IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – A. D. 2013

ATUGUBA, JSC (PRESIDING)
ANSAH, JSC
ADINYIRA (MRS), JSC
OWUSU (MS), JSC
DOTSE, JSC
ANIN-YEBOAH, JSC
BAFFOE-BONNIE, JSC
GBADEGBE, JSC
AKOTO-BAMFO (MRS), JSC

WRIT No. J1/6/2013

29TH AUGUST, 2013

PRESIDENTIAL ELECTION PETITION

IN THE MATTER OF A PETITION CHALLENGING THE VALIDITY OF THE ELECTION OF JOHN DRAMANI MAHAMA AS PRESIDENT OF THE REPUBLIC OF GHANA PURSUANT TO THE PRESIDENTIAL ELECTION HELD ON 7TH AND 8TH DECEMBER, 2012.

Article 64 of the Constitution, 1992; Section 5 of the Presidential Election Act, 1992 (PNDCL 285); and Rule 68 and 68A of the Supreme Court (Amendment) Rules 2012, C.I. 74.

BETWEEN:

1. **NANA ADDO DANKWA AKUFO-ADDO**] 1ST PETITIONER
   H/No. 2, Onyaa Crescent, Nima, Accra.]

2. **DR. MAHAMUDU BAWUMIA**] 2ND PETITIONER
   H/No. 10, 6th Estate Road, Kanda Estates, Accra.]

3. **JAKE OTANKA OBETSEBI-LAMPTEY**] 3RD PETITIONER
   24, 4th, Circular Road, Cantonment, Accra.]

AND

1. **JOHN DRAMANI MAHAMA**] 1ST RESPONDENT
   Castle, Castle Road, Osu, Accra.]

2. **THE ELECTORAL COMMISSION**] 2ND RESPONDENT
   National Headquarters of the Electoral Commission, 6th Avenue, Ridge, Accra.]

3. **NATIONAL DEMOCRATIC CONGRESS (NDC)**] 3RD RESPONDENT
   National Headquarters, Accra.]

JUDGMENT

ATUGUBA, JSC

By their second amended petition dated the 8th day of February 2013 the petitioners claimed, as stated at p.9 of the Written Address of their counsel;

"(1) that John Dramani Mahama, the 1st respondent herein, was not validly elected President of the Republic of Ghana;

(2) that Nana Addo Dankwa Akufo-Addo, the 1st petitioner herein, rather was validly elected President of the Republic of Ghana;

(3) consequential orders as to this Court may seem meet."

Although the petitioners complained about the transparency of the voters' register and its non or belated availability before the elections, this line of their case does not seem to have been strongly pressed. In any event the evidence clearly shows that the petitioners raised no such complaint prior to the elections nor has any prejudice been shown therefrom. Indeed even in this petition the petitioners claim that the 1st petitioner was the candidate rather elected, obviously upon the same register. So also their allegations that there were irregularities and electoral malpractices which "*were nothing but a deliberate, well-calculated and executed ploy or a contrivance on the part of the 1st and 2nd Respondents with the ultimate object of unlawfully assisting the 1st Respondent to win the 2012 December Presidential Elections.*" Indeed the 2nd petitioner for and on behalf of all the petitioners, testified that the first respondent did no wrong with regard to the conduct of the elections but was merely the beneficiary of the alleged malpractices, irregularities and violations

Eventually the core grounds of their case are as summarised at p.125 of their counsel's Written Address as follows:

"I. over-voting
II. voting without biometric verification
III. absence of the signature of a presiding officer
IV. duplicate serial numbers i.e. occurrence of the same serial number on pink sheets for two different polling stations
V. duplicate polling station codes, i.e. occurrence of different results/pink sheets for polling stations with the same polling station codes

VI. unknown polling stations i.e. results recorded for polling stations which are not part of the list of 26,002 polling stations provided by the 2nd respondent for the election."

At conference we unanimously saw no merit in ground IV relating to "*duplicate serial numbers i.e. occurrence of the same serial number on pink sheets for two different polling stations."*

We were at a loss as to how the embossment of the same number on more than one pink sheet whether serial or otherwise in respect of two different polling stations has impacted adversely on the 2012 electoral process. Those numbers, on the evidence of Dr. Afari Gyan the Electoral Commission's chairman, are the offshore generation of the printers of the pink sheets. Those numbers have no statutory base. However the decisive fact is that their incidence has not been shown to have any detrimental effect on the electoral process. We felt that grounds V and VI did not relate to matters that could have any substantial effect on the declared results. We therefore dealt mainly with the first three grounds of the petition.

Nonetheless, for the easy future ascertainment of the number and electoral location of pink sheets in the electoral process their numbering should be streamlined.

ABSENCE OF PRESIDING OFFICER'S SIGNATURE

By far the irregularity which has engaged and sharply divided this court as to its consequence is "*absence of the signature of a presiding officer*." This irregularity is anchored in article 49 of the 1992 constitution, which, as far as relevant, provides thus:

"**49. Voting at elections and referenda**

(1) At any public election or referendum, voting shall be by secret ballot.

(2) Immediately after the close of the poll, *the presiding officer shall*, in the presence of such of the candidates or their representatives and *their polling agents as are present*, proceed *to count*, at that polling station, *the ballot papers of that station* and record *the votes cast in favour of each candidate or question.*

(3) The presiding officer, the candidates or their representatives and, in the case of a referendum, the parties contesting or their agents and the polling agents if any, shall then *sign a declaration stating*

(a) the polling station, and

(b) the number of votes cast in favour of each candidate or question,

and the presiding officer *shall,* there and then, *announce the results of the voting at that polling station* before communicating them to the returning officer."(e.s)

It is undoubtable that in some instances the declared results were not signed by the presiding officer though the petitioners' polling agents did sign. The crucial question that has devastated this court is whether those results should be annulled.

To arrive at an answer to this question a number of considerations are relevant. To some minds the sacred nature of the constitution and the clarity of article 49 so far as the requirement of the presiding officer's signature is concerned warrant the unmitigated annulment of the votes involved. Quite clearly however this has not been the approach of this court and its predecessors to constitutional construction or application.

Clear violation of Constitutional Provisions

Article 157 of the constitution provides as follows:

"**157. Rules of Court Committee**

(1) There shall be a Rules of Court Committee which shall consist of

(a) the Chief Justice, who shall be Chairman,
(b) Six members of the Judicial Council, other than the Chief Justice nominated by the Judicial Council, and
(c) Two lawyers, one of not less than ten and the other of not more than five years' standing, both of whom shall be nominated by the Ghana Bar Association.

(2) The Rules of Court Committee *shall*, by constitutional instrument, *make rules and regulations for regulating the practice and procedure of all Courts* in Ghana."

It is globally acknowledged that despite such mandatory language in a constitutional provision, the failure of the Rules Committee to make such procedure Rules does not debar a litigant from adopting any appropriate method for approaching the court – see *Edusei [No. 2] v Attorney-General* (1998-99) SCG LR 753. In *Peters v Attorney-General* (2002) 3 LRC 32 C. A, Trinidad and Tobago at 657 de la Bestide CJ said:

> "There is abundant authority for the proposition that where matters of pure procedure have not been prescribed in relation to the exercise of a jurisdiction conferred by statute, *the court has an inherent jurisdiction* to approve or direct the procedure to be adopted. In *Jaundoo v A-G of Guyana* [1971] AC 972 the
> Government proposed to construct a road on a piece of land which was privately owned without paying the landowner compensation. *The landowner applied to the High Court under a provision of the Constitution* which gave t he High Court jurisdiction to grant redress for infringement of constitutional rights. *The Constitution further provided for Parliament to make provision with respect to the practice and procedure to be followed in the High Court in relation to the exercise of this jurisdiction. Neither Parliament nor the rule-making authority had made any provision in this regard*. The landowner non the less applied by way of originating motion to the High Court naming the attorney General as respondent. *The courts in Guyana held that in the absence of any provision as to the means by which proceedings of this kind were to be instituted, the High Court had no jurisdiction to entertain the landowner's application.* The Privy Council, however, held that in the absence of any provision prescribing the method of access to the High

Court, a person complaining of an infringement of his constitutional rights was entitled to adopt any form of procedure by which the High Court might be approached to invoke the exercise of any of its powers. In delivering the judgment of the Privy Council, Lord Diplock said ([1971] AC 972 at 982)

"*The clear intention of the Constitution* that a person who alleges that his fundamental rights are threatened should have uninhibited access to the High Court *is not to be defeated by any failure by Parliament or the rule-making authority to make specific provision as to how that access is to be gained.*'

x x x

The Privy Council held that an originating motion was an appropriate procedure in the circumstances and *proceeded to remit the matter to the High Court of Guyana to deal with on its merits*.

In *Port Contractors v Seamen and Waterfront Workers' Trade Union* (1972) 21 WIR 505 *the Court of Appeal refused to hold that the power given by statute to the Industrial Court to order the joinder of a party to proceedings 'on such terms and conditions as may be prescribed by rules made by the court'* was *stultified by the failure of the court to make any such rules.* Georges JA said ((1972) 21 WIR 505 at 510:

> 'To hold that *the power cannot be exercised* in the absence of a prescribed code of rules *would mean that parties to disputes would be deprived of the benefit of the exercise of the power because of the court's failure to produce a code- a circumstance over which they could have no control.* I do not think that this could have been intended.'(e.s)

Again he said ((1972) 21 WIR 505 at 510):

> 'I am satisfied also that the preparation of *such a code was not a condition precedent to the exercise of the power of joinder*. The *provision is directory- not mandatory*. The failure to prepare rules does not stultify the power conferred upon the court to exercise the power of joinder.'" (e.s)

Again article 125(1) of the constitution provides thus:

"**125**. **The judicial power of Ghana**

(1) *Justice* emanates from the people and *shall be administered in the name of the Republic* by the Judiciary which shall be independent and subject only to this Constitution." (e.s)

In the case of *Tsatu-Tsikata v Attorney General (No. 1)* (2001 – 2002) SCGLR 189 the majority of this court held that a criminal summons issued in the Fast Track High Court in the name of the President of Ghana rather than the name of the Republic contravened this provision and was therefore a nullity. This decision was reversed on Review by the majority of this court in *Attorney-General (No. 2) v Tsatsu Tsikata (No. 2)* (2001-2002) SCGLR 620. At 647 Acquah JSC (with the concurrence of Wiredu C.J, Sophia Akuffo and Afreh JJSC) held poignantly as follows:

"**Constitutionality of the criminal summons**

The applicant also *complains about the majority's holding that the criminal summons served on the respondent was unconstitutional*. Now *it is true that the criminal summons was inadvertently issued in the name of the President*, but *what harm or threatened harm did that error cause the plaintiff*? Did he as a *result of that error go to the castle to answer the call of the President*, or when he came to the court, *did he find the President of the nation presiding*? The plaintiff came to court *because he knew it was the court that summoned him*, and that *whoever issued the criminal summons, obviously made a mistake*. The plaintiff *suffered absolutely no harm by the error*, neither has he demonstrated any. *That error was one obviously amendable* without prejudice to the rights of the plaintiff-respondent. And *the majority's declaration on this error was nothing but an exercise in futility."* (e.s)

General Demands of Justice and Constitutional Provisions

It is globally established that where a constitutional infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Thus in *State v. Shikunga* (1998) 2 LRC 82 the Namibian Supreme Court was faced with a situation in which an appellant convicted of murder and robbery contended that his said conviction was vitiated by the reception in evidence of a confession statement in relation to which

s.217(1) (b) (ii) of the Criminal Procedure Act 1977 had placed on him the burden of proof of its involuntariness contrary to article 12(1) (a) (f) of the Constitution of Namibia 1990. The court, after considering authorities from Canada, the United States of America, Jamaica and Australia, held as per holding (2) of the Headnote thus:

> "(2) *In considering whether to quash a conviction resulting from a trial in which a constitutional irregularity had occurred* (in the instant case the admission of a confession pursuant to an statutory provision found to be unconstitutional), *the court had to balance two conflicting considerations of public policy*, namely, that while manifestly guilty persons should be convicted, *the integrity of the judicial process should also be upheld.* Before the constitutional entrenchment of the rights in question, the test that had evolved at common law in respect of non-constitutional irregularities was such that the effect of an irregularity depended upon whether or not a failure of justice had resulted from it. Under the common law, *where an irregularity was of so fundamental a nature* as to require that *the proceedings* in which it had occurred *be regarded as fatally defective*, any *resulting conviction had to be set aside*. Where *the irregularity was not of such a fundamental nature*, its effect would *depend on the impact of the irregularity* on the verdict and *whether the irregularity had in fact tainted the verdict*. It was considered that *this common law test should apply with equal force to cases where the irregularity complained of consisted of a constitutional breach.* In applying the test to the instant case, there was no justification for interfering with the conviction as *the conviction had not been dependent on the confession*, the *guilt of the accused* having been *proved by other reliable evidence*." (e.s)

Similarly in *Armah Mensah v The Republic* (1971)2 GLR it is stated in the headnote as follows:

> "The appellant was tried and convicted of stealing by a district court. When the *case was called for the first time* the appellant *applied for an adjournment to secure the presence of his counsel*. This was *disallowed and the appellant had therefore to defend himself in person*. Consequently *he did not adequately put his defence to the prosecution witnesses*. When, however, he put forward that defence when he was himself giving evidence, he was not cross-examined upon it. A statement made by the appellant, exhibit B was admitted in evidence although the

appellant objected to it on the ground that it was not on caution, the trial magistrate holding that an objection to admissibility can only be on the ground that the statement was not made voluntarily. On appeal,
Held, allowing the appeal: (1) article 20 (2) (e) of the Constitution, 1969, gives to every person charged with a criminal offence the right to defend himself or to be represented by counsel of his choice. That choice is not the tribunal's and where the tribunal narrows the choice to one there is an infringement of constitutional rights.
(2) In depriving the appellant of his rights under article 20 (2) (e) *the trial might have occasioned a miscarriage of justice* in that *the appellant was denied an adequate defence* and such defence as he put forward was rejected upon legally indefensible grounds, namely (a) the trial court was not entitled to disbelieve the appellant's story on which he was not cross-examined, and (b) exhibit B was admitted for the wrong reasons since involuntariness is not the only ground upon which a statement may be excluded. Further it was not certain whether the appellant's conduct constituted a crime or was general misconduct. The matter being in doubt, it should be resolved in favour of the accused." (e.s)

It is thus clear that Taylor J did not mechanically hold that a breach of article 20(2) (e) of the 1969 constitution ***ipso facto*** vitiated the appellant's conviction but that such breach occasioned a miscarriage of justice warranting the quashing of the conviction.

<u>Purposive Construction of the Constitution and other statutes</u>

In *Republic v High Court Accra ex parte Attoney-General (Delta Foods case)* 1998-99) SCGLR 595, even though the plaintiff instituted his action against the Minister of Agriculture rather than the Attorney-General as required by article 88(5) of the constitution, this court dismissed the application to quash the proceedings in the trial court, holding that the conduct of the defence had been done by state attorneys.

In these circumstances this court per Acquah JSC at 610 stated poignantly thus: "*Clearly* then, *the rationale underlying the need to have the Attorney-General*

named as the defendant in all civil actions against the state *is satisfied in the instant situation."* Accordingly this court concluded as stated in holding (1) of the headnote thus:

> *"(1) the effect of article 88(5) of the 1992 Constitution, by directing that the Attorney-General, and no other else, should be named the defendant in all civil proceedings against the State meant that in the instant action by the plaintiffs, the Attorney-General, and not the Minister of Food and Agriculture, ought to have been made the defendant – not to assume liability* but as the nominal defendant. *The failure to name the Attorney-General as a defendant in a suit where he ought to be so named should not, depending upon the circumstances in each case, be fatal, if the amendment could easily be effected (as in the instant case) by substituting him for the wrong defendant in the exercise of: (1)* the court's supervisory powers under article 132 of the constitution and section 5 of the Court's Act, 1993 (act 459); (ii) under the court's general jurisdiction under article 129(4) namely, to exercise all the powers, authority and jurisdiction vested in the court whose judgment or conduct is the subject-matter of the suit before the court; or (iii) *in the exercise of the court's powers in fitting situations and in the interest of justice to amend the record by substituting a new defendant for the one sued.* "

It is quite clear that this court in that case applied the PURPOSIVE approach to constitutional construction which has been enthroned in this court particularly in the adulated era of Dr. Date-Bah JSC, as the dominant rule for the construction of our constitution. Two very strong and recent decisions of this court based on the purposive approach to constitutional interpretation should be beacon lights to constitutional adjudication in this court. In *Amegatcher v Attorney-General (No. 1)* & Others (2012) 1 SCGLR this court, had to revisit the starkly clear provisions of article 88(5) of the constitution that

> " **88. The Attorney-General**
>
> x x x
>
> (5) The Attorney-General shall be responsible for the institution and conduct *of all civil cases* on behalf of the State; and *all civil proceedings* against the State *shall be instituted against the Attorney-General as defendant*."

This court unanimously held that to avoid the abuse of that power certain institutions of state could sue and be sued independently of the Attorney-General. Again in *Ransford France (No. 3) v Electoral Commission & Attorney-General* (2012) SC GLR 705 this court was again confronted with the starkly plain literalistic wording of article 296(c) which provides thus:

> "**296. Exercise of discretionary power**
>
> Where in this Constitution or in any other law discretionary power is vested in any person or authority,
>
> x x x
>
> (c) where the person or authority is not a justice or other judicial officer, *there shall be published by constitutional instrument or statutory instrument, Regulations* that are not inconsistent with the provisions of this Constitution or that other law *to govern the exercise of the discretionary power"*

In that case, fastening hard on that provision is consolidation with article 23 and 51 the plaintiff contended as stated in the Headnote:

> "that upon a true and proper interpretation of articles 23, 51 and 296 (c) of the 1992 Constitution, *the Electoral Commission*, the first defendant, in the exercise of its functions and discretionary power *in creating new constituencies, was required to make to make by constitutional instrument, regulations* not inconsistent with the 1992 Constitution or any other law *to govern the exercise of its discretionary power*. The plaintiff also sought *an order* directed at the first defendant *compelling the first defendant to*, as required by articles 51 and 296 (c) of the 1992 Constitution or any other law, *regulations to govern the exercise of its discretionary power* to create new constituencies including, in particular, *the specification of the formula and mechanism to be used in the creation of new constituencies*."

Dismissing the action this court stated per Dr. Date-Bah JSC, with fluorescent ability that this Court will not sanction a construction of the constitution that would lead to a nuclear melt-down of governmental functioning.

In *Francis Jackson Developments Limited v. Hall* (1951) 2 K.B. 488 C.A at 493-494 Denning L. J (as he then was), delivering the judgment of the Court of Appeal said thus:

> "The result would be, therefore, that, by reason of Perkins' application for security of tenure, all of them, including Perkins himself, would lose their security of tenure. *We do not think that we should adopt a construction of the Act which would produce a result so opposed to the intention of parliament. If the literal interpretation of a statute leads to a result which parliament can never have intended, the courts must reject that interpretation and seek for some other interpretation, which does give effect to the intention of parliament:*"

In *Coltman v Bibby Tankers Limited* (1986) 2 All ER 65 at 68 Sheen J. bluntly said: "...it is to be presumed that Parliament *did not intend to pass an Act* which, on its true construction would *be manifestly unjust or absurd*."

In *Mokotso v H M King Moshoeshoe II* (1989) LRC 24 Cullinan C.J sitting in the Lesotho High Court at 150 quoted Professor de Smith, Judicial Review of Administrative Action, 4th edn 1980 at 71 as saying that "The Courts will endeavour to construe Acts of Parliament so as *to avoid a preposterous result*; but if a statute *clearly evinces an intention to achieve the preposterous*, the courts, are under an obligation to give effect to its plain words."

In *Regina v. Bow Road Justices (Domestic Proceedings Court) Ex parte Adedigba* (1968) 2 QB 572 CA at 583-584 Salmon L.J said: "It seams to me that the words of Lord Blackburn in *Tiverton & Nouth Devon Rly Co v Loosemore* (1884) 9 ARO. Cas. 480, 497 can appropriately be applied to the intervening Acts." He said: "*In construing an Act of Parliament we ought not to put a construction on it that would work injustice, or even hardship, or inconvenience, unless it is clear that such was the intention of the legislature."*

Similarly in *Kwakye v Attorney-General* (1981) GLR 944 SC at 1070 Taylor JSC (descenting) said:

> "... In my humble opinion, *the function of the Supreme Court in interpreting the Constitution or any statutory document, is not to construe written law merely for the sake of laws. It is to construe the written law in a manner that vindicates it as an instrument of justice. If therefore a provision in a written law can be interpreted in one breadth to promote justice and in another to produce injustice, I think the Supreme Court is bound to select the interpretation that advances the course of justice unless, in fact, the law does not need interpretation at all but rather specifically and in terms provides for injustice."*

Fraudulent Advantage of a Statute

Our illustrious judicial predecessors here and in England in particular have from earliest times been alert to prevent the taking of an unfair or fraudulent advantage of a statute. Thus in *Tekyi @ Mensah v Ackon* (1980) GLR 779 at 786 Osei-Hwere J said:

> "*In spite of the prohibition in section 4 of the statute of Frauds, equity has, since 1686,* addressed itself to what has been described as *the task of decorously disregarding an Act of Parliament by means of the doctrine of past-performance."*

This stance of the courts in applying statutory provisions in a manner that even contravene their plainest words in order to avoid grotesque and gargantuan injustice has had the consistent support of the legislature in statutes passed to back them, see s.2 of the Conveyancing Act 1975. Indeed the legislature is deemed not to alter the common law except by very clear words or compelling implication. This is trite law. Consequently the vigilant Editor in his preface and Editorial Review to the (1998-99) SC GLR at p.xiv has hailed at length the decision of this court in *Amuzu v. Oklikah* (1998-99) SG GLR 141 thus:

> "**Land registration and equitable doctrine of notice and fraud**
>
> In a far-reaching decision in *Amuzu v Oklikah*, the Supreme Court has exploded the myth surrounding the long held view of the effect of section 24(1) of the Land Registry Act, 1962 (Act 122), as determined in *Asare v*

Brobbey the Court of Appeal held that since the mortgage deed relied upon by the third respondent had not been registered as required by section 24(1) of Act 122 at the time the power of sale was exercised, the document was ineffective and invalid to convey rights under the mortgage deed, and that the third respondent, as a bona fide purchaser of the disputed house, could not be protected under the Act. In the words of Archer JA (as he then was):

> "*...there is no statutory provision in the Land Registry Act, 1962, which protects the third respondent. Nowhere in the Act is it stated that a purchaser for value of land, the subject-matter of a mortgage deed which is unregistered shall not be affected by the provisions of the Act provided he has no notice that the mortgage deed has not been registered.*"

It is in the light of the statement of the law as enunciated in *Asare v Brobbey*, that the Supreme Court's decision in *Amuzu v Oklikah* in the present Volume of the Report becomes very significant. The court unanimously held that the Land Registry Act, 1962 did not abolish the equitable doctrines of notice and fraud. It was thus held that a later registered instrument relied upon by Dr. Oklikah, the plaintiff, could only obtain priority over an earlier unregistered instrument affecting the same plot of land under Act 122, s.24(1) if it was obtained without notice and fraud of the earlier unregistered instrument In support of the decision, his lordship Charles Hayfron-Benjamin JSC said:

> "*Asare v Brobbey*... cannot stand since *it did not take into consideration any equitable doctrine or rule which could ameliorate the harshness of the statute*. In my respectful opinion, *that decision must, to the extent* that *it requires the strict application of section 24(1)* of Act 122, be overruled ... While a party with an unregistered document may be unable to assert legal title in court, nevertheless the document will take effect in equity and will defeat all claims except the holder of the legal title."

In his contribution to the decision in *Amuzu v Oklikah*, his lordship Ampiah JSC admitted that the decision of the court in favour of the defendant, the first purchaser whose document remained unregistered, amounted to "*a revolutionary stance against settled authorities*." However, his lordship added:

> "But as stated before, *if justice is to prevail* in the manner lands are disposed of, *the courts must be bold to avoid too strict an*

> *application of the provision of the Land Registry Act, 1962 which gives blessing to fraudulent land dealers*. In other words, *justice must not be sacrificed on the alter of strict adherence to provisions of laws which at times create hardship and unfairness*." (e.s)
> The conclusion to be inexorably drawn is that the decision in *Amuzu v Brobbey* has, in effect, overruled the long-standing interpretation placed by the courts on section 24(1) of Act 122."

In this case it would be unfair and fraudulent for the petitioners to authenticate the results through their polling agents' signatures and turn round to seek to invalidate on the purely technical ground of absence of the presiding officer's signature.

Administrative Error

It is judicially acknowledged that failure to sign an official document could be due to an administrative error. In *Practice Note (Guardianship: Justices' Signatures)* In *re N(A Minor)* (1972) I WLR 596 at 597 Sir, George Baker P said:

> "in the present case *the justices' reasons are signed by two justices*. We have been told by Mr. Eady, who was present before the justices, that *in fact three justices sat and* that it appears from a letter from the justices' clerk that *the justice who has not signed was the chairman of the justices*. The inference which I would draw from that is that the chairman dissented from the view of the other two justices. It is not satisfactory that this court should be left to draw that inference, which may be wrong. *It may be that the failure to sign is simply an administrative error*, or because the chairman has been ill or abroad, or something of that kind. Further, practice varies: some justices' clerks put on the documents the names of the justices who were sitting, others do not. I would direct, first, that the names of the justices should always appear either, and preferably, at the top of the reasons or at the top of the notes. It is very important in many cases, and particularly in cases concerning children, for this court to know the composition of the bench and whether a lady or indeed ladies sat. Secondly, if a justice does not sign the reasons it should be stated either that the cause of not signing is that that justice did not concur in the decision or reasons, alternatively that there is some other reason, which need not necessarily be specified, for the absence of his or her signature."

The Court however did not base its judgment on the absence of the presiding judge's signature but on the merits of the case. It however issued this Practice Direction for future guidance.

In *Plymouth Corporation v. Hurrel* (1968)1 QB 455 CA. at 465-466 Salmon L. J commenting on the signature of a town clerk on a notice to a person in control of a house under the authority of the local council said "*Clearly the only purpose of having the town clerk's signature* upon the notice *is to provide some evidence that it has been duly authorised by the local authority.* The signature *in itself* has *no magic* about it..." This being the clear purpose of a signature, in dealing with the problem of absence of signature of the presiding officers in this case, as sir Donald Nicholls V-C said in *Deposit Protection Board v Dalia* (1993)1 All ER 599 at 605-606, "the court *treading circumspectively, must look at the underlying purpose of the legislation* and *construe the draftsman's language with that purpose in mind"*

Clearly the underlying purpose of the signatures of the presiding officer and the polling agents on the pink sheets is to provide evidence that the results to which they relate were those generated at the relevant polling station in compliance with the constitutional and other statutory requirements, otherwise each "*signature in itself has no magic about it."* The evidence in this case clearly shows that absent the presiding officer's signature, those of the polling agents are there. In those circumstances even if the failure by the presiding officer to sign the same is condemned as unconstitutional yet the polling agents' signatures, the public glare of the count and declaration of the results in question, the provision of copies of the same to the polling agents and their sustenance at the constituency's collation centre and all the way to the strong room of the 2nd respondent (the Electoral Commission) and the cross checking of the same thereat by the parties; representatives should satisfy the policy

objective of article 49(6) regarding signature. Indeed the petitioners have not on any ground approaching prejudice of any sort questioned the authenticity of the results which do not bear the presiding officer's signature.

Even though the constitution is undoubtedly the most sacred law of this country, despite the passion attached to the rebirth of constitutionalism in 1969 it was not pursued even in those early days to the point of crushing substantial justice. Thus in *Okorie alias Ozuzu v The Reupublic* (1974) 2 GLR 272 C.A in reacting to the reception in evidence at the trial of two confession statements from the appellant without informing him of his right to consult counsel of his own choice Azu Crabbe C.J delivering the judgment of the Court of Appeal firstly held that that fundamental right could be waived (though today some jurisdictions like India would disagree). He then held as follows:

> "There is no proof of any conscious waiver in this case, but counsel for the Republic, Mrs. Asamoah, has contended that failure to inform the second appellant of his right did not occasion a miscarriage of justice.
> In the opinion of this court, *it is irrelevant that an infringement of a constitutional right has not occasioned a miscarriage of justice. Any breach of the provisions of the Constitution carries with it "not only illegality, but also impropriety, arbitrariness, dictatorship, that is to say, the breaking of the fundamental law of the land*": see The proposals of the *Constitutional Commission For a Constitution For Ghana*, 1968, p. 22, para 88. The statement in exhibits A and K, were obtained in violation of the second appellant's constitutional rights, and consequently, *we hold that they were inadmissible in evidence at the trial* of the second appellant. *There is, however, sufficient evidence aliunde to support the conviction* of the second appellant, and *his appeal must, therefore, fail*." (e.s)

As I have endeavoured to demonstrate *ut supra*, absent the presiding officer's signature there is copious evidence *intra* the relevant pink sheets by way of the eternal signatures of the polling agents and also *aliunde* to sustain the authenticity of those results. Consequently I would adopt the attitude of the Court of Appeal in *Clerk v Clerk* (1976) 1 GLR 123 C.A in dealing with the

absence of the presiding officer's signature in this case. In that case Archer J.A (presiding) would appear to have overlooked the earlier decision of the Court of Appeal of which he was a concurring member *in Akunto v Fofie* (1973) 1 GLR 81 C.A and joined his brethren in deciding, as stated in the headnote thus:

> "W. Appealed against a decree of divorce granted H. Under the English Divorce Reform Act, 1969, s. 2(1) (e) on the grounds that the petition was signed not by H. But by his solicitor, and that even thought he petition was amended by substitution of H.'s signature for that of the solicitor, the amendment was filed out of time, thus the whole proceedings should be declared null and void.
>
> *Held, dismissing the appeal:* (1) a petitioner's failure to sign a petition was a mere irregularity and not a fundamental defect. It could therefore under the authority of L.N. 140A, Order 70, be remedied by the substitution of the signature of the petitioner for that of the solicitor which had erroneously been subscribed especially, as in the instant case, no disadvantage nor erosion of natural justice as occasioned by it *Armar v Armar*, Court of Appeal, 21 April 1969, unreported; digested in (1969) C.C. 73 followed.
>
> (2) The appellant could not be heard to complain that the amendment was filed out of time because she participated fully in the hearing before the trial court and yet failed there to invoke L.N. 140A order 28, r.7 or r. 4."

Even though there is no provision like O.70 the old High Court Civil Procedure Rules, LN. 140 A or O.81 of the current High Court Civil Procedure Rules, 2004, C.147, the principles evolved in Ghana and outside Ghana regarding constitutional construction which I have set out *ut supra*, warrant my adoption of the decisions in Clerk v Clerk.

Again in *Pollard v R*. (1995) 3 LRC 485 P.C the failure of the appellant to sign his notice of application for leave to appeal against his conviction for murder which had rather been signed by his counsel was not such a fundamental error that could not be cured. As stated in the Hednote:

> "The appellant and a co-accused were convicted of murder and sentenced to death. A notice of application for leave to appeal signed by counsel was taken within the time prescribed by the West Indies Associated States Court of Appeal Rules 1968 as stipulated by s. 48(1) of the Eastern Caribbean Supreme Court (St Vincent and the Grenadines) Act but was rejected because the appellant had not signed it as required by r.44(1) of the 1968 rules. When the co-accused's appeal came on for hearing the appellant, having signed a further notice for leave to appeal, moved the Court of Appeal to extend the time within which to lodge the notice. The Court held that it had no jurisdiction to extend time under s.48 (2) of the Acct where an appellant was under sentence of death. The court heard the co-accused's appeal and, after considering the poor quality of the sole witness's evidence, quashed his conviction on the ground that it was unsafe and unsatisfactory. The appellant appealed.
>
> HELD: Appeal allowed.
> Rule 11 of the West Indies Associated States Court of Appeal Rules 1968 should be applied to allow the hearing of a criminal appeal where an appellants failure to sign the notice of application for leave to appeal was not wilful and amounted to no more than a technical non-compliance with the rules and where it would be in the interests of justice to waive the non-compliance, thereby validating the notice under s.48 (1) of the Eastern Caribbean Suprem Court (St Vincent and the Grenadines) Act from the date of its lodgement. On the facts, there were compelling reasons in the interests of justice to apply r.11 with the result that the appeal was validly constituted so that the court of Appeal had jurisdiction to hear it. Accordingly, the appeal would be remitted to the Court of Appeal for determination."

It is true however that in the Nigerian case of *INEC v Oshiomole*, supra, the Nigerian Supreme Court took the view that an unsigned Election petition is a dud document to be struck out but Election petitions are sometimes treated very strictly because of the element of protraction over the outcome of the exercise of the franchise, see *Hari Shanker Jain v Gandhi* (2002)3 LRC 562 S.G. India. Even there the court bemoaned the days of technicalities in the administration of justice and liberally held that where there are several petitioners the signature openly one of them can support the petition and if a listed solicitor's agent signed a petition it should be accepted as valid.

OVER VOTING

There is a question as to what constitutes over-voting. The evidence of Dr. Mamudu Bawumia, the 2nd petitioner, Johnson Asiedu Nketia, General Secretary of the National Democratic Congress and of Dr. Kwadwo Afari Gyan, Chairman of the electoral Commission the 2nd respondent, is said to establish two types of overvoting.

The first is where the number of those who voted at a polling station exceeds the number of voters contained in the relevant polling station register. The second situation is where the number of ballots in the ballot book exceeds the number of ballot papers issued to the relevant polling station. Pondering over these two categories closely I would think that the second category of overvoting is rather an instance of ballot stuffing as testified by Johnson Asiedu Nketia.

According to the evidence where the votes in the ballot box are exceeded by even one vote the integrity of that vote is said to be compromised and must be annulled and depending on the impact of that vote on the overall results, the election in that polling station must be rerun.

Burden of Proof

Before tackling the issues of overvoting and voting without biometric verification at length the question of the burden of proof has to be settled.

It is said that election petitions are peculiar in character hence the question of burden of proof has evoked various judicial opinions in the common law world. However, upon full reflection on the matter I have taken the position that the

provisions of the Evidence Act, 1975 (N.R.C.D 323) with the appropriate modifications, where necessary, suffice.

Presumptive effect of the Instrument of Declaration of Presidential Results

Article 63(9) of the Constitution provides thus:

> "(9) An instrument which,
>
> (a) is executed under the hand of the Chairman of the Electoral Commission and under the seal of the Commission; and
>
> (b) states that person named in the instrument was declared elected as the President of Ghana at the election of the President,
>
> shall be prima facie evidence that the person named was so elected."

This means that unless the contrary is proved the president is presumed to haven been validly elected. The legal effect of this is governed by ss. 18-21 of Evidence Act, 1975 (NRCD 323). On the facts of this case the relevant provision are sections 20 and 21 (a), this not being a jury trial. The cardinal question therefore is whether the petitioners have been able to rebut the presumption of validity created by the presidential Declaration of Results Instrument. The evidence led by the petitioners is almost exclusively that of the pink sheets. Dr. Mahamudu Bawumia chiefly in his evidence, relied on his evidential maxim "you and I were not there" "The evidence is on the face of the pink sheets" which to him are the primary record of the election. The petitioners also sought to rely on extractive evidence from cross-examination of Johnson Asiedu Nketia and Dr. Kwadwo Afari Gyan Chairman of the Electoral Commission and Mr. Nii Amanor Dodoo the KPMG representative. They also relied on certain aspects of the pleadings supported by affidavits.

However Dr. Afari Gyan made it clear to this court in his evidence that the entries on the pink sheets were in such a state of omissions, repetitions etc that one would have to read them as a whole and construe them carefully and if

necessary resort to the relevant polling station register of voters, the serial numbers of the ballot papers and even the data base of the biometric verification machines themselves etc. To see one's way clear as to the course of voting.

On page 35 of the proceedings of the 3rd day of June, 2013 his evidence on the issue of overvoting was as follows:

"Q: In situations like that, can you tell the court whether there is a procedure that should be followed.

A: The annulment or you are talking about when there was an excess

Q: Yes

A: If they had been reported to us, that would have been a different issue. We would have taken certain steps to ascertain whether in fact those things constitute excess. There are all kinds of things that you would do, because we are dealing with a very sensitive situation so you must be sure of what you are doing. It is gone over by the claim one and may be in some places the votes involved are huge. So what do we do to make sure whether it is really gone over by 1. I will first carry out a very careful examination of the pink sheet, that will be the starting point, a very careful analyses of the pink sheet. *You have seen that somebody says that I was given 4 ballot papers when in fact he was given 325 and in some cases when you check the difference, there could be a mistake in the addition of the figures*. So that is a starting point check *whether the pink sheets have been properly executed*. In addition to that as the returning officer, I will *recheck whether all ballots in contention fall within the serial range of the ballots that were allocated to the station*. I would also cause are check of whether *every ballot paper in contention has the validating stamp*

of the polling station. And because our law says that when you vote *your name must be ticked I would cause a count.*

Q: Ticked where.

A: In the register. Your name must be ticked in the register. I would cause a count of the ticks in the register and all these things would have to be done before I take a decision on what to do."

Voting without Biometric Verification

The evidence clearly establishes that the 2012 election started on 7/12/2012 and due to difficulties with the biometric verification machines, continued on 8/12/2012. The evidence also shows that form 1C which was meant for those voters who had biometric voter ID cards but their names were not on the register, was not taken to the polling stations due to opposition from the political parties. In consequence form C3 was not to be filled but a few presiding officers still filled it in error. Dr. Afari Gyan's conflicting evidence as to the date of the printing of the pink sheets and the instructions concerning form C3 is such a technical error of recollection that not much weight should be attached to it.

The plaint about voting without biometric verification cannot, in addition to the foregoing reasons, therefore hold in the absence of some other contrary evidence.

The pink sheets contained errors of omission of e.g. proxy votes, blanks, repetitions, wrong grammatical renditions, etc. Indeed Dr. Bawumia admitted under cross-examination that the pink sheets cannot alone supply answer to issues arising from them, in all situations.

The pink sheet or its equivalent in other jurisdictions has been judicially regarded as the primary record of an election. But no one has given it a

conclusive effect. Neither the constitution nor any other statute, substantive or subsidiary has accorded the pink sheet any particular status. I would not infer from the constitution and Electoral laws that its reputation as the primary record of the election means anything more than that it is the ready and basic document to resort to, for a start, when one wants to ascertain how the elections fared in a particular polling station.

I am not aware of any judicial University that has awarded or conferred a graduate or doctoral degree on the pink sheet. Some of the Nigerian authorities filed by the petitioners are in point. Thus in *INEC v. Oshiomele* (2008) CLR 11 (a) S.C the Independent National Electoral Commission of Nigeria (NEC) was subpoenaed by the petitioners and did produce inter alia "*forms, voters registers, ballot papers and records of counting and sorting of the ballot papers*" in the challenged election, and the Supreme Court held that such documents largely established their case in addition to oral evidence.

Again in I.N.E.C v Ray (2004) 14 NWLR (Pt. 892) the Court of Appeal (Enugu Judicial Division) held as per the headnote (4) as follows:

"**ELECTION PETITION –**ALLEGATION OF HOLDING OF ELECTION:

> How allegation that election took place in a particular ward or Constituency can be proved.
> "*...a party who alleges that election took place in a particular ward or Constituency is required,* in order to prove that allegation; ...to call at *least one person who voted at any of the polling units in the* two wards whose registration card would show the stamp of the presiding officer and the date confirming that he had voted at the election. In the alternative, the presiding officer or any other official of INEC who participated in the conduct of the election, could give evidence to that effect and support that evidence by the production of the register of voters and other official documents of INEC prepared, signed, and dated by him, showing that election had taken place in all or some of the units of the wards concerned. Per OGUNBIYI, J. CA"

Indeed in *DTA v Prime Minister* (1996) 3 LRC 83 High Court, Namibia O'Linn J presiding, vigorously dissented from the validity of a law prohibiting the opening or inspection of sealed electoral material by any person except by order of court in criminal proceedings, saying as stated in the Headnote that it was an absurdity that a complainant be given the right to come to court *only to be deprived of the procedural right of discovery and inspection once there.*

It appears that the petitioners rather belatedly, towards the end of the case, realised the need for the adduction in evidence of such vital documents like the voters registers, collation sheets, etc and tried to do so, sometimes with the indulgence of this court, through cross-examination of Dr. Kwadwo Afari Gyan, Chairman of the Electoral Commission and also through unsuccessful applications for leave to serve on him notices to produce such documents.

It is felt, and the petitioners so submit, that the pink sheets do operate as estoppel as to the facts therein contained and therefore, inter alia, extrinsic evidence is inadmissible. The shortest answer to this is that the constitution being the supreme law of the land doctrines of estoppels do not apply to constitutional litigation, see *Tuffuor v Attorney-General* (1980) GLR 637 C.A (sitting as the Supreme Court*), New Patriotic Party v Attorney-General* (1993-94) GLR I. do not think that it makes a difference that such estoppels are contained in statutes, since such statutes cannot derogate from the supremacy of the constitution. In any case estoppels do not apply where the parties, as here, possessed common knowledge of the real facts involved such that no party can mislead the other as to them, see *Ghana Rubber Products Ltd v. Criterion Company Ltd* (1982-83) GLR 56 C.A, *Odonkor v Amartei* (1992) 1 GLR 577 S.C and in *Re Fianko Akotuah* (Decd); *Fianko v Djan* (2007-2008) SC GLR 170. I also need not waste time demonstrating that extrinsic evidence, were estoppels applicable here, is admissible under the exceptions thereto, see *Dua v*

Afriyie (1971) 1 GLR 260 C.A and *Koranteng II v Klu* (1993-94) 1 GLR 280 SC.

In the circumstances I do not think that the petitioners have established their allegations of overvoting and voting without biometric verification, except to the limited extent admitted by the Electoral Commission's chairman, which cannot impact much on the declared results.

POLLING AGENTS

It was sought to devalue the status of the polling agents to that of mere observers. That is certainly unacceptable. If they were such passive attendants at an election it is inconceivable that the constitution would have considered their signatures to the results sheet significant enough to merit express constitutional requirement. Before exiting the constitution to seek for other signs of their powers one is met squarely with article 297 (c) as follows:

> "**297. Implied power**
>
> x x x
>
> (c) where a power is conferred on a person or authority to do or enforce the doing of an act or a thing, all such powers shall be deemed to be also given as *necessary to enable that person or authority to do* or enforce the doing of the act or thing;"

Also under the Public Elections Regulations, 2012 (C.I. 75) Regulation s.19, as far as relevant is as follows:

> "**Polling agents**
>
> x x x
>
> (2) A candidate for presidential election may appoint one *polling agent* in every polling station nationwide.
>
> (3) An appointment under subregulations (1) and (2) is *for the purpose of detecting impersonation and multiple voting and certifying that*

the poll was conducted in accordance with the laws and regulations governing the conduct of elections.

(4) *A presiding officer shall give a polling agent the necessary access to enable the polling agent to observe election proceedings at a polling station.*

x x x

(6) The returning officer shall set a date on which the polling agents shall appear before the returning officer *to swear an oath to the effect that the polling agent shall abide by the laws and regulations governing the conduct of elections.*

x x x

(8) The polling agent shall present *the duplicate copy of the letter of appointment to the presiding officer of the polling station* to which the agent is assigned on the day of the poll.

(9) Despite subregulation (5) a candidate *may change an agent under special circumstances* and a new agent appointed by the candidate shall swear an oath before the presiding officer in charge of the polling station where that agent is assigned." (e.s)

In *Jayantha Adikari Egodawele v Commissioner of Elections* (2002) 3 LRC 1, the Sri Lanka Supreme Court per Fernando J commenting extensively on the important role of polling agents in an electoral system which is very similar to that of Ghana, said at 19 thus:

> "Would potential voters not lose confidence in the ability of the law enforcement authorities to protect them against unlawful acts and/ or to duly investigate them if they did occur? Ballot-stuffing and driving out polling agents go hand-in-hand with violence or the threat of violence – which, in turn, will have a deterrent effect on electors in the vicinity as well as on those still in their homes. *Impersonators will not have an easy task if there are polling agents present who might challenge them* (and demand declarations under s.41). *Obviously, polling agents are not chased away because they are disliked, but because they hinder impersonation*. Further, the practice of seizing polling cards from electors must not be forgotten. That is seldom an end in itself, because it does not prevent those electors from voting. However, if those electors

> can somehow be deterred from voting, and *if there are no polling agents likely to object*, a seized polling card will be a passport to impersonation. *Thus driving away polling agents is a classic symptom of graver and more widespread electoral malpractices*, ranging from the intimidation of electors and the seizure of polling cards to large-scale impersonation." (e.s)

Continuing at 21 he said:

> "*Polling agents have a special role to play in a free, equal and secret poll*, and this court emphasised the need to ensure their security shortly before the disputed poll. Their right to be present at the polling station is expressly recognised by s.33, in the same breath as the right of election staff, the police and candidates. *Their duties commence from the time the empty ballot box is sealed*; and, inter alia, *they have the right to challenge suspected impersonators*. An election, ultimately, is determined by the number of ballots cast. *It is the polling agents who play a leading part in ensuring that only those entitled to vote do cast ballots*. Chasing away *polling agents makes a poll cease to be equal."*(e.s)

Indeed in *Mcwhirter v Platten* (1969)1 All ER 172 serious discrepancies in the declared results of the Enfield borough local elections were taken up by an election agent called Harris and this led to the pursuit of criminal process. At 173 Lord Parker CJ said:

> "On 9th May 1968 local elections took place, amongst other places, in the borough of Enfield. There are thirty wards, each returning two candidates, and in one of those wards, West Ward with which we are concerned in the present case, there is no doubt that the elected candidates wee Conservatives. There were in addition two Labour candidates, two Liberal candidates and two Independent candidates, the two Independents being Mrs. Bradbury, who is one other appellants, and her husband, Mr. Bradbury. *The count in this ward took place in the presence of the election agents of the various candidates. The matter with which we are concerned came to light as the result of something that was said to Mr. Harris, who was the electing agent of the two Independent candidates*. The counting officer, or his deputy, told Mr. Harris at the end of the count that broadly speaking, subject to checking, the Conservative candidates had 2,600 votes each, the Labour candidates 170, and the two Liberal candidates had 140 votes. *So far as Mr. Harris's candidates, Mr. And Mrs. Bradbury, were concerned, he was told that subject to minor adjustment, Mr. Bradbury had got 525 and*

Mrs. Bradbury 519; in other words, they came second to the Conservatives and above the Labour and Liberals.

To Mr. Harris's amazement, when the formal announcement was made of the result, he found that the two Labour candidates had been given votes which exceeded those in respect of Mr. And Mrs. Bradbury, in other words the Labour candidates had come second. As a result, the returning officer, the respondent, looked into the matter, and he came across a very curious state of affairs- a shocking state of affairs really- as the result of which he felt constrained to make an announcement in the press, and on 24th May the following announcement was made by the respondent:

> *"*Following publication of the detailed results of the recent Borough Elections my attention has been drawn to apparent arithmetical discrepancies in the figures for [not merely West Ward, but Craig park and High field Words] I have discussed these matters with the Agents of the candidates primarily concerned and such enquiries as I have been able to make, have regard to the provisions of Electoral Law designed to preserve the secrecy of the ballot, lead me to the following conclusions: (i) *There has been no case in which there has been a failure to include in the Count any votes cast*, but the total *number of votes appears to have been miscalculated*, with the result that in two cases candidates as a whole appear to have been credited with more votes than were actually cast. (ii) In the third case candidates as a whole appear to have been credited with fewer votes than the total votes cast but in such proportions as not to affect their relative positions (iii) *In no case does it seem that these matters affect the result of any election. ...*"" (e.s)

This shows that misrepresentations of electoral results do not necessarily invalidate them when the real ascertainable truth can establish the contrary. So let it be with our pink sheets herein.

Continuing at 175 he said:

> "Let me say at once that there is no question whatever of an election petition. *The Conservatives were elected by a very large majority*, and *there is no question of Mrs. Bradbury or any body else bringing an election petition*. Therefore *the sole ground advanced*, and it is advanced by Mr. McWhirter and Mrs. Bradbury is the first one, namely *that the*

> *order is required for the purpose of instituting a prosecution for an offence in relation to ballot papers*. Both Mr. McWhirter and Mrs. Bradbury have sworn that is the object, in their affidavits." (e.s)

The certification of the results by the polling agents without any complaint at the polling station or by evidence before this court shows that certain recordings on the pink sheets should not readily be taken as detracting from the soundness of the results declared but rather point to the direction of administrative errors which at the worst, as demonstrated supra, can be corrected by the defaulting officials.

By analogy, though a company law case, I adopt substantially and ***mutatis mutandis*** the reasoning in *Marx v Estates and General Investments Ltd*. (1976) I WLR 380 as set out in the Headnote as follows:

> "A merger agreement between C. Ltd. and the defendant company was entered into, whereby the defendant company should acquire the share of the former in return for approximately 5.500,000 new ordinary stock units in the defendant company. The agreement was conditional on a resolution being passed by a general meeting of the defendant company approving the merger and increasing the authorised capital. A meeting was convened for June 12, 1975, for that purpose but, as a substantial number of shareholders objected to the merger, the meeting was adjourned. The dissentients distributed unstamped forms of proxy providing for the appointment of a proxy vote "at the adjourned extraordinary general meeting of the company ... or any further adjournment or adjournments thereof or at any new extraordinary general meeting of the company during 1975" dealing with the matter. The meeting was reconvened for July 16 and was adjourned to July 30. At that meeting the resolution approving the merger was defeated on a show of hands and a poll was demanded. The chairman accepted the votes tendered, appointed scruitineers and adjourned the meeting until the result of the poll could be declared. Article 66 of the company's articles provided that no objection should be raised as to the admissibility of any vote except at the meeting at which it was tendered and "every vote not disallowed at such meeting shall be valid for all purposes.
>
> On August 4, when the count was almost concluded, objections were raised as to the validity of the proxy forms on the ground that as they related to more than one meeting they should have been stamped 50p. In accordance with the Stamp Act 1891. The validity of the votes cast by

the proxies appointed on the unstamped forms determined whether the resolution had been passed. The opinion of the Controller of Stamps was obtained that the forms of proxy were not chargeable.

On a motion, treated as the trial of the action, by the dissentient shareholders to restrain the defendant company from treating the resolution as having been passed:

Held, giving judgment for the plaintiffs, that since the proxy forms were capable of being used to vote not only at adjournments of the meeting of June 12 but at any new extraordinary general meeting in 1975, even though they might have been intended only for use at one meeting, they were liable to a 50p. stamp and the chairman would have been entitled to reject them at any time at or before the July 30 meeting, but he was entitled to accept the votes of a proxy because the unstamped proxy votes were not void and were valid authorities capable of being stamped; and, accordingly, since the company had accepted them without objection at the meeting the votes cast by the proxies were valid (post, pp. 386H – 387a. 388A-B, C-D, 391D-E); and that in all the circumstances the dissentient shareholders were entitled to their costs on a common fund basis under R.S.C., Ord. 62 r. 28 93) (post, pp. 392D-F, H-393A).

Held, further, that by virtue of article 66 the objection taken several days after the meeting at which the votes were tendered was made too late to invalidate them (post, pp. 389H-390A) . . .(1) Adjudication by the Controller of Stamps does not prejudice rights asserted and relied upon prior to adjudication (post, pp. 387H-388A).

Prudential Mutual Assurance Investment and Loan Association v Curzon (1852) 8 Exch. 97 considered.
(2) There is *much to commend an article in a company's articles of association to the effect that an objection to the admissibility of a vote should only be raised at the meeting at which it is tendered* (post, p. 390A-E)"

At 390 Brightman J said:

"If an objection is raised to the form of proxy, there may be an explanation if only it can be heard. *What is more sensible than to provide that an objection must be voiced at the meeting where the vote is to be cast so that there is at least the opportunity for it to be answered?"*

In *The King v Robert Llewelyn Thomas* (1933) 2 K.B 489 C.C.A where a verdict in a criminal trial, at which the evidence was given partly in English and partly in Welsh, was delivered in the sight and hearing of all the jury without protest, the Court of Criminal Appeal refused to admit affidavits by two of the jurors showing that they did not understand the English language sufficiently well to follow the proceedings.

The signatures of the polling agents to the declaration of results therefore have high constitutional and statutory effect and authority, which cannot be discounted.

The Dimensions of an election Petition

An election petition is multidimensional. There are several legitimate interests at stake which cannot be ignored. In Ghana this is fully acknowledged. 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 Electoral Commission* [1996-97] SC GLR 589 and *Ahumah-Ocansey v Electoral Commission, Centre for Human Rights & Civil Liberties (CHURCIL) v Attorney General & Electoral Commission (Consolidated)* [2010] SCGLR 575.

Indeed in *Azam v Secretary of State for the Home Department* (1974) AC 18 at 75 HL Lord Salmon (dissenting) said that the right to vote is so fundamental that if a person entitled to vote in the House of Lords managed to enter the chamber without a pass as required his vote should not be invalidated.

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) 1 GLR 109. In *Danso-*

Acheampong v Attorney-General & Abodakpi (2009) SCGLR 353 this court in upholding the validity of s. 10 of the Representation of the People Act, 1992 (PNDCL 284) and rules 41(1) (e) and (3) of the Supreme Court rules 1996 (C 116) suspending the effect of a disqualification pending the determination of an appeal from a conviction, this court, ably speaking through Dr. Date-Bah JSC at 360 said: "what is at stake is not just the member of Parliament's private interest. *There is the public interest* which requires that *the constituents' choice should not be defeated by the error of a lower court* (e.s)"

Indeed in Cyprus voting is compulsory. In *Pingoura v The Republic* (1989) LRC 201 CA the Cyprus Court of Appeal held that compulsory voting was designed to reinforce the functioning of a democracy, an important constitutional objective.

In *Langer v Australia* (1996) 3 LRC 113 the High Court of Australia upheld the validity of a law, backed by criminal sanctions, which requires a voter to mark his ballot paper by showing his order of preference for all candidates, on the ground that it was meant to further or enhance the democratic process.

In *Peters v Attorney-General* (2002) 3 LRC 32 C.A., Trinidad and Tobago at 101 Sharma J.A Said:

> "An election petition is not a matter in which the only persons interested are candidates who strive against each other in elections. The public are substantially interested in it and that it is an essential part of the democratic process. It is not a lis between two persons, but a proceeding in which the constituency itself is the principal party interested. The characteristics of an election petition are fundamentally different from civil proceedings. Hence for example there was the need for special rules concerning, for example, the notice and publication, which is outside the courts ordinary jurisdiction and procedures.
>
> An election petition is quite unlike any of the initiating proceedings in the High Court. It is not a writ, or originating summons, nor is it in any way

close to say a petition in bankruptcy or a petition for divorce which respectively have their own rules of procedure. In a sense an election petition can be described as sui generis."

In *Jayantha Adokari Egodawole v Commissioner of Elections* (2002) 3 LRC 1 the Supreme Court of Sri Lanka at 26 stated per Fernando J thus:

> "The citizen's right to vote includes the right to *freely choose* his representatives, through a *genuine* election which guarantees the free expression of the will of the *electors*: not just his own. Therefore not only is a citizen entitled himself to vote at a free, equal and secret poll, *but he also has a right to a genuine election guaranteeing the free expression of the will of the entire electorate to which he belongs*. Thus *if a citizen desires that candidate X should be his representative, and if he is allowed to vote for X but other like-minded citizens are prevented from voting for X, then his right to the free expression* of the will *of the electors* has been denied. If 51% of the electors wish to vote for X, but 10% are prevented from voting- in consequence of which X is defeated – that is a denial of the rights not only of the 10%, but of the other 41% as well. Indeed, in such a situation the 41% may legitimately complain that they might as well have not voted. To that extent, the freedom of expression, of like-minded voters, when exercised through the electoral process is a 'collective' one, although they may not be members of any group or association." (e.s)

These judicial pronouncements as to the national dimension of a public election have been justified in this case. About 360 registered voters applied ***in initio litis*** to join in this petition in order to protect their vote. Failing in that move several of them have filed affidavits to protect their vote. Others took to lawful demonstrations calling for their votes to count. They are entitled under the constitution so to do. They are also particularly entitled under article 23 of the constitution to relief from administrative errors of public officials that affect their rights. It provides thus:

> "**23. Administrative justice**
>
> Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and

decisions shall have the right to seek redress before a court or other tribunal."

The administrative error of the presiding officers to sign the pink sheets was not only properly corrected at the collation centres in some instances but can still be corrected by order of this court by way of relief against administrative lapses under article 23 of the constitution or pursuant to s.22 of the Interpretation Act, 2009 (Act 792). It provides thus:

"22. (1) Where an enactment confers a power or imposes a duty on a person to do an act or a thing of an administrative or executive character or to make an appointment, the power or duty may be exercised or performed in order to correct an error or omission in a previous exercise of the power or the performance of the duty.

(2) The substantive right of, or the procedure for redress by a person who has suffered loss or damage or is otherwise aggrieved as a result of an omission or error corrected as is referred to in subsection (1) shall not be affected as a result of the correction of that omission or error and an investigation, a legal proceeding or a remedy in respect of a right, a privilege, an obligation or a liability shall continue as if the omission or error had net been corrected."

Even though this Act, despite s.10(4) thereof, professes not to be applicable to the Constitution the principle involved in s.22 thereof conduces to good governance and so can be adopted by this court under s.10(4) thereof.

The memorandum on Act 792 states with regard to this section as follows:

"*It is not unknown for an authority on which or a person on whom a power is conferred to make a mistake or an error in the exercise of that power*. In an important case it may require an Indemnity Act or a Validating Act to solve the problem. *Clause 22* of the Bill thus seeks *to make it an ancillary power for that authority or person to correct the error or omission* in the previous exercise or performance of the power or function. It should be emphasised, though, that the correction of an error or omission will not affect the substantive rights or procedures for redress by a person who has suffered loss or damage or is otherwise aggrieved as a result of the error or omission that has been corrected. In the

> circumstances, an investigation, a legal proceeding or a remedy in respect of a right, a privilege, an obligation or a liability will continue as if the omission or error had not been corrected." (e.s)

I should think that the implied powers in article 297(c) could even cater for this situation.

All these steps advocated here are warranted, inter alia, by the principle of constitutional interpretation that the constitution be construed as a whole so that the constitution be construed as a whole so that its various parts work together in such a way that none of them is rendered otiose. The oft quoted words of Acquah JSC (as he then was) in *J H Mensah v Attorney-General* (1996-97) SC GLR 320 at 362 repay constant resort to them. He said:

> "I think *it is now firmly settled* that *a better approach to the interpretation of a provision of the 1992 Constitution is to interpret the provision in relation to the other provisions of the Constitution so as to render that interpretation consistent with the other provisions and the overall tenor or spirit of the Constitution*. An *interpretation based solely on a particular provision without reference to the other provisions is likely to lead to a wrong appreciation of the true meaning and import of that provision*. Thus in Bennion's *Constitutional Law of Ghana* (1962) it is explained at page 283 that it is important to construe an enactment as a whole: (e.s)
>
> > "...since it is easy, by taking a particular provision of an Act in isolation, to obtain a wrong impression of its true effect. The dangers of taking passages out of their context are well known in other fields, and they apply just as much to legislation. Even where an Act is properly drawn it still must be read as a whole. Indeed a well-drawn Act consists of an inter-locking structure each provision of which has its part to play. Warnings will often be there to guide the reader, as for example, that an apparently categorical statement in one place is subject to exceptions laid down elsewhere in the Act, but such warnings cannot always be provided.""

Therefore in the exercise of this court's original jurisdiction, which does not include the fundamental human rights, it does not mean that when such rights

arise incidentally or are interlocked with matters falling within our original jurisdiction the same should be prejudiced or ignored, see *Tait v. Ghana Airways Corporation* (1970) 2 G&G 1415(2d), *Benneh v The Republic* (1974)2 GLR 47 C.A (full bench) and *Ogbamey-Tetteh v Ogbamey-Tetteh* (1993-94) 1 GLR

Furthermore to negate the constitutional inelasticity of *Re Akoto* (1961) GLR 523 I would hold that since article 33(1) provides for the right to resort to the High Court for redress of the fundamental human rights is "without prejudice to any other action that is lawfully available," the steps of some citizens of Ghana, in filing affidavits herein, inter alia, to protect their right to vote and the lawful demonstrations in that direction cannot be ignored by this court.

PRINCIPLES FOR ANNULLING RESULTS

For starters I would state that the Judiciary in Ghana, like its counter parts in other jurisdictions, does not readily invalidate a public election but often strives in the public interest, to sustain it. Thus in *Seyire v Anemana* (1971) 2 GLR 32 C.A. the appellant sought to invalidate a petition against his election on the ground that the respondent's petition was not accompanied by a deposit for security of costs since the said security had been paid not to the High Court but through a bank. On appeal from the trial court's rejection of that contention the Court of Appeal unanimously held as stated in the head note as follows:

> "*Held, dismissing the appeal:* (1) *Per Azu Crabbe J.A.*in the ordinary course of things a person who is required by law to make a payment into court cannot make a bank the agents of the court to receive such payment on behalf of the court. A bank, in those circumstances, would become the agents of the payer only. But when the registrar of the court, whose duty it is to receive the payment, directs the payer to pay the amount through a bank, he makes the bank the agent of the court. Therefore the registrar of the High Court, Tamale, constituted the Ghana Commercial Bank his agents for the purposes of receiving the amount paid on 10 October on behalf of the respondent as security for costs, and there was nothing

fundamentally wrong in his having done so. *Hodgson v Armstrong* [1967]1 All E.R. 307, C.A. considered.

(2) *Per Azu Crabbe J.A.* Although the payment of security for costs through the bank would not be payment according to Order 65, r.4, this was a procedural error which, because it can be waived by the other party without any injustice to him, can be considered as an irregularity and the court was able to cure the defect by applying Order 70, r.1. *MacFoy v United Africa Co., Ltd.* [1962] A.C. 152, P.C. and dictum of Lord Denning M.R. in *In re Pritchard* [1963]1 Ch. 502 at p. 516, C.A. applied.

Per Amissah J.A. Since the respondent had divested himself of the funds at the appropriate time, the registrar had consented to the method of payment and the appellant had not been prejudiced by the act or the method adopted, then the respondent had, on 10 October, given security in the required amount and within the time limited."

Again in *Osman v Tedam* (1970) 2 G&G 1246 (2d) C.A and *Osman v Kaleo* (1970) 2 G&G 1380 C.A. the Court of Appeal held that though the respondents were members of the Convention People's Party whose constitution made all members of Parliament of the Convention People's Party members of the party's Regional Executive Committees, that did not without more, make the respondents members of such committees and therefore disqualified to contest the 1969 parliamentary elections, which they had won.

The *Osman v Kaleo* case is even more striking. Though the respondent had secured exemption from disqualification from contesting the parliamentary elections, it was submitted that since his exemption had not been published in the Gazette, upon which publication it would have effect, under paragraph 3(5) of NLCD 223, 1968, the same was inoperative, notwithstanding that under paragraph 3(7) of that Decree the decision of the Exemptions Commission was final and conclusive. The Court of Appeal rejected that contention. At 1385 Sowah J.A held as follows: "Amongst the procedure adopted by the commission was *the announcement of its decision after hearing an applicant*. There is not

much substance in the argument that *since there was no publication in the Gazette the exemption was not valid*."

At 1391 Apaloo J.A trenchantly held as follows:

> "That the defendant appeared before the commission and satisfied it that he was deserving of exemption, is beyond question. He produced a certificate to that effect signed by all the members of that commission. After this, the defendant need do no more. *A mandatory duty is cast upon the commission to notify the National Liberation Council of this fact and the latter is under an obligation no less mandatory to publish this fact in the Gazette*. Both *these statutory duties are mere ministerial acts with which a successful party before the commission is not concerned*. But in his favour, it ought to be presumed that all these official acts were properly performed. ***Omnia praesumuntur rite esse acta***. *It would indeed be odd if a person who satisfied the commission and was so informed were to be said to be still under the disability from which he was freed because either the commission or the National Liberation Council failed to perform its official duties*. I think *the defendant gained exemption under paragraph 3(5) of N.L.C.D. 223 and I am in disagreement with Mr. Bannerman on this point.*" (e.s)

This reasoning should restrain this court from nullifying the otherwise sacred votes of citizens due to the oversight of the presiding officers in not signing the Results.

Also in *Nartey v Attorney-General and Justice Adade* (1996-97 SC GLR 63 this court after declaring the second defendant's continued stay in office beyond one year of the extension of tenure as unconstitutional under the 1992 constitution further held that that declaration should not affect prior judgments delivered or participated in by him, so as to protect third parties' rights. This is in line with article 2(2) of the constitution which empowers this court thus:

> "**2. Enforcement of the Constitution**
>
> > (2) The Supreme Court shall, for the purposes of a declaration under clause (1) of this article, *make such orders and give such directions as it may consider appropriate for giving effect, or enabling effect to be given, to the declaration so made*." (e.s)

As to the general principles for determining an election petition various tests have been formulated. The English approach was extensively evaluated in *Evov. Supa* (1986) LRC (Const) 18 but the court eventually concluded in much the same way as the Kenyan Supreme Court did in Raila Odinga v the Independent Electoral and Boundaries Commision and Others namely, "Did the petitioner clearly and decisively show the conduct of the election to have been *so devoid of merits*, and *so distorted as not to reflect the expressing of the people's electoral intent? It is this broad test that should* guide us in this kind of case, in deciding whether we should disturb the outcome of the Presidential election."

Mr. Quashie-Idun, counsel for the 2nd respondent urged on us that the provisions relating to the validity of an election in the Representation of the Peoples Law, 1992 (PNDCL 284 are applicable to a presidential election petition. Having pondered over the matter I cannot uphold that submission. The preamble to that law shows that it relates to parliamentary elections. Mr. Quashie-Idun's contention is piously based on only the Representation of the People (Amendment) Law, 1992 which amends the definition of "election" which in s.50 of PNDCL 284 related to parliamentary elections only, to mean "any public elections." The original definition excluded from its purview District level elections, etc which the High Court could also handle. The amendment will now cover such elections also. The definition of Court though as a court of competent jurisdiction is referable to courts which under the provisions of PNDCL 284 have various roles to play.

This however is somewhat academic since the principles laid down in *Re Election of First President Appiah v Attorney-General* (1970) 2 G&G 2d 1423 C.A at 1435-1436 when determining a presidential election under provisions of

the 1969 Constitution which are in ***pari material*** with article 64 of the 1992 Constitution are substantially the same as those in PNDCL 284.

The Court said:

> "We wish to conclude with the words of Kennedy, J. in the Islington West Division Case, *Medhurst v. Laugh and Casquet* (1901) 17 T.L.R. 210 (at page 230):
>
> > "An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinate in the conduct of the election where the court is satisfied that the election was notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that the result of the election, that is, the success of the one candidate over the other was not and could not have been affected by those transgressions. If on the other hand the transgressions of law by the officials being admitted, the court sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it is open to reasonable doubt whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the court is then bound to declare the election void. It appears to us that this is the view of the law which has generally been recognised and acted upon by the tribunals which have dealt with election matters."
>
> And again, the judgment in the case of *Woodward v Sarsons* (1875) 32L.T(N.s.) 867 at pp.870-871:
>
> > "... we are of opinion that the true statement is, that an election is to be declared void by the common law applicable to Parliamentary elections, if it was so conducted that the tribunal, which is asked to avoid it, is satisfied, as a matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election law: . . But if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reason to believe that a majority might have been prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the election void by the common law of Parliament.""

This is much the same as Canadian case of *Opitz v. Wrzensnewskyj* 2012 SCC 55-2012-10- in which the court said as follows:

> "The practical realities of election administration are such that imperfections in the conduct of elections are inevitable ... A federal election is only possible with the work of thousands of Canadians who are hired across the country for a period of a few days or, in many cases, a single 14-hour day. These workers perform many detailed tasks under difficult conditions. *They are required to apply multiple rules in a setting that is unfamiliar*. Because elections are not everyday occurrences, it is difficult to see how workers *could get practical on-the-job experience*... The current system of electoral administration in Canada is not designed to achieve perfection, but to come as close to the ideal of enfranchising *all entitled voters as possible*. Since the system and the Act are not designed for certainty alone, courts cannot demand perfect certainty. *Rather, courts must be concerned with the integrity of the electoral system*. This overarching concern informs our interpretation of the phrase "irregularities ...that affected the result." (Rothsterin and Moldaver JJ)."

The petitioners through their counsel's written Address, at p.88 rely on *Besigye Kuza v Museveni Yoweri Kaguta and Election Commission [2001]* UGSC 3 Judgment dated 20th April 2001 quoted Odoki CJ of Uganda saying:

> "From the authorities I have cited there is a general trend towards taking a liberal approach in dealing with defective affidavits. *This is in line with the constitutional directive enacted in article 126 of the Constitution that the courts should administer substantive justice without undue regard to technicalities...*"

At p. 89 counsel also submitted as follows:

> "In the Nigerian case of *Dr. Chris Nwebueze Ngige vrs Mr. Peter Obi and 436 Others* [2006] Volume 18 WRN 33, it was held by the Court of Appeal at holding 30 that, election petitions are by their nature peculiar from the point of view of public policy. It is, therefore, the duty of the

court to endeavour to hear them without allowing technicalities to unduly fetter their jurisdiction."

Consequently the petitioners seek equity from this court (which they deny to the pink sheets) as follows:

> "It is therefore submitted that since the affidavit of the 2nd petitioner to which the pink sheets were annexed was duly executed and sworn to, the unavoidable errors of pink sheet exhibits, *where the authenticity is not disputed by the respondents, ought to be treated and waived as mere irregularity, so that the said pink sheets exhibited which are already in evidence can be considered and evaluated in the interest of substantial justice*."

CONCLUSION

In modern times the courts do not apply or enforce the words of statutes but their objects purposes and spirit or core values. Our constitution incorporates its spirit as shown for example, in article 17(4) (d). This means that it should not be applied to satisfy its letter where its spirit dissents from such an application. Thus in *Black v Value Capital Ltd.*(1975) 1 WLR 6 Goulding J held as stated in headnote 2 thus:

> "That although he plaintiffs' proposed amendments *could technically be brought under paragraph (f) or (i) and (j) of Order 11, r.1(1), they should not be allowed since to do so would be an application of the letter but not of the spirit of the rule*, in that it would allow the trial in England of a dispute between foreigners merely because it concerned money in the hands of English bankers whose only interest therein was their proper bank charges, or because the agreements were expressed to have been executed in London, although the disputant companies were neither incorporated, resident nor trading in England, and the agreements were expressly to be governed by and enforced in accordance with Bahamian law (post, pp. 15G-16A); that in all the circumstances the only court that could effectively exercise jurisdiction was the Bahamian court which could act in personam against PRL and VCL and compel the use of their names and seals, and which was already seised of the winding up

> petitions, and leave to amend would therefore be refused (post, p. 16D-F)"

The Mischief rule of construction is much the same as the spirit of a statute. In *Catherine v Akufo-Addo* (1984-86) 1 GLR 96 C.A at 104 Mensa Boison J.A in delivering the judgment of the Court of Appeal said:

> "It is a sound rule, where the words admit, that an enactment should be construed such that *the mischief it seeks to cure is remedied, but no more.*"

Further allied is the rule of construction relating to absurdity, see *Brown v Attorney-General* (2010) SC GLR 183.

It would indeed be absurd for the courts to hold as was done in *Republic v Chieftaincy Committee on Wiamoasehene Stool Affairs; Ex parte Oppong Kwame and Another* [1978] 1 GLR 467 C.A (Full Bench) and do otherwise in this case. As stated in the headnote to that case:

> "Having been destooled by the Agona Ashanti Traditional Council, the Wiamoasehene appealed, and the National Liberation Council (N.L.C.) acting under Act 81, s.34 appointed a chieftaincy committee to inquire into the matter. The committee found the destoolment null and void and recommended that the appeal be allowed. The N.L.C. confirmed the findings by a notice in the Local Government Bulletin which also included the phrase "that the appeal be dismissed." A corrective notice repeating the confirmation but using the phrase "That the appeal be allowed" was published in a subsequent Local Government Bulletin. This attempt at correction was challenged by certiorari proceedings on the grounds that when the second notice was published the N.L.C. was *functus officio* and had no right to effect corrections after the first publication; and even if it had such right, the party adversely affected should have been given an opportunity to challenge the correction. The High Court held that the N.L.C. was precluded from re-opening the matter and this decision was affirmed by the Court of Appeal.
>
> On an application for review by the full bench,

> Held, allowing he application: (1) on the facts, far from having a change of mind, the N.L.C. had from the outset been desirous of giving force to the decision of the chieftaincy committee. The deliberate and repeated use by the N.L.C. of the term "confirmed" made it clear that *not only was the first publication contrary to the findings and recommendations of the chieftaincy committee, but also that an obvious mistake had occurred*. The argument *that a word once inscribed in print was beyond recall was contrary to good sense.* Even the finality of *res judicata* permitted the correction of clerical mistakes by the contrivance of the "slip rule."" (e.s)

Indeed when the constitution itself or any statute commits an error this court rectifies it see *Agyei Twum v Attorney-General Akwety* (2005-2006) SC GLR 732 where a constitutional omission relating to the procedure for the removal of the Chief Justice was rectified by reading into the relevant provisions, the necessary addition.

To sum up the result sought by the petitioners in this case would involve what Mackinnon J protested against in *British Photomaton Trading Company, Limited v Henry Playfair, Limited* (1933) 2 K.B 508 at 520 when he said: "this is a result against which one is inclined to struggle, because it tends to outrage both common sense and what is fair."

REFORMS

This petition however has exposed the need for certain electoral reforms. I mention same of them.

- The Voters register must be compiled and made available to the parties as early as possible.
- A supplementary register may cater for late exigencies.
- The calibre of presiding officers must be greatly raised up.
- The pink sheet is too elaborate, a much simpler one to meet the pressures of the public, weariness and lateness of the day at the close of a poll etc.
- The carbon copying system has to be improved upon.

- The Biometric Device System must be streamlined to avoid breakdowns and the stress on the electorate involved in an adjournment of the poll.
- Invalidating wholesale votes for insignificant excess numbers is not the best application of the administrative principle of the proportionality test.

The South African biometric system as judicially reviewed in *The New National Party of South Africa v The Government of the Republic of South Africa*, Case CCT 9/99 dated 13/4/1999 may be instructive.
However it is judicially acknowledged that the Electoral Commission is the body mandated by the constitution to conduct Elections and Referenda in Ghana and their independence must be respected as required by article 46 of the constitution. Their subjection to judicial control under articles 295(8), 23 and 296 (a) and (b) must be operated within the well known principles of judicial review of administrative action.

The case of *Appiah v Attorney-General*, supra therefore cautions that the reasonable exercise of a discretion by them in situations that may confront them ought not to be judicially impeded.

K P M G

I do not know how to express the gratitude of the judiciary and indeed of Ghana to KPMG for their unprecedented selfless and patriotic service so fully rendered this court with such professionalism and dedication. They are a rare species of Lover of Ghana and the cause of justice and democracy.

We are also grateful to counsel for their industry.

But in the end I am driven by the sheer justice of this case which hinges much on technicalities of the pink sheet, to dismiss the same subject to the useful

electoral reforms it has exposed as necessary to enhance the transparency of the Electoral process of Ghana.

(SGD) W. A. ATUGUBA

JUSTICE OF THE SUPREME COURT