IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: PWAMANG JSC (PRESIDING)
OWUSU (MS.) JSC
LOVELACE-JOHNSOSN (MS.) JSC
TORKORNOO (MRS.) JSC
AMADU JSC
PROF. MENSA-BONSU (MRS.) JSC
ASIEDU JSC

CIVIL MOTION

NO. J7/02/2023

26TH APRIL, 2023

IRENE TETTEY-ENYO …… PLAINTIFF/RESPONDENT/RESPONDENT RESPONDENT

VS

ELECTRICITY COMPANY OF GHANA LTD. … DEFENDANT/APPELLANT/ APPELLANT/APPLICANT

RULING

PWAMANG JSC:-

My Lords, the applicant before us is praying for a review of the decision of the ordinary bench delivered on 29th June, 2022 on the main ground, that the ordinary bench inadvertently committed a basic error when they, by implication, upheld that the applicant is a public service.

The respondent sued the applicant in the High Court for wrongful dismissal at common law and among the reliefs claimed was for an order of reinstatement. The applicant defended the action by stating that the dismissal of the respondent was not wrongful and further that, even if it was wrongful, the respondent was entitled to only damages and not reinstatement since the applicant is not a public service.

In his judgment, the High Court judge held that the dismissal was wrongful and also that the applicant is a public service thus, apart from the award of damages, the applicant was liable to be ordered to reinstate the respondent. The trial judge relied on article 191 of the Constitution, 1992 which protects a member of the public services against dismissal without just cause, as well as the case of **G.N.T.C. & Anor v Baiden [1991] 1 GLR 567.** The High Court accordingly ordered that the respondent be reinstated forthwith and paid all areas of salary. In addition, the High Court awarded damages to the respondent in the sum equivalent to her 15 months salary. The applicant appealed against the judgment of the High Court but the Court of Appeal dismissed the appeal in its entirety. The applicant further appealed to the Supreme Court and the ordinary bench allowed the appeal in part. The ordinary bench upheld the finding that the dismissal of the respondent was wrongful but disagreed with the awards that were made by the trial judge and affirmed by the Court of Appeal. The ordinary bench concluded their judgment as follows;

"The appeal against the decision of the Court of Appeal dated 21st May 2020, which decision upheld the judgment of the High Court dated 19th November, 2013 is allowed

in part. The judgment of the Court of Appeal affirming all the reliefs claimed by the plaintiff is varied by setting aside the award of 15 months salary as damages for wrongful dismissal of the plaintiff. No order is made as to costs."

The view of the matter that was taken by the ordinary bench was that, by the orders made by the trial judge for reinstatement of the respondent and payment of all areas of her salary, she was restored to the position she would have been but for the wrongful dismissal so she did not suffer any loss. In the circumstances, there was no justification for the additional award of 15 months salary as general damages, hence the general damages were set aside.

However, in this review application, the applicant argues that the ordinary bench inadvertently failed to address the aspect of its case where it argued that it is not a public service and therefore it is not liable to be ordered to reinstate the respondent. The applicant relies on the case of **Bani v Maersk Ghana Ltd [2011]2 SCGLR 796.** It submits that if the ordinary bench had interpreted article 190 of the Constitution in relation to the **Electricity Corporation of Ghana Decree, 1967 (NLCD 125)** and the **Statutory Corporations (Conversion to Companies) Act, 1993 (Act 461),** they would have concluded that the applicant, though a public corporation, was set up by the state as a commercial venture and therefore not part of the Public Services of Ghana.

It is important to underscore, that in this case, it is common cause between the parties that if indeed the applicant is not part of the Public Services of Ghana, then it is not liable to have been ordered to reinstate the respondent even if the dismissal was found to be wrongful. In that light, the respondent argues, that on a true and proper construction of all the relevant statutes touching and concerning the applicant, it falls within the definition of Public Services of Ghana envisaged by article 190 of the Constitution. The respondent mentions NLCD 125 and Act 461 as the applicant does, but insists that those statutes ought to be construed together with the **Public Services Act, 1994 (Act 482)** and

the **State Interests and Governance Authority Act, 2019 (Act 990)(the SIGA Act)**. She refers to us the Supreme Court decisions in the cases of **Ayine v Attorney-General, Writ No. J1/05/2018 dated 13th May, 2020, Mark Assibey Yeboah v Electricity Company of Ghana & Ors, Writ No. J1/7/2016 dated 28th July, 2016** and **Klomegah (No. 2) v Ghana Ports & Harbours Authority & Anor (No. 2)[2013-2014] 1 SCGLR 581,** and submits that public service ought to be given a broad definition to include the applicant herein. We are not unaware of the new provisions in the **Labour Act, 2003 (Act 651)** on the remedy of reinstatement, but in this case the respondent did not invoke the provisions of Act 651 in the alternative and there was no discussion of those provisions in the courts below or before us.

The grounds on which the Supreme Court may grant an application for review of a decision of the court's ordinary bench are only two; that is, where after the decision there has been discovery of new and important matter or evidence; and where there are exceptional circumstances that have resulted in a miscarriage of justice. The applicant herein relies on the presence of exceptional circumstances and in **Afranie II v Quarcoo and Ors [1992] 2 GLR 561** at pp. 605 to 606, Aikins, JSC summarised some of the circumstances that were stated in earlier decisions of the Supreme Court as exceptional and that may justify invocation of the review jurisdiction. He said as follows;

"Exactly what constitute exceptional circumstances are not spelt out, but various decisions of this court contain diverse opinions on what may be regarded as constituting exceptional circumstances. For example:

(a) The circumstances should be of such a nature as to convince this court that the judgment should be reversed in the interest of justice, and should indicate clearly that there had been a miscarriage of justice: see Bisi v. Kwayie [1987-88] 2 G.L.R. 295, S.C.

(b) The jurisdiction is exercisable in exceptional circumstances where demands of justice make the exercise extremely necessary to avoid irremediable harm to an applicant: see Nasali v. Addy [1987-88] 2 G.L.R. 286, S.C.

(c) Where a fundamental and basic error might have inadvertently been committed by the court resulting in a grave miscarriage of justice: see Mechanical Lloyd Assembly Plant Ltd. v. Nartey [1987-88] 2 G.L.R. 598, S.C.

(d) Decision was given per incuriam for failure to consider a statute or case law or a fundamental principle of practice and procedure relevant to the decision and which would have resulted in a different decision: see Mechanical Lloyd Assembly Plant Ltd. v. Nartey (supra) and Ababio v. Mensah (No. 2) [1989-90] 1 G.L.R. 573, S.C.

(e) When the appellant had sought for a specific relief which materially affected the appeal and had argued grounds in support, but the appellate court failed or neglected to make a decision on it: see Mechanical Lloyd Assembly Plant Ltd. v. Nartey (supra)."

It seems to us that Aikins JSC's paragraphs (c), (d) and (e) above apply in this case. The parties at the trial in the High Court did not set down as one of the issues for determination; whether or not the applicant is a public service and thereby amenable to be ordered to reinstate an employee who was wrongfully dismissed. That notwithstanding, that is a crucial issue that arose in the case and the relief of reinstatement that was granted by the High Court judge was premised on his determination of that issue against the applicant. Though the ordinary bench did not expressly tackle this issue, by upholding the order of reinstatement in the face of the counter arguments by the applicant, the court by implication endorsed the position that was taken by the trial judge that the applicant is a public service. However, a decision on this issue, which is admittedly of considerable public importance when the precedent it sets for similarly situated state entities is considered, called for a holistic interpretation

of the enactments as listed above. We therefore agree with the applicant that this is a proper case for the court to exercise its review jurisdiction and settle definitively, the question of the status of the applicant within the context of article 190 of the Constitution.

Article 190(1)(b) provides as follows;

(1) The Public Services of Ghana shall include…

(b) public corporations other than those set up as commercial ventures.

Under article 295 of the Constitution, which is the Interpretation article of the Constitution, public corporation is defined as;

"means a corporation or any other body of persons established by an Act of Parliament or set up out of funds provided by Parliament or other public funds."

Article 190 clause (1) paragraph (a) lists 14 specified Services as automatic members of the Public Services of Ghana. However, by paragraph (b) of clause (1), public corporations have been divided into two categories; public corporations *simpliciter* and commercial ventures set up by the state. Public corporations *simpliciter* are members of the Public Services of Ghana but those set up as commercial ventures are not members of the public service.

The respondent makes reference to Acts 482 and 990 in relation to the Public Services of Ghana, but from the provisions of those statutes, it appears that whereas the mandate of the Public Services Commission (PSC) covers those state agencies defined as Public Services under article 190 of the Constitution, the mandate of SIGA is in respect of other state entities that do not necessarily fall under the definition of Public Services of Ghana.

By article 196 of the Constitution, Parliament was mandated to provide for the functions of the Public Services Commission pursuant to which Act 482 was passed. Under section 4(a)(b)&(c) of Act 482, the functions of the PSC include the following;

(a) to advise Government on the criteria for appointment to Public offices as well as persons to hold or act in Public offices;

(b) to promote efficiency, accountability and integrity in the Public Services;

(c) to prescribe appropriate systems and procedures for the management of personnel records within the Public Services;

All the references with regard to the work of the PSC are to the Public Services as defined under article 190.

Act 990, on the other hand, established SIGA to take over the work that was done by the erstwhile State Enterprises Commission. By sections 3(1)&4(h)(i)(j) of Act 990, the objectives and functions of SIGA include the following;

(a) promote within the framework of Government policy, the efficient or where applicable profitable operations of specified entities;

(b) ensure that specified entities adhere to good corporate governance practices;

(c) acquire, receive, hold and administer or dispose of shares of the State in state-owned enterprises and joint venture companies;

(d) oversee and administer the interests of the State in specified entities; and

(e) ensure that

(i) State-owned enterprises and joint venture companies introduce effective measures that promote the socio-economic growth of the country including, in particular, agriculture, industry and services in accordance with their core mandates; and

(ii) other State entities introduce measures for efficient regulation and higher standard of excellence.

Section 4…

(h) ensure that dividends due the State are paid by specified entities;

(i) advise the sector Minister on policy matters for effective corporate governance of specified entities;

(j) advise Government on the appointment and removal of Chief Executive Officers or members of the boards or other governing bodies of specified entities; and…

SIGA's mandate covers specified entities and these are required by section 29 of Act 990 to be listed in a Register which has been displayed on its website. The state entities have been categorised into three groups; (i) State Owned Enterprises (ii) Joint Venture Companies and, (iii) Other State Entities. There are, at the last count per the website of SIGA, 53 State Owned Enterprises, and Electricity Company of Ghana Limited is No.6 on the Register. Is the respondent arguing that entities like the applicant that come under the mandate of SIGA as state owned enterprises are still subject to oversight by the Public Services Commission? Act 990 which is a later in time statute states as follows;

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(1) This Act applies to specified entities.

(2) This Act does not abrogate or affect the validity of the functions or operations of any specified entity.

(3) Subject to subsection (2), where there is a conflict or inconsistency, between any other enactment and this Act, this Act shall prevail.

(Emphasis supplied).

So, going by the two statutes, the applicant comes under the mandate of SIGA and not the Public Services Commission. Sections 3(c) of Act 990 makes SIGA the authority to hold and manage government's shares in the applicant while section 4(h) of Act 990 mandates SIGA to ensure the payment of dividends by the applicant to Government.

In any event, the central question for determination in this case is whether or not the applicant was set up as a commercial venture? According to **Oxford Advanced Learners Dictionary; Eight Edition,** "commercial" has a number of ordinary meanings, but in the context in which the word is used in article 190(1)(b), the applicable ordinary meaning in our opinion found in the dictionary is; "intended to make a profit". In the interpretation of statutes, the court is required to give non-technical words their ordinary meaning within the context they appear, unless the ordinary meaning leads to an absurdity or an unjust outcome. Applying the plain ordinary meaning of the word "commercial" in the context it is used under article 190(1)(b), the provision refers to ventures set up by the state that are intended to make profit. This is as against corporations set up by the state whose main purpose is to provide a social service, even if it does not make profit.

The applicant was first established in 1967 as a public corporation by NLCD 125. However, its status was changed following the enactment of Act 461. The preamble and section 1 of Act 461 provide as follows;

AN ACT to provide for the conversion of specified statutory corporations into companies limited by shares; to provide for the vesting of the assets and liabilities of the statutory corporations in the successor companies; to provide for the holding of shares in the companies and for other related matters.

1. Conversion of specified statutory corporation into companies

A company under the Companies Act, 1963 (Act 179) shall be formed and registered after the coming into force of this Act, for the purpose of vesting in the company the assets, properties, rights, liabilities and obligations to which any of the statutory corporations specified in the Schedule to this Act was entitled or subject to immediately before the registration.

The Schedule of Act 461 lists 15 public corporations, including state-owned banks, that were to be converted to companies limited by shares and the applicant is number 7 on the list. It is not disputed that the conversion was effected and now the applicant is a company limited by shares with the shares vested in the Government. By this conversion, it is plain that the Government decided to change the status of the applicant and for it to operate in accordance with the provisions of the Companies Act for companies limited by shares. This, in our opinion, was to turn the applicant and the other state owned enterprises listed in the Schedule from public corporations *simpliciter* to commercial ventures owned by the state. By this change, the applicant is required by law, annually, to prepare profit and loss accounts and whenever dividend is declared by the board of directors, to pay it to Government as the shareholder. These, for us, are clear indications that the applicant is intended by the state to operate as a commercial venture and to make profit. Sections 129(4) and 131(4) of the Companies Act, 2019 (Act 992) on accounts of a company limited by shares provide as follows;

129(4) The statement of comprehensive income and statement of cash flows shall, subject to subsection (4) of section 131, relating to a consolidated financial statement,

(a) give a true and fair view of the profit or loss and other comprehensive income of the company for the period to which the statement relates;

Section 131(4)

(4) The consolidated financial statements shall—

(a) give a true and fair view of the profit or loss and other comprehensive income and of the state of affairs of the company and the subsidiaries dealt with by the consolidated financial statements as a whole, in so far as it concerns the interest of the company; and

(b) be prepared in compliance with International Financial Reporting Standards as adopted by the Institute of Chartered Accountants, Ghana.

Therefore, on a true and proper interpretation of the provisions of the statutes that apply to the applicant, we hold that it is set up as a commercial venture and does not form part of the Public Services of Ghana under article 190 of the Constitution. We have considered this court's earlier decisions referred to us by the respondent but we do not find that any of them was concerned with the issue that arises in this case, which is whether the state-owned enterprises that were turned into companies limited by shares are members of the public services.

In view of our interpretation above, the trial judge committed a fundamental error of law when he held that the applicant is a public service and made an order against it to reinstate the respondent in its employment. Consequently, it was an inadvertent basic error for the ordinary bench to have upheld the order of reinstatement. This has obviously occasioned a miscarriage of justice to the applicant by compelling it to take back the respondent, whereas under the law relied on in this case, the respondent was entitled to only damages for her wrongful dismissal. Accordingly, we review the judgment of the ordinary bench dated 29th June, 2022 and set same aside. In its place we decide as follows;

The judgment of the Court of Appeal dated 21st May 2020, which affirmed the judgment of the High Court dated 19th November, 2013 is set aside and we order the applicant to pay the respondent only damages in the sum of 15 months of her salary for wrongful dismissal. However, on account of the special circumstances of this case, and only because the respondent may have received payments for areas of salary by virtue of three earlier Superior Courts judgments, if those payments are higher than the damages of 15 months salary, then the said payments if already received by the respondent, shall constitute the quantum of damages for her wrongful dismissal in this case. For the

avoidance of doubt, the order of reinstatement of the respondent and payment of any benefits is set aside.

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

A. LOVELACE-JOHNSON (MS.)

(JUSTICE OF THE SUPREME COURT)

G. TORKORNOO (MRS.)

(JUSTICE OF THE SUPREME COURT)

I.O. TANKO AMADU

(JUSTICE OF THE SUPREME COURT)

PROF. H. J. A. N. MENSA-BONSU (MRS.)

(JUSTICE OF THE SUPREME COURT)

S. K. A. ASIEDU

(JUSTICE OF THE SUPREME COURT)

COUNSEL

F. PAA KWESI ABAIDOO ESQ. FOR THE PLAINTIFF/RESPONDENT/ RESPONDENT/RESPONDENT.

SEYRAM DABIE ESQ. FOR THE DEFENDANT/APPELLANT/APPELLANT/ APPLICANT BEING LED BY JEMIMA IRRE ARYERE ESQ..