IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, AD. 2016

CORAM: ATUGUBA JSC (PRESIDING)
AKUFFO (MS) JSC
DOTSE, JSC
YEBOAH JSC
GBADEGBE JSC
AKOTO- BAMFO (MRS) JSC
BENIN JSC

CONSOLIDATED WRITS
JI/26/2015
JI/21/2015
JI/22/2015

20TH JULY 2016

BETWEEN

1. **GHANA BAR ASSOCIATION**
2. **NENE AMEGATCHER - PLAINTIFFS**
3. **JUSTIN AMENUVOR**
4. **FRANK BEECHAM**

AND

1. **THE ATTORNEY - GENERAL - DEFENDANTS**
2. **JUDICIAL COUNCIL**

3. RICHARD SKY	**-**	**PLAINTIFF**
VRS		
THE ATTORNEY-GENERAL	**-**	**DEFENDANT**
4. KWASI DANSO-ACHEAMPONG	**-**	**PLAINTIFF**
VRS		
THE ATTORNEY-GENERAL	**-**	**DEFENDANT**

JUDGMENT

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ATUGUBA, JSC:

These three suits were separately initiated but by reason of certain basic commonalties between them were subsequently consolidated by this court. We now proceed to dispose of them seriatim.

Writ No. J1/26/2015

The plaintiffs by their writ dated the 30th day of June 2015 claim against the defendants as follows:

> "1. A declaration that upon a true and proper construction of Article 144 clauses (2) and (3) of the Constitution 1992 all appointments made by the president of the Republic of Ghana to the Superior Courts are valid only to the extent that such appointments are made in strict accordance with the advice of the 2nd Defendant herein, the Judicial Council.

2. A declaration that upon a true and proper interpretation of Article 144 (2) and (3) of the Constitution 1992, a constitutional trust is created in the 2nd Defendant herein, the Judicial Council, to make nominations of persons best qualified to serve as Justices of the Superior Courts of Judicature, and the 2nd Defendant is required to ensure that such nominations are actually submitted by the President to Parliament for approval after due consultations with the Council of State.

3. A declaration that accordingly, upon a true and proper construction of article 144 clauses (2) and (3) of the Constitution 1992 the Judicial Council of the Republic of Ghana has a constitutional obligation to specifically advice the president of the Republic of Ghana as to which specific person(s) is/are suitable for appointment to serve as Justice(s) of the Superior Courts of the Judicature, in accordance with which advice the President is mandatorily required to exercise his powers of appointment.

4. A declaration that an appointment or non-appointment by the President of the Republic of Ghana of a Justice of the Superior Court in a manner out of accord with the advice of the Judicial Council is unconstitutional, null, void and of no effect."

The joint memorandum of issues of the parties to the consolidated suits, as far as relevant to this writ are as follows:

"(i) Whether or not the constitutional requirement that the President of the Republic of Ghana must obtain the advice of the Judicial Council in the process of appointing Superior Court Justices means that the President is bound by the advice of the Judicial Council?

(ii) Whether or not the doctrine of separation of powers is undermined if the President of the Republic of Ghana is held to be bound by the advice of the Judicial Council in his appointment of Justices of the Superior Courts?

(iii) Whether or not a holding that the President of the Republic of Ghana is bound by the advice of the Judicial Council in his appointment of Superior Court Justices will produce absurd constitutional results?

(iv) Whether or not the advisory function of the Judicial Council invests the Council with the constitutional power to nominate persons for appointments as justices of the Superior Courts?"

Before delving into the merits, the defendants have in paragraph 4 of their statement of case dated 19/10/2015 contended that though the plaintiffs have averred that since 1992 all Presidents of the Republic of Ghana have not acted fully on the advice of the Judicial Council in the appointment of Supreme Court judges in particular, they have led no evidence thereon and that consequently the plaintiffs "On their pleading,..... are seeking declarations in a vacuum." However upon scrutiny the defendants have plenarily pleaded in paragraph 13 of their said statement of defence thus:

> "*The only instance cited by the Plaintiffs is contained in paragraph 2.36 of their Statement of Case where they state in respect of the recent appointments to the Court of Appeal and the Supreme Court that "in as much as the President picked some names and rejected others from the list advised by the 2nd Defendant, the President did not follow the advice of the 2nd Defendant which was binding on him thus making the appointments made in breach of Article 144 Clause 2 and 3 of the 1992 Constitution of the Republic of Ghana.*" What the

Plaintiffs failed to point out in this instance is whether the President disregarded *in toto* the advice rendered by the Judicial Council. In light of the fact that the entire case of the Plaintiffs rests on the proposition that the President is bound, as if he were a clerk of Parliament, to transmit all the names contained in the advice of the Judicial Council to Parliament without more, it makes sense for them to contend that he violated the advice by transmitting some names and leaving others. In that case, a good question would be whether there are any numerical limitations to the number of "nominees" that the Judicial Council can send to the President? *Going by the argument of the* Plaintiffs, if the Judicial Council, in exercise of its newly *found constitutional power to nominate justices for mandatory appointment by the President, decides to nominate one hundred persons for appointment as Supreme Court judges, then the President has no choice but to send the one hundred names to Parliament without due consideration to the resources to compensate these persons for the work they would be doing as justices of the Supreme Court.* Indeed, the Plaintiffs must be aware that the logical effect of their argument is that any person meeting the constitutional minima can be appointed a justice of the Supreme Court once their name is transmitted to the President by the Judicial Council."(e.s)

Quite clearly the defendants have by this pleading indulged in confession and avoidance. That being so since the avoidance is only a question of law as to whether there should be no numerical limitations with regard to the list(s) of recommended persons for appointment it cannot be said that the

plaintiffs have failed in respect of their factual allegation regarding presidential failure to appoint to the extent of the full number of persons recommended by the Judicial Council for appointment to the Supreme Court, at least in respect of "*the recent appointments to the Court of Appeal and the Supreme Court*." That single instance suffices to ground the plaintiffs' action herein.

ISSUE I

(i) **Whether or not the constitutional requirement that the President of the Republic of Ghana must obtain the advice of the Judicial Council in the process of appointing Superior Court Justices means that the President is bound by the advice of the Judicial Council**?

This issue is the kernel of this action. The plaintiffs contend that to secure the independence and best quality of the Judiciary the advice of the Judicial Council on appointments to the Supreme Court should be binding on the President. They inter alia, rely on paragraph 2.20 of the Memorandum on the Proposals for a Constitution for Ghana 1968 in which it was "**proposed that appointments to the Judiciary shall be by the President, and not on the advice of the Prime Minister**. It was noted that this proposal is "the most effective way of ensuring **that political considerations** and influences **shall not be allowed to dictate these appointments**."

They also rely on paragraph 123 of the ***Proposals Of the Constitutional Commission For A Constitution For the***

Establishment of A Transitional (interim) National Government For Ghana 1978 as follows;

> "123. One major limitation on the President's power is in the area of appointments to public offices. We concede and accept that the President should have some freedom in appointing the team with which to formulate and implement his programs and policies. ***We feel, however, that this discretion should not be untrammeled, particularly in the appointment of persons to perform certain sensitive functions in which a degree of impartiality and independence from executive is considered essential...***"

Apart from these excerpts from the Proposals for the 1969 and 1979 Constitutions we have to bear in mind the recent history and realities concerning appointments to the superior courts, particularly the Supreme Court to ascertain further the spirit or core values that should inform our interpretation of article 144(2) and by extension clause 3 thereof, as counselled by *Tuffour v Attorney-General* (1980) GLR 634 C.A (sitting as the Supreme Court) and a plethora of well-known subsequent decisions of this court.

In *New Patriotic Party v Inspector General of Police* (1993-94)2 GLR 459 at 469 Amua-Sekyi JSC, commenting on the statutory reversal of an acquittal and retrial of certain leading personalities on a charge of treason, bluntly said:

> "Acquitted in proceedings intituled *State v Otchere* [1963]2 GLR 463, SC the verdicts were set aside by executive order: see Special Criminal Division Instrument, 1963 (EI 161). Put back on trial before *a more*

pliant bench, the executive had the satisfaction of seeing them convicted and sentenced to death. Mercifully, the sentences were not carried out; but a grave precedent had been set. *The judges were not spared*: Korsah CJ was removed from office, and a constitutional amendment cleared the way for the dismissal of Adumua-Bossman J (as he then was) and other judges *whose loyalty to the Absolutist State was now called in question*."(e.s)

Again in *Wuaku v Attorney-General*(1993-94)2 GLR 393 SC at 396 Amua-Sekyi JSC trenchantly stated as follows:

"After the overthrow of the Nkrumah regime, the judiciary came in for much criticism for the role it had played while the previous government was in power. It was said that *it had departed from its traditional role as an independent arm of government and had become a willing tool of repression in the hands of the executive.* It was also said that *some of the appointments to the bench had been politically motivated in that persons with known sympathies for the regime had been favoured over those who exhibited an independent frame of mind.* Worse still, it was said that *some of the judges had become so depraved and demoralized that they habitually took bribes.* The answer of the new administration was the wholesale dismissal of judges – cleaning the Augean stables, as it were – and appointing new ones to take their place. But it was soon realized that merely changing personnel would not be enough: what was required was a reappraisal of the role of the judge in the body-politic and the creation of the conditions necessary for the proper exercise of his functions."(e.s)

In *Hansen v Ankrah* (1987-88) GLR 639 at 667 Sowah JSC said:

> "Before I am done I consider it ethically and judicially unacceptable *the comments on the composition of the panel in this appeal.* If my brother Taylor JSC had reservations, he should have made them abundantly clear before the hearing and not after opinions have been rendered which are contrary to his own. And *in any event the judges referred to are by all standards, including their knowledge of the law and integrity, competent to adorn the Supreme Court bench. It is by sheer accident of past politics that they have not taken precedence over some members of the Supreme Court.*"(e.s)

This longstanding skepticism of the independence of the judiciary and now the Supreme Court in particular led to the issuance of the following Practice Direction on empanelment in the Supreme Court reported in (2000) SCGLR 586 as follows:

"**PRACTICE DIRECTION**

PRACTICE IN EMPANELLING JUSTICES OF THE SUPREME COURT

10 January 2001

Practice and procedure – Supreme Court – Constitutional cases – Empanelling of court by Chief Justice – Practice in – Chief Justice to empanel all available justices of the Supreme Court or at least seven justices in constitutional matters – Rationale for empanelling all available Justices of Supreme Court in such matters – Constitution, 1992 arts 125(4) and 144(6).

It is provided by the Constitution, 1992, arts 125(4) and 144(6) that:

> "125(4) The Chief Justice shall, subject to this Constitution, be the Head of the Judiciary and shall be responsible for the administration and supervision of the Judiciary."
>
> "144(6) Where the office of the Chief Justice is vacant, or where the Chief Justice is for any reason unable to perform the functions of his office –
>
> (a) until a person has been appointed to, and has assumed the functions of, that office; or
>
> (b) until the person, holding that office has resumed the functions of that office; as the case may be,
>
> those functions shall be performed by the most senior of the Justices of the Supreme Court."

[*In exercising the functions of his office under articles 125(4) and 144(6) of the 1992 Constitution, His Lordship, the Ag Chief Justice, per his letter dated 10 January 2001 addressed to all the Justices of the Supreme Court and copied to the Judicial Secretary and the Registrar of the Supreme Court, directed as follows:]*

> "In order *to minimize the mounting criticisms and the persistent public outcry against the Judiciary in our justice delivery and to restore public confidence,* it is my desire that where practicable and especially in constitutional matters, all

available Justices of the Supreme Court have a constitutional right to sit, or at least seven (7) justices of the court.

In view of the above and in the instant case [ie *Republic v High Court, Bolgatanga and Hajia Fati Seidu; Ex parte Hawa Yakubu, Civil Motion No. 2/2001],* by virtue of the powers conferred on the Chief Justice by article 125(4) and on me by article 144(6), I have decided that Hon Justice Sophia Akuffo and myself, ie Hon Justice E K Wiredu, Ag Chief Justice, be added to the justices already paneled. (e.s)

Signed

Hon. Mr. Justice E K Wiredu

Ag Chief Justice."

[*Editorial Note. In pursuance of the above Directive, a panel of seven Justices of the Supreme Court, coram: Edward Wiredu Ag CJ, Adjabeng, Acquah, Atuguba, Sophia Akuffo, Lamptey and Adzoe JJSC in Republic v High Court, Bolgatanga, Ex parte Hawa Yakubu,* CM No 2/2001, on 16 January 2001 unanimously granted (reserving the reasons), the *application by Madam Hawa Yakubu for an order of certiorari to quash the proceedings and order of the High Court, Bolgatanga, dated 6 January 2001, in an electoral petition resulting from the 7th December 2000 Parliamentary Elections for Bawku Central Constituency. In the respectful view of the Editor, the above Practice Direction, issued by His Lordship the Hon Ag Chief Justice, is to be most welcomed by all members of the Bench and Bar and the general public; and it may also be considered as very appropriate and long overdue. The Practice Direction, in the form*

of a letter to all the justices of the Supreme Court, makes the empanelling of the Supreme Court for the determination of constitutional cases more transparent; and more importantly, the Direction is in line with the democratic aspirations of all Ghanaians and the sustenance of the rule of Law in the country. It also has the obvious merit of insulating and freeing the high Office of the Chief Justice from all imaginary and unproven but disturbing allegations of political bias in the empanelling of the Justices of the Supreme Court.]"

This skepticism, as noted at 128-129 of Dr. Date-Bah's formidable book, Reflections on the Supreme Court of Ghana, has persisted under the current Chief Justice. He thereat states as follows:

"*The Chief Justice's power to empanel judges confers on him or her, arguably, the opportunity or potential to influence the outcome of particular cases.* The Chief Justice's knowledge of *an individual judge's track record on particular issues or his or her judicial inclinations on particular issues* may give the Chief Justice this potential. This, rightly or wrongly, *has attracted unfavourable comment from people in political circles, in relation to politically controversial decisions.* It is in reaction to such comments that Chief Justice Georgina Wood *decided that she would, during her tenure, empanel, as a matter of practice, a bench of nine justices to hear all constitutional cases.*

On this current practice, the Constitution Review Commission commented that it finds in regard to Ghana's judicial practice that no law has ever prescribed the maximum number of Justices of the

Supreme Court that should sit on a case brought before the Court, though it has been the practice to specify the quorum. It has noted that this is a deliberate policy on the part of the law makers to allow the highest court a certain flexibility and freedom in deciding when to field a full complement of members depending on the gravity of the case and the need for a reconsideration of the law. It acknowledges that this practice has helped ensure that in the adjudication of matters of importance, as many judicial minds as possible would be involved in settling the law and making a definitive pronouncement. In this regard, *the Commission commends the emerging practice by which 9 justices of the Supreme Court are empanelled to sit on constitutional cases.*"

The legal colossus, Dr. Date-Bah JSC (rtd.), at 201 of his said book has further observed as follows:

"*A perception and conviction by the public of the Supreme Court's impartiality between parties in its adjudication is vital to its fulfillment of its broader role.* Nevertheless, *there has in recent years been a degree of controversy in the media as to the impartiality of the judiciary in general in disputes between the Government (by which is meant the Executive) and the individual.* This has been a challenge that the Supreme Court, along with other courts, has had to live with. *The challenge has arisen from the highly competitive nature of Ghanaian party politics in the last decade* and the perceived tendency for a party in government to prosecute politicians belonging to the opposition. The courts have been caught in the middle of this conflict and in their endeavour to do justice

between parties before them have incurred the wrath of political party activists of the governing party who have alleged that the judiciary is biased against the government. *The best response to this challenge is for the conduct of the judiciary to manifest its indubitable impartiality*."

In the light of this ample context of this matter, the celebrated golden rule of construction, which after all is the harbinger of the reigning purposive rule of construction comes handy. As has been stated in the classic and oft-cited Heydon's Case (1854) 3 Co Rep 7a:

> "*For the sure and true interpretation of all statutes in general* (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned. (1st) What was the common law before the making of the Act/ (2nd) *What was the mischief and defect for which the common law did not provide? (3rd) What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth? And (4) The true reason of the remedy; and then the office of all judges is always to make such construction as shall suppress the mischief and advance the remedy, and* to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo, and to add force and life for the cure and remedy, according to the true intent of the makers of the act, pro bono publico.*"(e.s)

This court therefore has to construe the relevant provisions relating to the appointment of the justices of this court so as to ensure as far as possible their image of "*indubitable impartiality*."

The Honourable Deputy Attorney-General, Dr. Dominic Akuritinga Ayine, has in paragraphs 13-14 of the aforementioned statement of case on behalf of the defendants made submissions that appear to be well reflective of the compelling considerations we have set out, ut supra, regarding the proper interpretation of article 144(2). They are as follows:

> "17. Your Lordships, the purpose of the article 144 appointment clauses, while ensuring the independence of the various branches of government, reflect a careful set of checks and balances. It *places the power to appoint in the President* and *the ability to check that power in certain ways in the Judicial Council, Council of State and parliament.*
>
> x x x
>
> The provision, read as a whole and within the context of separation of powers enshrined in our Constitution, *anticipates that some choice must be left to the appointing authority*.
>
> 18. We further respectfully submit that the argument that the advice of the Judicial Council once given is binding on the President would produce absurd constitutional results. This is because within the overall context of the Constitution, it is clear that the President is the appointing authority but does the appointments on the advice of the Judicial Council and in consultation with the Council of State with the prior approval of Parliament. *The fundamental rationale for requiring the advice, consultation or approval of these other constitutional bodies is so that they can act as a restraint on improper appointments by the President and not* as a substitute for the power of the president to appoint the officeholders in question."(e.s)

On the other hand Dr. Date-Bah JSC (rtd.) in his aforementioned book, states at 211-212 regarding this matter thus:

> "The mode of appointment of Justices of the Supreme Court is specified by article 144 of the 1992 Constitution. It provides for their appointment by the President, acting on the advice of the Judicial Council, in consultation with the Council of State and with the approval of Parliament. Thus both the executive and the legislature are involved in the process. *The intention of the framers of the Constitution, as confirmed by practice, appears to be that nominations should be made by the Judicial Council, although the appointment is by the president.* The names of nominees recommended by the Judicial Council are forwarded to the President who places them before the Council of State for their views. If the views of the Council of State are not negative, *the president then forwards the names to the Speaker of Parliament* for Parliamentary vetting.
>
> It should be noted, however, that Presidents in the Fourth Republic have not considered themselves bound by the advice of the Judicial Council in relation to nominations for appointment to the Supreme Court. *Presidents have on occasion refused to accept some nominees recommended by the Judicial Council.* Though the Council has expressed regret at this, it has not challenged the legality of such refusal in court. There is thus *no Judicial decision clarifying the meaning of "acting on the advice of the Judicial Council" in article 144(2).* Under a Constitution on the Westminster model, such as that in force in Ghana between 1957 and 1960, the Governor-General was

obliged to follow the advice given him on judicial appointments. However, *this convention and understanding have not survived into the Republican era*. Ordinarily, Presidents tend to accept the nominees of the judicial Council as, it has to be remembered, the Attorney-General (the President's principal legal adviser) and four nominees of the President serve on the Judicial Council. The President thus has ample opportunity to influence the nominations by the Judicial Council. The appointment process for Supreme Court Justices therefore enjoys a degree of independence from the executive, but it is not hermetically sealed from the influence of the executive. Furthermore, because the constitutional provision requires parliament's prior approval, *Parliament has a veto power over the appointment of any Supreme Court Justice.*

Although the above shows that, roles are assigned to both the President and Parliament in the appointment process of Supreme Court Justices, the crucial role of the Judicial Council ensures that the judiciary and the Bar play important roles as well in the process. The appointment of Justices of the Supreme Court thus involved *an interactive process* between stakeholders identified by the Constitution."(e.s)

We think that none of these views, is absolutely right. We think that (1) the cardinal principle for appointments to the Supreme Court in article 144(2) is based on the common law principle that granted professional competence, a judge should be impartial and be capable of being regarded as such by the public, see *Therrien v Canada* (2001)5 LRC 575 a decision of

the Canadian Supreme Court, *Republic v Mensa-Bonsu; Ex parte Attorney-General* (1995-96)1 GLR 377, SC and Dr Date-Bah JSC (rtd.), in his aforementioned book.

(2) This principle is deeply embedded in article 144(2) read in conjunction with article 128(4) as follows:

"(4) A person *shall not be qualified for appointment as a Justice of the Supreme Court* unless he *is of high moral character and proven integrity and is of not less than fifteen years' standing as a lawyer*."

(3) The involvement of the Judicial Council, the Council of State and Parliament are meant to be restraints on the appointing power of the President, see *Emmanuel Noble Kor v The Attorney-General and Justice Delali Duose,* Suit no. J1/16/2015 dated 10/3/2016, unreported, (4) The contrast between the expressions "shall... a*cting on the advice of the* Judicial Council" and "*in consultation with the* Council of State, " shows that the restraining effect of the Judicial Council's recommendation on the President is greater than that of the Council of State. In other words if the recommendation of the Judicial Council cannot be flawed on the requirements of article 128(4) the consultation with the Council of State cannot warrant its rejection by the President. However if the President for the purposes of consulting the Council of State unearths information which he puts before the Council of State which can unsettle the recommendation of the Judicial Council in terms of article 128(4) he can reject the recommendation of the Judicial Council even if the Council of State advises otherwise.

What is clear however is that all the authorities involved in the process for appointment of Supreme Court Justices are bound in the exercise of their various powers by articles 128(4), and 296(a) and (b) of the Constitution.

See further *Tema Development Corporation v Atta-Baffuor* (2005-2006) SCGLR 121, *Ghana Bar Association v Attorney-General* (1995-96)1 GLR 598 at 606-608 per Edward Wiredu JSC (though dissenting), *Ghana Commercial Bank v Commission on Human Rights and Administrative Justice* (2003-2004)1 SCGLR 91, *Republic v District Magistrate, Accra Ex parte Adio* (1972)2 GLR, 125 C.A, *Yailey v Yakom* (1992)1 GLR 499.

As to whether the President is bound to appoint any number of justices duly qualified and recommended to him by the Judicial Council it is quite clear that there is here *contemporanea expositio* whereunder the number of Supreme Court Justices has never exceeded 14. A radical departure from this situation is therefore not within contemplation. In any case there is a settled presumption against statutory absurdity, see *Brown v Attorney-General* (2010) SCGLR 183.

ISSUES II AND III

Issues ii and iii do not arise in view of our decision on issue (i).

ISSUE IV

(iv) Whether or not the advisory function of the Judicial Council invests the Council with the constitutional power to nominate persons for appointment as justices of the Superior Courts.

This issue is also settled by the *contemporanea expositio* under article 144(2) and its predecessors. This is also a rule of construction. That there is such a practice is captured to some extent by Dr. Date-Bah JSC (rtd.), in his book aforementioned. That Practice is that nominations for

appointment to the Supreme Court come mainly from the Attorney-General, the Ghana Bar Association and the Chief Justice and the Judicial Council sends their recommendations on successful candidates to the President, who then pursues the process to completion. An advisory body proceeds on advice sought from it, see *Wetminster City Council v Greater London Council* (1986)2 AllER 278, and articles 91(1) and (2).
Though that practice may have its challenges, yet since constitution after constitution has not abrogated it and it can augment the intended check on apprehended abuse of the President's appointing power, it should stay.

However it must be emphasized that no appointment can be made by the President to the Supreme Court without a recommendation to that effect by the Judicial Council pursuant to which the appointment can then be made after consultation with the Council of State and the approval of Parliament under article 144(2).

The proper interpretation of article 91(2) and(3) is that article 91(3) relating to "*any matter being considered or dealt with by the President*" is a general or residual clause dealing with situations where the President is, under the terms of the relevant provision requiring the advice, not bound by the Council of State's advice.
The plaintiffs' claims and the defendant's counterclaim stand granted or refused respectively according to the extent and terms of this judgment.

We acknowledge the industry and ingenuity of counsel in writ No. J1/26/2015 which were of great assistance to us and thank them therefor.

Writs nos. J1/21/2015 and J(1)/22/2015

The following issues concerning these two writs stand on the parties' memorandum of agreed issues:

"(v) Whether or not the Council of State is the proper institution to initiate and / or nominate a person for the position of an Electoral Commissioner?

(vi) Whether or not the President is bound by the advice of the Council of State?

(vii) Whether or not the nomination and appointment of the Chairman of the Electoral Commission and his/her Deputies should involve public / stakeholder consultations?

(viii) Whether or not there is a justiciable case before the Supreme Court in suit Nos. J1/21/2015 and J1/22/2015?

(ix) Whether or not upon a true and proper interpretation of Article 70(2) of the 1992 Constitution the Council of State is to initiate the process of appointment of Chairperson and other Commissioners of the Electoral Commission and advise the President on a suitable candidate to be appointed?

(x) Whether or not the advice of the Council of State in the said appointments under Article 70(2) of the Constitution is binding on the President?

(xi) Whether or not the provisions of Article 91(3) are applicable to the role of the Council of State in Article 70(2) of the 1992 Constitution notwithstanding the provisions of Article 91(4) of the 1992 Constitution?"

However the resolution of issue (viii) will dispose of these two actions severally. The common basis for these actions is heated public debate on

the issues raised in them in the Media. There is no allegation of a breach or threatened breach of any constitutional provision in any of them.

It is therefore crystal clear that these writs severally seek an advisory opinion as to the said issues from this court. As held in *Bilson v Attorney-General* (1993-1994) GLR 105 SC such advisory opinion is the work of a solicitor not this Court.
The said writs are accordingly, as to each of them, dismissed.

(SGD) W. A. ATUGUBA

JUSTICE OF THE SUPREME COURT

AKUFFO (MS) JSC:-

I have read the concurring opinion of my brother Dotse JSC and it is that opinion that I agree with.

(SGD) S. A. B AKUFFO (MS)

JUSTICE OF THE SUPREME COURT

CONCURRING OPINION.

DOTSE JSC

I have had the opportunity of reading the lead opinion authored by my respected brother Atuguba JSC. Even though I am in agreement with the conclusion reached therein in all three consolidated suits, however, because my reasons are somewhat different, I deem it expedient to set them out in this very brief concurring opinion.

INTRODUCTION

The matter before this court consists of three consolidated suits, which turn on the meaning **"shall acting on the advice of the Council of state, appoint** the Chairman, Deputy Chairmen and other members of the Electoral Commission" reference article 70 (2) of the Constitution and "the other Supreme Court Justices **shall be appointed** by the President **acting on the advice of the Judicial Council**, in **consultation** with the **Council of State** and **with the approval** of Parliament" reference article 144 (2) of the Constitution 1992.

A preliminary issue which arises is whether the Plaintiffs' suits as filed is properly before this Court in invoking its original jurisdiction and whether the Plaintiffs have in real terms established a breach of the Constitution.

In my assessment of writ number J1/26/2015, which is the Ghana Bar Association suit, I hold the view as was stated by the President of this Court Atuguba JSC that the Plaintiff's therein have crossed that threshold as they have indeed stated in their statement of case, breach of article 144 (2) of the Constitution by Presidents in the 4th Republic, especially in the last appointment of Supreme and Court of Appeal Judges.

However, the situation is not so clear in writ numbers J1/21/2015 the Richard Sky case and J1/22/2015, Kwasi Danso Acheampong cases respectively.

I will therefore proceed to discuss this opinion in respect of the Ghana Bar Association case Suit No. J1/26/2015 as in my view apart from the factual evidence pleaded, there is sufficient ambiguity in the said provisions of article 144 (2) of the Constitution for this Court to be called upon to interpret.

On the appointment of Supreme Court Justices, article 144 (2) sets out a three tier system of appointment process prior to the appointment by the President.

A literal reading of the article suggests that, it is the President who makes the appointment, in other words, the President is the appointing authority of Supreme Court and Court of Appeal Judges.

But this position can only be actualized if the President acts on the advice of the Judicial Council and consults the Council of State with the approval of Parliament.

From a contextual reading and understanding of the article 144 (2) provisions of the Constitution, it is clear that, the President receives the advice of the Judicial Council and also consults with the Council of State before the nominations are made public for the Parliamentary approval. The approval of the nominees by Parliament is the last leg of the appointment process.

Under these circumstances, three basic issues come up for discussion namely:-

1. Must the President seek the advice of the Judicial Council?
2. Must he also consult the Council of State?
3. Is the President bound by the opinions given in this advice or consultation?

The answer to the first and second questions are fairly easy and straightforward.

Yes, the President must have this advice from the Judicial Council and also consult with the Council of State.

Black's Law Dictionary, 9th Ed, by Bryan A. Garner defines the word "*advice*" on page 63 as "*guidance offered by one person to another*". However, the phrase acting on, in the context in which it has been used means "*stick to, adhere to, or to follow.*"

When the two words and phrases e.g. acting on the advice are put together, a clearer meaning of the role of the Judicial Council giving an advisory opinion is apparent and this therefore in my opinion makes such an advice in the true meaning of the words not binding. Therefore, a simple, ordinary and common sense reading of these provisions indicates that the President must at all cost have this advice from the Judicial Council and if he does not have this advice, the appointments of the Justices will not be valid. But at all times, this remains an advice and the President, in my opinion is not bound to follow it.

On the other hand, the word, consult, is defined in Chambers, 21st Century Dictionary, Revised Edition at page 294 as follows:-

> "*to ask the advice of, to consider, consult with someone, to have discussions with them.*"

Black's Law Dictionary, 9th ed, by Bryan A. Garner on page 358 also defines consultation as "*the act of asking the advice or opinion of someone e.g. a lawyer.*"

In all these, what is clear is that, "*in consultation with the Council of State*" connotes that, before the Justices of the Supreme Court for example are appointed,

the President must have consultations with the Council of State on the nominees being considered for such appointment.

It is therefore right and or correct to state that, whilst the President is mandated by the express provisions of the Constitution in articles 144 (2) and (3) to seek the advice of the Judicial Council before appointments to the Supreme Court and Court of Appeal are made, and similarly consult with the Council of State on the appointment process of the Supreme Court Judges, he is nonetheless not bound by the advice or opinion of these bodies. My understanding however is that, if these bodies did not recommend a particular candidate or nominee, the President cannot go behind that advice to appoint someone else. It also follows that, if the Judicial Council recommends a particular person and the President does not feel obliged to appoint that person, there is infact no obligation on the President to have that person appointed.

As a matter of fact, the President is not bound by any such advice. The only thing is that, the President can also not go outside the names or lists of persons recommended to him by these bodies.

A perusal of the Constitution 1992 gives the clearest of intentions about the structured position of the President's appointment processes and powers.

1. For example, there are times when there are no limitations on his appointment powers, reference article 89 (2) (d) where the President appoints eleven (11) members of the Council of state.

2. At other times, the President is required to act in consultation with various Councils, i.e. Council of State, reference article 70 (1) of the Constitution where the President in consultation with the Council of State appoints all

those constitutional office holders mentioned therein, e.g. Commissioner of CHRAJ, Auditor-General etc.

3. Thirdly, there are those appointments that he makes with the prior approval, e.g. Article 78 where Ministers of States are appointed by the President with the prior approval of Parliament.

4. Then there are the classes of appointments that are made subject to advice and consultation and the approval of Parliament. Examples of this are the appointment of the Chief Justice and other Justices of the Supreme Court, reference articles 144 (1) and (2) of the Constitution for example.

What is the purpose of these different appointment processes and powers of the President in these very important constitutional offices?

PURPOSIVIST ANALYSIS

The President is directly elected by the people and therefore accountable to the people of Ghana. He is to be enabled to direct the affairs of Government through persons who believe in his ideology, philosophy and are competent to deliver his goals and objectives. But checks and balances are very important to ensure that certain basic principles of competence, independence and merit such as are incorporated in international principles which have been adopted by the Commonwealth, known as the (Latimer House) Principles are not overlooked. These Latimer House principles on Judicial Appointments states as follows:-

> *"Jurisdictions should have an **appropriate independent process in place for judicial appointments.** Where no independent system already exists,*

appointments should be made by a Judicial Services Commission (established by the Constitution or by statute) or by an appropriate officer of state acting on the recommendation of such a commission.

The appointment process, whether or not involving an appropriately constituted and representative Judicial Services Commission, ***should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the Judiciary.***

Judicial appointments to all levels of the Judiciary should be made on merit with appropriate provision for the progressive removal of gender imbalance and of other historic facts of discrimination. Judicial appointments should normally be permanent; whilst in some jurisdictions contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure.

Judicial vacancies should be advertised." Emphasis

In Ghana, the Constitution 1992, has in articles 153 to 154 provided for the composition and functions of the Judicial Council, which as stated in various articles of the Constitution, performs very important roles in the appointment process of Judges at all levels.

This indeed satisfies the Latimer House Principles just referred to in extenso.

The framers of the Constitution 1992 must be commended for ensuring that the Judicial Council has been given these very important roles in recommending persons found suitable for appointments to the Bench. Indeed, Looking at the composition of the Judicial Council, one is left in no doubt that it is a highly competent body composed of legal luminaries and well qualified persons outside

legal practice who perform these important roles assigned them under the Constitution.

The Judicial Council as established under the Constitution 1992 in my opinion is very well suited and capable of performing the arduous tasks and roles it has been requested to do.

In conclusion, I want to reiterate the point that, whilst the President is mandated to seek the advice of the Judicial Council, and consult with the Council of State in the appointment process of Supreme Court Judges with the approval of Parliament, those advisory opinions are not binding on the President.

He is entitled to disregard the advice, but he can also not appoint any person who has not gone through the three tier process of recommendation, i.e. Judicial Council, Council of State and Parliamentary approval. Care must always be taken to ensure that the Latimer House Principles which have been adopted in our Constitution are complied with.

This in my opinion will practicalise and actualise the words of John Adams, a former U.S. statesman when he stated in his *"Thoughts on Government"* on page 177-178 in "The Quotable Founding Fathers" edited by Buckner Melton, as follows

> *"Judges, therefore,* ***should be always men of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness and attention.*** *Their minds should not be distracted with jarring interests****, they should not be dependent upon any man or body of men.****" Emphasis*

I think it is in the pursuit of the above objectives that Judges should be independent and really seen to be independent in the discharge of their work. This is why it is

prudent to have the appointment process somewhat insulated against excessive executive control and inter meddling. It is only in this way, that the independence of the Judiciary, which is a very important principle and takes it's root from the separation of powers as embodied in articles 125 (1) and 127 (1) and (2) of the Constitution will be complied with.

Save for the above clarification made to the lead opinion of my respected brother Atuguba JSC in respect of writ No. J1/26/2015, I agree with the conclusions and reasons stated by him in respect of the other two suits namely J1/21/2015 and J1/22/2015.

(SGD) V. J .M. DOTSE

JUSTICE OF THE SUPREME COURT

YEBOAH JSC:-

I agree.

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

GBADEGBE JSC:-

I agree.

(SGD) N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

AKOTO-BAMFO (MRS) JSC:-

I agree.

(SGD) V. AKOTO BAMFO (MRS)

JUSTICE OF THE SUPREME COURT

BENIN JSC:-

I agree.

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT

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KWASI DANSO ACHEAMPONG FOR HIMSELF IN WRIT NO. J1/22/2015.

DR. DOMINIC AYINE (DEPUTY ATTORNEY-GENERAL) FOR THE DEFENDANTS IN ALL THE WRITS WITH HIM MRS. DOROTHY AFRIYIE ANSAH (CHIEF STATE ATTORNEY), MRS. ANGELA HEDO

(ASSISTANT STATE ATTORNEY) AND MS ZEINAB AYARIGA (ASSISTANT STATE ATTORNEY).