have been publicly counted, recorded and announced, should have such votes not 'counted' on account of the sins of one public officer?

We have freely chosen the democratic form of governance in which sovereign power resides in the people as a whole. Under that system each citizen must be afforded a genuine opportunity, through the conduct of free and fair elections, to determine who his leaders or representatives should be.

An election being a process as opposed to it being an event, where all the stages have been gone through and therefore the elections could be said to have been

substantially held in accordance with the regulations, to nullify the results on this ground per se, would amount to putting in the power of some unscrupulous presiding officer in some polling station to nullify the solemn act of the whole constituency by his single act of omission.

> The right to vote is at the heart of our democracy; Tehn-Addy V A G and Ors, 1997-98 1GLR 47 and Ahumah-Ocansey V Electoral Commission and Ors 2010 SCGLR575.

One would ask what the purpose is for Article 49(3) in the Constitution.

Article 51 of the Constitution vests the power in the Electoral Commission to enact regulations for the conduct of the elections. Pursuant to the said power, C.I. 75 came into force. Regulation 19 thereof defines the role of a polling agent in these terms:

> *"an appointment under sub-regulations (1) and (2) for the purpose of detecting impersonation and multiple voting and certifying that the poll was conducted in accordance with the laws and regulations governing the conduct of elections"*

> That the polling agent plays a vital role in the process is not in doubt. In this regard the certification that the poll was conducted in accordance with the laid down procedures is crucial for the integrity of the process. As a representative of a candidate or a party, by appending his signature to the Declaration; he serves notice to his principal and the generality of the citizenry that the presiding officer has complied with the rules; there has been the casting of the ballot, counting, recording and the declaration of the results. Since the Constitution requires that both the Presiding Officers and polling agents sign, looking at their duties;and obviously the reason for signatures in terms of the credibility of the process i. e. the polling agent vis a vis the presiding officer, in the event of the presiding officer's failure to sign , a purposive interpretation would not defeat the objectives of Article 49(3) in that even though the Presiding Officer had failed to sign, the polling agent's signature, to my mind, is a bold declaration for the integrity

of the whole electoral process. Where he therefore certifies the results, which is essentially about the ballot; the absence of the presiding officer's signature should not result in an annulment. Of the two, the polling agent was obliged to protest should he take the view that there was a violation of some statute, he could refuse to sign and give reasons; however the presiding officer had no such option.

Furthermore there was no evidence that the persons who voted in the election ought not to have voted, neither is there any evidence that some people voted more than once. Indeed there was no evidence that any of the voters or the respondents engaged in any fraudulent acts. In other words, there was a real election by ballot.
Undoubtedly the competing provisions guaranteeing the right to vote under Article 42 and Article 49(3) which imposes a duty on the presiding officer to sign the Declaration Form should be resolved by purposively interpreting them so as to ensure that those who have exercised their right to vote shall have their votes counted.

In my view, visiting the sins of some public official on innocent citizens who have expressed their choice freely would run counter to the principle of universal adult suffrage, one of the pillars of our democracy, and perpetuate an injustice.

The omissions of a presiding officer should not disenfranchise the voter.

I would therefore decline the invitation to invalidate the votes cast on account of the absence of the signature of the presiding officers.

A general comment

The notion that polling agents are ornamental pieces adorning the polling stations must be discarded. Their roles are clearly defined by the Constitution and other statutes governing the elections. A vigilant polling agent would detect some of the wrongful acts at the polling station. He

could then set in motion the complaint mechanism in the governing statute, designed at addressing the complaints, at the polling stations or collation centers' with minimum delay. This costly exercise of combing through a mountain of election materials, with a view of unearthing irregularities, well after the declaration of the results, would be greatly reduced. Sadly, many a time, the crucial duties of polling agents are left in the hands of persons who hardly appreciated the reasons for their presence at such fora.The need to recruit a group of committed and dedicated persons with a certain level of education cannot be overemphasized.

DUPLICATE SERIAL NUMBERS

It is the petitioners' case that "there were widespread instances where there were same serial numbers on pink sheets with different poll results when the proper and due procedure established by 2nd Respondent required that each polling station have a unique serial number in order to secure the integrity of the polls and the will of the lawfully registered voters.

Under this head the petitioners request that 3,508,491 votes be invalidated. In answer the respondents asserted that the serial numbers had nothing to do with the Declaration Form; that its unique features were the name of the polling station and its unique code.

I must say that the pieces of evidence offered by both Mr.Johnson Asiedu Nketiah and Dr. Afari Gyan shredded into pieces the petitioners' case under this head. It became evident that Dr. Bawumia was not too familiar with the processes and procedures leading to the conduct of the presidential elections.

The exact nature of the malpractice under this head was not clear from his testimony, how the serial numbers affected the recording of the results,

but more importantly how the alleged opportunity offered by the duplicate series got exploited so as to result in any irregularity was never established.

It is trite learning that an election cannot be overturned on the basis of mere speculation, for it is not about what could have happened; but what did take place. I do not therefore feel able to grant the prayer of the petitioners under this category.

VOTING WITHOUT BIOMETRIC VERIFICATION

As per paragraph 20 Grounds (1) and (d) of the amended Petition, the petitioners alleged:

(a) That 2nd respondent permitted voting to take place in many polling stations across the country without prior biometric verification by the presiding officers of 2nd respondent or their assistants, contrary to Regulation 30(2) of C.I. 75.

According to the 2nd Petitioner as per paragraph 52 of his affidavit; 137,112of the votes should be annulled.

In his evidence before the Court, Dr. Bawumia in answer to a question as to how the petitioners arrived at the conclusion that persons voted without biometric verification

ANSWER: "My Lords, evidence is on the face of the pink sheet. Section C3 of the pink sheet asks the question how many voters voted with the use of form 1 C were verified to vote by the use of form 1C and not by biometric verification device that is filled in Sec C3, and so, my Lords, what we did was to aggregate for each polling station where voting without biometric verification took place. We aggregated all the numbers in Sec C3 and my Lords if I may refer to my tables we have a total of 535, 723 people who voted without biometric verification in the polling stations under contention"

It is obvious that the petitioners simply went through the pink sheets and totaled all the figures in Form C3. The issue is whether that sole exercise discharges the burden placed on the petitioners, in terms of Sections 10 and 11 of the Evidence Act, 1973.

Dr. Afari Gyan in his testimony stated that the column C3 was not required to be filled by the presiding officers.

According to him that column was created to take care of those voters who had been registered during the biometric registration exercise that preceded the voting, but whose biometric data had been lost.

He stated however that upon discussions with the political parties some of them vehemently opposed the idea and insisted that the only means of verification should be through the machines. It was therefore agreed that the form 1. C. was not to be used. This, according to him, was at a time the forms had already been printed and that since C3 column could not be taken off, the presiding officers were asked to leave that column blank. He tendered in evidence E. C. 5 the Form 1. C. and added that the said Form C1 was therefore not taken to the polling stations.

Regulation 30(1) of C.I. 75 provides:

(1) A presiding officer may, before delivering a ballot paper to a person who is to vote at the election, require the person to produce
    (a) a voter identification card or
    (b) any other evidence determined by the Commission in order to establish by fingerprint or facial recognition that the person is the registered voter whose name and voter identification number and particulars appear in the register.

(2) The voter shall go through a biometric verification process.
The procedure to be followed under Regulation 30 presupposes that there must be a ballot paper; a voter's identification card and biometric verification equipment. The latter has been defined in Regulation 47 as a device provided at the polling station for the purpose of establishing by fingerprint the identity of the voter.

Therefore where a dispute arises as to whether a voter had been verified, the best evidence should be the verification machine. Even if the pink sheet were the primary document, it is not conclusive; for it is my respectful view that prints out from the verification device would have put to rest any arguments as to whether those persons went through the verification process or not.

It is to be noted that when the petitioners made the allegation which was denied by the 2nd respondent, it was not enough for the 2nd petitioner to have mounted the witness the box and repeated the averments since those facts are capable of proof by some other means i.e. producing the prints out of the machine as a form of proof. Majolagbe V. Larbi(1959)1 GLR190.

It could be argued that since the evidence led was documentary, parole evidence was inadmissible to vary or contradict same.

That there are exceptions to the rule is beyond doubt. Dr. Afari Gyan tendered the form 1.C. With the introduction of the said document the question in C3 became meaningful. It became obvious, that one could not answer the question in that column without any reference to E. C. 5 which were not taken to the polling stations, in other words, E, C. 5 was consistent with the contents in C.3, Again the 2nd was emphatic that no person voted without being verified and, that, while admitting that there challenges with the equipment, voting in those areas were adjourned to the next day in those areas.

It is a notorious fact that the poll was adjourned in some areas and therefore there were two days of voting. If persons were allowed to vote

without verification would there have been any need for the adjournment? I think not. In the absence of any credible evidence to the contrary (some polling agent or voter testifying) I would prefer the pieces of evidence of the respondent's on this issue to the bare assertions of the petitioners based on the face of the pink sheets,It became obvious that the attack mounted under that category was premised on a misconception and therefore impossible to stand.

I would accordingly decline the petitioner's invitation to annul the votes under that category.

UNKNOWN POLLING STATIONS

In paragraph 20 Ground 2(a) the petitioners complained that "there were 28 locations where elections took place which were not part of the twenty-six thousand and two (26002) polling stations created by the 2nd respondent."

In Court however, on the issue, Dr. Bawumia testified thus "we could not match the names and the polling stations. Again as with the duplicate numbers category, this category is insignificant;'

The petitioners had a duty to establish that those polling stations did not exist.

Exhibit EC 3 showed that the petitioners knew about the existence of those polling stations and had indeed appointed agents to thereto.

If they did not know of the existence of those polling stations, they obviously could not have sent their agents there.

I must say that no evidence was led on when those polling stations were created.

I would in the circumstances, find that the petitioners have failed to lead evidence sufficient for a finding in their favour on this ground.

I accordingly decline to annul the votes stated there under.

SAME POLLING STATION CODES ON DIFFERENT PINK SHEETS

Under this category even though the petitioners took the view that votes under that category were insignificant, I would only find the explanation by the 2nd respondent credible; that some were polling stations were so large as to be divided into sections A and B; while the others, constituted polling stations where special voting took place, I would so find and dismiss the petitioners' case under this ground as well.

For the foregoing reasons I would dismiss the petition in its entirety.I must say that on paper, we seem to have a transparent electoral system which has evolved over the years. The political parties have been active participants. Even though the IPAC is not backed by law, it has played a pivotal role at every stage of the process. The registration of voters, printing of ballot papers, training of polling agents, the sorting and counting done publicly, the transparent ballot boxes and the photo identification cards raise the level of transparency to a very high degree. It became evident however that the myriad of errors and blunders were committed by the election officials. Such errors did no credit to the system. It is therefore recommended the caliber of persons recruited for the exercise.

(SGD) V. AKOTO-BAMFO(MRS)

JUSTICE OF THE SUPREME COURT

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