THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2019

CORAM: ANSAH, JSC (PRESIDING)

DOTSE, JSC

YEBOAH, JSC

MARFUL-SAU, JSC

KOTEY, JSC

CIVIL APPEAL
NO. J4/34/2019

24TH JULY, 2019

TIESO GHANA LIMITED ..... PLAINTIFF/APPELLANT/APPELLANT

VRS

EUROGET DE-INVESTA SA .....
DEFENDANT/RESPONDENT/RESPONDENT

JUDGMENT

KOTEY, JSC:-

Before us is an appeal from the judgment of the Court of Appeal affirming a decision on the trial High Court dismissing an application by the Plaintiff/ Appellant/Appellant (hereinafter Plaintiff) for leave to enter final judgment under Order 64, Rule 13 of C.I. 47.

The Plaintiff was a subcontractor of the Defendant/Respondent/Respondent (hereinafter Defendant) for the construction of a 160-bed regional hospital at Wa in the Upper West region. Their contract was governed by "Federation Internationale Des Ingenieurs-Conseils", International Federation of Consulting Engineers Rules (hereinafter referred to as FIDIC Rules) which contain dispute resolution provisions.
For ease of reference we reproduce the dispute resolution provisions of the FIDIC Rules.

*"**20.1 Contractor's Claim***

If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Employer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.

20.2 Appointment of the Dispute Adjudication Board

In cases of disagreements between the parties: They shall attempt to resolve their disagreement through friendly, direct dialogue and negotiations. Failure to do that at the end of 30 days from the date when the disagreement arose, either party shall give notice to each other of its wish to resort to a DAB and disagreement shall formally become dispute. Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision]. The parties shall jointly appoint a DAB by the date 28 days after a Party gives notice to the other Party of its intention to refer a dispute to a DAB in accordance with Sub-Clause 20.4.
The DAB shall comprise, as stated in the Particular Conditions, either one or three suitably qualified persons ("the members") If the number is not so stated and the Parties do not agree otherwise, the DAB shall comprise three persons…

20.4 Obtaining Dispute Adjudication Board's Decision

If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, or instruction, opinion of valuation of the Employer, then after a DAB has been appointed pursuant to Sub-Clause 20.2 [Appointment of the Dispute Adjudication Board], and 20.3 [Failure to Agree Dispute Adjudication Board], either party may refer the dispute in writing to the DAB for its decision, with a copy to the other party. Such reference shall state that it is given under this Sub-Clause.

For a DAB of three person, the DAB shall be deemed to have received such reference on the date when it is received by the chairman of the DAB.

Both Parties shall promptly make available to the DAB all information, access to the Site, and appropriate facilities, as the DAB may require for the purposes of making a decision on such dispute. The DAB shall be deemed to be not acting as arbitrators. If either party is dissatisfied with the DAB's decision, then either party may, within 21 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 42 days (or as otherwise approved) after receiving such reference or such payment, then either Party may, within 14 days after this period has expired, give notice to the other Party of its dissatisfaction.

In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.7 [Failure to Comply with Dispute Adjudication Board's Decision] and Sub-Clause 20.8 [Expiry of Dispute Adjudication Board's Appointment], neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

If the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 21 days after it received the DAB's decision, then the decision shall become final and binding on both Parties.

20.5 Amicable Settlement

Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agreed otherwise, arbitration may be commenced on or after the 30th day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.

20.6 Arbitration

Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled with international arbitration unless otherwise agreed by both Parties.

a) The dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,

b) The dispute shall be settled by three arbitrators appointed in accordance with these Rules, and

c) The arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [Law and language].

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion, or valuation of (or on behalf of) the Employer, and any decision of the DAB, relevant to the dispute.

Neither party shall be limited in the proceedings before the arbitrator(s) to the evidence arguments previously put before the DAB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties and DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works."

The Defendant owed the Plaintiff for work done which was to be paid in tranches after each phase of work done and the submission of an invoice. Defendant received the invoices for phases of work done but refused to pay Plaintiff. The defendant then terminated the contract with the plaintiff.

The Plaintiff commenced an action in the High Court by a writ of summons that claimed among other reliefs "a declaration that the purported termination of the contract by the Defendant/Respondent herein on the grounds of non-performance or delayed performance was false procedurally wrong and unjust" and further claimed for payment for work done together with interest.

Upon an application by the Plaintiff for interlocutory injunction or in the alternative for a valuation of work done at the construction site, the Court declined to grant the interlocutory injunction but granted an order for both parties to send their team of quantity surveyors to value the extent of work done before the Plaintiff handed over the construction site to the Defendant. This report was consensual and was filed and presented to the High Court. The Defendant was then allowed to take over the construction site and they appointed a new contractor.

The Defendant refused to accept to pay the amount agreed upon by the team of quantity surveyors and filed an application before the Court to activate the dispute settlement provisions of the contract. This application was granted and the court referred the matter to a Dispute Adjudication Board (hereinafter referred to as DAB). The Institution of Surveyors was nominated by the agreement of both parties. The DAB

submitted its decision to the Court recommending the same amount as the joint team of quantity surveyors appointed by the parties for the amount of work done. Aggrieved by the decision of DAB, the Defendant gave a notice of dissatisfaction to the Plaintiff. Plaintiff then filed a motion for leave to sign final judgment on the DAB decision under Order 64 of the High Court (Civil Procedure) Rules 2004, (CI 47).

The trial High Court Judge refused to grant the said application to sign final judgment and referred the matter to international arbitration in accordance with the FIDIC Rules. Dissatisfied with the ruling of the trial High Court, plaintiff appealed to the Court of Appeal which dismissed the appeal. It is against this decision that the plaintiff has appealed to this court on the following grounds as contained in the Notice of Appeal.

Grounds of Appeal

1. The learned Court of Appeal erred in law and in equity when it affirmed the decision of the High court dismissing the application to sign final judgment on the value of work done which had been agreed upon by both parties and confirmed by the Dispute Adjudication Board hereinafter called DAB.

2. The Court of Appeal wrongly affirmed the decision of the High court which referred the case to international arbitration by ignoring the fact that Appellants claim is peculiarly for work done as agreed between the parties and confirmed by the court.

3. The learned court's misapprehension of the rules governing arbitration led to make a reference to international arbitration under paragraph 20 of the FIDIC contract when there was no such basis and said reference amounted to a reference for "its own sake" occasioning injustice to the Plaintiff/Appellant/Applicant.

4. The learned Appeal Court erred when it refused to give weight to the fact that Respondent's "notice of dissatisfaction" did not conform to the definition of a valid "notice of dissatisfaction" by demonstrating "serious irregularity" and has been so ruled by a ruling of the High Court on record dated 4th July 2017.

5. The ruling of the Court of Appeal to the effect that international arbitration was a matter of course (since it is set out in paragraph 20 of the FIDIC contract) is a misinterpretation of the law and rules governing arbitration, especially where there was no basis from the peculiar circumstances of this case for such reference.

6. The High Court's definition of an "arbitral award" to exclude the DAB report dated 31st January 2018 was wrong in law and has occasioned a miscarriage of justice to the Appellant.

7. The Appellate Court in its judgment ignored the clear and unambiguous interpretation of FIDIC clause 20.6 which stated that only decisions of the DAB which have "not become final and binding" shall be settled by international arbitration.

8. The judgment of the Court of Appeal dated 15th November, 2018 is against the weight of the evidence.

Issues in this Appeal

We have carefully examined the eight grounds of appeal filed by the plaintiff and argued by the parties and are of the considered view that they can logically be grouped into three main issues, namely;

i. Whether the decision DAB process was an arbitration and its decision an arbitral award?
ii. Whether the decision of the DAB is "final and binding" between the parties; and

iii. Whether the Court of Appeal erred in affirming the decision of the trial High Court to refer the dispute between the parties to international arbitration?

We now proceed to examine these issues.

Was the DAB process an Arbitration?

This issue is captured in ground 6 of the notice of appeal.
On this matter the trial court in its ruling of 31st January 2018 (page 1521 of the record) held as follows;

"I find that the parties submitted themselves to a Dispute Adjudication Board which came out with a decision. The respondent has filed a notice of dissatisfaction with the said decision. This decision was not an arbitral award. In view of this there is no arbitral award properly so called which is capable of being adopted and entered by this court as final judgment within the meaning of Order 64 of C.I.47."

The Court of Appeal affirmed this finding of the trial High Court when it stated at page 21 of its judgment dated 15th November 2018 as follows;
"Indeed, under clause 20.4 of the FIDIC Rules the DAB shall be deemed not to be acting as arbitrators".

The Plaintiff is challenging this holding by the courts below. Counsel for the Plaintiff argued before us that the DAB process was an arbitration and its decision an arbitral award. Counsel referred to KLIMATECHNIK ENGINEERING v. SKANSKA JENSEN INTERNATIONAL [2005-2006] SCGLR 913 at 925, where the court found that the decisions of both arbitrators and umpires are to be treated as arbitral awards under the Arbitration Act,1961(Act 38). As an arbitral award, the plaintiff argued the Court must comply with Order 64 of CI 47. R 12(1) which specifically stipulates that, "No award shall be set aside except on the ground of perverseness or misconduct of the arbitrator

or umpire" if is to set aside the decision of the DAB. Counsel submitted that in order for the court to disregard the arbitral award, the defendant must prove the award is perverse or that the arbitrators or umpires misconducted themselves. As the Defendant has failed to prove any perverseness or misconduct, counsel argued that the court cannot set aside the decision of the DAB.

The Defendant, on the other hand, submitted that there has been no arbitration and therefore no arbitral award capable of adoption. The DAB process, the Defendant contended, was an expert adjudication not arbitration. It argued that once a Notice of Dissatisfaction has been issued within the stipulated time it is enough to take the dispute resolution to another level which will culminate at international arbitration.

The ruling of the trial High Court which was affirmed by the Court of Appeal was in respect of an application by the Plaintiff for the leave to sign final judgement under Order 64 of C1.47. In Klimatechnik Engineering Ltd v Skanska Jensen International [2005-2006] SCGLR 913 at 927 Georgina Wood JSC (as she then was) stated; "The importance of determining the statute under which the application was initiated cannot be overemphasised". See also Akwass Farms Ltd. v. Ghana Telecom Co Ltd. (C.A., unreported, Suit No. HI/30/2010, dated 9th December 2010).

Order 64, rule 1 of CI. 47 provides that, "if the parties to an action desire that any matter in dispute between them in an action shall be referred to the final decision of an arbitrator, either party or both parties may apply to the court at any time before final judgment for an order of reference and on application the Court may make an order of reference accordingly". Rule 8 then provides that the award of the arbitrators "shall contain a conclusive finding on each of the matters referred. Rule 13 finally provides that if there is no application to set aside or remit an award under the rules, a party may file the award for incorporation into an order of the court.

There are therefore two conditions precedent to the invocation of order 64, rule 13; an arbitration and a final award.

We begin our consideration of this issue by reiterating the admonition of Adinyira JSC in **BCM Ghana Ltd v. Ashanti Goldfields Ltd** [2005-2008] SCGLR 602 at 611 that "The Courts must strive to uphold dispute resolution clauses in agreements."

Clause 20.4 of the FIDIC Rules provides that, "The DAB shall be deemed to be not acting as arbitrators." It further provides that "neither party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this sub-clause". The DAB report itself stated that; "The parties therefore submitted that the DAB resolves the dispute between Tieso Ghana Ltd v Euroget De-Invest by Adjudication as opposed to Arbitration".

It is therefore evident that at the stage of the DAB, arbitration has not commenced. In fact clause 20.6 of the FIDIC Rules then goes on to provide for arbitration. The Plaintiff has not provided us with any reason why we should depart from the clear express provision of their agreement, as contained in clause 20.4 of the FIDIC Rules, that the DAB shall be deemed not to be acting as arbitrators. We therefore reject the contention of the Plaintiff that the DAB process was an arbitration and affirm the decision of the trial High Court and the Court of Appeal that it was not.

Is the Decision of the DAB "final and binding"?

We now consider the question whether the decision of the DAB is "final and binding" and capable of adoption as a final judgment of a court under Order 64 of C.I.47.

Clause 20.4 of the FIDIC Rules provides that;

"If the DAB has given its decision as to a matter in dispute to both parties, and no notice of dissatisfaction has been given by either party within 21 days after it received the DAB's decision then the decision shall become final and binding upon both parties".

Both the trial High Court and the Court of Appeal held that the following the issuing of a "Notice of Dissatisfaction" by the Defendant the decision of the DAB was not "final and binding". The Court of Appeal, affirming the decision of the High Court stated per Kwofie J.A at page 22 of its judgement dated 15th November 2018;

"It is my view that with the defendant having given the Notice of Dissatisfaction within the time stipulated by the FIDIC rules the decision of the DAB cannot become final and binding on the parties".

The Plaintiff challenges this finding by the High Court and the Court of Appeal. The Plaintiff argued that both the value of work done determined by the joint team of quantity surveyors and the decision of the DAB are "final and binding" within the meaning of clause 20.6 of the FIDIC Rules. "The DAB is thus enforceable and final" it contended. The Plaintiff conceded that the Defendant did, in fact, issue a Notice of Dissatisfaction within the time frame stipulated by clause 20.4 but argued that the notice failed to point out why the Defendant was dissatisfied with the decision of the DAB. The failure of the notice of dissatisfaction to challenge the decision of the DAB on any substantive grounds or for "serious irregularity", Plaintiff submitted, rendered the notice nugatory.

The Defendant, on the other hand, submitted that the FIDIC Rules do not require it to provide detailed reasons for its dissatisfaction with the decision of the DAB. It contended that clause 20.4 of the FIDIC Rules only requires that "this notice of dissatisfaction shall state that it is given under this sub-clause and shall set out the matter in dispute and the reason(s) for dissatisfaction". The Defendant therefore submitted that its notice of dissatisfaction that "Our client has been served with a copy

of the decision of the DAB dated 28th of April 2017 and it is our client's instructions to say that they are dissatisfied with the said decision arrived at by the DAB. It is our client's further instructions to say that Tieso Ghana Limited is not entitled to the sum stated in the 28th April 2017 decision" complies with the FIDIC Rules.

Clause 20.4 of the FIDIC Rules provide that;

> "If the DAB has given its decision a s to a matter in dispute to both Parties and no notice of dissatisfaction has been given by either party within 21 days after it received the DAB's decision, then the decision shall become final and binding on both Parties".

Both the trial High Court and the Court of Appeal held that, following the issuing of a Notice of Dissatisfaction with the DAB decision by the defendant, that decision was not final.

The Court of Appeal, affirming the decision stated per Kwofie J.A at page 22 of its judgment of dated 15th November 2018;

> "It is my view that with the defendant having given the notice of dissatisfaction within the time stipulate by the FIDIC rules the decision of the DAB cannot become final and binding on the parties.

The plaintiff challenges this finding by trial High Court and the Court of Appeal.

The plaintiff argues that both the value of work done determined by the joint team of quantity surveyors of and the decision of the DAB are "final and binding" within the meaning of clause 20.6 of the FIDIC Rules. "The DAB is thus enforceable and final" it contended. The Plaintiff conceded that the Defendant issued a Notice of Dissatisfaction within the time frame stipulated by clause 20.4 of the FIDIC Rules but argued that the notice failed to point out why the Defendant was dissatisfied with the decision of the DAB. The failure of the Notice of Dissatisfaction to challenge the decision of the DAB

on any substantive or procedural grounds or for "serious irregularity" rendered the notice invalid, the Plaintiff submitted.

The Defendant on the other hand, submitted that the FIDIC rules did not require it to provide detailed seasons for its dissatisfaction with the decision of the DAB. It contended that clause 20.4 of the FIDIC rules only requires that;

> "this notice of dissatisfaction shall state that it is given under this sub-clause and shall set out the matter in dispute and the reason(s) for dissatisfaction"

The defendant therefore submitted that its notice of dissatisfaction that "our client has been served with a copy of the decision of the DEAB dated 28th of April 2017 and it is our client's instructions to say that they are dissatisfied with the said decision arrived at by the DAB. It is our client's further instructions to say that TIESO Ghana Limited is not entitled to the sum stated in the 28th of April 2017 decision" complies with the FIDIC Rules.

Having carefully considered the arguments of the parties, the FIDIC Rules and the law on contractual dispute resolution provisions, ii is our considered opinion that the parties agreed to be governed by a dispute resolution process provided for under the FIDIC Rules and are bound by it. Under these Rules, the DAB process is an intermediate expert adjudication stage. The decision of the DAB only becomes "final and binding" if neither party gives a notice of dissatisfaction within 21 days. Once a party gives a notice of dissatisfaction within the stipulated period, the DAB decision is not "final and binding."

We therefore affirm the decision of the High Court and the Court of Appeal that the decision of the DAB was not final and binding and not capable of adoption as a final judgement of the Court under Order 64 of C.I. 47.

Was it an Error to Refer the Dispute to International Arbitration?

Following its dismissal of the Plaintiff's application for leave to sign final judgement on the decision of the DAB, the trial High Court affirmed by the Court of Appeal, referred the dispute between the parties to international arbitration under the FIDIC Rules.

This has been heavily challenged by the Plaintiff in grounds 2,3,5 and 8. The reference to international arbitration has been variously described by the Plaintiff as a reference for "its own sake" "a misinterpretation of the law and rules governing arbitration" and being "against the weight of the evidence". The Plaintiff contends that since both the joint team of quantity surveyors chosen by the parties and the DAB arrived at the same figure as the total amount due to the it for work done, there was no need to refer to the matter to international arbitration, hence the description a reference "for its own sake". It submitted that the determination of the value of work done by the quantity surveyors and the DAB cannot change or be altered and therefore is final and binding and cannot be the subject of international arbitration. At page 15 of its Statement of Case, the Plaintiff stated its position as follows:

> "My Lords, it is the Appellant's respectful submission that as long as the value of work done and agreed upon by both parties is confirmed it will be an exercise in futility for any court of law and equity to hold that the same figure confirmed and agreed by both parties as work done and owed to the Appellant be sent to further international arbitration".

The Plaintiff concluded that on the peculiar facts of this case since the quantity surveyors appointed by the parties have determined the value of work done and it has been confirmed by the DAB, there is no dispute to be referred to international arbitration.

The Defendant, on the other hand, challenged the interpretation placed on the valuation of the quantity surveyors and the decision of the DAB. It argued the quantity surveyors made an independent valuation, which was not accepted by the Defendant. It

also argued that the decision of the DAB went beyond the valuation of work done and included other matters such as calculation of interest. It further submitted that it was because they did not accept the valuation of the quantity surveyors that the matter was referred to the DAB. They therefore contended that following its notice of dissatisfaction to the DAB decision, the trial High Court and the Court of Appeal were right in referring the dispute to international arbitration in accordance with the FIDIC rules.

The arguments being canvassed by the Plaintiff before us were urged on the Court of Appeal which after consideration rejected them. The Court of Appeal stated its conclusion at page 22 of its judgment as follows;

> "The Rules (FIDIC) have therefore provided for a step by step approach to dispute resolution starting from friendly dialogue and negotiations, referral to Dispute Adjudication Board and where a Notice of Dissatisfaction is given by either party, then there would be attempts to settle amicably and where that fails international arbitration".

We have carefully considered the facts of this case, the submissions of the parties and the FIDIC rules and find the position of the Plaintiff untenable. The parties contracted to be governed by the FIDIC Rules. These Rules provide for a dispute resolution process. The Plaintiff's contention that the dispute between the parties has ended is not borne out by the facts. The Defendant did not accept the valuation of the quantity surveyors and gave a notice of dissatisfaction after the DAB decision. We therefore affirm the decision of the High Court and the Court of appeal to refer the dispute between the parties to international arbitration under the FIDIC Rules.

In the circumstances, this appeal fails in its entirety and is accordingly dismissed.

(SGD) PROF. N. A. KOTEY

(JUSTICE OF THE SUPREME COURT)

ANSAH JSC:-

I agree with the reasoning and conclusion of my brother Kotey.

J. ANSAH

(JUSTICE OF THE SUPREME COURT)

DOTSE JSC: -

I agree with the reasoning and conclusion of my brother Kotey JSC.

V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

YEBOAH JSC :-

I agree with the reasoning and conclusion of my brother Kotey JSC.

ANIN YEBOAH

(JUSTICE OF THE SUPREME COURT)

MARFUL-SAU JSC:-

I agree with the reasoning and conclusion of my brother Kotey JSC.

S. K. MARFUL-SAU

(JUSTICE OF THE SUPREME COURT)

COUNSEL

ANKAMAH MENSAH FOR THE PLAINTIFF/APPELLANT/APPELLANT.

YAW ESHUN WITH AMERLEY ADJOTEYE FOR THE DEFENDANT/RESPONDENT/RESPONDENT.

THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2019

CORAM: AKUFFO (MS), CJ (PRESIDING)

ADINYIRA (MRS), JSC

DOTSE, JSC

BAFFOE-BONNIE, JSC

GBADEGBE, JSC

PWAMANG, JSC

DORDZIE (MRS), JSC

WRIT NO. J1/03/2018

12TH JUNE, 2019

**1. BENJAMIN KOMLA KPODO, MP } **
2. RICHARD QUASHIGAH, MP } ……. PLAINTIFFS

VRS

THE ATTORNEY-GENERAL } ……. DEFENDANT

JUDGMENT

AKUFFO (MS), CJ:-

Background

By a Writ of Summons, issued 27th December, 2017, the Plaintiffs suing in their capacity as citizens of Ghana, for the interpretation and enforcement of the Constitution, pursuant to articles 2(1)(b) and 130(1)(a), claimed the following reliefs from this Court:

"1. A declaration that upon a true and proper interpretation of article 252 clause 2 of the Constitution, neither Parliament nor the Minister responsible for Finance may allocate an amount that is less than five per cent (5%) of the total revenues of Ghana to the District Assemblies Common Fund;

"2. A declaration that upon a true and proper interpretation of article 252 clause 2 of the Constitution, sections 3(2), 3(5) and 7 of the Earmarked Funds Capping and Realignment Act, 2017 (Act 947) and Section 126(2) of the Local Governance Act, 2016 (Act 916), to the extent that they purport to limit the proportion of revenue to be allocated to the District Assemblies Common Fund to tax revenue and not total revenue, are inconsistent with and in contravention of the Constitution and are thus null and void and of no effect whatsoever;

"3. A declaration that the exclusion of the District Assemblies Common Fund in the disbursement of benchmark revenue from oil operations as provided for under sections 3, 16 and 21 as well as the First Schedule of the Petroleum Revenue Management Act, 2011 (Act 815) as amended is unconstitutional and therefore null and void;

"4. An order directed at the Defendant to take steps to ensure compliance with the letter and spirit of the Constitution encapsulated in article 252 clause 2; and

"5. Any other order or orders as this Honourable Court may deem fit in the circumstances."

The facts giving rise to this action are common cause between the parties and are coherently and concisely set out in the Defendant's Statement of Case as follows:

a. Article 252(1) of the 1992 Constitution established the District Assembly Common Fund (DACF) and Article 252(2) mandates Parliament to make annual provision for the allocation of not less than five percent (5%) of the **total revenue of Ghana** to District Assemblies for development, to be paid into the District Assemblies Common Fund (hereinafter referred to as 'the DACF') in quarterly installments.

b. Towards the implementation of the provisions of Article 252, Parliament passed the District Assemblies Common Fund Act, 1993 (Act 455), Section 17 of which defined total revenue as revenue collected by or accruing to the Central Government other than foreign loans, grants, non-tax revenue and revenues already collected by or for District Assemblies under any enactment in force.

c. Subsequently, in 2016, Parliament passed the Local Governance Act, 2016 (Act 936) which repealed the District Assemblies Common Fund Act, 1993 (Act 455). Section 126(2), of Act 936 provides that the total revenues of the country includes the revenues collected by or accruing to the Central Government other

than foreign loans and foreign grants, non-tax revenue, petroleum revenue paid into the Petroleum Holding Fund under section 3 of the Petroleum Revenue Management Act, 2011 (Act 815) and revenues already collected by or for the District Assemblies under any enactment.

d. Furthermore, section 234 of Act 936, defined "total revenue" as the entire revenue collected by or accruing to the Central Government other than foreign loans, grants, non-tax revenue and revenues already collected by or for a District Assembly under an enactment.

e. Additionally, Parliament passed the Earmarked Funds Capping and Realignment Act, 2017 (Act 947), which puts a cap on all earmarked funds including DACF as specified in the Schedule to that Act.

f. The objective of this Act is to ensure that all Earmarked Funds specified in the said Schedule is twenty-five percent of tax revenue, which the Minister of Finance must ensure is allocated to the Earmarked Funds specified in the Schedule, each according to a weight approved by Parliament as part of the Annual Budget for each fiscal year and each Earmarked Fund must be adjusted accordingly. By section 3(5) of Act 947, however, the Minister of Finance is enjoined to comply with any quantum of revenue allocation or retention of Internally Generated Funds that is provided for under the Constitution.

g. In December 2017, the Ministry of Finance presented the Budget Statement and Economic Policy of the Government of Ghana for 2017 Financial Year to Parliament. In the budget, the total revenue including oil tax revenues was stated as amounting to GH¢ 34,382,052,975.00

h. Thereafter, by the Appropriation Act (No. 1), 2017, (Act 945), enacted to execute the said budget, an amount of GH¢ 1,575,935,339.00 was allocated to the DACF

The crux of the Plaintiffs' complaint herein is that the amount allocated under Act 945 (i.e. the 2017 Appropriation Act) to the DACF was not 5% of the total revenue of that

year. Rather, the Plaintiffs alleged that the Finance Minister, in calculating the allocation for the DACF, excluded non-tax revenue and oil revenue in reliance on the provisions of Acts 815, 916 and 947. According to the Plaintiffs, these provisions are inconsistent with and in contravention of Article 252(2) of the Constitution, and are, thus, unconstitutional and void.

ISSUES FOR DETERMINATION

Pursuant to the Memorandum of Agreed Issues filed by the Parties, on 31st July, 2018, the following issues were set down for determination;

i. "Whether or not upon a true and proper interpretation of article 252(2) of the Constitution the term "total revenues" means all revenues irrespective of source;

ii. "Whether or not upon a true and proper interpretation of the Constitution sections 3(2), 3(5) and 7 of the Earmarked Funds Capping and Realignment Act, 2017 (Act 947) and section 126(2) of the Local Governance Act 2016 (Act 916) are inconsistent with Article 252(2) of the Constitution to the extent that the said statutes purport to limit the proportion of revenue to be allocated to the District Assemblies Common Fund to tax revenue;

iii. "Whether or not the purported exclusion of the District Assemblies Common Fund from the disbursement formula of benchmark revenue from oil operations as provided for in sections 3, 16 and 21 as well as the First schedule of the Petroleum Revenue Management Act 2011 (Act 815) is inconsistent with or in contravention of the Constitution."

JURISDICTION

The original jurisdiction of this Court being a special one, whenever it is invoked, it must be evident that the matter falls within the parameters set by the Constitution and as clarified in several decisions of the Court, such as **Ghana Bar Association v Attorney General and Another [2003-2004] 1 SCGLR 250, Bimpong Buta v General Legal Council [2003-2004] 2 SCGLR 1200, 2SCGLR 1038 and Abu Ramadan v Electoral Commision Writ No.J1/14/2016.**

The position of the law, as expounded in the cases cited above is that, inter alia, the existence of an ambiguity or imprecision or lack of clarity in a provision of the Constitution is a precondition for the invocation and exercise of the original interpretative jurisdiction of this Court. Where the words of a provision are precise, clear and unambiguous, or have been previously interpreted by this Court, its exclusive original interpretative jurisdiction cannot be invoked or exercised. This is important for ensuring that the special jurisdiction is not needlessly invoked and misused in actions that, albeit dressed in the garb of a constitutional action, might be competently determined by any other court. Consequently, it has become our practice that in all actions to invoke our original jurisdiction, whether or not a Defendant takes objection to our jurisdiction, or even expressly agrees with the Plaintiff that our jurisdiction is properly invoked, we take a pause to determine the question of the competence of the invocation of our jurisdiction, before proceeding with the adjudication of the matter or otherwise.

In this case, the Plaintiff is effectively calling upon the Court to interpret and give effect to the meaning of Article 252(2) of the Constitution. The Defendant did raise an objection to the invocation of the Court's jurisdiction, arguing that there is nothing ambiguous, imprecise or unclear about the expression "total revenues". The Defendant's argument was that the Plaintiffs failed to establish that, '*total revenue*' as used in the Constitution refers to both tax and non-tax revenue, and that the Constitution did not provide any definition for the phrase, neither is any reference made to it in the Report of the Committee of Experts.

Additionally, the Defendant argues that a careful reading of the Plaintiffs reliefs, reveals that the issue of interpretation does not arise save that the exclusion of certain revenues by Parliament, including petroleum revenue from the 'total revenue' is inconsistent with what constitutes total revenue under Article 252 (2). The Defendant contended that, as is clear from articles 176 and 181(3)(4), Parliament is vested with the power to exclude certain categories of public funds from the 'total revenue'

Having perused the Statements of Case filed by both parties, it is evident from the Memorandum of Agreed Issues, which issues arise from the Statements of Case filed by the Parties, that the meaning and scope of the expression"**total revenues of Ghana**" as it appears in Article 252(2), is unclear and requires interpretation by the Court. The meaning of the words is essential for a full understanding of the manner in which revenue is to be apportioned to the DACF and, depending on the interpretation of "total revenues of Ghana", the impugned statutory provisions may either be held to be constitutional or unconstitutional.

The Plaintiffs' Case

The Plaintiffs argue that the apportionment made by both Parliament and the Executive in the disbursement of financial resources to the DACF results in resource transfers which are below the constitutional minimum of 5 % of total revenues of Ghana. According to the Plaintiffs, whether one applies the plain meaning approach, or the purposive approach, of interpretation, "total revenues of Ghana", can only refer to the sum-total of public monies collected by the government in the course of its operations. They contend that, from the choice of words used, the framers of the Constitution intended that 5% of **all** the revenue accruing to the government is required to be allocated to the DACF and that, had the framers intended any part of the revenue to be excluded, it would have been so expressed in the Constitution. Plaintiffs, further, contended that the purpose of the provision was to ensure that there would be a constant flow of funds to guarantee a sound financial base for the operations of the

type of local government system established by the Constitution. They submitted that the words "total revenues of Ghana", having been used in the Constitution, any interpretation or application of those words by Parliament must accord with the objectives intended by the framers of the Constitution. Rather, according to the Plaintiffs, the outcome of the interpretation given to 'total revenue', by the various legislative provisions, particularly the Local Governance Act, the Earmarked Funds Capping and Realignment Act and the Petroleum Revenue (Management) Act, is the exclusion of classes of revenue, such as non-tax revenue and petroleum revenues, from the ambit of 'total revenues of Ghana'. In the view of the Plaintiffs, the net result is that the DACF has been deprived of essential funds for local governance and development, contrary to what the framers of the Constitution intended or otherwise envisaged.

Hence, the Plaintiffs submitted that the provisions that exclude non-tax revenue and oil revenue from the application of 'total revenue of Ghana' for the purpose of calculating the 5% for the DACF are in violation of the Constitution and ought to be struck down.

The Plaintiffs argued, in the alternative, that, if Parliament might be said to have power to exclude some sources of government revenue from the calculation of the allocation due to the DACF, then there must be a compelling rationale for excluding any particular source of revenue. Hence, in this regard, they contend that the exclusion of petroleum revenue, which is a natural resource, is arbitrary since revenue from solid natural resources is included in the allocation to the DACF.

The Defendant's Case

The Defendant appears to agree that "total revenues of Ghana" Article 252(2) refers to all sources of revenue accruing to the state but contends that the provision has been made subject to other provisions of the Constitution. The Defendant therefore drew attention to the fact that certain provisions of the Constitution confer on Parliament the power to determine what constitutes "total revenues of Ghana". According to Defendant, Articles 176(2) empowers Parliament to determine 'total revenue' and that is exactly what Parliament did in the provisions of the statutes Plaintiffs are complaining

about. The Defendant, therefore submitted that, upon a true and proper construction of Article 181(3) & (4), Parliament is justified in excluding loans contracted by the government from total revenue for the purpose of allocation to the DACF because such loan funds are usually contracted for specific purposes stated in the loan agreements. Thus, according to the Defendant, it is the very same Constitution, which establishes the DACF, that authorizes Parliament to take out certain sources from the total revenue. Therefore, the provisions in that regard are constitutional.

Analysis

We shall first consider the argument of the Defendant that Articles 176(2) empowers Parliament to determine what constitutes "total revenues of Ghana" for purposes of Article 252(2). The provisions of the article are as follows:

"176. (1) There shall be paid into the Consolidated Fund, subject to the provisions of this article –

(a) all revenues or other monies raised or received for the purposes of, or on behalf of, the Government; and

(b) any other monies raised or received in trust for, or on behalf of, the Government,

(2) The revenues or other monies referred to in clause (1) of this article shall not include revenues or other monies –

(a) that are payable by or under an Act of Parliament into some other fund established for specific purpose; or

(b) that may, by or under an Act of Parliament, be retained by the department of government that received them for the purposes of defraying the expenses of that department." (Emphasis added)

In principle, one cannot gainsay the Defendant's submission that, because Article 252(2) is expressed to be subject to the Constitution, any provision of the Constitution which might be interpreted to place a limitation on the words of the Article ought to be held to qualify the said Article. However, as is patently clear, the part of the Article 176(2) relied on by the Defendant does not limit and cannot be taken as limiting, the scope of the words used in Article 252(2). The provisions of Article 176(2) are concerned with custody of revenue and monies raised or received by the government and stipulates that they shall be paid into the Consolidated Fund or such specific purpose funds as Parliament may establish. As to how the monies that are paid into the Consolidated Fund and the funds Parliament may establish are to be applied, the Article does make any provision. Provisions on the utilization of monies in the Consolidated Fund are set out in other parts of the Constitution. For example, by article 127(4) of the Constitution, all administrative expenses of the judiciary including emoluments shall be charged on the Consolidated Fund. The monies in the specific purpose funds that Parliament may establish would be applied in the manner Parliament provides in the statutes that set them up. An instance of such fund and its usage is as set out in Section 2 of the Road Fund Act, 1997 (Act 536), which provides that monies in the fund shall be applied for routine and periodic maintenance and rehabilitation of public roads.

Where Parliament establishes any fund, it has a discretion to determine the sources of government revenue, and the percentage thereof, that shall be paid into such fund. Thus, as a further example, Parliament, by Section 3(a) of the Ghana Education Trust Fund Act, 2000 (Act 581) has established that 2.5% of value added tax receipts is to be paid into the GETFUND. Pursuant to Article 176(2), Parliament may even set up a specific purpose fund and impose a levy specifically for that fund as in the case of the National Insurance Levy provided for by Section 78(a) of the National Health Insurance Act, 2003 (Act 650).

However, it is the Constitution itself that established the DACF, and it has specifically provided for the source of money and determined the minimum percentage that shall be apportioned to it. From the language of Article 252(2), therefore, although

Parliament may increase the percentage to be paid into the DACF, Parliament has no discretion in respect of the source of money and the minimum percentage. Article 252 provides that;

> **(1) There shall be a fund to be known as the District Assemblies Common Fund.**
>
> **(2) Subject to the provisions of this Constitution, Parliament shall annually make provision for the allocation of not less than five percent of the total revenues of Ghana to the District Assemblies for development; and the amount shall be paid into the District Assemblies Common Fund in quarterly installments.**
>
> **(3) The monies accruing to the district Assemblies in the Common Fund shall be distributed among all the District Assemblies on the basis of a formula approved by Parliament.**
>
> **(4) There shall be appointed by the President with the approval of Parliament, a District Assemblies Common Fund Administrator.**
>
> **(5) Parliament shall by law prescribe the functions and tenure of office of the Administrator in such a manner as will ensure the effective and equitable administration of the District Assemblies Common Fund.**

Clearly, it was not the District Assemblies Common Fund Act, 1993 (Act 455) that established the DACF and the impression created in the legal submissions of the Defendant is totally erroneous. The DACF is a creature of the Constitution; what Article 252(3) &(5) of the Constitution required of Parliament, in respect of the DACF, was to prescribe the functions and tenure of the Administrator of the Fund, provide for the efficient management of the Fund and regulate its equitable distribution, nothing more. The Constitution empowered Parliament to determine the formula for distribution of the monies in the DACF. If it was intended that Parliament shall determine the ambit of 'total revenues of Ghana', Article 252 would have so provided in. Hence, when

Parliament in Section 17 of Act 455 purports to define "total revenues", which term the Constitution itself used in Article 252(2), Parliament, in truth, exceeded the power the Constitution conferred on it by Article 252(5). The constitutionally mandated authority to define the scope of total revenues as used in Article 252(2), where the same has not been defined by the Constitution itself, is the Supreme Court, albeit that until this suit, no one had sought such judicial interpretation of the expression.

It would be straining the meaning of the provisions in Article 176(2) to say that they empowered Parliament to determine what sources of Government revenue would constitute total revenues of Ghana for purposes of Article 252(2). In our view that argument of the Defendant is not supported by a true interpretation of Articles 176 and 252(5) when read together. We therefore reject that argument. To do otherwise would overstretch the scope of article 176(2) and do damage to the effectiveness of Article 252(2). It would create uncertainty and would empower Parliament to alter, at will, the sources of monies for the DCAF, thus placing into jeopardy the community viability and development at the local government level, intended to be assured by the constitutional establishment of a specifically sourced fund for effective local governance.

In interpreting "total revenues of Ghana" we need to advert our minds to the question whether, in the choice of those words in Article 252(2), the framers of the Constitution intended that every conceivable revenue accruing to the government of Ghana ought to be included in the calculation of the 'not less than 5%' for the DACF? Might the framers be said not to have intended it to cover some of the sources of revenue that Parliament has sought to exclude by the impugned provisions? Stated differently, what is the intended scope of the words. See **Republic v High Court (Commercial Division), Accra: Ex Parte Attorney-General (Balkan Energy Ghana Ltd &Ors Interested Parties) [2011] 2 SCGLR 1183 at pp 1190-1191.**

In order to answer the first question we need to examine the principles of interpretation of a constitutional document, such as we have, which is expected to direct the affairs of a nation for all time; the present as well as the future. It now a crystalised principle that

the Constitution must be read as a whole and construed purposively with an eye into the future. In delivering the judgment of the Court in ***Tuffuor v Attorney-General*** [1980] GLR 637 at pages 647-648, Sowah JSC (as he then was) stated as follows:

> "A written Constitution such as ours is not an ordinary Act of Parliament. It embodies the will of a people. It also mirrors their history. Account, therefore, needs to be taken of it as a landmark in a people's search for progress. It contains within it their aspirations and their hopes for a better and fuller life...The Constitution has its letter of the law. Equally, the Constitution has its spirit. It is the fountain-head for the authority which each of the three arms of government possesses and exercises. It is a source of strength. It is a source of power. The executive, the legislature and the judiciary are created by the Constitution. Their authority is derived from the Constitution. Their sustenance is derived from the Constitution. Its methods of alteration are specified. In our peculiar circumstances, these methods require the involvement of the whole body politic of Ghana. **Its language, therefore, must be considered as if it were a living organism capable of growth and development indeed, it is a living organism capable of growth and development,** as the body politic of Ghana itself is capable of growth and development. A broad and liberal spirit is required for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach to interpretation would not do. We must take account of its principles and bring that consideration to bear, in **bringing it into conformity with the needs of the time.**" [Emphasis added]

His Lordship continued at page 648:

> "And so a construction should be avoided which leads to absurdity. And when a particular interpretation leads to two, shall we say "inconsistent" results, the spirit of the Constitution would demand that the more reasonable of the two should be adhered to. We must have recourse to the Constitution as a whole." [Emphasis added]

In his opinion in support of the majority decision of the Supreme Court in the landmark case of ***New Patriotic Party v Attorney General (31st December Case)*** [1993-94] 2 GLR 35, Francois JSC opined at pages 79-80:

> "My own contribution to the evaluation of a Constitution is that, **a Constitution is the out-pouring of the soul of the nation and its precious life-blood is its spirit. Accordingly, in interpreting the Constitution, we fail in our duty if we ignore its spirit. Both the letter and the spirit of the Constitution are essential fulcra which provide the leverage in the task of interpretation**…In every case, a true cognition of the Constitution can only proceed from the breadth of understanding of its spirit…The necessary conclusion is **that the written word and its underlying spirit are inseparable bedfellows in the true interpretation of the Constitution**." [Emphasis added]

Borrowing from outside Ghana, one may also look at the words of Lord Denning MR in the case of ***Buchanan & Co Ltd v Babco Forwarding & Shippin****g UK Ltd* [1977] 1 All ER 518, when explaining what European Judges refer to as the 'schematic and teleological' method of interpretation, that:

> "All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. **They go by the design or purpose which lies behind it. When they come upon a situation which is to their mind within the spirit - but not the letter -** of the legislation they solve the problem by looking at the **design and purpose** of the legislation- at the effect it was sought to achieve. They proceed then to **interpret the legislation so as to produce the desired effect**…"[emphasis supplied]

Lord Denning expressed strong support for the Purposive Approach to Interpretation in his book, "*The Closing Chapter"* Butterworths, 1985, at pp 93-98. A portion of his views

is quoted by Bimpong Buta in his book, "The Law of Interpretation in Ghana; (Exposition & Critique), 1995 p 277.

The memorandum to the ***Interpretation Act 2009 (Act 792)*** has given legal backing to the 'living constitutionalist' approach to interpretation. It provides that:

> "By that process the construction and interpretation of the constitution, 1992, will not be tied down by the Interpretation Act but will take account of the cultural, economical, political and social development of the country without recourse to amendments which can be avoided if the spirit of the Constitution is given its due prominence. The Constitution is a sacred document. It must of necessity deal with facts of the situation, abnormal or usual. **It will grow with the development of the nation and face challenging changes and new circumstances**. It must be allowed to germinate and develop its own peculiar conventions and constructions not hampered by niceties of language and form that would impede its singular progress." [Emphasis added]

Thus this Court, per Date-Bah, JSC, in the case of ***Ghana Lotto Operators Association v National Lottery Authority*** *[2007-2008] 2 SCGLR 1088* stated as follows:

> "A more modern approach would be to see the document as a living organism. As the problems of the nation change, so too must the interpretations of the Constitution by the Judiciary. Interpreting the Constitution as a living organism implies that sometimes there may be a departure from the subjective intention of the framers of it. The objective purpose of the Constitution may require an interpretation different from that of the original framers of it."

In ***Asare v Attorney-General*** *[2003-2004] SCGLR 823,* at pages 834 and 844, Date-Bah JSC distinguished between the subjective purpose and objective purpose of the Constitution as follows:

> "The subjective purpose of a constitution or statute is the actual intent that the authors of it, namely the framers of the constitution or the legislature, respectively, had at the time of the making of the constitution or the statute. On the other hand, the objective purpose is not what the author actually intended but rather what a hypothetical reasonable author would have intended, given the context of the underlying legal system, history and values, etc of the society for which he is making law. This objective purpose will thus usually be interpreted to include the realization, through the given legal text, of the fundamental or core values of the legal system..."

Reading Articles 240 and 252 together, and taking note of the fact that these articles have been entrenched by the framers of the Constitution in Article 290(1)(o), the purpose of the provision is clearly to assure sound system of local government and administration, whose core feature is viable decentralization. The article is, therefore, intended to guarantee adequate financial resources to the Assemblies and to create firm foundations for growth at the local government level, unlike what pertained in the period prior to this Constitution when every development was initiated from the Central Government.

Armed with the abovementioned principles of constitutional interpretation, we are of the view that the framers of the Constitution did not by Article 252(2) intend that every conceivable revenue ought to be added in the calculation of the allocation to the DACF.

Having answered the first of the two questions in the negative, our next task is to determine the scope of "total revenues of Ghana" with reference to the particular sources of revenue excluded by the impugned provisions.

"Total revenues of Ghana" must, prima facie, refer to the total revenues and monies that accrue to the central government in any given year over which the government has a discretion as to how to apply same for its operations. 'Government' ass used here to includes the legislature and not limited to the executive arm of government as defined in Article 295 of the Constitution.

The statutory provision that has suffered the greatest attack from the Plaintiffs is section 126 of Act 963 which provides as follows :

> **"The total revenues of the country includes the revenues collected by or accruing to the central Government other than foreign loans and foreign grants, non-tax revenue, petroleum revenue paid into the Petroleum Holding Fund under section 3 of the Petroleum Revenue Management Act, 2011 (act 815) and revenues already collected by or for District Assemblies under any enactment"**

We believe that it is useful, at this juncture to take each excluded source of excluded revenue and ascertain whether or not such exclusion is justified.

Petroleum Funds.

The Local Government Act in defining total revenue for purposes of the DACF excluded all forms of petroleum revenue the management of which was provided for in the Petroleum Revenue Management Act, 2011 (Act 815). We read the statement of case of the Defendant closely to see if any policy justification was provided for the exclusion of petroleum revenue but we did not find any. In the course of arguing this case, only one justification, based on a legal ground, has been urged on us, ie that Parliament has been given authority by Article 176(2) to determine what constitutes total government revenues for purposes of calculating the allocation to the DACF. We have already rejected that argument so it means the Defendant has no justification for this far reaching provision.

Petroleum is a non-renewable natural resource, which Ghana only recently started producing in commercial quantities. Such production commenced long after the coming into effect of the Constitution. On the other hand, before the Constitution was promulgated, Ghana had a long history of generating and receiving revenue from mining of solid minerals which are also non-renewable and had been making investments towards the production of petroleum in commercial quantities. As the

plaintiffs rightly contended, there can be no justification for interpreting total revenues of Ghana to include revenues from solid minerals but exclude revenues from petroleum. We note that the Constitution employs the plural of the word and states total "revenues". That means that unless some other provision of the Constitution might be said to intend exclusion of a source of revenue, which is not so, we hold that the reference to total revenues of Ghana included revenues from all natural resources including petroleum revenue.

This holding does not diminish the laudable objectives and scheme in the Act for petroleum revenue management aimed at ensuring that the nation obtains optimal benefits from its petroleum resources. Nevertheless, the Constitution has directed that part of the revenue from petroleum shall be paid to the DACF to improve the financial strength of the District Assemblies to engender development at that level. By the scheme of revenue management adopted in Act 815, it does appear to us that not all the funds established under the Act are inconsistent with the scope of Article 252(2) as we have construed it, and as is clear from the following analysis:

- **Petroleum Holding Fund.**

This fund, which is established by Section 2 of Act 815, is only the receptacle of all petroleum revenue and we find nothing wrong with keeping the revenue separate as this would facilitate proper accounting.

- **Ghana Petroleum Funds**.

These are the Heritage Fund and the Stabilisation Fund established by Sections 10 and 11 respectively of the Act. The Heritage Fund is intended to support development by future generations of Ghana so as to prevent dissipation within a few generations. The interest accruing on it may be drawn upon and used for budgeted expenditure of the

country in intervals of fifteen years. Similarly, the Stabilisation Fund is a reserve of some of the petroleum revenue to be drawn from when oil prices fluctuate and the revenue from petroleum in any given year reduces below expected levels. In our understanding, the revenue in the Ghana Petroleum Funds is not available to the government to be applied for its operations in the year it is generated but it will be made available in some years to come. Now, Article 252(2) states that not less than 5% of total revenues shall be paid annually into the DACF. In our view, this can only refer to revenue available for use by the Government in any particular year and not necessarily revenue generated in that year. Therefore, in thus hedging round the unavailable funds, nothing is lost to the DACF from the Ghana Funds, since in years to come the monies would definitely be become available for use by the Government, whereupon the Article would apply to such deferred revenues and not less than 5% thereof will then become payable to the DACF.

- **Annual Budget Funding Amount.**

By Sections 16 and 17 of Act 815, on an annual basis, not more than seventy percent of the Benchmark Revenue received into the Petroleum Holding Fund in that year shall be transferred into the Consolidated Fund to support the national budget. It is our view that this category of the revenue forms part of the total revenues of Ghana for the year in question and, consequently, not less than 5% of it must be paid to the DACF.

The Plaintiffs have complained that the DACF ought not to have been excluded in the list of areas of national development to which the Annual Budget Funding Amount shall be applied as stated in Section 21 of Act 815.

Section 21(3) provides as follows:

> **"(3) Where the long-term national development plan approved by Parliament is not in place, the spending of petroleum revenue within the budget shall give priority to, but not be limited to programmes or activities relating to…."**

It is thus plain that the areas mentioned are to be given priority consideration and that they are not exclusive.

The provision that rather invokes suspicion is Section 22 which is that;

> **"22. Outside of the allocation of the Petroleum Holding Fund, extra budgetary activities or statutory earmarking of petroleum revenue for any consideration is prohibited."**

At first sight, it would appear that Parliament sought to prohibit allocation of petroleum revenue to the DACF but on close reading, the section refers to *statutory earmarked funds.* The DACF has been constitutionally earmarked not statutorily. Therefore it is obvious that Parliament did not exclude it.

Foreign Loans;

Article 181 (4) of the Constitution provides, that the terms and conditions of loans either granted or raised by the Government on behalf of itself or any public institution shall be placed before Parliament for approval. This presupposes that the framers of the Constitution were aware that monies received by the Government as loans would definitely be subject to terms and conditions including specification of the projects to which such loans must be applied. The application of monies from loans raised by the Government are, therefore, not entirely be at the discretion of the Government. Consequently, when the provisions in the Constitution are construed as a whole, the logical result would be that the reference to total revenues of Ghana in Article 152(2)was not intended to include loans. In any case, the budget statement for 2017 (as is the case in other budgets) does not capture loans under revenues.

But, we notice from a reading of the tables in the appendixes to the 2017 budget, which provoked this case, that in the figures on financing of the budget, there are differentiations among foreign project loans, programme loans and bonds. Our holding above is in respect to loans contracted within the purview of Article 181 by or under the authority of an Act of Parliament for purposes of a particular identified project or

program and does not exclude any loan that is contracted to fund the national budget in general terms, such as government treasury bills and bonds which are issued to raise money to finance regular government activities.

Foreign Grants;

These are similar to loans to the extent that the development partner who gives a grant may do so on terms and conditions as to application of such monies, over which the Government has no discretion. Consequently, as we have said with regard to foreign loans, foreign grants do not form part of total revenue for purposes of Article 252(2) provided that any foreign grant that permits Government discretion as to the application of monies given shall not be excluded from total revenue under Article 252(2).

Non-tax revenue;

Prima facie, term non-tax revenue means the monies referred to are part of total revenues. In fact, Section 8 of Act 947 defines it as follows: **"is the recurring income earned by Government from sources other than taxes and grants".** This comprises of revenue from goods and services provided by the government; fees, penalties and fines; income from business ventures and investments by government; rent income and royalties. These are regular sources of revenue for government the application of which government has discretion to determine. In the circumstances, non-tax revenue was certainly in the contemplation of the framers of the Constitution when they provided that not less than 5% of the total revenue of Ghana be paid into the DACF.

As the Defendant rightly argues, what is known as internally generated funds of various government departments come under non-tax revenue. This, from the above holding might be seen as part of total revenues, except that, in the case of retained internally generated funds, the Constitution makes a provision which, in our understanding, limits the words "total revenues of Ghana' in Article 252(2). It is provided by Article 176(2)(b)

that the department of government that receives monies that would normally form part of government revenue may, by the authority of Parliament, retain part of such monies received for the purposes of defraying the expenses of that department. The Government has over the years, implemented this provision by authorizing retention by departments of a percentage of internally generated funds. Therefore, the Constitution having authorized a particular use to which such monies (for defraying expenses of the collecting department) are to be applied, must have intended that such retained funds would not form part of the total revenue of government for the purposes of Article 252(2). The distinction between clause 2(a) and 2(b) of Article 176 is that, whereas in clause 2(a) the Constitution talks only of the custody of the revenue, in clause 2(b) it directs a particular use to which the revenue shall be put.

In the light of the foregoing analysis, the portion of non-tax revenue that is paid to central government forms part of total revenues for calculating the portion due for payment into the DACF.

The Plaintiffs also complain about the **Earmarked Funds Capping and Realignment Act, 2017 (Act 947)**, which in Section 1 states that follows;

> **"1(1) This Act applies to Earmarked Funds**
>
> **(2) Where a provision in an enactment relating to an Earmarked Fund or an Internally Generated Fund is inconsistent or conflicts with a provision of this Act this Act shall prevail."**

The objects of the Act are spelt out in Section 2 thereof as follows;

> **"Objects**
>
> **2. The objects of this Act are to**
>
> **(a) provide a cap on the Earmarked Funds specified in the Schedule to ensure that the revenue encumbered by the Earmarked Funds as a result of allocations is twenty-five percent of tax revenue; and**

(b) empower the Minister in, consultation with the relevant sector Minister, to review the enactment under which the Earmarked Funds specified in the Schedule are established, and to make a determination as to whether or not a particular Earmarked Fund has outlived its purpose."

Number 5 on the Schedule referred to in the Act is the DACF. The complaint of the plaintiffs in this regard is that, if the DACF is added to all the statutory Earmarked Funds and made to share twenty-five percent of annual tax revenue, the amount to be allocated to the DACF is likely to be lower than what the Constitution directed in Article 252(2).

It is clear that the primary defect in this Act is Section 1(2) which stipulates that the Act prevails over any inconsistent "enactment". The term enactment includes a provision of a constitution and if by use of the term here Parliament intended that the Act prevails over inconsistent provisions of the Constitution, then without any doubt it is fundamentally wrong. An Act of Parliament which is later in time may expressly or impliedly amend an inconsistent provision in an earlier Act. No Act of Parliament that postdates the Constitution can possibly be taken to amend a provision of the Constitution. We therefore reiterate for the avoidance of any doubt that the DACF was established by the Constitution, which determined the source of money payable into it. It was not established by an Act of Parliament. Though Parliament may amend certain provisions of the Constitution, Article 252(2) which set up the DACF is entrenched and by Articles 290, it cannot be amended without a referendum.

Consequently, the inclusion of the DACF in the Schedule to Act 947 is in contravention of the constitution and the same is unconstitutional, void and of no effect. We, must emphasise however, that this finding does not make the rest of the Act void. We have taken due note of the desire of the Government to free itself from the constraints imposed on it by the statutory earmarking of revenue which leaves very little revenue for general development of the nation. The Government may realign statutory earmarked funds, but, certainly, it may not do so to the constitutional funds without

amending the relevant provisions of the Constitution in accordance with the dictates of the Constitution.

For the avoidance of doubt, our decision must not be interpreted to mean that levies imposed by Parliament to specifically provide money for specific-purpose funds, such as the National Health Insurance Levy under Act 650, the Energy Sector Levy (ESLA) under Act 899 or Petroleum Products Levy under Act 536; are to be treated as forming part of total revenues of Ghana for purposes of Article 252(2). Such levies could not have been in the contemplation of the framers of the Constitution since they are not regular and recurring sources of revenue to government.

Conclusion

We, therefore, make the following Orders:

1. Relief 1 endorsed in the plaintiff's writ of summons is dismissed as upon a true and proper interpretation of Article 252(2) "total revenues of Ghana" does not encompass every revenue no matter the source; we so declare accordingly.

2. a) To the extent that Sections 1(2), 2(b),3(1)(b),3(5)(a),7(a), and 8 of the Earmarked Funds Capping and Realignment Act,2017(Act 947) and Section 126 of the Local Governance Act, 2016 (Act 916) purport to limit the proportion of revenue due for allocation to the District Assemblies Common Fund as established by Article 252(2) of the Constitution, the same are in the contravention of the Constitution and are hereby declared to be null and void.

   b) Consequently the District Assemblies Common Fund is hereby deleted from the schedule to the said Act 947; and the references to the Annual Budget Funding Amount, provided for by Section 16 and 18 of the Petroleum Revenue Management Act 2011 (Act 815) from tax Revenue, in Section 126 of the Local Governance Act are hereby deleted.

c) For avoidance of doubt such amounts of Internally Generated Funds that Parliament has, pursuant to Article 176(2) (b) authorized to be retained by departments that receive them, as provided for under Act 947, remain valid and in effect.

3. Relief 3 is dismissed.

4. Consequently, we hereby direct that in calculating the annual amount to be allocated to the District Assemblies Common Fund, the Defendant shall comply strictly with the provisions of Article 252(2) as construed and interpreted in this judgment.

"Total Revenue of Ghana," for purposes of allocation to the District Assemblies Common Fund shall include Petroleum Revenue allotted as Annual Budget Support amount and non-tax revenue paid to Central Government. Total Revenues of Ghana shall not include foreign loans and grants, Petroleum receipt paid into the Heritage and Stabilization Fund, retained Internally Generated Fund and levies imposed by Parliament for specific purposes under an Act of Parliament.

S. A. B. AKUFFO (MS)
(CHIEF JUSTICE)

ADINYIRA (MRS), JSC:-

I agree with the conclusion and reasoning of my sister Akuffo, CJ.

S. O. B. ADINYIRA (MRS)

(JUSTICE OF THE SUPREME COURT)

DOTSE, JSC:-

I agree with the conclusion and reasoning of my sister Akuffo, CJ.

V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

BAFFOE-BONNIE, JSC:-

I agree with the conclusion and reasoning of my sister Akuffo, CJ.

P. BAFFOE-BONNIE

(JUSTICE OF THE SUPREME COURT)

GBADEGBE, JSC:-

I agree with the conclusion and reasoning of my sister Akuffo, CJ.

N. S. GBADEGBE

(JUSTICE OF THE SUPREME COURT)

PWAMANG, JSC:-

I agree with the conclusion and reasoning of my sister Akuffo, CJ.

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

DORDZIE (MRS), JSC:-

I agree with the conclusion and reasoning of my sister Akuffo, CJ.

A. M. A. DORDZIE (MRS)

(JUSTICE OF THE SUPREME COURT)

COUNSEL

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