IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA – A.D. 2021

SUIT NO.: IS/21/2021

BETWEEN

J7/7/2021

THE REPUBLIC

VERSUS

HIGH COURT, HO

EX PARTE: ATTORNEY-GENERAL ... APPLICANT/RESPONDENT

AND

1. **PROF. MARGARET KWEKU**
2. **SIMON ALAN OPOKU-MINTAH**
3. **JOHN KWAME OBIMPEH**
4. **GODFRED KOKU FOFIE**
5. **FELIX QUARSHIE**

} **INTERESTED PARTIES/ APPLICANTS**

MOTION ON NOTICE FOR REVIEW OF THE RULING OF THE SUPREME COURT DATED 5TH JANUARY 2021
(ARTICLES 133 OF THE CONSTITUTION AND RULES 54, 55 AND 56 OF CI 16 AS AMENDED)

PLEASE TAKE NOTICE that this Honourable Court shall be moved by Counsel for and on behalf of Interested Parties/Applicants herein praying for an order of the Court reviewing the Ruling delivered on 5th January 2021 on the grounds set forth in the Statement of Case and the accompanying affidavit.

And for any further or other order or orders as this Honourable Court may deem fit.

COURT TO BE MOVED on TUESDAY the 26TH day of January 2021 at 9.00am in the forenoon or so soon thereafter as counsel for and on behalf of Interested Parties/Applicants may be heard.

DATED AT ZENITH LAW CONSULT, HO THIS 8TH DAY OF JANUARY, 2021.

EMILE ATSU AGBAKPE ESQ.
ZENITH LAW CONSULT
P. O. BOX HP 922
HO
BARRISTER & SOLICITOR

LAWYER FOR INTERESTED PARTIES/APPLICANTS
eVOL/01057/21

THE REGISTRAR
SUPREME COURT
ACCRA

AND FOR SERVICE ON THE:

THE ATTORNEY-GENERAL, OFFICE OF THE ATTORNEY GENERAL AND MINISTRY OF JUSTICE.

IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA – A.D. 2021

SUIT NO.: JS/21/2021

BETWEEN

THE REPUBLIC

VERSUS

HIGH COURT, HO

EX PARTE: ATTORNEY-GENERAL ... APPLICANT/RESPONDENT

AND

1. **PROF. MARGARET KWEKU**
2. **SIMON ALAN OPOKU-MINTAH**
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4. **GODFRED KOKU FOFIE**
5. **FELIX QUARSHIE**

INTERESTED PARTIES/ APPLICANTS

AFFIDAVIT IN SUPPORT OF APPLICATION FOR REVIEW

I, PROFESSOR MARGARET KWEKU, resident at AH-066, Hohoe-Ahado in the Volta Region of the Republic of Ghana, do hereby make oath and say as follows:

1. I am the deponent herein and the 1st Interested Party/Applicant herein and I have the authority of the other applicants to swear to this affidavit on their behalves as well as on my own behalf.

2. On 5th January 2021, on an application by the Attorney-General, this court gave a ruling whereby it quashed certain proceedings before the High Court, Ho.

3. A copy of the said ruling is herewith attached, marked "**MKSCR 1**".

4. I am advised by Counsel and verily believe that this ruling contained fundamental errors of law which have occasioned us, the Applicants herein, a grave miscarriage of justice.

5. The Statement of Case filed by our Solicitor sets out eighteen grounds for review which, I am advised and verily believe, justify this Honourable Court reviewing its own decision.

6. In respect of the ruling of the Court on the eligibility of His Lordship Justice Hoenyenugah to sit on this case, my lawyers have applied for a certified true copy of the said ruling and I will be able to exhibit that also upon receipt.

7. In respect of the issue of His Lordship Justice Hoenyenugah, a letter was written by my Solicitor to the Registrar of the Supreme Court asking His Lordship to recuse himself.

8. Before the court sat, my Counsel were informed by the Registrar that His Lordship the Chief Justice had minuted on the said letter to the effect that the matter of His Lordship Justice Hoenyenugah recusing himself be raised in open court, which Counsel did.

9. At the hearing of this application Counsel will seek leave to refer to all processes filed in the suit herein.

10. It is in the interest of justice that this Honourable Court correct its fundamental errors.

11. Wherefore I swear to this affidavit in support of the application for review.

SWORN AT ACCRA

THIS 8TH DAY OF

JANUARY, 2021

.....

DEPONENT

BEFORE ME

COMMISSIONER FOR OATHS

YUUSUFU KLORTIA KORQUAYE
Commissioner For Oaths
P.O. Box AN 8897, Accra-North

Exhibit "MKSCR. 1"

IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA- A.D. 2021

CORAM: **APPAU, JSC (PRESIDING)**
MARFUL-SAU, JSC
TORKORNOO (MRS.), JSC
HONYENUGA, JSC
AMADU, JSC

This is the Document marked Exh. "MKSCR" referred to in the Affidavit/oath of Professor M. Kweku Sworn before this 8th day of January 2021 Commissioner For Oaths

CERTIFIED TRUE COPY ... 2021 ... REGISTRAR SUPREME COURT OF GHANA

CIVIL MOTION
NO. J5/21/2021

5TH JANUARY, 2021

THE REPUBLIC

VRS

HIGH COURT, HO	.....	**RESPONDENT**
EX-PARTE: ATTORNEY-GENERAL	.....	**APPLICANT**
1. PROF. MARGARET KWEKU **2. SIMON ALAN OPOKU-MINTAH** **3. JOHN KWAME OBOMPEH** **4. GODFRED KOKU FOFIE** **5. FELIX QUARSHIE**	.....	**INTERESTED PARTIES**

RULING

APPAU, JSC:-

On the 23rd day of December, 2020, one Professor Margaret Kweku who was the parliamentary candidate of the National Democratic Congress (NDC) Party in the Hohoe Constituency of the Volta Region and four (4) others, namely; Simon Alan Opoku-Mintah,

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6-1-2021

John Kwame Obimpeh, Godfried Koku Kofie and Felix Quarshie who claimed to be registered voters in the Santrokofi, Akpafu, Likpe and Lolobi traditional areas in the Oti Region (hereinafter referred to as SALL Areas), initiated an action in the High Court, Ho by Originating Motion on Notice, praying for certain reliefs against the Electoral Commission as 1st respondent and three others. The three others are; Wisdom Kofi Akpakli (the Returning Officer for Hohoe Constituency, as 2nd respondent), John Peter Amewu (the NPP M.P. Elect for Hohoe Constituency, as 3rd respondent) and the Attorney-General, as the 4th respondent. Per their motion paper, the action of the applicants in the trial High Court, was premised on article 33 (1) of the Constitution, 1992; Order 67 of the High Court Civil Procedure Rules, 2004 [C.I. 47] and the Inherent Jurisdiction of the High Court.

Article 33 (1) and Order 67, rule 1 of C.I. 47 provide:

"Article 33 (1): ***Where a person alleges that a provision of this constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress.***

Order 67 rule 1 of C.I. 47: ***A person who seeks redress in respect of the enforcement of any fundamental human right in relation to the person under article 33 (1) of the Constitution shall submit an application to the High Court."***

In their application, the applicants were seeking six (6) declarations, an order of mandamus and three (3) restraining orders. These are:

1.

a. A declaration that the decision of the 1st respondent, implemented by the 2nd respondent, preventing and excluding the 2nd to 5th applicants and other registered voters in the Santrokofi, Akpafu, Likpe and Lolobi traditional areas from voting for a parliamentary candidate in the Hohoe Constituency, denied the said voters their

fundamental right to vote, to democratic participation and specifically, to be represented in Parliament;

b. A declaration that the eleventh hour decision of the 1st respondent, implemented by the 2nd respondent, preventing the holding of Parliamentary elections in the Santrokofi, Akpafu, Likpe and Lolobi traditional areas from voting for a parliamentary candidate in the Hohoe Constituency was arbitrary and capricious and without recourse to due process of law as required of the 1st and 2nd respondents by article 296 of the Constitution, 1992;

c. A declaration that the decision of the 1st respondent, implemented by the 2nd respondent, preventing and excluding the 2nd to 5th applicants and other registered voters from the four traditional areas concerned from voting for a parliamentary candidate, was in violation of the right to equality before the law of the registered voters in those areas;

d. A declaration that the refusal of the 1st respondent to address concerns raised by the NDC, the party on whose platform the 1st applicant stood, about the conduct of the parliamentary elections in the Hohoe Constituency, ending up with the eleventh hour decision to exclude certain voters from participation, was wholly unreasonable;

e. A declaration that the disregard by the 1st and 2nd respondents of the fundamental nature of the right of citizens in a democracy to vote and 1st respondent's disdain for authoritative pronouncements of the Supreme Court , led to wanton abuse of power by them in the conduct of the parliamentary elections in the Hohoe Constituency on 7th December, 2020.

f. A declaration that as a result of the numerous deficiencies in the conduct of the elections by the 1st and 2nd respondents as set out above, the 3rd respondent was not duly elected as the person to represent the people of Hohoe Constituency (including the applicants and all registered voters in the subject-areas) in Parliament from 7th January 2021 to 6th January 2025.

2. An order of mandamus to compel the 1st and 2nd respondents, to organize and conduct the parliamentary election in respect of the Hohoe Constituency including the Santrokofi and the other three traditional areas to enable all registered voters there to have the opportunity to vote for the determination of the member of parliament.

3. An order to restrain:

a. the 1st and 2nd respondents from seeking to gazette the 3rd respondent as the duly elected M.P. for the Hohoe Constituency from January 7th 2021 to January 6, 2025;

b. the 1st and 2nd respondents from in any way, presenting the 3rd respondent as duly elected to represent the people of Hohoe Constituency in Parliament; and

c. the 3rd respondent from presenting himself to be sworn in as the Member of Parliament for the Hohoe Constituency or otherwise holding himself out as such.

On the same day that the applicants filed the originating motion on notice, they also filed an ex-parte motion, praying for interim orders of injunction pending the determination of the substantive originating motion on notice. This ex-parte motion for injunction was fixed for hearing on the same date it was filed and it was indeed heard that day and granted by the trial High court. The orders sought by the applicants in the ex-parte application were to restrain:

(a) the 1st respondent from seeking to gazette the 3rd respondent as duly elected M.P. for the Hohoe Constituency;

(b) the 1st and 2nd respondents from presenting the 3rd respondent as duly elected to represent the people of Hohoe Constituency in Parliament from January 7th 2021 to January 6th, 2025; and

(c) the 3rd respondent from presenting himself to be sworn in as the Member of Parliament for the Hohoe Constituency or otherwise holding himself out as such.

The Order made by the trial court in the interim application, was as follows:

"It is ordered that the respondents be and are hereby restrained in the interim, and in particular:

(1) the 1st respondent from seeking to gazette the 3rd respondent as duly elected to be Member of Parliament for Hohoe Constituency from January 7th 2021 to January 6th, 2025;

(2) the 1st and 2nd respondents from, in any way, presenting the 3rd respondent as duly elected to represent the people of Hohoe Constituency in Parliament... and

(3) the 3rd respondent from presenting himself to be sworn in as the Member of Parliament for the Hohoe Constituency or otherwise holding himself out as such.

The Orders shall last for 10 days effective today."

My Lords and Lady, the instant application invoking our supervisory jurisdiction in the nature of certiorari and prohibition, which was filed on 29th December, 2020 by the Attorney-General (i.e. the 4th respondent in the action before the High Court, Ho and who, hereinafter, shall be referred to as 'Applicant'), is a progeny of the interim orders made by the trial High Court on 23rd December, 2020. The Applicant is praying for two supervisory reliefs. The first is an order of certiorari directed at the Ho High Court, to bring into this Court for the purpose of being quashed, the interim restraining orders made by the court dated 23rd December, 2020 and quoted supra. The second is an order prohibiting the High Court, Ho, coram: Buadi, J. from further hearing or conducting proceedings in the said originating motion on notice.

The Applicant stated three grounds for the application. The first was that the trial High Court has no jurisdiction under article 33 (1) of the Constitution, 1992, to entertain a matter in the nature of a parliamentary election petition and to grant any relief(s), interim, interlocutory or final, available in a parliamentary election commenced under article 99 and section 16 of the Representation of the People's Law, 1992 [PNDCL 284]. The second was that the proceedings of the said date and the orders emanating

therefrom, were void as same were in violation of article 99 of the Constitution, 1992. The third was that the orders of the trial High court dated 23rd December, 2020 constituted a patent error on the face of the record to the extent that they purported to confer on the applicants therein who are the interested parties herein, non-existent voting rights in respect of the Hohoe Constituency in the Volta Region.

The sum total of applicant's arguments in his statement of case, in brief, was that this application is meant to prevent a palpable abuse of the human rights jurisdiction of the Ho High Court for the ventilation of a non-existent parliamentary election grievance, when there exists a specific remedy prescribed by the Constitution and an act of Parliament for that purpose. The Applicant contended that the reliefs sought by the interested parties herein in the Ho High Court; particularly reliefs **1 (f), 2** and **3 (a), (b)** and **(c)**, constituted a challenge against the conduct of Parliamentary elections in the Hohoe Constituency and the consequent election of the 3rd respondent in the action, Mr. John Peter Amewu as the Member of Parliament for Hohoe Constituency from 7th January, 2021 to 6th January, 2025. As a matter that constitutes a challenge to the due election of a contestant in the parliamentary elections held on 7th December, 2020, the Ho High Court has no jurisdiction under article 33 of the Constitution and Order 67 of C.I. 47 to grant remedies available only in a parliamentary election petition constitutionally required to be instituted under article 99 of the Constitution, 1992 and section 16 of PNDCL 284. The interim orders made by the High court on 23rd December purporting to restrain the 1st respondent from gazetting the 3rd respondent as the Member of Parliament elect for the Hohoe Constituency and also from presenting him to Parliament to be sworn in as the Member of Parliament for the said constituency, were therefore void as they can only be made in an election petition instituted under article 99 of the Constitution, 1992 and section 16 of the Representation of the People's Law PNDCL 284.

Quite apart from that, the order of the trial High court purporting to restrain the Electoral Commission from gazetting the 3rd respondent, was made at a time the Commission had already gazetted the 3rd respondent, making it a spent order or

otiose. Applicant attached Exhibit 'AG 1' titled; "Ghana Gazette No. 195 dated Tuesday 22nd December 2020", to her application, which showed that the results of the December 7 Parliamentary Elections, including that of the 3rd respondent, was gazetted on 22nd December 2020; i.e. a day before the institution of the action in the Ho High Court by the interested parties.

Applicant contended further that per the decision of this Court in Suit No. J6/01/2020, titled **VALENTINE EDEM DZATSE v HENRY AMETEFE & 5 Others, dated 24th June 2020**, the inclusion of the SALL Areas in the Hohoe Constituency of the Volta Region, is inconsistent with article 47 (2) of the Constitution, 1992 to the extent that these traditional areas form part of the Oti Region created by C.I. 112. Consequently, C.I. 128 was passed, placing the traditional areas of SALL under the Buem Constituency in the Oti Region. This being the case, the assumption of jurisdiction by Buadi, J. of the Ho High Court constituted a patent error on the face of the record.

The Applicant accordingly prayed the Court to quash the interim orders made by the High Court on 23rd December, 2020, as same constituted a flagrant abuse of the process of the court and to halt further proceedings by the court of the originating notice of motion before it. Aside of the constitutional provisions and statutes referred to supra, the applicant recalled the Court's attention to its own decisions in **YEBOAH v J. H. MENSAH [1998-99] SCGLR 492; EDUSEI v ATTORNEY-GENERAL [1996-97] SCGLR 1; IN RE PARLIAMENTARY ELECTION FOR WULENSI CONSTITUENCY; ZAKARIA v NYIMAKAN [2003-2004] 1 SCGLR 1**; etc. to buttress her submissions.

The 1st Interested party, who happened to be the 1st applicant in the Originating Motion on Notice at the Ho High Court, filed an affidavit in opposition, for herself and on-behalf of the other interested parties, to the applicant's application. They also filed a supplementary statement of case to expatiate their opposition to the application. The affidavit made very interesting reading. In fact, the crux of the affidavit and the statement of case filed by the interested parties were in respect of an alleged violation of the human rights of the interested parties and other voters in the four traditional

areas of SALL, due to alleged acts of the Electoral Commission and its agents. Paragraph 18 of the affidavit in opposition was as follows:

"18. That the fundamental human rights that are implicated in the Human Rights action includes (but are not limited to) the right of the Interested Parties, the chiefs and people of SALL Area to:

a. vote and fully participate in political activities,
b. administrative justice and
c. equality and non-discrimination."

The Interested parties then denied that their action in the Ho High Court was an election dispute and contended under paragraph 31 thus:

"31. That I am advised and I verily believe same to be true that it is two events, namely:

a. the failure of the Electoral Commission to comply with this Honourable Court's order in the Dzatse case to amend C.I. 95 to bring it in conformity with C.I. 112; and
b. the unceremonious public notice in Exhibit MK3, which effectively revoked the rights of the chiefs and people of the SALL Area,

that constituted the egregious violation of the fundamental human rights of the Interested Parties and that of the chiefs and people of the SALL Area."

After a careful consideration of the interested parties' affidavit in opposition and the lengthy submissions made by their counsel, we noticed that the interested parties did not say anything in justification of the interim orders made by the High Court, which are in the nature of orders made in an election petition. Counsel for the interested parties made extensive submissions on C.I.128 and concluded that the constitutional instrument in question was unconstitutional and therefore lacked any legal justification. C.I. 128 is the **'REPRESENTATION OF THE PEOPLE (PARLIAMENTARY CONSTITUENCIES) INSTRUMENT, 2020'**, which purportedly revoked C.I. 95 of 2016 and placed the people

in the SALL Area previously under the Hohoe constituency per C.I. 95 under the Buem Constituency upon the creation of the Oti Region.

Our jurisdiction in the instant application before us does not extend to the determination of the constitutionality or otherwise of C.I. 128. The interested parties have not invoked the jurisdiction of this Court to challenge the constitutionality or otherwise of C.I. 128. Whether the SALL Area people have to vote either in Hohoe Constituency or Buem Constituency is not the issue before us in this application. That is a matter between the interested parties and the Electoral Commission as they themselves have deposed to severally in their affidavit in opposition to the application. In the affidavit in support of the motion on notice for leave to file supplementary statement of case, the 1st interested party, representing the other interested parties deposed at paragraph 23 as follows:

"23. I am further advised and verily believe that the announcement of the Electoral Commission on 6th December 2020 that the voters in the SALL area could not vote in Parliamentary elections on 7th December 2020 and the resultant denial of the right to representation in the 8th Parliament of Ghana are <u>at the heart</u> of the action for the enforcement of fundamental human rights that we have initiated in the High Court, Ho." {Emphasis ours}.

Invariably, what is at the heart of the interested parties' action in the Ho High Court, as they themselves claim, for which they are seeking to enforce their fundamental human rights, is the alleged denial of their right to vote in the December 7 Parliamentary elections and consequently their right to representation in the 8th Parliament of Ghana. If the Interested parties claim is against the Electoral Commission for violating their rights to vote with the creation of the Oti Region, what has that got to do with the gazetting of the 3rd respondent whom the Electoral Commission has declared as the winner of the contest in the Hohoe Constituency Parliamentary elections? The fact is that, Mr. John Peter Amewu has nothing to do with the denial by the Electoral Commission of the right of the people in the SALL Area to vote. He is not an agent of the Electoral Commission and never performed any functions for and on behalf of the Electoral Commission. He was a candidate who put himself up to be elected and never took any decision as to who

to vote and where to vote. If the contention of the interested parties was that Mr. John Peter Amewu was not duly elected due to certain infractions of the Electoral Commission and therefore does not deserve to be gazetted or presented to Parliament to be sworn into office as a Member of Parliament, then they have to comply with the law and resort to the specific remedy and procedure provided by law to ventilate such grievance.

The law as constitutionally and statutorily provided and judicially considered by this apex Court in a plethora of decisions, does not permit the interested parties to include reliefs **1 (f), 2** and **3** in the reliefs sought in their apparent human rights action when these reliefs were purporting to challenge the due election of John Peter Amewu as the Member of Parliament elect for the Hohoe Constituency. In the *Yeboah v J. H. Mensah case* supra, a case whose ratio is similar to the instant matter before us, though factually different, the veteran politician Mr. J. H. Mensah of blessed memory, was elected as the Member of Parliament for the Sunyani East Constituency in the then Brong-Ahafo Region in the 1996 Parliamentary elections on the ticket of the New Patriotic Party (NPP). On 25th February 1997, one Michael Yeboah caused a writ to be filed in this apex Court, invoking the original jurisdiction of the Court in terms of articles 2, 94(1) and 130 of the Constitution, 1992 and rule 45 of the Supreme Court rules, 1996 [C.I. 16]. The plaintiff claimed that Mr. J. H. Mensah was not qualified or competent to become a Member of Parliament in terms of article 94(1)(b) of the Constitution, 1992. The defendant, who denied plaintiff's contention, raised a preliminary objection to the action on the ground that plaintiff's action was incompetent, having been instituted in a wrong forum. The Supreme Court upheld the objection on the ground that the Court was not the proper forum for the action. This Court relied on the provisions of section 16 of PNDCL 284 and article 99 of the Constitution, whose combined effect is that the validity of an election to Parliament may be questioned only by a petition presented to the High Court. The Court re-echoed the decisions in **WILKINSON v BARKING CORPORATION [1948] 1 KB 721 @ 724** per Asquith, L.J. & **PASMORE v OSWALD TWISTLE UDC [1898] AC 387 @ 394,** per Lord Halsbury that; "where a statute creates a right and in plain language gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking

to enforce the right must resort to that specific remedy or tribunal and not others." In the *Pasmore case* supra, Lord Halsbury stated it bluntly that; ***"the principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law."***

It is quite clear that our Constitution, 1992 per article 33(1), clothes only the High Court with authority to hear and determine matters pertaining to the violation or infringement of the fundamental human rights of persons. In the same vein, the same Constitution per article 99, clothes only the High Court with jurisdiction to hear and determine any question as to whether or not a person has been validly elected as a Member of Parliament. With regard to the provisions under article 99, there existed a law before the promulgation of the Constitution, 1992, i.e. PNDCL 284, which law was saved by article 11(1)(d) of the Constitution. This law provides under section 16(1) that the validity of an election to Parliament may be questioned only by a petition brought under sections 17 to 26 of that law. In the wake of these two provisions; i.e. article 99 of the Constitution, 1992 and section 16 of PNDCL 284 of 1992, a person cannot sidestep this procedure and commence an action in the High Court invoking any of the High Court's other jurisdictions to ventilate a grievance that border on the validity of an election to Parliament. Substantively therefore, the jurisdiction of the High Court conferred by article 99 of the Constitution, 1992 and section 16 of PNDCL 284 of 1992, for the determination of a Parliamentary dispute, is fundamentally different from a human right action pursued under article 33(1) of the Constitution, 1992.

Article 99 of the Constitution, 1992 provides: ***"The High Court shall have jurisdiction to hear and determine any question whether (a) a person has been validly elected as a Member of Parliament or the seat of a member has become vacant..."*** And Section 16 of PNDCL 284 also provides that; ***"(1) The validity of an election to Parliament may be questioned only by a petition brought under sections 17 to 26".***

Article 33(1) of the Constitution also provides: "***Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress.***"

Meanwhile, counsel for the interested parties has invited us to hold that PNDCL 284 is subservient to the Constitution, 1992 so the provision under section 16 of that law that says that the validity of an election to Parliament may be questioned only by an election petition, does not take away their right to seek redress under article 33 (1) of the Constitution, particularly, where there exists the phrase; *"without prejudice to any other action that is lawfully available".*

With all due respect to learned counsel for the interested parties, that argument, in our view, is untenable. The fact that PNDCL 284 has prescribed a specific remedy for the ventilation of grievances in election matters does not mean the law is in contravention of the Constitution. It is a specific legislation made for a specific purpose in compliance with article 99 of the Constitution, 1992. As was stated by Hayfron-Benjamin, JSC in the *Yeboah v J. H. Mensah case* supra, ***"when a remedy is given by the constitution and a forum is given by either the Constitution itself or statute for ventilating that grievance, then it is to that forum that the plaintiff may present his petition."***

Article 99 of the Constitution, 1992 vests the High Court with jurisdiction to hear and determine any question as to whether or not a person has been validly elected as a Member of Parliament and the procedure prescribed by statute, in this case PNDCL 284, is only by an election petition. So whilst the High Court has power to hear and determine actions brought under article 33 of the Constitution pertaining to an alleged violation or infringement of the fundamental human rights of persons, it has no jurisdiction to make orders that in their nature, appear to challenge the validity of any parliamentary election conducted by the Electoral Commission when exercising its jurisdiction under that article. The only time that the High Court has power to make orders affecting the validity of any

parliamentary election is when an election dispute is initiated under article 99 of the Constitution. It is therefore not surprising that the interested parties' affidavit in opposition did not provide any answer to applicant's submissions against the propriety of the interim orders made by the trial High court on 23rd December, 2020.

It is also worthy of note to emphasize that the orders made by the trial High court on 23rd December, 2020, which the applicant is praying this Court to quash, were made ex-parte and therefore limited by time. Order 25 rr. 1 (1) and (9) of the High Court Civil Procedure Rules, 2004 [C.I. 47] provide:

"1(1) The Court may grant an injunction by an interlocutory order in all cases in which it appears to the Court to be just or convenient to do so, and the order may be made either unconditionally or upon such terms and conditions as the Court considers just.

(9) Where an order is made pursuant to an application made ex-parte under subrule (3) it shall not remain in force for more than ten days."

Though the trial judge has jurisdiction to issue ex-parte interim orders as shown above, such orders, by operation of law, are limited by time. It is for the above provision in C.I. 47 that the trial High court, Ho, stated emphatically that its interim orders were to last for only ten (10) days, which is the life time statutorily provided for such ex-parte orders. So by operation of law, the interim orders of the trial High court, though wrongly made or *void ab initio*, lapsed ten (10) days after the date they were made. This means that, the wrong orders of the trial High court made on 23rd December, 2020, died a natural death by the close of 2nd January 2021 and has long been buried. {Ref. Order 80 r. 1(5) of the High Court Civil Procedure Rules, 2004 [C.I. 47]}

So in effect, as of today 5th January 2021, there are no subsisting orders of the trial High Court to be brought to this Court to be quashed. However, since the trial High court has no jurisdiction to determine reliefs **1(f), 2** and **3(a), (b) and (c)** as endorsed in the originating motion on notice under the authority invoked before the court; i.e. article 33(1) of the Constitution, 1992, we shall strike out the said reliefs for wrongful

assumption of jurisdiction and we hereby do. This Court would however decline to grant the second order of prohibition sought by the applicant against the trial judge, since the other reliefs which are founded on the alleged violation or infringement of the fundamental human rights of the interested parties to vote and choose their representation in the 8th Parliament of Ghana, i.e. reliefs **1 (a); (b); (c); (d) and (e),** fall within the mandate of the trial High court as invoked. However, it is for the trial High court to determine whether or not the right to vote, which is not a provision under Chapter 5 of the Constitution on fundamental human rights but under Chapter 7 on the Directive Principles of State Policy, is a human right issue or not.

Again, apart from the failure of the applicant to demonstrate in any way that there is the likelihood of bias on the part of the trial judge in determining the alleged human right issues, the fact that the trial judge erred in granting the interim orders was not conclusive that he would be biased or there is the likelihood of bias on his part in the determination of those reliefs. We therefore decline the invitation by the applicant to injunct the trial judge from hearing and determining the remaining reliefs.

For the reasons stated above, we grant the first leg of the applicants prayer but refuse the second, which seeks to prohibit the High court, Ho from hearing and determining the apparent human right reliefs under relief 1 (a) to (e). We accordingly order that the entire proceedings of the High Court, Ho dated 23rd December, 2020, which led to the making of the void interim orders of mandamus and injunction, be brought to this Court for the purpose of same being quashed and they are hereby quashed.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

S. K. MARFUL-SAU
(JUSTICE OF THE SUPREME COURT)

G. TORKORNOO (MRS.)
(JUSTICE OF THE SUPREME COURT)

C. J. HONYENUGA
(JUSTICE OF THE SUPREME COURT)

I.O. TANKO AMADU
(JUSTICE OF THE SUPREME COURT)

COUNSEL

GODFRED YEBOAH-DAME (DEPUTY ATTORNEY-GENERAL) WITH HIM MRS. VERONICA ADIGBO (PRINCIPAL STATE ATTORNEY) AND (MS. YVONNE BANNERMAN) FOR THE APPLICANT.

TSATSU TSIKATA WITH HIM EMILE ATSU AGBAKPE FOR THE INTERESTED PARTIES/RESPONDENTS.

IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA – A.D. 2021

SUIT NO.: JS/21/2021

BETWEEN

THE REPUBLIC

VERSUS

HIGH COURT, HO

EX PARTE: ATTORNEY-GENERAL ... APPLICANT/RESPONDENT

AND

1. **PROF. MARGARET KWEKU**
2. **SIMON ALAN OPOKU-MINTAH**
3. **JOHN KWAME OBIMPEH**
4. **GODFRED KOKU FOFIE**
5. **FELIX QUARSHIE**

} **INTERESTED PARTIES/ APPLICANTS**

APPLICATION FOR REVIEW RULE 56 OF THE SUPREME COURT RULES, 1996 (CI 16)

STATEMENT OF APPLICANTS' CASE

A. INTRODUCTION

1. This is an application seeking an order for the review of the ruling of this Court on 5th January 2021 on an application by the Attorney-General, who was one of the Respondents to an application in the

High Court, Ho, for enforcement of fundamental human rights. The application sought to quash interim orders of the High Court, Ho, made on 23rd December 2020 and to prohibit the court from further proceeding with the suit.

2. Applicant applied ex parte for abridgment of time. The Interested Parties appeared in court at the hearing on 30th December 2020 and requested to be heard. This was granted and Counsel for the Interested Parties proposed to file the Statement of case for the Interested Parties the next day, 31st December, 2020 and it was ordered that this be done by noon on the 31st December, 2020. The Deputy Attorney-General, representing the Applicant, undertook to file the Reply to the Statement of Case of the Interested Parties by the close of day. Hearing of the application was fixed for 4th January 2021.

3. After the filing of the Statement of Case of the Interested Parties on 31st December 2021, the Applicant filed a Supplementary Statement of Case, in which, for the first time, they brought in the issue of CI 128 and proffered that as the basis of their argument that the Interested Parties should have voted in another constituency.

4. At the hearing on 4th January 2021, the court rejected an objection to a member of the panel and proceeded to hear an application by the Interested Parties to file a Supplement to their Statement of Case. This was granted and the court then heard the case.

B. <u>REVIEW JURISDICTION</u>

5. This application for review is based on the jurisdiction of this Court provided for in article 133(1) of the Constitution as follows:

> "***The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by the rules of court***".

Rule 54 of the Supreme Court Rules (C. I. 16) provides the grounds and conditions for review to include "***Exceptional circumstances which have resulted in miscarriage of justice***".

6. In **Afranie II v. Quarcoo [1992] 2 GLR 561**, the Supreme Court held that although what constituted "exceptional circumstances" had not been spelt out, on the authorities, "the court had found exceptional circumstances where (a) the circumstances were of such a nature as to convince the court that the judgment should be reversed in the interest of justice and indicated clearly that there had been a miscarriage of justice; or (b) the demands of justice made the exercise extremely necessary to avoid irremediable harm to the applicant; or (c) a fundamental or basic error might have been committed by the court resulting in a grave miscarriage; or (d) the decision had been given per incuriam for failure to consider a statute or a binding case law or fundamental principle of practice and procedure relevant to the decision ...".

   All four of the above-cited categories of "exceptional circumstances" are found in this case and this Honourable Court is respectfully requested to review its ruling of 5th January 2021 in this case.

7. It has been recognized time and again by this Court that the review jurisdiction cannot be simply an opportunity for another bite at the cherry. A review is not an appeal. In bringing this application for review, we are extremely conscious of these important considerations. Our submissions below show the gross and fundamental errors that this court committed which have necessitated this application for review.

   The following words of Aikins JSC in *Afranie II v Quarcoo* (supra at 609) are pertinent:

> "...it is essential that this court *accommodates a re-examination of the judge's previous thinking...with a view to correcting a fundamental mistake that has*

occurred. If this is not done, the exercise of the review power *would end in futility and would only serve to rubber stamp or confirm a previous stance of the court which may result in a miscarriage of justice."*

8. In ***Koglex Ltd. No. 2) v Field*** (2000) SCGLR 175 it was held that the decision of the majority of the Court of Appeal, which had failed to detect an error of law and which had been similarly affirmed by the majority of the Supreme Court, had thus occasioned a grave miscarriage of justice to the plaintiff-applicant and the majority decision of the Supreme Court was, therefore, reversed by a majority (4-3) decision on a review. Acquah JSC reflected the majority view as follows: "I am aware that I am not sitting on an appeal over a decision of my learned and respectful colleagues. However, I find myself in the invidious position of observing the problems from a fresh outlook. For in fairness to my conscience and my judicial oath, I cannot condone the perpetuation of such a glaring fundamental error as occurred in this case."

   In this case, we are dealing with numerous glaring, fundamental errors and we would respectfully submit it does not require fresh eyes to see them, but simply the preparedness, upon sober reflection, to acknowledge error and correct it in the interests of justice.

9. In ***Antwi v NTHC Ltd*** **CM J7/3/09** the Supreme Court (coram: Sophia Akuffo, Dr. Date-Bah, Sophia Adinyira, R C Owusu, Dotse, Anin Yeboah and Baffoe-Bonnie JJSC) unanimously reviewed its previous judgment reported as ***NTHC Ltd v Antwi*** (2009) SCGLR 117 by adjusting its award of interest in terms of duration and currency because it had overlooked certain material facts which were before the court at the time of its earlier decision. (See also **Royal Dutch Airlines (KLM) v. Farmex** (No. 2) [1989-90] 2 GLR 682 where an application to the Supreme Court for a review and/or clarification of an earlier majority decision on calculating interest was successful.) Again, in **Daniel Ofori v. Ecobank Ghana, Civil**

Motion J7/22/2018, in a judgment delivered on 27th February 2019, this Court reviewed a decision it had earlier given in respect of interest rate payments in order to reflect statutory provisions in CI 52.

10. In **Republic v. Tetteh** [2003-2004] SCGLR 140, upon an application for review of a unanimous decision of the Supreme Court, it was held that the decision should be set aside because the court's decision was given *per incuriam* of a provision in the Armed Forces Regulations (CI 12).

We will show, from our submissions on the Grounds of Review, that this is a most appropriate case for their Lordships to correct clear and fundamental errors that have occasioned a serious miscarriage of justice and review their ruling of 5th January 2021.

C. GROUNDS FOR REVIEW

11. The eighteen grounds on which the review is sought are set out below:

a) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice when it said, per incuriam, that there is a determination for the High Court to make as to "whether or not the right to vote, which is not a provision under Chapter 5 of the Constitution on fundamental human rights but under Chapter 7 on the Directive Principles of State Policy, is a human right or not."

b) This Honourable Court committed a fundamental error of law in invoking its supervisory powers and granting the discretionary order of certiorari against the High Court, Ho, which had jurisdiction to embark on the application to enforce fundamental human rights of the Interested Parties. This fundamental error occasioned a miscarriage of justice.

c) In this Honourable Court claiming "[o]ur jurisdiction in the instant case does not extend to the determination of the

constitutionality or otherwise of CI 128. The Interested parties have not invoked the jurisdiction of this Court to challenge the constitutionality or otherwise of CI 128", it committed a fundamental error of law that has occasioned a miscarriage of justice by not recognizing that it was the Applicant that put forward CI 128 to contest the insistence of the Interested Parties that CI 95 had not been repealed.

d) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in its complete misapprehension of the case the Interested Parties presented to the High Court, Ho.

e) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in stating what is to be determined by the High Court, Ho, as if it was already determined or could be determined by the Supreme Court: "The fact is that, Mr. John Peter Amewu has nothing to do with the denial by the Electoral Commission of the right of the people in the SALL Area to vote".

f) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in determining that because the Interested Parties stated in an affidavit that "the announcement of the Electoral Commission on 6th December 2020 that the voters in the SALL area could not vote in Parliamentary elections on 7th December 2020 and the resultant denial of the right to representation in the 8th Parliament of Ghana **are at the heart** of the action for the enforcement of the fundamental human rights that we have initiated at the High Court, Ho", "John Peter Amewu has nothing to do with the denial by the Electoral Commission of the people in the SALL Area to vote.

g) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in prejudging in the

very opening paragraph of the ruling the alleged status of John Peter Amewu as "the NPP M.P Elect for Hohoe Constituency".

h) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in its claim that "the Interested Parties did not say anything in justification of the interim orders made by the High Court" and that "the interested parties' affidavit in opposition did not provide any answer to applicant's submissions against the propriety of the interim orders made by the trial High court on 23rd December 2020."

i) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice when it deprived the Interested Party of constitutionally protected fundamental human rights by recourse to a provision in a statute.

j) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice when it claimed that the "Constitution per article 99, clothes only the High Court with jurisdiction to hear and determine any question as to whether or not a person has been validly elected as a Member of Parliament."

k) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice when it claimed that "In the wake of these two provisions; that is article 99 of the Constitution, 1992 and section 16 of PNDCL 284 of 1992, a person cannot sidestep this procedure and commence an action in the High Court invoking any of the High Court's other jurisdiction to ventilate a grievance that border (sic) on the validity of an election to Parliament."

l) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in its claim that the interim orders "are in the nature of orders made in an election petition."

m) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice when it claimed "The only time that the High Court has power to make orders affecting the validity of any parliamentary election is when an election dispute is initiated under article 99 of the Constitution."

n) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice when it purported to "order that the entire proceedings of the High Court, Ho dated 23rd December, 2020, which led to the making of the void orders of mandamus and injunction, be brought to this Court for the purpose of same being quashed and they are hereby quashed" after earlier determining that: "... the wrong orders of the trial High court made on 23rd December, 2020, died a natural death by the close of 2nd January 2021 and has (sic) long been buried. So, in effect, as of today 5th January 2021, there are no subsisting orders of the trial High Court to be brought to this Court to be quashed."

o) This Honourable Court acted without jurisdiction when it purported to strike out certain reliefs sought in the originating motion on notice.

p) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in failing to take into consideration in its ruling earlier binding decisions of the court which Counsel for the Interested Parties had cited before the court in both written and oral submissions.

q) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in its ruling in respect of the objection raised against the participation of Justice Hoenyenugah in a determination of his own eligibility after an objection on the real likelihood of bias and actual bias arising from the Justice's long-standing close relationship with

Amewu and the "unbreakable bond" between them was raised with the indication of witnesses being available to testify.

r) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in its ruling in respect of the objection raised against the participation of Justice Hoenyenugah when it claimed that the action in the High Court, Ho, was not about Amewu.

We proceed with submissions in respect of each of these grounds.

12. Ground a) -This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice when it said, per incuriam, that there is a determination for the High Court to make as to "whether or not the right to vote, which is not a provision under Chapter 5 of the Constitution on fundamental human rights but under Chapter 7 on the Directive Principles of State Policy, is a human right or not." (p. 14)

It is in clear and fundamental error for their Lordships to consider the right to vote as part of the Directive Principles of State Policy. There is a world of difference between the Directive Principles of State Policy which are in Chapter 6 of the Constitution and the Fundamental Human Rights provided for in Chapter Five of the Constitution. It is also a patent and fundamental error for their Lordships to say that there is a determination to be made by the High Court, Ho, as to whether the right to vote is a fundamental human right. That matter is well settled by reference to numerous decisions of the Supreme Court which the High Court is duty bound to apply. It is definitely not for the High Court, Ho, to determine whether the right to vote is a fundamental human right in the light of the settled authorities from the Supreme Court.

13. Notably, in **Ahumah-Ocansey v. Electoral Commission; Centre for Human Rights and Civil Liberties (CHURCIL) v. Attorney-General and Electoral Commission (Consolidated) [2010]**

SCGLR 575, Wood CJ considered the right to vote a fundamental human right under Chapter V of the Constitution on the basis of Article 33(5) of the Constitution:

> *"Admittedly, Article 42 [on the right to vote] does not fall under either Chapter Five or Six of the Constitution, which deals with Fundamental Human Rights and Freedoms and The Directive Principles of State Policy, respectively... But* ***there is no doubt, that voting rights constitute a fundamental right of such significance or importance it does qualify as a fundamental human right. My stated position is in the light of Article 33 (5) of the Constitution ..."*** (at page 614, emphasis supplied).

14. Bamford -Addo JSC, in **Apaloo v Electoral Commission of Ghana [2001-2002] SCGLR 1,** referred to the "*peoples' right to vote*" as an "*inalienable right*". In ***Tehn-Addy v Attorney-General And Electoral Commission*** [1997-98] 1 GLR 47, Acquah JSC, speaking for the Supreme Court stated that:

> *"The exercise of this right of voting, is therefore indispensable in the enhancement of the democratic process; and cannot be denied in the absence of a constitutional provision to that effect.....A heavy responsibility is therefore entrusted to the Electoral Commission under Article 45 of the constitution in ensuring the exercise of this constitutional right to vote. For in the exercise of this right, the citizen is able not only to influence the outcome of elections and therefore the choice of government but also he is in a position to help influence the course of social, economic and political affairs thereafter. He indeed becomes involved in the decision-making process at all levels of governance."*

15. Atuguba JSC in In re Presidential Election Petition (No. 4) [2013] SCGLR 73, at 134-5, stated: *"The fundamentality of the individual's right to vote and the need to protect the same have been stressed by this court in several cases:* ***Tehn-Addy v Attorney-General And Electoral Commission*** *[1997-98] 1 GLR 47 and* ***Ahumah-Ocansey v. Electoral Commission; Centre for Human Rights and Civil Liberties (CHURCIL) v. Attorney-General and Electoral Commission (Consolidated) [2010] SCGLR 575.*** *.....Beyond the individual's right to vote is the collective interest of the constituency and, indeed, of the entire country in protecting the franchise: see* ***Luguterah v. Interim Electoral Commissioner*** *[1971] 1GLR 109."*

16. The Ahumah-Ocansey and the **Tehn-Addy** cases, particularly, have been cited with approval both by Justices of the Supreme Court who formed the majority in In Re: Presidential Election Petition (No. 4) [2013] SCGLR 73as well as those in the minority. Rose Owusu JSC, part of the minority, stated at page 293: *"I happened to be part of the decision in the Ahumah-Ocansey Case and I still stand by my opinion therein expressed. For this reason, I will not by annulling votes under the three categories of over-voting, voting without biometric verification and absence of the signature of a presiding officer and indirectly deny the voters their fundamental and inalienable right to vote as enshrined in article 42 of the 1992 Constitution. Consequently, where votes have to be annulled as a result of violations, irregularities, etc, I would call for a run-off of the elections."*

17. Anin-Yeboah JSC (as he then was) also said: *"It has been vigorously argued and urged on us by citation of leading cases like* ***Tehn-Addy v. Electoral Commission*** *[1996-97] SCGLR 589;* ***Centre for Human Rights and Civil Liberties (Churcil) v. Attorney-General*** *(Consolidated) [2010] SCGLR 575 that any rejection of the votes cast by voters in the exercise of their constitutional rights as enshrined in the Constitution on the grounds that, the presiding officer at any polling station did not sign, would be contrary to the constitutional rights of the individual to cast a valid vote. Both cases appear to support the argument that nothing should be done to deny any*

qualified Ghanaian his constitutionally-guaranteed rights to vote at public elections. I must place it on record that I was a member of the panel which delivered the judgment in the ***Ahumah -Ocansey Case (supra),*** *on the interpretation of article 42 of the 1992 Constitution. I said (as stated at page 676) as follows:*

> *"However, article 42 which is under interpretation, is a constitutional provision and, indeed, an entrenched one which stands on its own. Under article 42 of the Constitution, it is a constitutional right which the framers of our Constitution have entrenched in the Constitution to be enjoyed as a basic tenet to democratic governance in electing our leaders. No wonder the Preamble of the Constitution talks of the Principle of Universal Adult Suffrage."*
>
> *I came to the conclusion in the above-stated case in support of the opinion of my worthy colleagues including the Chief Justice to make it abundantly clear that prisoners, ought to vote in public elections and should be registered to exercise that fundamental constitutional right. Reference was indeed made to the* ***Tehn-Addy Case*** *by members on the panel to support the constitutional right vested in the Ghanaian who is qualified to vote to be registered to vote."*

18. It is thus established beyond any doubt by a well-established line of cases in the Supreme Court (including those cited above) that the right to vote is a fundamental human right under Chapter 5 of the Constitution and, therefore, enforceable by Article 33. The statement of this Honourable Court on the last page of its ruling of 5th January 2021 that: ***"However, it is for the trial High Court to determine whether or not the right to vote, which is not a provision under Chapter 5 of the Constitution on fundamental human rights but under Chapter 7 on the Directive Principles of State Policy, is a human right issue or not"*** is thus a patent and fundamental error of law that is per incuriam of the line of

Supreme Court cases discussed above. What the High Court, Ho, is required to determine is a) whether, indeed, on the facts, the Applicants before it have been denied this fundamental human right to vote and other fundamental human rights as alleged by the Applicants and b) what remedies are appropriate under Article 33(2) to address the denial of the right to vote and other fundamental human rights that the High Court, Ho, finds have been established.

19. It is also worth underlining that Articles 33 and 42 of the Constitution are among the "entrenched provisions" of the Constitution as per Article 290 (1) (d) and (e). The entrenched nature of these provisions reflects the pride of place they have within the architecture of the Constitution. In the words of Kpegah JSC in **Awuni v. West African Examinations Council** [2003-2004] SCGLR 471at page 490: "The historical and political development of the country, as demonstrated by the landmark case of In re Akoto [1961] GLR 523, SC not only made it paramount but inevitable that the fundamental rights of the individual be enshrined and entrenched in the 1992 Constitution, but also desirable that a mechanism be provided for their enforcement. Therefore, in enacting the fundamental rights of the citizen in articles 12 to 32 of the Constitution coupled with a provision in article 33(1) empowering the High Court to enforce these rights, the framers of our Constitution have not only demonstrated their resolve and determination to confer rights on the individual but also that these rights be enforceable as well. It may be that it is this mechanism that the framers of the Constitution intended to use to avoid, in the future, a similar decision like the one in In re Akoto."

20. In similar vein, Sophia Akuffo JSC (as she then was) said at pages 504-506: "In our collective and national quest for overall good governance, the rights and freedoms set out in chapter five of the 1992 Constitution constitute, by far, some of the most crucial mechanisms created by the Constitution for assuring the attainment and sustenance of the political, social, economic and cultural foundations of a modern democracy. ....

"The scope and magnitude of guaranteed fundamental human rights and freedoms are such that, the 1992 Constitution, in article 33(5) makes it very clear that the rights and freedoms specified in chapter 5 are not intended to be exhaustive or exclusive of other rights, duties, declaration and guarantees relating to fundamental rights and freedoms *"which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man."* (The emphasis is mine).....

" ... The Constitution, in chapter five, does not only proclaim the fundamental rights and freedoms but goes on, in article 33, to provide, through the High Court, effective means for assuring the protection of these rights. In this light, therefore, it is the duty of the High Court, and appellate courts, to ensure that, where a person approaches the seat of justice for the protection of his rights and freedoms, the procedural rules of court do not become instruments for obstructing or delaying the aggrieved person's access to justice."

21. The egregious errors of this Honourable Court in regarding the right to vote (a) as among the Directive Principles of State Policy and (b) as a right which, not being in Chapter 5, is now to be considered by the High Court to determine whether it is a fundamental human right, have occasioned a grave miscarriage of justice to the Interested Parties. The decision of this court on 5th January has denied the Interested Parties a right to have due enforcement of their fundamental human right both to vote and, indeed, to be represented in the 8th Parliament of Ghana, by the High Court, Ho, which assumed jurisdiction rightly, based on Article 33, continuing with a determination of the appropriate remedies, both interim and final.

22. Ground (b) This Honourable Court committed a fundamental error of law in invoking its supervisory powers and granting the discretionary order of certiorari against the High Court, Ho, which had jurisdiction to embark on the application to

enforce fundamental human rights of the Interested Parties. This fundamental error occasioned a miscarriage of justice.

The Supreme Court has had cause to analyse carefully the parameters of its supervisory jurisdiction over inferior courts. In **Republic v. High Court, Accra; Ex parte Industrialization Fund for Developing Countries** [2003-2004], Dr. Date-Bah JSC expressed the unanimous position of the court as follows:

"We believe there to be a sound policy reason for keeping narrow the category of errors by the superior courts that can be made subject to judicial review. Thus, in our view, errors of law made by a superior court judge in Ghana should not ordinarily take the court outside its jurisdiction, if it had jurisdiction at the start of the inquiry." (at page 316). His Lordship made it clear that in referring to patent errors on the face of the record, "by the 'record' was meant the document which initiated the proceedings, the pleadings, if any, and the adjudication but not the evidence nor the reasons unless the tribunal chose to incorporate them".

The Applicant clearly went beyond the record in her application. Applicant attached Exhibit 'AG 2 titled 'Ghana Gazette No. 195 dated 22nd December 2020', to the affidavit in support of her application.

This purported Gazette Notice was not part of the record of the proceedings for the purpose of the certiorari application. If the Gazette was being put forward as a reason for the High Court, Ho, not to grant the reliefs sought or, even, not to assume jurisdiction, the proper course for the Applicant to have taken was to proceed under Order 25 Rule 1 (11) to set aside the ex parte order rather than by recourse to the supervisory jurisdiction of this court and seek to introduce evidence that is not part of the record in respect of which the supervisory jurisdiction of the Supreme Court is being invoked. Issues about the purported Gazette Notice are clearly matters to be brought before the High Court, Ho.

23. **Ground (c) In this Honourable Court claiming "[o]ur jurisdiction in the instant case does not extend to the determination of the constitutionality or otherwise of CI 128. The Interested parties have not invoked the jurisdiction of this Court to challenge the constitutionality or otherwise of CI 128", (p. 9) it committed a fundamental error of law that has occasioned a miscarriage of justice by not recognizing that the Applicant put forward CI 128 to contest the insistence of the Interested Parties that CI 95 had not been repealed.**

It is worth recalling how the issue of CI 128 came before this Court. The original application that the Applicant put before this court had no reference to CI 128. This was despite the fact that the case of Interested Parties, as presented to the High Court, Ho, and exhibited by the Applicant as Exh "AG 2" was consistently expressed in terms of CI 95 defining the Hohoe Constituency. The Interested Parties insisted that CI 95 had neither been repealed or replaced by any other CI., despite the Supreme Court ordering the Electoral Commission to amend CI 95. On 31st December 2020, after the Interested Parties filed their Statement of Case in response to the Statement of Case of the Applicant, a Supplementary Affidavit was filed on behalf of the Applicant with a few pages from what was claimed to be CI 128 being exhibited as Exhibit AG 4.

24. A motion for leave to file a Supplementary Affidavit and a Supplement to the Statement of Case was filed on behalf of the Interested Parties. At the hearing on 4th January 2021, Applicant did not oppose this application and, in response to the request by Counsel for the Interested Party to have the full CI 128 document, handed over a document with CI 128 on it as the entire document from which the few pages had been extracted in the Supplementary Affidavit. There and then, Counsel for the Interested Parties stated that, on its face, the purported CI 128 was unconstitutional. The Court asked Counsel for the Interested Parties to wait until the Applicant moved the motion.

25. After Applicant moved the motion, Counsel for Interested Party submitted that the purported CI 128 was unconstitutional because of it not having been published in the Gazette on the day it was laid before Parliament. He referred to Article 11(7)(b) of the Constitution: "Any Order, Rule or Regulation made by a person or authority under a power conferred by this Constitution or any other law shall –

> .... (b) be published in the Gazette on the day it is laid before Parliament;"

Issue was, therefore, joined on the matter of the constitutionality of CI 128 which the Applicant introduced and, thus, set up for their Lordships' consideration. For their Lordships now to claim that "[t]he Interested parties have not invoked the jurisdiction of this Court to challenge the constitutionality of CI 128" shows that their Lordships have overlooked how this issue came before the Court and failed to appreciate that no matter how the issue arose in this court, their Lordships were bound to ensure compliance with the Constitution.

26. A similar situation arose in **Faroe Atlantic v. Attorney-General** [2005- 2006] SCGLR 271 where a constitutional provision in respect of the need for Parliamentary approval of international business transactions was not taken up for the determination of the matter when the constitutional point was first raised before the Court of Appeal. The Supreme Court held that once the constitutional point was raised, the Court of Appeal should have applied it in its adjudication of the matter. The words of Her Ladyship Sophia Akuffo JSC (as she then was) are directly applicable to the circumstances of this case: "It is my respectful view that the manner in which the learned Justices of the Court of Appeal dealt with such an important issue left a lot to be desired. The Constitution is the supreme law of the land and article 1(1) makes it clear that '... the powers of government are to be exercised in a manner and within the limits laid down in this

Constitution. As the supreme law of the land, the Constitution is applicable at all times and all acts and things, particularly those done for and on behalf of the Republic of Ghana, must always be tested against its provisions. In the course of judicial proceedings, it is incumbent upon every Judge to keep its provisions in mind to assure compliance, not only by the parties before it, but also by the court itself. Admittedly, the issue was raised rather belatedly. However, it was raised, and the Court of Appeal, instead of treating it in such an offhanded manner, as a 'small matter' and disposing of it on mere procedural grounds, ought to have afforded the Respondent an opportunity to respond thereto, so as to enable the court give the issue all due consideration." (at pages 304-5).

27. Dr. Date-Bah, JSC, also stated, after quoting Article 1(2) of the Constitution: "..if even statute law is void if in conflict with the Constitution, *a fortiori*, contracts breaching the Constitution should not be enforced. ....

The constitutional provision in terms of article 1(2), in my view, is a peremptory norm that has to be heeded by this court. To borrow from the language of public international law, it may be viewed as analogous to a *jus cogens* whose enforcement cannot be impeded by the normal rules." (at page 294).

The sidestepping of the issue of constitutionality of CI 128 by this court was, with respect, per incuriam the decision in **Faroe Atlantic** which has been settled law and been followed in a number of cases such as **Attorney -General v. Balkan Energy Ghana Ltd [2012] 2 SCGLR 998.**

28. Just as their Lordships felt able to determine, albeit erroneously, that PNDC Law 284 was not in contravention of the Constitution – "The fact that PNDCL 284 has prescribed a specific remedy for the ventilation of grievances in election matters does not mean the law is in contravention of the Constitution. It is a specific legislation made for a specific purpose in compliance with the Constitution, 1992" (p. 12)-their Lordships should also have considered the

constitutionality of CI 128. More so as the Applicant sought to justify invoking the supervisory jurisdiction of this court on the basis of CI 128.

29. **Ground d) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in its complete misapprehension of the case the Interested Parties presented to the High Court, Ho.**

The misapprehension of the case of the Interested Parties was starkly expressed in the question posed in the following passage of the ruling: "If the Interested Parties claim is against the Electoral Commission for violating their rights to vote with the creation of the Oti Region, what has that got to do with the gazetting of the 3rd Respondent whom the Electoral Commission has declared as the winner of the contest in the Hohoe Constituency Parliamentary elections?" (p. 9). The question indicates that their Lordships considered that the claim by the Interested Parties was only "a claim against the Electoral Commission for violating their right to vote with the creation of the Oti Region", and, hence, nothing to do with Peter Amewu. This was absolutely not the case. The Interested Parties are well aware that the Electoral Commission did not create the Oti Region and have therefore not claimed that the Electoral Commission had violated "their right to vote with the creation of the Oti Region." What the Interested Parties put before the High Court, Ho, was that they had a right to vote in the Hohoe Constituency as set out in CI 95 and that the Electoral Commission had denied them the right to vote in that Constituency or in any other constituency by a directive on the 6th December 2020 and other unconstitutional actions. The Interested Parties also clearly seek to be represented in the 8th Parliament of Ghana as is their fundamental entitlement.

30. The Interested Parties have supported their claim with the representations made to the Electoral Commission, for instance, by the Constituency Chairman of the NDC, the party on whose ticket the 1st Interested stood as a Parliamentary Candidate

contesting in the Hohoe Constituency, since July 2020. These representations (by way of letters), were made after a decision of this Honourable Court in **Dzatse v Ametefe and ors.**, a copy of which decision was attached to one of their letters to the Electoral Commission. The letters also showed the reliance of the 1st Interested Party and other interested parties on that decision of the Supreme Court. There was not even an acknowledgement by the Electoral Commission of those letters, much less a response. It is obvious that their Lordships would not have asked such a question if they had appreciated the claims of the Interested Parties.

31. Without a doubt, the declaration of Peter Amewu as Member of Parliament Elect for that constituency in which the Interested Parties had a right to vote and his being gazetted as such, had all to do with what is before the High Court, Ho. In respect of 1st Interested Party, who contested Peter Amewu, it should be obvious why the suit had everything to do with Amewu who shares a common interest with the Electoral Commission as regards what is claimed as the area of the Hohoe constituency. Through its misapprehension of the matters in issue in the High Court, the Honourable Court reached wrong conclusions about the significance of the reliefs sought against Amewu. This misapprehension of the issues is further evident in the answer their Lordships went ahead to provide to the question posed, as we further show in the submissions in respect of Ground (e) below.

32. Ground (e) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in stating what is to be determined by the High Court, Ho, as if it was already determined or could be determined by the Supreme Court: "The fact is that, Mr. John Peter Amewu has nothing to do with the denial by the Electoral Commission of the right of the people in the SALL Area to vote". (p. 9)

There was no basis whatsoever for their Lordships to state as a "fact" that Mr. Amewu "has nothing to do with the denial by the

Electoral Commission of the right of the people in the SALL Area to vote", (p. 9). The reasons given in the succeeding sentences for asserting the "fact" are, with respect, hollow: "He is not an agent of the Electoral Commission and never performed any functions for and on behalf of the Electoral Commission. He was a candidate who put himself up to be elected and never took any decision as to who to vote and where to vote." (p. 9).The legal position the court proceeds to express that "[i]f it the contention of the interested parties was that Mr. John Peter Amewu was not duly elected due to certain infractions of the Electoral Commission and therefore does not deserve to be gazetted or presented to Parliament to be sworn into office as a Member of Parliament, then they have to comply with the law and resort to the specific remedy and procedure provided by law to ventilate such grievance", (p. 10), does not establish a "fact" that Mr. Amewu "has nothing to do with the denial by the Electoral Commission of the right of the people in the SALL Area to vote".

33. For a court to make a determination of "fact", as their Lordships purported to do, evidence must be made available to the court in accordance with the Evidence Act. The alleged "fact" in this passage of their Lordships' ruling had no basis in evidence. Indeed, it is clearly premised on an assumption that the Hohoe constituency can have no relevance to those in the SALL area. That premise is contrary to the case that the Interested Parties have put forward before the High Court in Ho. It is, with respect, not within the remit of this Honourable Court to seek to truncate the process of establishing the facts in the manner provided in the Constitution and laws of Ghana.

34. The facts that are undisputed, according to the affidavit of the Interested Parties in support of the application for enforcement of fundamental human rights, which is part of the record herein, are that Mr. Amewu was a candidate on the ticket of the New Patriotic Party and was declared the MP-Elect by the 2nd Respondent. Consequently, if there are infringements of the fundamental human rights in the conduct of the election, the remedies could

relate to him and his purported status at the time as a Member of Parliament-Elect. That is why he is also a Respondent, entitled to be heard by the High Court, Ho. Instead of participation in this case, though, Mr. Amewu has chosen the path of evasion and thuggery and been evading service, as deposed to in the affidavit filed on behalf of the Interested Parties. In his presence, his agents seized the court bailiff who tried to serve him with process and took him into a pickup truck and began to beat him up severely as they drove off, ending up dumping the court bailiff in a remote area outside city limits. Such lawless behaviour on the part of a party before a court, which was made known to the court, must not be swept under the carpet as if irrelevant to the issue before the court because it serves to undermine the very foundations of the justice system. It is unfortunate that the Supreme Court would not allow Counsel for the Interested Party to address it on the matter. The more so in the light of the utterances he made on the floor of Parliament in the early hours of 7th January 2021 which we respectfully ask this court to take judicial notice of the statement of Peter Amewu (captured by television cameras of the news media) in respect to Parliamentarians on the opposite side: "....I will kill all of them."

35. This sense of impunity is what was foreshadowed in the Statement of Case filed on behalf of the Interested Parties as follows: "It is hard to resist the conclusion that the highest law office of the land is being used for the sole purpose of advancing the personal interests of the 3rd Respondent in the application before the Ho High Court, Peter Amewu. This is particularly unfortunate in the circumstances of this case. As deposed to in the affidavit filed with this Statement of Case, Peter Amewu has been evading service. In one attempt at service, his agents pounced on the court bailiff who was attempting service as well as another bailiff accompanying him. The bailiff trying to effect service was mercilessly beaten up. For officials of the courts embarking on their simple duties of serving process to be subjected to such brutality by agents of a person who is holding high Ministerial office, raises serious questions about the individual in question and his lack of respect

for the legal processes through which justice is sought to be administered. It would be unfortunate if this entirely unmeritorious application which essentially is on his behalf, gives him greater confidence in lawless behaviour."

36. Ground (f) -This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in prejudging, in the very opening paragraph of the ruling, the alleged status of John Peter Amewu as "the NPP M.P Elect for Hohoe Constituency". (p. 2)

In the very opening paragraph of the ruling, their Lordships refer to John Peter Amewu as the NPP M.P Elect for Hohoe Constituency". It is a fundamental error of law for the starting-point of the consideration by the Supreme Court of the application for orders of certiorari and mandamus to state what is in controversy from the point of view of one side only. No indication is given that there is a challenge to that alleged status, effectively pre-judging one of the matters that the Interested Parties sought to have determined in the action to enforce their fundamental human rights. In that action, it is clearly stated in the affidavit in support of the origination motion that the declaration by the 2nd Respondent (the Returning Officer for the Hohoe Constituency) of the 3rd Respondent, Peter Amewu, as "Member of Parliament-Elect for Hohoe Constituency" is a nullity. This is because the votes of the voters in the SALL area who are part of the Hohoe constituency as established in CI 95 were not allowed by the Electoral Commission to be cast and were not counted. It being clear from the record before this court that the purported declaration of 3rd Respondent as "Member of Parliament-Elect for Hohoe Constituency" is being challenged as a nullity, the prejudgment of the issue in the very opening paragraph of the ruling is telling.

37. The reasoning of the court is infected with that prejudgment as soon shown by the question posed at page 9 of the ruling - discussed under Ground (d) above – "If the Interested Parties

Claim is against the Electoral Commission for violating their rights to vote with the creation of the Oti Region, what has that got to do with the gazetting of the 3rd respondent whom the Electoral Commission has declared as the winner of the contest in the Hohoe Constituency Parliamentary elections?" The reference to the gazetting of 3rd respondent as winner of the contest is not part of the record before this court, as indicated earlier in our submissions on Ground (b) above. That purported gazetting alleged in the affidavit of the Applicant is contested in the affidavit in opposition. Indeed, the Interested Parties seek, among their reliefs, an injunction to stop the gazetting of 3rd Respondent by 1st Respondent as MP -Elect and obtained an order ex parte to that effect.

38. **Ground(g) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in determining that because the Interested Parties stated in an affidavit that "the announcement of the Electoral Commission on 6th December 2020 that the voters in the SALL area could not vote in Parliamentary elections on 7th December 2020 and the resultant denial of the right to representation in the 8th Parliament of Ghana are at the heart of the action for the enforcement of the fundamental human rights that we have initiated at the High Court, Ho", "John Peter Amewu has nothing to do with the denial by the Electoral Commission of the people in the SALL Area to vote".**

Their Lordships quote paragraph 23 of the affidavit in support of the application for leave to file supplementary statement of case where the 1st Interested Party refers to the announcement of the Electoral Commission on 6th December 2020 that the voters in the SALL area could not vote in Parliamentary elections on 7th December 2020 and the resultant denial of the right to representation in the 8th Parliament of Ghana being "at the heart of the action for the enforcement of fundamental human rights that we have initiated in the High Court Ho." (p. 9). The object of that quotation is to create the impression that the claim of the

Interested Parties only concerns the Electoral Commission and Amewu is in no way implicated in the claims before the High Court, Ho.

39. Their Lordships did not, however, refer to the affidavit in opposition to the motion to invoke the supervisory jurisdiction of the Supreme Court in which the 1st Interested Party stated as follows, among other things:

> **"23. That as the Parliamentary candidate for the Hohoe constituency, I am aware that the Hohoe constituency, as defined in CI 95 issued by the Electoral Commission does, at all material times, includes (sic) the SALL area.**
>
> **.....**
>
> **36. That I am advised and verily believe same to be true that the claims in the present application are entirely concerned with upholding the right of representation of a certain Hohoe constituency other than the constituency that is defined in CI 95 and which imaginary Hohoe constituency has no legal basis whatsoever."**

Their Lordships could have discerned from the affidavit in opposition to the application before them that Amewu's claim to representing that imaginary Hohoe constituency that is without any legal basis is in issue and he could not be M.P. Elect for the constituency as it legally exists when part of the electorate had been disenfranchised and now faced the prospect of having no representation in Parliament. The prejudgment of Amewu's status, as shown in our submissions on Ground disabled their Lordships from appreciating the fundamental human rights issues that were before the High Court, Ho, and led to the erroneous positions taken by their Lordships, quoted in Grounds (d) to (f) above, deflecting

from the consequences that there could be for Amewu's purported status as MP-Elect.

40. Just because the actions of the Electoral Commission are at the heart of the fundamental human rights violations that Interested Parties complain of does not mean there is no connection with Amewu's claim to be MP-elect of the Hohoe Constituency. That is a fundamental error and leads this Court into further fundamental error in claiming, therefore, that no reliefs relating to Amewu are within the jurisdiction of the High Court, Ho. The Interested Parties sought reliefs before the High Court, Ho, based on the provisions of Article 33(2) of the Constitution: "The High Court may, under clause (1) of this article, issue such directions or orders or writs including writs or orders in the nature of *habeas corpus, certiorari, mandamus*, prohibition, and *quo warranto* as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions on the fundamental human rights and freedoms to the protection of which the person concerned is entitled." A writ of "*quo warranto*" in the common law tradition was used to question whether a person purporting to hold a certain office truly had the warrant to hold that office. The Interested Parties, according to the pleadings in the Human Rights action, were claiming that voters in the SALL area had been denied their right to vote in the Hohoe Constituency as defined in CI 95 and that, without their votes being counted in that constituency, the Electoral Commission official could not declare Peter Amewu as the Member of Parliament-Elect. The purported declaration of Amewu and other acts of the Electoral Commission now denied them (the Interested Parties) of their right to representation in Parliament. Certiorari and quo warranto were writs available under to quash wrongful acts of officials and wrongful assumption of office, respectively. These were among the remedies explicitly provided for in Article 33(2).

41. The reliefs the Interested Parties sought, consequent upon these fundamental rights violations, included the proper conduct of elections in the whole Hohoe constituency as defined in CI 95.

These reliefs are in consonance with the provisions of Article 33(2) and it was for the High Court to ascertain the facts and determine whether they are "appropriate for the purposes of enforcing or securing the enforcement of any of the provisions on the fundamental human rights and freedoms to the protection of which the person concerned is entitled." (Article 33(2)).

42. Their Lordships' claim that "[t]he law as constitutionally and statutorily provided and judicially considered by the this apex Court in a plethora of decisions, **does not permit the interested parties to include reliefs 1 (f), 2 and 3 in their apparent human rights action** when those reliefs were purporting to challenge the due election of John Peter Amewu as the Member of Parliament elect for the Hohoe Constituency" (p. 10 emphasis added) is per incuriam in not taking into consideration Article 33(2) of the Constitution.

43. Ground (h) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in its claim that "the Interested Parties did not say anything in justification of the interim orders made by the High Court" (p. 8) and that "the interested parties' affidavit in opposition did not provide any answer to applicant's submissions against the propriety of the interim orders made by the trial High court on 23rd December 2020." (p. 13)

It is not, with respect, the case that the Interested Parties did not say anything in justification of the interim orders made by the High Court. For one thing, it was the Interested Parties that exhibited in the proceedings in the Supreme Court the motion ex parte and supporting affidavit as well as a Statement of Case (together "**Exhibit MKSC 1**"). The entirety of that exhibit which was attached to an affidavit filed by 1st Interested Parties on behalf of all the Interested Parties, showed why the interim orders were not only justified but necessary. They would prevent irreparable damage from the denial of the people in the SALL area their right to vote for a Parliamentary candidate of their choice and to have

representation in the 8th Parliament. Counsel for the Interested Parties also justified the reliefs in terms of the powers under Article 33(2) of the Constitution. Counsel read out this provision in court as the decisive justification by Counsel of the reliefs that the Interested Parties sought in the High Court, Ho. It is obvious that the focus of Counsel for the Interested Parties in this regard was on the court's jurisdiction to make those orders since, in an application invoking the supervisory jurisdiction of the Supreme Court over proceedings in the High Court, it was the jurisdiction of the High Court that was central. Their Lordships' claim that the Interested Parties did not say anything in justification of the interim orders suggests that they did not consider "**Exhibit MKSC 1**" nor realize that the reference to Article 33(2) by Counsel was decisive justification of the reliefs that the Interested Parties sought in the High Court, Ho.

44. Ground (i) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice when it deprived the Interested Party of constitutionally protected fundamental human rights by recourse to a provision in a statute.

Both the position of the Applicant in the Statement of Case and that of their Lordships in their ruling is centred around the provision in section 16 (1) of PNDCL 284. According to their Lordships: "With regard to the provisions under article 99, there existed a law before the promulgation of the Constitution, i.e. PNDCL 284, which law was saved by article 11(1)(d) of the Constitution" In this reliance on the listing of "existing law" in the laws of Ghana, their Lordships failed to take into consideration the significance of Article 11(6) of the Constitution: "6. The existing law shall be construed with any modifications, adaptations, qualifications and exceptions necessary **to bring it into conformity with the provisions of the Constitution,** or otherwise **to give effect to, or enable effect to be given to any changes effected by the Constitution.**"(Emphasis supplied). All through the ruling of their Lordships, at no point does this outlook of subjecting PNDCL 284

to consistency with the Constitution surface. The section (16(1)) of the PNDC Law, which provides that: "The validity of an election to Parliament may be questioned only by a petition brought under sections 17 to 26"), is highlighted in the ruling to the detriment of provisions in the Constitution, particularly Article 33, on the enforcement of the fundamental human rights provisions. The decisions of this Court in ***New Patriotic Party v Inspector-General of Police*** [1993-94] 2 GLR 459, and ***New Patriotic Party v Attorney-General (31st December case)*** (1993-94)2 GLR 35) show how statutory provisions that predated the 1992 Constitution had to be brought into conformity with the Constitution.

45. It is also worthy of note that in **Awuni v. WAEC**, this Court, faced with a similar reliance, as in this case, on a PNDC Law -the West African Examinations Council Law, 1991, PNDCL 255 -to suggest that it was the provisions of that law that the applicants should have recourse instead of the recourse to Article 33, was unimpressed. Sophia Akuffo JSC (as she then was) stated simply: "However, since PNDCL 255 is subject to the 1992 Constitution, any investigation [under PNDCL 255] must comply with the requirements of article 23. ....WAEC ought to have conducted a more serious investigation in the course of which the affected persons should have been given some opportunity to be heard. ... the fact that an investigation which complies with natural justice and meets the constitutional standards of fairness and reasonableness might seem inconvenient or impracticable is no excuse." (at pages 519-520).

The decision of their Lordships in this case is thus per incuriam of Article 11 (6) and Article 33 as well as the previous decisions above referred to.

46. Ground (j) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice when it claimed that the "Constitution per article 99, clothes only the High Court with jurisdiction to hear and determine any

question as to whether or not a person has been validly elected as a Member of Parliament." (p. 11, emphasis supplied).

In this passage in their Lordships' ruling, the word "only" is transposed from section 16 of PNDCL 284 and inserted into the terms of article 99 of the Constitution. The jurisdiction provided the High Court in Article 99 over questions as to whether a person has been validly elected a Member of Parliament is stated simply as such without the word "only". It is not expressed as excluding other courts of jurisdiction they may have which may overlap in certain respects with the power that the High Court has with respect to an election petition. No canon of interpretation of a Constitution or statute can justify this insertion of "only" into article 99. This insertion – for the purpose of supporting an argument about jurisdictional exclusivity -constitutes a fundamental error which occasioned a miscarriage of justice.

47. **Ground k) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice when it claimed that "In the wake of these two provisions; that is article 99 of the Constitution, 1992 and section 16 of PNDCL 284 of 1992, a person cannot sidestep this procedure and commence an action in the High Court invoking any of the High Court's other jurisdiction to ventilate a grievance that border (sic) on the validity of an election to Parliament." (p. 11)**

In this passage of the ruling, their Lordships are essentially claiming that, on the basis of Article 99 of the Constitution and section 16 of PNDCL 284 of 1992, invoking any of the other jurisdictions of the High Court "to ventilate a grievance that border (sic) on the validity of an election to Parliament", amounts to "sidestep[ing] this [election petition] procedure" provided for in article 99 of the Constitution and section 16 of PNDCL 284. With respect, there can be no question of a sidestepping of Article 99 of the Constitution and/or section 16 of PNDCL 284 when a High

Court, seised with jurisdiction under Article 33 of the Constitution to enforce fundamental human rights, including the right to vote and to representation in Parliament, has to consider whether the conduct of an election has been a part of the denial of fundamental human rights. The High Court would simply be exercising a jurisdiction bestowed on it by the entrenched provisions of Article 33 to determine whether, indeed, the alleged conduct of the election was part of the fundamental human rights violation that is under consideration before it.

48. Were it not so, a High Court before whom an action for enforcement of fundamental human rights is proceeding, would have to refuse to deal with the aspect of the fundamental human rights violation that has to do with the validity of the election and require that that aspect proceed by way of an election petition! That would, with respect, be an unacceptable dereliction of the important responsibilities that the jurisdiction to enforce fundamental human rights imposes on the High Court under Article 33. It is unthinkable for a judge of the High Court, in hearing an action for the enforcement of fundamental human rights, to abnegate his important constitutional responsibilities in the manner described above!

49. Adjudication of fundamental human rights violations related to the conduct of elections would be stalled by an alternative remedy such as the election petition process being made to override the pursuit of remedies under Article 33(2) for fundamental human rights violations. This court, we respectfully submit, ought not to put judges of the High Court in a situation of abnegating their constitutional responsibilities to enforce fundamental human rights under Article 33 of the Constitution. Yet this is exactly what Your Lordship's ruling would unfortunately do, hence the imperative need of the exercise of the review jurisdiction.

50. Attention must be paid to the terms of Article 33(1) of the Constitution: *"When a person alleges that a provision of the Constitution on the fundamental human rights and freedoms has*

been, or is being or is likely to be contravened in relation to him, then, ***without prejudice to any other action that is lawfully available,*** *that person may apply to the High Court for redress."*

There is explicit recognition that the remedy being provided here is regardless of, "without prejudice to" any other recourse the applicant for redress may have. Thus, whether an election petition may also be lawfully available to the applicant, whether recourse to the Supreme Court is available, whether any other avenue is available to the applicant, Article 33 (1) clearly entitles the Interested Parties to go to the High Court and seek remedies available under Article 33(2).

In **Awuni v. WAEC**, Date-Baah, JSC, also stated clearly:

"A close reading of article 33(1) of the 1992 Constitution especially the "without prejudice" clause, reveals that the appellants can bring an application under article 33(1) even if there are other forms of action available to them. In the words of Acquah JSC in ***Edusei (No 2) v. The Attorney-General*** [1998-99] SCGLR 753 at 788: "without prejudice to any other action that is lawfully available' ...refers to any possible cause of action that may arise from the violation of one's fundamental human right and freedom, independent of that victim's constitutional right of seeking redress for the said violation. *It is therefore improper for the Court of Appeal to attempt to restrict the options of the appellants to an action by writ of summons."*

51. A passage of the judgment of Hayfron-Benjamin JSC in **Yeboah v. J.H. Mensah** which their Lordships quote with emphasis (at p. 12) actually also undermines the ruling of their Lordships: **"when a remedy is given by the Constitution and a forum is given by either the Constitution itself or statute for ventilating that grievance, then it is to that forum that the plaintiff may present his petition."** The Interested Parties in this case went exactly to that forum the Constitution has designated to ventilate

their grievances about being denied fundamental human rights, including rights to vote and to representation in Parliament. That forum cannot be prevented by this Court from going into all aspects of the fundamental human rights violations, including those that may relate to the conduct of the election in the Hohoe constituency. That forum cannot be stripped of the hallowed constitutional jurisdiction given to it, an entrenched jurisdiction that emanated from the bowels of the nation's history, as many of their Lordships in this Court have had occasion previously to acknowledge.

52. The invocation of this jurisdiction of the High Court by the Interested Parties cannot be derailed merely because issues about the conduct of the election and its validity arise as part of the matters to be considered. The following words of Sophia Akuffo JSC (as she then was) in **Awuni** are, again, very apposite: "*When fundamental human rights have been, are being or likely to be contravened, access to judicial redress must be as swift and timely as feasible to ensure that such rights or freedoms are not lost or irremediably damaged forever... It is clear to me that what article 33(1) seeks to assure, by making provision for access by an application rather than a writ of summons (a relatively sluggish process), is that such a complaint be disposed of by the High Court with the optimum dispatch... the High Court's jurisdiction under article 33(1) is a special one; and by clear constitutional stipulation, it may be invoked by an application.*"

53. Ground (l) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in its claim that the interim orders "are in the nature of orders made in an election petition." (p. 8)

When the High Court, Ho, made the interim orders it did, it was acting on the basis of its jurisdiction under Article 33 and not its jurisdiction to hear an election petition under Article 99 of the Constitution. Those interim orders were as a result of an application ex parte by the Interested Parties who were not

proceeding by way of an election petition. Indeed, since, to their knowledge, there had been no publication of a Gazette with the results of the Parliamentary elections, the Interested Parties could not have proceeded by way of an election petition when they filed their enforcement action and the application ex parte **(Exhibit MKSC 1)** on 23rd December 2020. The interim orders were sought under Order 25 (1)(7) of CI 47 with specific circumstances being highlighted that threatened, and still threaten, irreparable damage. Order 25 Rule 1(2) is clear in its terms: "*A party to a cause or matter may apply for the grant of an injunction before, or after the trial of the cause or matter, whether or not a claim for an injunction was included in the party's writ, counterclaim or third party notice.*"

Order 25 Rule 1(7) allows such interim orders to be made ex parte.

54. Interim orders made pursuant to the fundamental human rights enforcement jurisdiction of the High Court are not "in the nature of orders made in an election petition". It is the cause or matter in the course of which such interim orders are made, that determines the nature of the interim orders. An interim order can be made by a High Court judge in the context of fundamental human rights enforcement jurisdiction or in the context of an election petition. Each context, by virtue of Order 25 Rule 1 (2), is an acceptable context for a party to seek and obtain such orders. It was therefore clearly and fundamentally in error for their Lordships to consider the orders as "in the nature of orders made in an election petition. "This fundamental error has occasioned a miscarriage of justice in leading to the judge claiming these orders were void.

55. Ground(m) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice when it claimed "The only time that the High Court has power to make orders affecting the validity of any parliamentary election is when an election dispute is initiated under article 99 of the Constitution." (pp. 12-13)

The claim made in the above-quoted passage of the ruling of their Lordships has no basis whatsoever in the Constitution. It even goes beyond the claims made in the passages of the ruling cited in Grounds (j) to (l) above. This passage of the ruling means that without an election dispute being initiated under article 99 of the Constitution, there is no time when the High Court has power to make orders affecting the validity of any parliamentary election! No constitutional or legal basis exists for this statement. As we have submitted above in respect of Ground (l), if in the course of exercising its fundamental human rights jurisdiction, the High Court has to determine matters affecting the validity of an election, Article 33(2) gives the Court power to issue appropriate directions or orders etc "as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions on the fundamental human rights and freedoms to the protection of which the person concerned is entitled. "Their Lordships have consistently made that very clear.

56. Ground (n)-This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in failing to take into consideration in its ruling earlier binding decisions of the court which Counsel for the Interested Parties had cited before the court in both written and oral submissions.

Remarkably, in the entire ruling of their Lordships, not a single decision of the Supreme Court or of the High Court exercising its enforcement jurisdiction, cited in either the Statement of Case or the Supplement to the Statement of Case of the Interested Parties was referred to, much less discussed. Yet, the common law doctrine of **stare decisis** does require judges to apply binding precedents. Indeed, the Supreme Court is normally bound by its own previous decisions as provided for in Article 129 (3) of the Constitution: "The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on questions

of law." Thus, faced with a line of well-established Supreme Court decisions on the right to vote, for instance, their Lordships simply disregarded them rather than seek to distinguish them.

57. The failure to consider binding Supreme Court decisions which Counsel for Interested Parties relied on contrasts sharply with their Lordships' references to all the authorities cited by the Applicant. It is essentially as a result of this one-sided approach that basic legal errors, such as those described in our submissions above under Ground (a), and the other errors to be demonstrated in the other grounds occurred. It is also remarkable that while their Lordships make reference to the contentions of the Applicant in respect of the Supreme Court decision in **Dzatse v. Henry Ametefe & ors**, they are entirely silent on the submissions of the Interested Parties on the authority, including the submissions about the Applicant's submissions being quite misleading in respect to the terms of the Supreme Court.

58. The dead silence on the line of Supreme Court cases cited by the Counsel for the Interested Parties constitutes a failure of their Lordships to give due consideration to the case of the Interested Parties as required by Article 296 (a) and (b): "Where in this Constitution or in any other law discretionary power is vested in any person or authority –

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

It is clear on the face of the ruling of their Lordships that not a single authority cited by Counsel for the Interested Parties was even mentioned in the ruling! Thus, on all the points of legal contention in this suit, and especially, in respect of the exercise of discretionary power involved in its supervisory jurisdiction, the

failure to act fairly and candidly and the unreasonableness in not considering authorities relied on by the Interested Parties is a fundamental error of law that has led to a grave miscarriage of justice.

59. In **Kyenkyenhene v. Adu Boahen** [2003-2004] SCGLR 142, the Supreme Court reversed a Court of Appeal decision upholding a High Court judge's exercise of discretionary power on the basis that there was an infringement of Article 296(a) and (b). In the words of Baddoo JSC, at p. 154 -5:

> "It is my considered opinion that the trial judge, in the exercise of his discretion, did not only misapprehend the evidence, but failed to give critical consideration to relevant issues...Article 296 of the 1992 Constitution requires that the exercise of discretionary power shall not be arbitrary, capricious or biased, but should be fair and candid. I have found that the trial judge in the exercise of his discretion ...., was not fair."

The requirements of Article 296, as here expounded, are even more applicable to the exercise of discretionary power by judges of the Supreme Court as they are to set the standards for judges below to follow.

60. Ground (o) This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice when it purported to "order that the entire proceedings of the High Court, Ho dated 23rd December, 2020, which led to the making of the void orders of mandamus and injunction, be brought to this Court for the purpose of same being quashed and they are hereby quashed" (p. 14) after earlier determining that: "... the wrong orders of the trial High court made on 23rd December, 2020, died a natural death by the close of 2nd January 2021 and has (sic) long been buried. So, in effect, as of today 5th

January 2021, there are no subsisting orders of the trial High Court to be brought to this Court to be quashed."(p. 13).

In its consideration of the interim orders made by the High Court, Ho, their Lordships set out the provisions of Order 25 Rules (1) and (9) and, then, proceed as follows: "Though the trial judge has jurisdiction to issue ex parte interim orders as shown above, such orders, by operation of law, are limited by time. It is for (sic) the above provision in C.I. 47 that the trial High Court judge stated emphatically that its interim orders were to last for only ten (10) days, which is the lifetime statutorily provided for such ex-parte orders. So by operation of law, the interim orders, though wrongly made or void *ab initio,* **lapsed ten (10) days after they were made. This means that, the wrong orders of the trial High Court made on 23rd December, 2020, died a natural death by the close of January 2021 and has long been buried.** {Ref. Order 80 r. 1(5) of the High Court Civil Procedure Rules, 2004 [C.I. 47]}". (p. 13 emphasis added).
Their Lordships continued: "**So in effect, as of today 5th January 2021, there are no subsisting orders of the trial High Court to be brought to be quashed."**

61. Yet, their Lordships conclude their ruling as follows: "We accordingly order that the entire proceedings of the High Court, Ho dated 23rd December, 2020, which led to the making of the void interim orders of mandamus and injunction, be brought to this Court for the purpose of same being quashed and they are hereby quashed." (p. 14). The last sentence on those orders on the previous page was: "So in effect, as of today 5th January 202, there are no subsisting orders of the trial High Court to be brought to this Court to be quashed." How then did these dead and buried orders resurrect only a page later for their Lordships to make an order that they be quashed? We respectfully submit that the last sentence of their Lordships' ruling is entirely inconsistent with the reasoning of the previous page and is fundamentally in error.

62. We submit that their Lordships recognized correctly that "the trial judge has jurisdiction to issue ex parte interim orders as shown above," -by reference to Order 25 r. 1- and that "such orders, by operation of law, are limited by time." For that reason, the supervisory jurisdiction of the Supreme Court could not be invoked to quash the orders and the Supreme Court should have left the matter at that.

63. **Ground (p) This Honourable Court acted without jurisdiction when it purported to strike out certain reliefs sought in the originating motion on notice.**

Directly after the statement in their Lordships' ruling that "there are no subsisting orders to be brought to this Court to be quashed", their Lordships proceeded as follows:

"However, since the trial High court has no jurisdiction to determine reliefs 1(f), 2 and 3(a), (b) and (c) as endorsed in the originating motion on notice under the authority invoked before the court, i.e. article 33(1) of the Constitution, we shall strike out the said reliefs for wrongful assumption of jurisdiction and we hereby do." (pp. 13-14). With the greatest respect to their Lordships, the Applicant herein did not bring before this Court an application to strike out reliefs in the originating notice of motion and the Court had no jurisdiction to decide on the reliefs in the originating notice of motion. The Interested Parties who are affected by such a decision never got a chance to be heard on the issue of whether the reliefs in their originating notice of motion were in any way, wrongful. Fundamental principles of natural justice undoubtedly require that the Interested Parties are given a hearing before such an order is made on a matter which was not part of the case that this Court heard on 4th January 2021.

64. **Ground (q)This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in its ruling in respect of the objection raised against the participation of Justice Hoenyenugah in a determination of**

his own eligibility after an objection on the real likelihood of bias and actual bias arising from the Justice's long-standing close relationship with Amewu and the "unbreakable bond" between them was raised with the indication of witnesses being available to testify.

At the hearing of the suit on 4th January 2021, Counsel for the Interested Parties intimated to the court that there had been communication to the court requesting that His Lordship Justice Hoenyenugah recuse himself in the light of a longstanding close personal relationship with John Peter Amewu. Counsel indicated that he would be obliged to raise an objection to His Lordship sitting on the case should he not recuse himself. Following the indication that Justice Hoenyenugah would not recuse himself, Counsel proceeded to raise the objection, indicating that by reason of the close, longstanding personal relationship and an "unbreakable bond" that existed between His Lordship and Mr. Amewu, there was a real likelihood of bias and, indeed, actual bias on the part of Justice Hoenyenugah sitting on a matter that concerned Amewu. Counsel further indicated that there are witnesses available to testify to the nature of the relationship referred to between Justice Hoenyenugah and Amewu. Counsel also stated that Justice Hoenyenugah could not be a judge in his own cause in the determination of his eligibility and referred to the precedent in the well-known case of **Sallah v. Attorney-General** where upon an objection being raised to Justice Apaloo hearing a case involving Mr. Sallah, a trial within a trial was conducted to determine whether or not Justice Apaloo was to be disqualified from sitting on the case.

65. In the ruling of their Lordships, in which Justice Hoenyenugah obviously participated, their Lordships dismissed the objection by Counsel. The participation of Mr. Justice Hoenyenugah in the determination of the objection was in breach of the fundamental principle of natural justice -nemo judex in causa sua, no one shall be a judge in his own cause. A trial within a trial should, with respect, have been ordered to ascertain the facts as to the

allegations. The court's reliance solely on the letter requesting Justice Hoenyenugah to recuse himself was a fundamental error as the letter only requested the recusal of His Lordship. Following the decision of His Lordship not to recuse himself, Counsel raised the objection with the clear statement that witnesses were available to testify to the relationship between

Justice Hoenyenugah and Amewu. For the court to dismiss the objection without giving the opportunity for the witnesses to be called to testify was a fundamental error that occasioned a miscarriage of justice.

66. It may be recalled that during the hearing on 4th January 2021, Her Ladyship Justice Tokornoo made a comment to Counsel for the Interested Parties about having eaten kenkey in the house of Counsel, suggesting that such an allegation could not be a basis for her disqualification in a case involving counsel. It bears emphasis that there is no comparison between the allegation made against Justice Hoenyenugah and what Justice Tokornoo referred to in her comment. A student of law eating kenkey in the house of a lecturer of hers can hardly more than thirty years later be a ground for an allegation of bias should Justice Tokornoo sit on a case involving Counsel. Of course, if Justice Tokornoo wished to recuse herself on account of her having eaten kenkey in her lecturer's house as a student, that is within her rights. What has been alleged against Justice Hoenyenugah is not about eating kenkey over thirty years ago. It is that there has been a longstanding personal relationship, an "unbreakable bond" with Amewu which witnesses would testify about.

Further submissions on this will be made when the record of the court's ruling is made available.

67. Ground (r)This Honourable Court committed a fundamental error of law that has occasioned a miscarriage of justice in its ruling in respect of the objection raised against the

participation of Justice Hoenyenugah when it claimed that the action in the High Court, Ho, was not about Amewu.

Among the considerations of the court in dismissing the objection was the claim that the suit did not involve Amewu. This claim echoes what their Lordships suggested in their ruling on 5th January 2021 about the case that the Interested Parties brought before the High Court, Ho, not being about Amewu. With respect to their Lordships, Amewu was a named Respondent in the suit as the record before this court makes clear. Further, as our submissions above make clear, Amewu had common cause with the Electoral Commission whose official had declared him Member of Parliament-Elect for Hohoe Constituency. The circumstances make it obvious that Amewu is very much implicated in the suit before this court. The affidavit in support of the application itself makes it clear that the issue of Amewu's declaration as the Member of Parliament-Elect for Hohoe Constituency and his being subsequently gazetted are the central matters the Applicant was seeking to protect even as the Applicant also claimed that "[t]he instant action" is of supreme public interest as it bears implications for the composition of the next Parliament of Ghana which commences on 7th January 2021, the election of the Speaker of the next Parliament of Ghana (without which there cannot be a Parliament of Ghana) and, generally, for the representation of the people of the Hohoe constituency in Parliament." (p. 2 of Statement of Case filed on behalf of the Applicant).

68. Precisely because of the matters of public concern, including the issue of the non-representation of the people of the SALL Area in the 8th Parliament (a matter on which the Application is studiously silent), the issue of bias on the part of a judge whose relationship with the Judge in question the Interested Parties were prepared to prove, it was essential that JUSTICE IS NOT ONLY DONE BUT MANIFESTLY BE SEEN TO BE DONE. Refusal by their Lordships to allow an inquiry into the matter on the ground that the suit did not involve Amewu was, in the circumstances, a fundamental error which occasioned a miscarriage of justice.

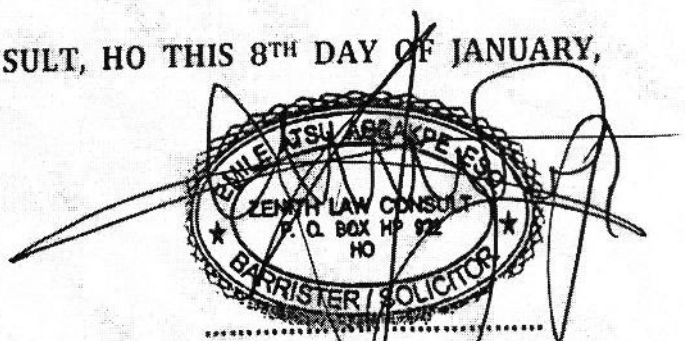
Further submissions on this will be made when the record of the court's ruling is made available.

D. CONCLUSION

69. In our respectful submission, each of the grounds of our application for review have been established and the Court should, in the interests of justice, review its decision of 5th January 2021 and dismiss the application. The case in the High Court, Ho, for the enforcement of the fundamental human rights of the Interested Parties herein should be allowed to run its course. The Respondents therein, including Amewu and the Attorney-General, have every opportunity to present their case to that court.

70. It is undoubtedly in the interests of justice that the Interested Parties are heard expeditiously in respect of their serious allegations of violations of their fundamental human rights. More so as the Attorney -General admitted in open court that it was wrong and unlawful for the people of the SALL Area to have been prevented by the Electoral Commission from voting in Parliamentary Elections on 7th December 2021.

DATED AT ZENITH LAW CONSULT, HO THIS 8TH DAY OF JANUARY, 2021.



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LAWYER FOR INTERESTED PARTIES/APPLICANTS
eVOL/01057/21

THE REGISTRAR
SUPREME COURT
ACCRA

AND FOR SERVICE ON THE:

THE ATTORNEY-GENERAL, OFFICE OF THE ATTORNEY GENERAL AND MINISTRY OF JUSTICE.