IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA GHANA

CORAM: WOOD (MRS), CJ (PRESIDING)
DOTSE, JSC
ANIN YEBOAH, JSC
BAFFOE-BONNIE,JSC
GBADEGBE, JSC
BENIN, JSC
AKAMBA, JSC

WRIT.
No. J1/14/2016

5TH MAY 2016

1. ABU RAMADAN **PLAINTIFFS**

2. EVANS NIMAKO

VRS

1. THE ELECTORAL COMMISSION **DEFENDANTS**

2. THE ATTORNEY GENERAL

JUDGMENT

GBADEGBE JSC:

On or about February 25, 2016 the plaintiffs issued a writ before us seeking the following reliefs:

1. "A declaration that upon a true and proper interpretation of article 45(a) of the constitution of the Republic of Ghana, 1992 (hereinafter, the "constitution"), the mandate of the Electoral Commission of Ghana to compile the register of voters implies a duty to compile a reasonably accurate and credible register

2. A declaration that the current register of voters which contains the names of persons who have not established qualification to be registered is not reasonably accurate or credible and therefore inconsistent with article 45(a) of the constitution thereby making same unconstitutional, null and void of no effect.

3. A declaration that the current register of voters which contains the names of persons who are deceased is not reasonably accurate or credible and is therefore inconsistent with article 45(a) of the constitution thereby making same unconstitutional, null and void of no effect.

4. (a) An order setting aside the current register of voters and compelling the Electoral Commission to compile a fresh register of

voters before the conduct of any new public election or referendum in Ghana;

Or in the alternative,

(b) An order compelling the Electoral Commission to audit the current register of voters through the validation of the registration of each person currently on the register

i. To delete the names of unqualified persons and deceased persons and
ii. To provide each validated registration with biometric evidence thereof and
iii. To strike out the names of those persons who fail to validate their voter validation within the stipulated period

Before the conduct of any new registration exercise or public election or referendum in Ghana."

A statement of case that provided both the factual basis of the action and the applicable law on which the claim was planked accompanied the writ. Also filed by the plaintiffs, as part of the processes initiating the action herein is a verifying affidavit. We wish to state at once that the practice by which the plaintiffs exhibited documents to the statement of case is inappropriate; the better practice is that such documents be exhibited to an affidavit

in the form of a verifying affidavit as stipulated in rule 46(2) of the supreme Court Rules, CI 16. The issue of procedure turning on the rule has been the subject of previous decisions of this court and it is expected that in future parties would endeavor to comply with its requirements. As the action herein raises matters, which require to be dealt with expeditiously, we have enabled the action to proceed to trial notwithstanding the said procedural lapse but hope that this indulgence will not be construed as a relaxation of the rules of procedure.

In their statement of case, the plaintiffs place great reliance on their right to relief in the action herein on a previous decision of this court in a consolidated action numbered as JI/11/2014 and JI/9/2014 and entitled **Abu Ramadan and Another v The Electoral Commission and Another; and Kwasi Danso Acheampong v The Electoral Commission and Another,** an unreported judgment of this court dated July 30, 2014. In the judgment in the said case, the use of National Health Insurance Identification Cards (hereinafter for convenience referred to as "cards") to establish qualification for registration was declared unconstitutional. The plaintiffs contend that following the declaration of the unconstitutionality of the use of the said cards, names of persons who used it in the registration process conducted under CI 72 cannot continue to remain on the register of voters for them to exercise their franchise in any public elections or referenda to be held within the jurisdiction.

The plaintiffs also complain about the names of several minors and decedents (deceased persons) which continue to be on the electoral roll without being deleted and contend that it is of great constitutional importance that the a fore-mentioned categories of registered voters be deleted from the register as their continued presence on it tends to render the register of voters bloated and consequently devoid of reasonable accuracy and or credibility and contrary to the provisions of the constitution.

The plaintiffs further allege that subsequent to the declaration of the unconstitutionality of the use of the cards for registration in the Abu Ramadan case (supra), they made several efforts to persuade the Electoral Commission to take steps to delete names of persons who used them for registration under CI 72 before the decision of the Supreme Court. A similar complaint regarding the presence of minors and deceased persons on the current register of voters was also made but the first defendant refused and will not have those names deleted from the register of voters before the holding of the 2016 presidential and parliamentary elections notwithstanding the fact that a committee it had set up, the Crabbe Committee came to the conclusion that the current register of voters is bloated. It seems that in bringing the action herein the plaintiffs seek the intervention of the Supreme Court in directing the first defendant to have the names of ineligible and deceased persons deleted from the register before the holding of the upcoming national elections.

In the view of the plaintiffs, if the issues raised in the matter herein are not adjudicated upon by this court in the exercise of its exclusive original jurisdiction under articles 2(1) and 130(1) of the 1992 Constitution, it will result in ineligible persons continuing to remain as registered voters contrary to article 42 of the constitution. The said article of the Constitution provides:

"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 purpose of public elections and referenda"

The above words are free from any disputation as to their true meaning, the corollary of which is that persons who are not Ghanaians though resident in the jurisdiction do not qualify to be registered as voters and that any such registration violates the 1992 Constitution. So stated, it appears that the plaintiffs in taking out the action herein have been driven by a desire to resist the inclusion of non- Ghanaians on the register of voters contrary to article 42 of the constitution.

In answer to the plaintiffs' claim, the first defendant contends that the action herein raises no real interpretative or enforcement issue within the meaning of articles 2(1) and 130(1) of the 1992 Constitution. The first defendant further contends that the real intendment of the instant action is to enforce what the plaintiffs

perceive to be the right interpretation of the court's previous decision in the case of Abu Ramadan and Another v The Electoral Commission and Another (supra). The second defendant similarly contends that the claim herein raises no issue that is properly cognizable by this court under the exclusive original jurisdiction conferred on it under articles 2 and 130 of the 1992 Constitution.

Our first task in the light of the said objections is to consider whether we have the jurisdiction to inquire into the plaint herein. The central questions for our narrow decision regarding the jurisdictional point is whether the action herein raises any question of interpretation or enforcement of the constitution. In our view, the jurisdiction conferred on the court in its original jurisdiction may relate to either its interpretative or enforcement function as was decided in the case of **Sumaila Bielbiel v Dramani** [2011] 1 SCGLR 132, 143- 145. See also: **Emmanuel Noble Kor v Attorney-General and Another**, an unreported judgment of the Supreme Court in Suit Number JI/16/2015 dated March 10, 2016. For the purpose of the jurisdictional question, the question is whether the matter raises a fair case of interpretation or enforcement and the court at this stage is not required to decide on the merits if the case is weak and or sustainable. In the Sumaila Bielbiel case (supra), it was observed on the jurisdictional point at page 144 thus:

"At this point we need not inquire into whether or not the case of the plaintiff is weak or one that is likely to succeed. It is sufficient if it raises a case though weak, that might proceed to trial."

Applying the decision in the above cases to the action herein, it seems that it raises for our decision the question whether having regard to the previous decision in the Abu Ramadan case (supra), the current register of voters which includes names of persons who utilized cards to be registered as voters and continues to have on the voters roll names of minors and deceased persons can be said to be reasonably accurate and credible such as to satisfy the requirement imposed upon the Electoral Commission under article 45 (a) of the 1992 Constitution "*to compile the register of voters and revise it at such periods as may be determined by law."*

The plaintiffs by the action herein may be said to be crying out regarding the failure of the first defendant to delete the names of minors and deceased persons as well as those whose registration as voters was facilitated by cards for our determination in the exercise of its power of judicial review. The question that arises in view of the presence of those objectionable names on the register is whether the first defendant has properly exercised his functions under articles 42 and 45(a) to register qualified Ghanaians as voters and to compile the register of voters subject to revisions at statutory specified intervals. It seems that this is a fair invitation to urge on us in order to give effect to the fundamental right conferred on

Ghanaians of age 18 and above under article 42 of the constitution to be registered as voters in order that they might exercise the franchise in public elections and referenda. The importance of this right cannot be brushed aside particularly when being entered on the register of voters is an essential pre-requisite for contesting parliamentary and presidential elections and indeed, being appointed to certain positions such as a minister of state. The right to vote cannot thus be taken for granted; for it gives a registered voter certain rights that are unavailable to non-Ghanaians. The concern, which fairly emerges from the allegation of the violation of the fundamental right provided under article 42, is that it erodes its availability to only Ghanaians with the requisite qualifications. Of this fundamental right, Wood (Mrs.) CJ observed in the Abu Ramadan case (supra) as follows:

"If the right to vote is important in participatory democracy, the right to register is even more fundamental and critical. It is the golden key that opens the door to exercising the right to vote."

In our view, looked at from this standpoint, the plaintiffs action seeks to give teeth and meaning to articles 42 and 45(a) of the constitution by ensuring that names of ineligible person, minors and decedents are deleted from the register before the upcoming public elections. The pivotal nature of the right to vote has been pronounced upon by this court in a collection of cases including **Tehn Addy v Electoral Commissioner** [1996-97] SCGLR 589;

Ahuma Ocansey v Electoral Commission; Center for Human Rights and Civil Liberties (CHURCIL) v Attorney-General [2010] SCGLR575. Accordingly, the objection to our jurisdiction, which is raised by the defendants in their respective statements of case is hereby dismissed; we hold that this court has jurisdiction under articles 2(1) and 130(1) of the 1992 Constitution to inquire into the issues raised in the action herein. It being so, we turn our attention to examining the claims herein on the merits.

However, in the course of the hearing of the action, we dismissed two interlocutory applications on March 3, and April 21, 2016, but reserved our reasons to be incorporated in the judgment in the substantive action. The first application sought an order of interlocutory injunction restraining the first defendant whether by itself, its agents, assigns, privies servants and whomsoever of whatever description from conducting a limited or other voters registration pending the final determination of the action herein. In the supporting affidavit, the plaintiffs-applicants relied substantially on the complaints relating to the current register of voters which form the basis of the instant action. The application was opposed by the first defendant-respondent. The reasons for our refusal of the application are as follows.

In the first place as the issues on which the right of the plaintiffs-applicants to the interlocutory order of injunction involved the same considerations as those which we have to decide in the main action

we thought that in order not to prejudice a fair hearing of the action the requirements of justice would be better served if we expedited the hearing of the substantive matter. Again, the registrations in respect of which the order of interlocutory injunction was sought is a constitutional function of the first defendant contained in article 45 (a) of the constitution to "compile the register of voters and revise it at such periods as may be determined by law" and to accede to the order at that stage of the application when the plaintiffs-applicants right to the reliefs claimed in the substantive action had not been finally determined would result in greater inconvenience to the first defendant in the event of those reliefs not being granted at the end of the day. Further, as the registration exercise concerned persons who had turned 18 years of age and were utilizing the opportunity to register for the first time, an order of restraint would have deprived them of the fundamental right to register and vote subsequently at public elections and referenda.

In relation to that part of the application which sought to restrain the first defendant from holding any public election or referenda pending the final determination of the action herein, we were of the opinion that to accede to the application would as regards the bye-election which was about to be held in the Akim-Abuakwa- North Constituency in the Eastern Region to fill a vacancy that had occurred following the death of the member of Parliament, not only deprive the members of the constituency of a representative in Parliament, who are not parties to the action but that the

constituents would be greatly inconvenienced by a grant of the application.

We also took into account the fact that in view of the relief (4) sought by the plaintiffs in the action herein namely setting aside the voters register or in place thereof validating the voters register to ensure that only eligible persons remain on the it, the applicants were not likely to suffer any irreparable hurt or loss if either the limited registration or bye-election in the Akim-Abuakwa North Constituency were to be proceeded with and they succeed in the action herein as the mischief which the action seeks to obviate and for which the interlocutory injunction was applied for would effectively have been cured by the grant in their favour of either of the alternative reliefs. On the whole as regards the application for interlocutory injunction, applying the test of relative convenience and or inconvenience, we came to the view that the balance tilted in favour of its dismissal.

The second application concerned an application at the instance of the People's National Convention Party for joinder as third Plaintiff. The reasons for our decision are provided shortly as follows. In our view, the applicant does not come within the designation of "a party" within the meaning of rule 45(a) of the Supreme Court Rules. The said rule provides as follows:

"The Court may, on its own motion or on the application of a party order that any other person shall be made a party to the action in addition to or in substitution for any other party."

The above rule appears to be narrower in scope than the formulation contained in Order 4 rule 5(2) of the High Court (Civil Procedure) Rules by which the application for joinder is authorised to be made not only by parties to the action but " on application" presumably of any person. As rule 45 (2) only authorizes an order for joinder in the exercise of our original jurisdiction to be made either at our own instance or on the application of a party to a pending matter, which the applicant unfortunately is not, the applicant lacked the requisite capacity to bring the application for joinder.

Although the reasons provided in the preceding paragraph are sufficient to dispose of the application made to us under rule 45 (2) of CI 16, it appears from the processes filed in regard to the said application that the applicant's interest in the matter is not coterminous with that of the plaintiffs to whom it seeks to be added. Again, a careful examination of the processes before us in the matter herein reveal that the applicant is not a person who ought to have been joined as a party or whose presence is necessary for the effectual and complete adjudication of all the matters in dispute in the action herein. We think that this is the overriding principle in applications for joinder which an applicant must satisfy. In the case

of **Vandervell Trustees Ltd v White** [1970] 3 All ER 16, 24 Dilhorne LJ in the course of his judgment observed as follows:

"... I cannot construe the language of the rule as meaning that a party can be added whenever it is just or convenient to do so. That could have been simply stated if the rule was intended to mean that. However wide an interpretation is given, it must be an interpretation of the language used. The rule does not give power to add a party whenever it is just or convenient to do so. It gives power to do so only if he ought to have been joined as a party or if his presence is necessary for the effectual and complete adjudication on all matters in dispute in the cause or matter"

We are of the opinion that the issues raised for adjudication in the action herein can be effectively and completely adjudicated without the presence of the applicant herein, the People's National Convention Party. It was for these reasons that we declined to have the applicant joined to the action herein.

We open the merit consideration of the action herein by observing that under the 1992 constitution, this court and none other has the onerous responsibility of determining whether an act, legislation and or any act(conduct) is within the boundaries of the constitution as provided for in articles 2(1) and 130(1). Article 2(1) of the Constitution provides:

"A person who alleges that-

(a) an enactment or anything contained in or done under the authority of that or any other enactment; or

(b) any act or omission of any person is inconsistent with, or in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect."

Article 130(1) of the constitution also provides as follows:

" Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human rights and Freedoms as provided in article 33 of this Constitution, the Supreme court shall have exclusive original jurisdiction in-

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

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

The essence of the jurisdiction conferred on us under the said articles is to enable us intervene in appropriate instances to declare and enforce the law regarding the extent and exercise of power by any person or authority. Although the said constitutional provisions have not used the words "judicial review", their cumulative effect is to confer on us the jurisdiction to declare what the law is and to

give effect to it as an essential component of the rule of law. The nature of the court's obligation it to measure acts of the executive and legislative bodies to ensure compliance with the provisions of the constitution, but the jurisdiction does not extend beyond the declaration, enforcement of the constitution and where necessary giving directions and orders that may be necessary to give effect to its decision as contained in article 2(2) of the constitution. The court's original jurisdiction thus enables it to determine the limits of the exercise of the repository's powers.

It is observed that in the exercise of the court's original jurisdiction, it is not permissible for the court to substitute its own decision for that of the body or persons exercising a discretion conferred on it by the constitution. This is necessary to keep the court itself within its proper limits in order to give effect to the supremacy of the law, which appears to be the foundation of the original jurisdiction. The court's function is to set limits on the exercise of the discretion, which by the constitution has been vested in an institution or body of persons, and a decision made within these boundaries cannot be impugned. We think the situation that confronts us in the matter herein may be likened to an appeal from the exercise of a discretion by trial courts. In such cases the question for determination by the appellate court is whether the discretion was exercised properly having regard to the available materials and not to substitute the discretion of the appellate court for that of the trial judge even though the justices may hold a different view on the discretion so

exercised. In the case of **Ballmos v Mensah** [1984-86] 1 GLR 724, 731, Osei Hwere JA (as he then was)emphasized the settled principle in such cases when he approved a statement made in the head note to Blunt v Blunt [1943] AC 517, 518 as follows:

"An appeal against the exercise of the court's discretion may succeed on the ground that the discretion was exercised on wrong or inadequate materials if it can be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take relevant matters into account., but the appeal is not from the discretion of the court to the discretion of the appellate tribunal."

In our opinion, it is important that this caveat be borne in mind as we proceed to consider the issues raised for our determination in the action herein.

The exercise of the original jurisdiction requires us to deliver credible decisions in order to enhance public confidence in the administration of justice as an independent decision making body with the sole responsibility of having a monitoring role over acts of the legislature and the executive for the purpose of ensuring observance with the constitution. The situation with which are concerned in these proceedings is not new and our courts have exercised their original jurisdiction over the years properly drawing inspiration from the landmark case of **Marbury v Madison**, 5 U.S.

137 (1803). The previous decision of this court in the Abu Ramadan case (supra), like many others to which reference has been made in the course of this judgment is a testimony to the court's robust commitment to ensure compliance with the constitution in terms of our oath of office. Having disposed of the preliminary legal objection to our jurisdiction, we now turn our attention to the issues for determination that were contained in a joint memorandum filed by the parties to the action herein. The agreed issues set out in the memorandum filed on April 14, 2016 are as follows:

"1. *Whether or not the original jurisdiction of this court has properly been invoked by the Plaintiffs*

2. *Whether or not the presence of names of ineligible persons on the Current Register of voters renders same not reasonably accurate or credible and therefore inconsistent with article 45 (a) of the constitution.*

3. *Whether or not the presence of names of deceased persons on the Current Register of voters renders same not reasonably accurate or credible and therefore inconsistent with article 45(a) of the constitution.*

4. *Whether or not the decision by 1st Defendant not to use the record validation process to revise the current register of voters is unreasonable and inconsistent with articles 23 and 296 of the constitution.*

5. *Whether the court has jurisdiction and authority to make orders compelling 1st defendant to discharge its functions in a particular manner.*
6. *Whether Plaintiffs suit falls for determination within the exclusive jurisdiction of the court.*
7. *Whether plaintiffs have proved the extent to which the register of voters is inaccurate as for it to be unreasonable within the meaning of article 45(a) of the 1992 Constitution.*
8. *Whether or not a Party is entitled to an order from the court to compel 1st defendant to carry out its constitutional function of compiling and revising the register of voters in a particular way, form or manner?*
9. *Whether or not 1st defendant is bound by suggestions from citizens and other stakeholders as to how 1st defendant must carry out its constitutional function of compiling and revising the register of voters?"*

The first issue concerns the invocation of our original jurisdiction by the plaintiffs. In view of the discussions had previously about the jurisdictional point, we think that the question raised by issue (1) receives an affirmative answer.

We next proceed to consider issues (2) and (3). The said issues concern the question whether by the continued presence on the current register of voters of ineligible persons as declared in the Abu Ramadan case (supra) and deceased persons, the register can

be said not to be reasonably accurate or credible and therefore inconsistent with article 45 (a) of the 1992 Constitution. As the two issues raise common questions of law turning on undisputed facts, we shall consider them conjunctively. In our opinion, death being an inevitable occurrence in the life of any human being should have had very clear provisions made in relation thereto for the purpose of deleting such names from the register by for example, requiring the Births and Death Registry to forward at specified intervals to the first defendant through its district offices for deletion. The unhappy situation, however is that the system of registration of births and deaths in the country is woefully behind current trends in development. This has the effect of rendering the current register of voters not reasonably accurate or credible. We do not; however think that the defect is so extensive in nature to result in an inconsistency with article 45(a) of the constitution as the existing law has made ample provisions for such names to be deleted when the provisional register is exhibited before it is certified under regulation 27 of CI 91 as the existing register. We think that the elaborate scheme provided the law is sufficient to address the presence on the register of voters of names of persons who might have died since the last registration exercise. Although the issues for our determination have not included minors, we think that names of such persons can also be deleted using the processes provided for in the law. From the complaint made in relation to deceased persons, there is an implied admission that at the time of their registration they were alive and eligible to be registered. There

is also the added mechanism of biometric registration which when enforced will prevent people impersonating such deceased persons as the fingerprints and photo identifications will not match.

Turning to the presence on the register of voters' of ineligible persons who must have utilized cards for their registration, it appears from the proceedings herein that that the exact numbers are not known. This creates some difficulty in determining the actual percentage in order to answer the question posed whether the register may on such ground only be said not to be reasonably accurate or credible. However, that should not present us with an insurmountable problem. In our view, following the previous decision of this court in the Abu Ramadan case (supra) by which the use of the cards for registration was declared unconstitutional, the continued presence of names on the register that derive their identification from the said cards renders the register not reasonably accurate or credible. In coming to this view of the matter, we are not disregarding the report of the panel which is part of the processes before us in these proceedings as exhibit "ABU6" that the register of voters is bloated, a fact which is not controverted by the defendants. We are in a great difficulty, however agreeing with the plaintiffs that by virtue only of the said infraction, the entire register has the attribute of unconstitutionality. The said registrations were conducted under CI 72, which was the applicable legislation under which eligible citizens were registered before the 2012 elections. As the registrations were made under a law that

was then in force, they were made in good faith and the subsequent declaration of the unconstitutionality of the use of cards should not automatically render them void. The legitimate way of treating them is to have them deleted by means of processes established under the law. In view of the fact that these registrations were not effected in breach of the law, the persons affected thereby cannot be said to be benefiting from their own wrong such as to be deprived of their registration without being given the opportunity of being heard. As the said registrations were done before the declaration of unconstitutionality in the Abu Ramadan case (supra) to have their names deleted will have the effect of disenfranchising persons affected by it. This approach enables us to do justice in a manner that preserves the rule of law and a stable constitutional order without affecting acts and or things which were previously ordered on the legality of the impugned provision in the Abu Ramadan case. We think that any person whose registration is affected by the decision in the Abu Ramadan case (supra) be given the opportunity to go through the process of registration to establish his eligibility or otherwise in order that the appropriate remedies provided under the law may be applied. There being no credible dispute that the current register of voters was compiled under legal provisions deriving their legitimacy from the primary legal source, the entire register of voters cannot be said to have been compiled unconstitutionally. Accordingly, by way of answer to issues (2) and (3) we are of the opinion that although the presence of the names of ineligible and deceased persons on the register of voters renders

same neither reasonably accurate nor credible, the register is not thereby rendered inconsistent with article 45(a) of the constitution.

Issue (4) raises the question of validation, which from the processes filed before us was suggested by some stakeholders as a means of deleting or "cleaning" as it is popularly called, ineligible names from the register of voters but rejected by the Electoral Commission. It appears from the case of the plaintiffs that had the first defendant made an accession to this proposal, there would not have been the need for the instant action to be initiated before us. While there appears to be some reason in the proposal for validation, it is without statutory authority and seeks to introduce a mechanism that the lawmaker did not make provision for to be utilized in deleting the names of ineligible and deceased persons from the register of voters. In carrying out its function under the law, the Electoral Commission cannot employ non-statutory remedies, as the law does not give it that mandate. It is observed that it is unreasonable to demand from a public officer whose authority is derived from the law, performance that is not authorized by law and its effect is that non-compliance with the proposal of validation does not constitute any inconsistency with articles 23 and 296 of the constitution.

This leads to issue (5), which concerns the question whether the court has jurisdiction to make orders compelling the first defendant to discharge its functions in a particular way. In our view, our

jurisdiction in so far as the action herein goes is only to determine the limits within which the first defendant as a repository of constitutional authority can lawfully exercise its functions. By article 46, the first defendant is endowed with independence in the performance of its functions including the initiation, regulation and conduct of elections in the country as follows:

"Except as provided in this Constitution or in any other law not inconsistent with this Constitution, in the performance of is functions, the Electoral Commission, shall not be subject to the direction or control of any other body."

In our opinion and as part of our function to declare what the law is, the above words which are unambiguous insulate the Electoral Commission from any external direction and or control in the performance of the functions conferred on it under article 45 in the following words:

"The Electoral Commission shall have the following functions-

(a) to compile the register of voters and revise it at such periods as may be determined by law;

(b) to demarcate the electoral boundaries for both national and local government elections;

(c) to conduct and supervise all public elections and referenda;

(d) to educate the people on the electoral process and its purpose

(e) to undertake programmes for the expansion of the registration of voters; and

(f) to perform such other functions as may be prescribed by law."

A fair consideration of the functions of the first defendant reveals that the demand which was made on it by the plaintiffs regarding the presence of ineligible and deceased persons and the latter's refusal to acquiesce in the said demands which provoked the action herein relates to its mandate under article 45 (a) "to compile the register of voters and revise it at such periods as may be determined by law". In order to determine if the performance of the function conferred on it under article 45(a) is subject to any other constitutional provision, we have to read the constitution in its entirety paying particular attention to the various provisions in order to find out if there are any exceptions to its independence. Then we have to turn to our electoral laws and embark on the same journey to discern if there are any limitations imposed on its independence that to be good must not be inconsistent with the constitution. A careful scrutiny of the constitution reveals that its function under article 45(a) is not subject to any other provision, therefore in performing the said function, we cannot make an order compelling the Commission to act in a particular manner.

We think that the independence of the Commission is crucial for the success of any election. If the Commission is perceived otherwise, there is little prospect of the electoral administration on

Election Day being perceived as transparent and fair. If we are to consolidate our democracy, it is incumbent on us all to defend and protect its independence as provided for in the constitution. We think that in the circumstances when a specific complaint is made regarding the performance of any of the functions of the Commission, it is our duty to inquire into it and ask if there is by any provision of the constitution or any other law which detracts from the presumption of independence that article 46 bestows on it. If there is no such constitutional or statutory provision then what it means is that the matter is entirely within its discretion and not subject to the control of any other authority including the court. As the plaintiffs have not disclosed any vitiating circumstances such as illegality, irregularity, unfairness or failure to satisfy an essential pre-requisite to the making of a decision that may justify our intervention to set any such discretion aside, the decision as to what to do is properly in the domain of the first defendant.

In further consideration of issue (5), we would like to refer to some specific provisions of the constitution that have placed a fetter on the exercise of the independence bestowed on the first defendant by article 46.By article 48(1) its decision regarding the demarcation of boundaries may be appealed to a special tribunal constituted by the Chief Justice with a further right of appeal to the Court of Appeal being provided for in article 48(2).Similarly, in its function relating to the demarcation of the country into constituencies, the constitution has made specific provisions in article 47 to regulate

its exercise. There are other exceptions provided for in article 49 of the constitution, which regulate its function relating to the conduct of elections in the following words;

49(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 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 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 effect of these specific provisions is that where the constitution intended the exercise of any of the functions conferred on the Commission to be subject to any other person or law, it is so provided. Accordingly, where no such provisions have been specifically made, the effect is that the constitution intended the

commission to exercise its discretion without the control or direction of any person or authority. This court being the ultimate judicial authority in the country must endeavor to respect the boundaries of the jurisdiction conferred on it in order to give effect to the supremacy of the constitution. To accede to the demand made on it in the action herein would amount to subverting the plain constitutional provisions. The result is that issue (5) receives an answer in the negative.

However, before we end the consideration of the independent status of the Electoral Commission, we wish to say that the independent status of the first defendant does not make it immune from action for the purpose of declaring that it has exceeded its authority or acted in a manner that having regard to its unreasonableness, irrationality or unfairness cannot be accorded the sanction of legality in view of articles 23 and 296 of the constitution. We do not agree with the contention pressed on us by the first defendant that the 1992 Constitution "forbids any control or direction of the 1st defendant as to how to accomplish its work." Plainly, the said statement is erroneous as article 46 itself recognises that its independence may be derogated from either in the constitution or by any other law including but not limited to the instances referred to in regard to articles 48(1), and 49(1). There is also the point that as a creature of article 43, the Electoral Commission is subject to the constitution; to deny that it is so subject is to misconstrue the nature of the independence bestowed on it in relation to our exclusive jurisdiction, which is critical to effectuating the

supremacy of the law. We make reference to the observation of Marshall CJ in the landmark case of **Marbury v Madison** (supra):

"It is emphatically the province and duty of the Judicial Department (judicial branch) to say what the law is……."

In our view having gone beyond the jurisdictional point, there is before us a justiciable cause of action which we have to inquire into by virtue of article 125 of the constitution in order that the matters in dispute in the action herein may be completely and effectively decided. That is the essence of judicial power as conferred on the judiciary in article 125(5) in the words that follows:

"The Judiciary shall have jurisdiction in all matters civil and criminal, including matters relating to this Constitution, and such other jurisdiction as Parliament may, by law, confer on it."

The correct position is that the courts as constituted under the 1992 constitution may intervene in acts of the first defendant to ensure that it keeps itself within the boundaries of the law and also to give effect to provisions of the constitution. This is a jurisdiction that our courts have always exercised in relation to the first defendant of which the recent decision in the Abu Ramadan case (supra) is an example. In that case, one of the orders made by the court following the declaration was "an order of perpetual injunction restraining the Electoral Commission from using the

National Health Insurance Card in its present form and a voter identification card other than as explained under relief (2) for the purposes of registering a voter under article 42 of the 1992 Constitution." The said order clearly was a direction which affected the first defendant, of whom we observe complied therewith by excluding the utilization of the card as qualification to register in regulation 1 (3) of the Public Elections (Registration of Voters) Regulations, 2016 (CI 91.)

Again, in the Tehn Addy case (supra), the essence of the declaration granted against the Electoral Commission was an intervention by the Supreme Court to set aside its exercise of discretion in purporting to suspend the registration of voters; a situation that emphasises that in appropriate cases the first defendant is subject to the control and or direction of this court. We make bold to say that had the Commission not complied with the terms of the judgment in the Abu Ramadan case (supra), it would have opened itself up to the sanctions provided in article 2 (3) and (4 relating to a high crime. We do not think that our intervention was unwarranted by the constitution. On the contrary, it was justified by the provisions of article 2(1) and 130 (1) of the 1992 Constitution which are intended to give effect to the supremacy of the constitution contained in article 1(2). The first defendant's independence is also subject to the High Court's exercise of its supervisory jurisdiction under article 141 of the constitution and actions in which questions may be raised whether in carrying out its functions, it has exceeded the authority conferred on it in

specified statutes; in such cases the High Court has the jurisdiction to determine whether it has acted intra vires.

Regarding issue (6), we think that the answer to issue (1) adequately takes care of the considerations that are raised by it and accordingly, no useful purpose will be served by considering it again.

Then there is issue (7) which raises the question whether the plaintiffs before us have proved the extent to which the register of voters is inaccurate for it to be unreasonable within the meaning of article 45(a) of the constitution. The said article deals with the obligation of the Electoral Commission to compile the register of voters for use in public elections and referenda in the country. In considering the point, which arises under this issue, we wish to take judicial notice of the fact that since the delivery of judgment in the Abu Ramadan case (supra) names that were entered on the register with the utilization of cards during the registration exercise conducted under the repealed legislation, C.I. 72, have not been deleted from the register of voters. The continued presence of such names being derived from a constitutionally declared wrong offers sufficient proof of the extent of the inaccuracy of the current register of voters and can therefore be said to be unreasonable. We are of the opinion that any public document required to be compiled under statutory authority that contains entries, which are instances of non- compliance with mandatory constitutional provisions as is

the case with the current register of voters has the attribute of unreasonableness. The presumption being that the law is intended to be reasonable; any act that is derived from unconstitutionality must be deemed unreasonable. Accordingly, issue (7) is answered in the affirmative.

Turning our attention to issue (8), we note that it concerns substantially the same question that has been previously discussed and resolved in this delivery as issue (5) and so there is no need for the court to consider the same question again. This leaves us with the determination of issue (9) regarding whether the first defendant is bound by suggestions from citizens and stakeholders in carrying out its constitutional mandate. While conceding that there is no law that obliges the first defendant, it seems to us that in order to render its work acceptable to Ghanaians, it may engage in consultation and collaboration with citizens and stakeholders that are intended to deepen the participation of the citizenry in the electoral process. Listening to others takes nothing from the Electoral Commission but on the contrary, it has the effect of engendering public confidence in the electoral process and trust in the outcome. Accordingly, issue (9) receives an answer in the negative.

The result is that we proceed to grant the following reliefs:

(1) That upon a true and proper interpretation of article 45 (a) of the Constitution, the mandate of the Electoral Commission to

compile the register of voters implies a duty to compile a reasonably accurate and credible register.

(2) A declaration that the current register of voters which contains the names of persons who have not established qualification to be registered is not reasonably accurate or credible.

(3) A declaration that the current register of voters which contains the names of persons who are deceased is not reasonably accurate or credible.

(4) Reliefs (4) (a) and (b) are dismissed in their entirety.

In the exercise of the power conferred on us under article 2(2) of the constitution, we make the following orders:

(a) That the Electoral Commission takes steps immediately to delete or as is popularly known 'clean" the current register of voters to comply with the provisions of the 1992 Constitution, and applicable laws of Ghana;

(b) That any person whose name is deleted from the register of voters by the Electoral Commission pursuant to order (a) above be given the opportunity to register under the law.

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

WOOD (MRS) CJ:-

I agree.

(SGD) G. T. WOOD (MRS)
CHIEF JUSTICE

DOTSE JSC:-

I agree.

(SGD) V. J. M. DOTSE
JUSTICE OF THE SUPREME COURT

YEBOAH JSC:-

I agree.

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

BAFFOE-BONNIE JSC:-

I agree

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

AKAMBA JSC:-

I agree

(SGD) J. B. AKAMBA
JUSTICE OF THE SUPREME COURT

CONCURRINIG OPINION

BENIN, JSC:-

I have had the priviledge of reading the well-reasoned opinion just delivered by my able brother Gbadegbe JSC and I am in entire agreement with it. However, I have decided to say a few words about some aspect of the case which borders on the rule of law. I should say, by way of introductory remark, that having fashioned a Constitution unto ourselves to govern our actions and direct our path to liberty and progress, it is the duty of every person, human

as well as corporate, to keep in mind that the rule of law is indispensable in all our actions and behaviour. And when a person is acting within the confines and limits of the law, none can compel him to act in a particular way to suit that person's desire. That explains the oath of office that notable state actors take on assumption of office to perform the functions attributed to them without fear or favour, affection or ill-will. Article 46 of the Constitution has reinforced these principles by granting the 1st defendant independence in the performance of its functions, subject only to the Constitution and to any other law for the time being in force. And once they are acting within the law, no authority or power can compel them to act in a different way. As observed by Warren E. Burger in his address at the Law Day Service at St. John's Cathedral in Jacksonville, Florida on June 15, 1973, "the (rule of law) places restrictions on individuals and on governments alike. This is a delicate, a fragile balance to maintain. It is fragile because it is sustained only by an ideal that requires each person in society, by an exercise of free will, to accept and abide the restraints of a structure of laws. "In the lead opinion, my brother Gbadegbe, JSC has set out some areas in which the powers of the 1st defendant have been restricted in one way or the other by the Constitution so I will not dwell on it. He has also set out the facts and the issues so I will not repeat them. In this piece I will focus on the exercise of discretionary power in the performance of the 1st defendant's core mandate as set out in Article 45 of the Constitution.

For the purpose of the views I am about to express I will reproduce issues 4, 5, 8 and 9 set down in the memorandum of issues. They provide:

4. Whether or not the decision by 1st Defendant not to use the record validation process to revise the current voters register is unreasonable and inconsistent with Articles 23 and 296 of the Constitution.

5. Whether this Court has the jurisdiction and authority to make orders compelling 1st defendant to discharge its function in a particular manner.

8. Whether or not a party is entitled to an order from this Court to compel 1st defendant to carry out its constitutional function of compiling and revising the voters register in a particular way, form or manner.

9. Whether or not 1st defendant is bound by suggestions from citizens and other stakeholders as to how 1st defendant must carry out its constitutional function of compiling and or revising the voters register.

These issues have arisen from the plaintiffs' case that the current voters register contains the names of persons who used the National Health Insurance card as identification to establish nationality under the repealed CI 72, which this court in its decision of 30th July 2014 in Abu Ramadan case, referred to in the lead opinion, declared unconstitutional. It is the plaintiffs' case further that the 1st defendant has since that decision not taken any steps to remove the names of all those affected by that decision. Also the names of several dead persons are on the register; these factors do not make the register credible within the meaning of Article 45(a) of the Constitution. The plaintiffs claim they have made several efforts to get the 1st defendant to perform their constitutional mandate but without success. Other stakeholders and citizens of this country have played similar roles all to no avail. The plaintiffs have therefore approached this court to compel the 1st defendant to either compile a fresh voters register or to embark upon a validation exercise to clean up the existing register, in order to render same reasonably accurate and credible.

The defendants seriously challenge this on ground that the 1st defendant cannot be compelled to act in a particular manner. They claim they will not be able to identify those who used the NHI card

to register. Hence the four issues set down above. These issues together have the same effect; that the court should be able to give effect to its 2014 decision on the unconstitutionality of registering with an NHI card, and also remove the names of deceased persons.

I begin this discussion by reminding ourselves that the court itself is bound by the law and must act within the confines of the law, and so too is every other institution or person in this country. This court's role in such matters is in the nature of judicial review of executive and administrative actions, which the courts in commonwealth jurisdictions have not shied away fromin exercising since Marbury v. Madison was decided, a case which every student of constitutional law is familiar with. But the courts have been careful not to impose themselves on other institutions of state as to how they should perform their functions. This caution is important to observe because the law determines the extent of each institution's mandate, it is not the court which determines that. But the court has a duty to bring other institutions to order if they stray from the path of legality. More often than not, this role of the court has been distasteful to the other institutions of state.

Needless to say that this problem was not resolved with ease, and even the circumstances surrounding the Marbury v. Madison decision bear testimony to it. It had its roots from what became known as the 'midnight appointments' by the then outgoing US President John Adams. I will not go further into this. But I must say that since the problem was identified in the USA and first dealt with by the courts there, any attempt to talk about it will necessarily take us to the jurisprudence of that country. Not only the courts in the USA were called upon to determine the extent of the court's supervisory power over other state institutions, the executive also waded into that. Naturally the executive believed the court was asserting too much influence over their sphere of authority. The views expressed by some American Presidents and writers on the subject, though not legal, are worth noting. These executive leaders

have articulated views and doctrines that avoid ultimate Supreme Court authority over executive functions.

Commenting on the American sedition law, Thomas Jefferson wrote a letter to Mrs. John Adams on September 11, 1804, published in 8 Works of Thomas Jefferson 310-31 (1897) as follows:

"You seem to think it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the executive, more than to the executive to decide for them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment.....But the executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution."

James Madison in 4 Elliott, Debates on the Federal Constitution, 550 (1836) wrote that;

"However true, therefore, it may be that the judicial department is, in all questions submitted to it by the forms of the Constitution, to decide in the last resort, this resort must necessarily be deemed the last in relation to the authorities of the other departments of the government, not in relation to the rights of the parties to the constitutional compact, from which the judicial, as well as the other departments, hold their delegated trust."

And when he had the opportunity to write on the subject, Abraham Lincoln, in 6 Richardson, Messages and Papers of the Presidents, 5, 9-10 (1897) wrote:

"I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the government.....At the same time, the candid

citizen must confess that if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court…….the people will have ceased to be their own rulers."

The views expressed above clearly summarize the views of the executive in the USA on the role the court plays when it comes to deciding its involvement in the performance of the functions of other state institutions. These misgivings notwithstanding, the courts have intervened where the act of the state institution complained of was arbitrary, capricious or manifestly unlawful. See cases like CHEVRON USA, INC vs. NATURAL RESOURCES DEFENSE COUNCIL, INC., 467 US 817 (1984); UNITED STATES vs. O'HAGAN, 138 L ED (2d)724 (1997).

The courts do apply the presumption of regularity to the acts of state officials, but being a presumption it does not preclude the court from probing the act to find out if it was performed in accordance with the law; see the case of CITIZENS TO PRESERVE OVERTON PARK, INC vs. VOLPE, 401 US 402 (1971). This presumption has been legislated by section 37(1) of the Evidence Act, 1975 (NRCD 323) which says there is a presumption in favour of official acts that they have been regularly performed. So a party who thinks otherwise, assumes the burden of displacing that presumption by evidence.

In order to overcome the problems associated with judicial review of executive and administrative actions, the US enacted into law the Federal Administrative Procedure Act and this provides the scope of review. I am aware that this Act is not applicable here, yet a lot of its provisions were the result of court decisions and these decisions, though not binding, are of persuasive influence. But more importantly some of these provisions do find expression in our Constitution, 1992. Section 706 of the Act sets out grounds for a

reviewing court to determine the validity of any order or action of the authority, these are:

1. to compel agency action unlawfully withheld or unreasonably delayed; and
2. to hold unlawful and set aside agency action, findings, and conclusions found to be---

(a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(b) contrary to constitutional right, power, privilege or immunity;
(c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(d) without observance of procedure required by law.
(e) unsupported by substantial evidence……
(f) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

The long and short of all these is that the state institution must act within the confines of the law, and must exercise discretion in accordance with law. For this reason Article 296 of the Constitution, 1992, assumes prominence in the conduct of the affairs of all state actors. It reads:

Where in this Constitution or in any other law discretionary power is vested in any person or authority-

(a) That discretionary power shall be deemed to imply a duty to be fair and candid;
(b) The exercise of the discretionary power shall not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and shall be in accordance with the process of law; and
(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 the Constitution or that other law to govern the exercise of the discretionary power.

Clause (b) of Article 296 uses expressions like arbitrary and capricious. These are not terms of art but must bear a legal meaning by which the exercise of discretionary power will be judged. When considered in context of Article 296 a person will be in violation of use of arbitrary discretion if he applies his own discretion in disregard of the law. In this respect it has the same meaning as applied in New Zealand, for as stated by Gallen J. in the case of RE M (1992) 1 NZLR 29 at 41: "Something is arbitrary when it is not in accordance with law or which is not in accordance with the principles which the lawregards as appropriate for a discretion to be operated within."

And capricious exercise of discretion when used in relation to an individual person relates to individual behavior of impulsiveness and unpredictability. And in reference to corporate bodies it is applicable when they fail to consider rules of evidence or rules of law, or if they act without principles or reason.

The actions of the 1st defendant will therefore have to be examined in the light of these relevant constitutional provisions, namely Articles 45(a), 51 and 296. The 1st defendant has a mandate under articles 45(a) and 51 of the Constitution, 1992 to compile a voters' register for the country after publishing the details of the exercise by way of a constitutional instrument. As explained in the lead opinion, this involves the compilation of a reasonable and credible register. It also means that where for some legal reason there is cause to believe that the register is not credible and therefore does not satisfy the provisions of Article 45(a) of the Constitution, the 1st defendant has a duty cast upon it to rectify the situation. It is in this scenario that the plaintiffs are calling upon this court to compel the 1st defendant to perform its constitutional mandate. The 1st defendant is saying it is acting in accordance with existing law.

As at the time this action was brought to this court the relevant regulations were contained in C.I 72, but this law was repealed and replaced by C.I 91.

With these regulations in place, the plaintiffs assume the initial burden of convincing the court that the 1st defendant has taken any step in the process of cleaning up the register that is not governed by the repealed CI 72and now CI 91. The plaintiffs also have to satisfy this court that the 1st defendant has abused the discretionary power vested in it by Article 296 of the Constitution, 1992 by taking steps which are arbitrary, capricious or unwarranted by the law or regulations. The plaintiffs also have to satisfy the court that the validation exercise is known to the laws of this country or is within the regulations in force governing elections in this country currently C.I 91.

However efficacious the system of validation may be, even the 1st defendant cannot employ it unless it is sanctioned by the law or regulations. That is the more reason why such issues should not be brought before a court without the legal basis. The 1st defendant may introduce the validation process by constitutional instrument under Article 51 if need be. The plaintiffs have not told this court that the 1st defendant has taken any step contrary to law, nor have they been accused of breaching its discretionary power. In the absence of such breaches, the court has no power to compel or even to direct the 1st defendant as to how to exercise its constitutional mandate to produce a credible register; it is the end that will justify the means. I must emphasize here that even if there is provision in the law and/or regulations for validation, the court cannot compel the 1st defendant to follow that method unless it is the only mode that is sanctioned by the law or regulations. If the law provides for alternative ways of performing the task, the discretion is vested in the actor in deciding within the limits imposed by Article 296 of the Constitution as to which one of them will best suit the task on hand.

It is certain the path embarked upon by the plaintiffs is not supported by the law because the 1st defendant has not been found to be acting contrary to law, whichever way one decides to characterize their actions. As long as the process they have chosen to clean up the voters' register is authorized by the law or regulations, they cannot be faulted, even if it is considered that a more efficient mode exists.

I do not intend to comment on the status of the report of the committee of experts, namely the Crabbe Committee, appointed by the 1st defendant to help them address the issue of the voters register, except to say that it is merely advisory without a legal status enforceable by a court of law, because like all advisory opinions it is not binding on the recipient.

I would take this opportunity to comment briefly on C.I 91. In view of all the happenings in respect of the eligibility criteria of potential voters on the register, one would have thought that any change in the law would have made provision for the form of identification used by a registered voter to be captured in the 1st defendant's database. This would have made it easier in future for the court to make definitive pronouncements on the status of persons whose names appear in the voters register. It is sad to recall that C.I 91 has been published without this important information. It is good to draw lessons from court decisions in order to inform future conduct of state actors. Regulation 22 of CI 91 did not improve upon CI 72. If this court's decisions do not guide the future conduct of state actors, then problems of needless litigation will never be stopped and the country will be poorer for it. An offshoot of court decisions is to provoke and influence change or reform in the law to prevent or reduce future litigation and conflict.

It is for these brief reasons that I fully agree with the decision reached in this case that the plaintiffs' action be dismissed in so far as it seeks an order to compel the 1st defendant to compile a fresh

voters' register or to use the validation process to clean the existing register.

(SGD) A. A. BENIN
JUSTICE OF THE SUPREME COURT

COUNSEL

NANA ASANTE BEDIATUO WITH HIM MISS OFOSUA AMAGYEI FOR THE PLAINTIFFS.

THADDEUS SORY FOR THE 1ST DEFENDANT.

MRS. AFRIYIE ANSAH (CHIEF STATE ATTORNEY) WITH HER MISS. IVY VANDERPUIJE (SENIOR STATE ATTORNEY) FOR THE 2ND DEFENDANT.