

OWUSU(MS) JSC.

The petition is brought under Art.64 (1) of the 1992 constitution of the Republic of Ghana. The Article reads as follows:

“The validity of the election of the president may be challenged only by a citizen of Ghana who may present a petition for the purpose to the Supreme Court within twenty-one days after the declaration of the results of the election in respect of which the petition is presented.”

The petitioners are all Ghanaian citizens by birth and members of the New Patriotic Party (NPP), a political party duly registered under the laws of the Republic of Ghana.

The 1st Petitioner was the presidential candidate of the party in the December 2012 elections with the 2nd petitioner as his running mate. The 3rd petitioner is the National Chairman of the party.

By their petition, the petitioners pray for the following Declarations:

- (1) That John Dramani Mahama, the 2nd 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.

The validity of the declaration of the results of the December 2012 presidential election was challenged on the following grounds:

“Ground 1

There were diverse and flagrant violations of the statutory provisions and regulations governing the conduct of the December 2012 presidential election which substantially and materially affected the result of the election as declared by the 2nd Respondent on 9th December, 2012.

Particulars

- (a) That 2nd Respondent permitted voting to take place in many polling stations across the country without prior biometric verification by the presiding officers of 2nd Respondent or their assistants, contrary to Regulation 30 92) of C. I. 75.
- (b) That the voting in polling stations where voting took place without prior biometric verification were unlawfully taken into account in the declaration of results by 2nd Respondent in the presidential election held on 7th and 8th December 2012.
- (c) That by 2nd Respondent’s established procedure, 2nd Respondent conducted the December 2012 presidential and parliamentary elections at polling stations each of which was assigned a unique code to avoid confusing one polling station with another and to provide a mechanism for preventing possible electoral malpractices and irregularities.
- (d) That there were, however, widespread instances where different results were strangely recorded on the declaration forms (otherwise known as the ‘pink sheet’ or ‘blue sheet’) in

respect of polling stations bearing the same polling stations codes.

- (e) That the existence of polling stations of the nature referred to in the preceding sub-paragraph (d) and the results emanating therefrom were patently illegal.
- (f) That there were widespread instances where there were no signatures of the presiding officers or their assistants on the declarations forms as required under Regulation 36 (2) of C. I. 75. and yet the results on these forms were used in arriving at the presidential results declared on 9th December 2012 by the Chairman of 2nd Respondent, thereby rendering the results so declared invalid.

Ground 2

- (1) That the election in 11,916 polling stations were also vitiated by gross and widespread irregularities and /or malpractices which fundamentally impugned the validity of the results in those polling stations as declared by 2nd Respondent.
 - (a) That the results as declared and recorded by the 2nd Respondent contained widespread instances of over-voting in flagrant breach of the fundamental constitutional principle of universal adult suffrage, to wit, one man one vote.
 - (b) That there were widespread instances where there were the same serial numbers on pink sheets with different poll results, when the proper and due procedure established by 2nd Respondent required that each polling station have unique serial number in order to secure the integrity of the polls and will of the lawfully registered voters.

- (c) That, while the total number of registered voters as published by the 2nd Respondent and provided to all political parties or candidates for the presidential and parliamentary election was **fourteen million, thirty-one thousand, six hundred and eighty (14,031,680)**, when 2nd Respondent announced the result of the presidential election on 9th December 2012, the total number of registered voters that 2nd Respondent announced mysteriously metamorphosed to a new and inexplicable figure of **fourteen million, one hundred and fifty-eight thousand, eight hundred and ninety (14,158,890)**. This thereby wrongfully and unlawfully increased the total number of registered voters by the substantial number of **one hundred and twenty-seven thousand, two hundred and ten (127,210)**.
- (d) That there were widespread instances of voting without prior biometric verification;
- (e) That there were widespread instances of absence of the signatures of presiding officers or their assistants on the Declaration Form known as 'pink sheet'; and
- (f) That there were widespread instances where the words and figures of votes cast in the elections and as recorded on the 'pink sheets' did not match.

Ground 2a

That there were 28 locations where elections took place which were not part of the **twenty-six thousand and two (26,002)** polling stations created by the 2nd Respondent for purposes of the December 2012 elections.

Ground 3

(1) That the statutory violations and irregularities and/or malpractices described under Grounds 1, 2 and 2a herein, which were apparent on face of the Declaration Forms ('pink sheet'), had the direct effect of introducing into the aggregate of valid votes recorded in the polling stations across the country a whopping figure **four million, six hundred and seventy thousand, five hundred and four (4,670,504)** unlawful and irregular votes, which vitiated the validity of the votes cast and had a material and substantial effect on the outcome of the election, as shown in the table below:

Particulars

NO	VIOLATIONS, IRREGULARITIES AND/OR MALPRACTICES	NUMBER OF VOTES
1	Exclusive Instances of over voting due to total votes exceeding ballots papers issued to voters or the polling station voters register	128,262
2	Exclusive Instances of the joint occurrence of: (I) Over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register. (II) Voting without biometric verification.	48,829
3	Exclusive Instances of the joint occurrence of: (I) Over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register. (II) Voting without biometric verification (III) Same serial numbers on "pink sheets" with different results.	145,129
4	Exclusive Instances of the joint occurrence of: (I) Over voting due to total votes exceeding ballot papers issued to voters or the polling station	34,167

	<p>voters register.</p> <p>(II) Voting without biometric verification</p> <p>(III) Same serial numbers on “pink sheets” with different results.</p> <p>(IV) absence of presiding officers or assistants’ signatures on “pink sheets”.</p>	
5.	<p>Exclusive Instances of the joint occurrence of:</p> <p>(I) Over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register.</p> <p>(II) Voting without biometric verification</p> <p>(III) Absence of presiding officers or assistants’ signatures on “pink sheets”.</p>	9,004
6	<p>Exclusive Instances of the joint occurrence of:</p> <p>(I) Over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register.</p> <p>(II) Same serial numbers on “pink sheets” with different results.</p>	425,396
7	<p>Exclusive Instances of the joint occurrence of:</p> <p>(I) Over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register.</p> <p>(II) Same serial numbers on “pink sheets” with different results.</p> <p>(III) Absence of presiding officers or assistants’ signatures on “pink sheets”.</p>	93,035
8	<p>Exclusive Instances of the joint occurrence of:</p> <p>I. Over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register.</p> <p>II. absence of presiding officers or assistants’ signatures on “pink sheets”.</p>	34,023
9	<p>Exclusive Instances of voting without biometric verification.</p>	137,112
10.	<p>Exclusive Instances of the joint occurrence of:</p> <p>(I) voting without biometric verification</p>	

	(II) Same serial numbers on “pink sheets” with different results	395,529
11	Exclusive Instances of the joint occurrence of: (I) voting without biometric verification (II) Same serial numbers on “pink sheets” with different results (III) Absence of presiding officers or assistants’ signatures on “pink sheets”.	71,860
12	Exclusive Instances of the joint occurrence of: (I) voting without biometric verification (II) Absence of presiding officers or assistants’ signatures on “pink sheets”.	21,071
13	Exclusive Instances of Same serial numbers on “pink sheets” with different results	2,583,633
14	Exclusive Instances of the joint occurrence of: (I) Same serial numbers on “pink sheets” with different results (II) Absence of presiding officers or assistants’ signatures on “pink sheets”.	352,554
15	Exclusive Instances of absence of presiding officers or assistants’ signatures on “pink sheets”.	117,870
16	Exclusive Instances of same polling station codes with different results.	687
17	Exclusive Instances of the joint occurrence of: (I) over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register (II) voting without biometric verification (III) Same serial numbers on “pink sheets” with different results (IV) Same polling station codes with different results.	
18	Exclusive Instances of the joint occurrence of: (I) Same serial numbers on “pink sheets” with different results	26,208

	(II) same polling station code with different results	
19	<p>Exclusive Instances of the joint occurrence of:</p> <p>(I) same serial numbers on “pink sheets” with different results</p> <p>(II) absence of presiding officers or assistants’ signatures on “pink sheets”.</p> <p>(III) same polling station code with different results</p>	7,160
20	<p>Exclusive Instances of the joint occurrence of:</p> <p>(I) over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register</p> <p>(II) same serial numbers on “pink sheets” with different results</p> <p>(III) same polling station codes with different results</p>	6,537
21	<p>Exclusive Instances of the joint occurrence of:</p> <p>(I) voting without biometric verification</p> <p>(II) Absence of presiding officers or assistants’ signatures on “pink sheets”.</p> <p>(III) same polling station code with different results</p>	671
22	<p>Exclusive Instances of the joint occurrence of:</p> <p>(I) voting without biometric verification</p> <p>(II) same serial numbers on “pink sheets” with different results</p> <p>(III) same polling station code with different results</p>	7,920
23	<p>Exclusive Instances of the joint occurrence of:</p> <p>(I) over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register</p> <p>(II) same serial numbers on “pink sheets” with different results</p> <p>(III) absence of presiding officers or assistants’ signatures on “pink sheets”</p> <p>(IV) same polling station code with different results</p>	4,855

24	<p>Exclusive Instances of the joint occurrence of:</p> <ul style="list-style-type: none"> (I) voting without biometric verification (II) same serial numbers on “pink sheets” with different results (III) absence of presiding officers or assistants’ signatures on “pink sheets” (IV) same polling station code with different results 	3,471
25	<p>Exclusive Instances of the joint occurrence of:</p> <ul style="list-style-type: none"> (I) over voting due to total votes exceeding ballot papers issued to voters or the polling station voters register (II) voting without biometric verification (III) same serial numbers on “pink sheets” with different results (IV) absence of presiding officers or assistants’ signatures on “pink sheets” (V) same polling station code with different results 	1,787
26	<p>Exclusive Instances of 28 locations which were not part of the twenty-six thousand and two (26,002) polling stations created by the 2nd Respondent prior to the December 2012 elections for purposes of the election but where elections took place.</p>	9,757
	GRAND TOTAL	4,670,504

Respondent in the presidential election held on 7th and 8th December 2012.

The 1st Respondent was the presidential candidate of the National Democratic Congress (NDC), the 3rd Respondent herein in the December 2012 presidential Election and the person declared by

the 2nd Respondent on 9th December 2012 as having been validly elected as president of the Republic of Ghana following the presidential election.

The 2nd Respondent is the constitutional body established by Article 43 of the 1992 constitution and the provisions of the Electoral Commission Act of 1993 (Act 451) mandated under Art. 45(c) and section 2(c) of the constitution and the Act respectively to conduct and supervise public elections and referenda in Ghana and to declare the results thereof in accordance with the constitution and the law.

The 3rd Respondent which was later joined as a party to the action on its own application is the political party on whose ticket the 1st Respondent contested the election. In this action, the party is being represented by its General-Secretary, Johnson Asiedu Nketia.

THE CASE OF THE PETITIONERS

The case of the petitioners is simple but very much involved. It is their case that there were constitutional and statutory violations, malpractices and irregularities in the conduct of the 2012 presidential elections and that these violations, malpractices and irregularities affected the outcome of the elections. The main categories of these they identified as follows:

- i. Over-voting, that is to say, widespread instances of polling stations where (a) votes cast exceeded the total number of registered voters or (b) votes exceeded the total number of ballot papers issued to voters on voting day in violation of Article 42 of the Constitution and Regulation 24(1) of C. I. 75.

- ii. Widespread instances of polling stations where there were no signatures of the presiding officers or their assistants on the pink sheets in clear violation of Article 49 (3) of the Constitution and Regulation 36 (2) of C. I. 75.
- iii. Widespread instances of polling stations where voting took place without prior biometric verification in breach of Regulation 30(2) of C. I. 75.
- iv. Widespread instances where there were the same serial numbers on pink sheets with different poll results, when the proper and due procedure established by 2nd Respondent required that each polling station have a unique serial number in order to secure the integrity of the polls and the will of lawfully registered voters.
- v. Widespread instances of polling stations where different results were strangely recorded on the pink sheets in respect of polling stations bearing the same polling station code, when, by 2nd Respondent's established procedure, each polling station was assigned a unique code in order to avoid confusing one polling station with another which could not be explained by a reference to special voting.
- vi. Twenty-three (23) locations where voting took place which were not part of the twenty-six thousand and two(26,002) polling stations created by the 2nd Respondent for purposes of the December 2012 elections.

THE RESPONDENTS' CASE

The Respondents on the whole denied the substance of the petitioners claim. The 1st Respondent contended that even if there were such occurrences in the December, 2012 elections, the declared result of the election would not be affected. In the case of Presiding Officers of the 2nd Respondent failing to sign the pink sheets, the 1st Respondent further contended that such

failure could not invalidate the results. The claim of over voting was also denied and so was the claim for voting without Biometric verification challenged.

The 2nd Respondent, in further denial of the petitioners' claim sought to vehemently defend the presidential election. The commission however partly admitted the incidents of presiding officers not signing the pink sheets contending that these are irregularities. It was its case that no body voted without being biometrically verified.

The 3rd Respondent's case was substantially the same as that of the 1st Respondent.

On 2nd April, 2013, this court set down the following issues for trial:

1. whether or not there were violations, omission, malpractices and irregularities in the conduct of the presidential election held on the 7th and 8th December, 2012;
2. whether or not the said violations, omissions, malpractices and irregularities, if any, affected the results of the election.

To expedite the trial, the court decided that same shall be by affidavit evidence. The parties were however given the option to lead oral evidence. Oral evidence by any other person was to be allowed only where the court was satisfied that there were compelling reasons for so doing.

Following the order of the court, the parties filed affidavits in support of their cases and also preferred oral evidence.

The 2nd petitioner filed a joint affidavit on behalf of the petitioners in support of their case.

In paragraph 20 of the affidavit, the 2nd petitioner averred that following complaints that the results being declared by the 2nd Respondent were not accurate, a task force was set up by the 1st petitioner and the NPP to investigate the results as declared in the presidential election. He was placed to lead and direct the investigation as the running mate of the 1st petitioner and also as a person with proficiency in statistics.

The investigation involved examination of the statement of poll and Declaration of the Result of the Office of president (“pink sheets”) of the polling stations.

According to him, the polling stations results as captured on the “pink sheets” constitute the “primary evidence” upon which the election results were declared. The pink sheets were given to representatives of the 1st petitioner as required by Regulation 36(3) (b) of C. I. 75.

It is as a result of the investigation that the six main categories of constitutional/statutory violations, commission irregularities and malpractices were uncovered.

It is their case that these irregularities create opportunities for electoral malpractices.

The 2nd petitioner also claimed that there were 23 locations which were not part of the twenty-six thousand and two (26,002) polling stations created by the 2nd Respondent prior to the 2012

elections for the purpose of the elections but where voting took place.

In paragraphs 44-67 of 2nd petitioner's affidavit, the various categories of alleged electoral malpractices have been specified.

The oral testimony of the 2nd petitioner was in line with his sworn affidavit. He was extensively cross-examined by counsel for the Respondents but was not shaken in the evidence he proffered.

The General-Secretary of the 3rd Respondent also swore to an affidavit on the party's own behalf and on behalf of the 1st Respondent whose power of Attorney he held.

In paragraph 2 of the affidavit, he proffered that –

“By virtue of my position as the General Secretary of the 3rd Respondent I was involved in the processes leading to the 7th and 8th December elections. I attended the meetings held by 2nd Respondent with all political parties and was an integral part of the organization of the elections on behalf of 3rd Respondent and on behalf of 1st Respondent our candidate for the Presidential Elections.”

In the affidavit, the Deponent challenged the basis of the petitioners' claim for annulment of 4,637,305 votes. He averred that the total number of pink sheets submitted as exhibits by the petitioners in proof of the various permutations of alleged violations, irregularities, omissions and malpractices do not add up to 11,842 as sworn to in the 2nd petitioners affidavit nor the

11,916 polling stations as contained in the 2nd Amended petition. According to him the pink sheets submitted by the petitioners are 8,621.

Out of this, 115 have absolutely no date on the basis of which the petitioners' allegations the subject matter of the petition, can be supported. A further 373 were duplicated.

He averred further that on the pink sheets exhibit, there is no instance in which the petitioners are alleging that valid votes cast exceed number of registered voters at the polling station. That what the petitioners are alleging to be instances of over voting are in reality patent clerical, and sometimes, arithmetic errors in recording, which have no material effect on the actual votes publicly cast, sorted, counted and recorded.

On voting without prior fingerprint Biometric verification, he maintained that to the best of his knowledge, no body voted without prior biometric verification.

On absence of signatures of presiding officers on pink sheets Mr. Asiedu Nketia did not deny the violation but rather averred that the results were not challenged by the petitioners and that their own agents signed the declared results.

The Deponent sought to explain what the serial numbers on the pink sheets are meant for and that they are not to identify the polling stations. It is not the case of the petitioners that voting did not take place in the polling stations which bear the same serial numbers.

On pink sheets with same polling station code, he countered that these have been used for the special and general elections as has been explained by the 2nd Respondent.

His case in general response to the various allegations is that in most of the polling stations, in respect of which the petitioners are complaining, their polling Agents have signed the pink sheets without any protest.

The 2nd Respondent was represented by its chairman Dr. Afari-Gyan who testified at the trial even though the affidavit filed in response to the order of the court was not sworn to by him.

The said affidavit was sworn to by Amadu Sulley, a Deputy Chairman (Finance & Administration) of the Commission. He in this affidavit relied on the answer filed by the 2nd Respondent to the 2nd amended petition.

Dr. Afari-Gyan in his oral Testimony took the court through the electoral process in general and the voting process in particular. He thereafter sought to answer the various infractions alleged by the petitioners some of which he denied and explained away where he admitted them, his stance was that the entries on the “pink sheets” were made in error or wrong interpretation of the entries by the petitioners.

PINK SHEETS

By an order of this court dated 9th May 2013 Messrs KPMG was mandated to make a count of all the exhibit of pink sheets filed by the petitioners KPMG duly carried out the order of the court. Its report was tendered through its Director, Nii Amanor Dodoo as court Exhibits 1, 1A, 1B, 1C and 1D.

The report at least assisted in clarifying the issue of the number of “pink sheet” filed.

The report indicated that 13,926 were counted from the Registrar’s set out of this 8,675 are unique as to its polling station name, code and exhibit numbers. Out of this are 5,470 which are not duplicated. 1,545 pink sheets could not be identified by the team because according to them, they were unclear so marked them as “incomplete Data” in the Registrar’s set.

However, the petitioners were able to identify 1,219 whereas the 2nd Respondent also identified 15 more to make the total 1, 234.

A control check using the president’s set, 2,876 pink sheets were found which were not in the Registrar’s set.

Out of this, 804 of them were identified as unique and distinct by the petitioners. From the remaining 1,366 which the team described as unclear, according to the petitioners 60 more were counted.

With the confusion around these figures, the petitioners finally based their case on 10,119 exhibits of pink sheets.

BURDEN OF PROOF

The Respondents contend that the burden is on the petitioners to prove the irregularities, malpractices, violations, etc.

There is no gain saying that in a civil case, of which an election petition is akin to the burden of proof is on the plaintiff in this case the petitioners to lead evidence to the degree prescribed under the evidence Act (N. R. C. D. 313) on the facts in issue to make out their claim.

See the evidence Act sections 10- 14.

10. Burden of persuasion defined

(1) For the purposes of this Act, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or Court.

(2) The burden of persuasion may require a party
(a) to raise a reasonable doubt concerning the existence or non-existence of a fact, or

(b) to establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.

11. Burden of producing evidence defined

(1) For the purposes of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party.

(2) In a criminal action, the burden of producing evidence, when it is on the prosecution as to a fact which is essential to guilty, requires the prosecution to produce sufficient evidence so that on the totality of the evidence a reasonable mind could find the existence of the fact beyond a reasonable doubt.

(3) In a criminal action, the burden of producing evidence, when it is on the accused as to a fact the converse of which is essential to guilt, requires the accused to produce sufficient evidence so that on the totality of the evidence a reasonable mind could have a reasonable doubt as to guilt.

(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence which on the totality of the evidence, leads a reasonable mind to conclude that the existence of the fact was more probable than its non-existence.

12. Proof by a preponderance of the probabilities

(1) Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities.

(2) "Preponderance of the probabilities" means that degree of certainty of belief in the mind of the tribunal of fact or the Court by which it is convinced that the existence of a fact is more probable than its non-existence.

13.

14. Allocation of burden of persuasion

Except as otherwise provided by law, unless it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence that party is asserting.

The petitioners therefore have to lead sufficient evidence in proof of the irregularities, violations, malpractices etc they are alleging. In this regard, they exhibited Duplicate copies of the statement of polls and Declaration of Results forms given (pink sheets) to them by the 2nd Respondent and made it clear to the court that their whole case is based on what is stated on the “pink sheets” and therefore their analysis is based on what is on the face of the pink sheets.

They in the oral evidence of the 2nd petitioner, explained how they arrived at their analysis on the various allegations made by them. I will therefore examine the various heads of the infractions they complain of.

OVER VOTING

What is over voting?

The 2nd petitioner told the court of two instances of over-voting being

1. Where the number of people registered to vote at a particular polling station is less than the number of ballots found in the ballots box at the end of polls.
2. Where the ballots found in the ballots box at the end of polls is more than the number of votes actually issued to the votes who turned up to vote.

In evidence of the 2nd Respondent, he confirmed the first definition given by the 2nd petitioner. To a question from the Bench, Dr. Afari-Gyan's answer is:

“Oh yes my Lords the classical definition of over-vote is where the ballot cast exceed the number of persons eligible to vote at the polling station or if you like the number of persons on the polling stations register that is the classical definition of over-voting. -----”

He did not dismiss the second instance of over voting given by the 2nd petitioner even though he said he has problem with it.

Nothing is said on what constitutes over-voting in C. I. 75, so I will go by both definitions.

The petitioners contend that over-voting constitutes an abuse of the franchise under the supervision of the 2nd Respondent. It means that the integrity of the polls at the particular polling station has been compromised and the results at the polling station in question cannot be guaranteed and therefore same must be annulled.

The 1st Respondent contends that there was no over voting and that the entries on the pink sheets do not constitute sufficient proof of over voting.

In determining whether the entries alone constitute sufficient proof, counsel argued that should be done against the background of the constitutionally guaranteed right to vote under Article 42 of the constitution. He referred the court to the cases of AHUMA-OCANSEY VRS ELECTORAL COMMISSION; CENTRE FOR HUMAN RIGHTS AND CIVIL LIBERTIES (CHURCHIL) VRS ATTORNEY GENERAL & ELECTORAL COMMISSION (consolidated) [2010] SCGLR 575 and TEHN ADDY VRS ELECTORAL COMMISSION [1996-97] SCGLR 589.

On this head, the 3rd Respondent contends that in the absence of any person being even alleged to have voted twice or illegally, or any person having been identified as having made a complaint of over voting, whether formally or informally merely invoking entries on the administrative portion of pink sheets which have been shown to contain errors cannot meet the broken of proof on the petitioners.

Section 11(1) of the evidence Act, states that –

“for the purposes of this Decree the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue.”

The petitioners did introduce the evidence of over voting from the face of the “pink sheets” exhibited by them. Admittedly, it is not on the face of all pink sheets that they established the over voting. In paragraph 44 of the 2nd petitioners’ affidavit, the pink

sheets exhibited exclusively in the case of over voting are 310 polling stations.

The petitioners introduced evidence from which the infringement could be found. The entries on the face of the pink sheets constitute prima facie evidence in proof of the evidential burden. At that point, the burden shifts onto the Respondents to lead evidence from which it may reasonably be inferred that no over voting took place.

Whereas the 1st and 3rd Respondents contended that there was no such over voting, the 2nd Respondent when confronted with some pink sheets did admit that the entries showed that there were over voting.

WITNESS: Let me put it in a very short sentence. If I notice on the face of the pink sheet that there appears to be excess votes, I will subject the situation to very close scrutiny before I take firm determination as to what to do.

Q. Where there is an excess of votes in the ballot box in comparison with what is written on the pink sheet as the votes issued to the polling station, what would be your reaction when you see such a pink sheet?

A.. As I said just a moment ago, I will subject the situation to very close scrutiny. There are a number of things that will have to be done. I will not assume that the presiding officer had done anything directly or wrongly, I will seek to redo what was supposed to have been

done, I will look at the ballot papers to find out whether all of them fall within the serial range of the ballots issued. I have narrated some of these things before that I will go through the things that I mentioned. But I must tell you that, I must do everything possible to make sure that indeed, there are excess votes because we are dealing with not abstract numbers but votes of people who have a constitutional right to take part in the choice of their leaders.”

What is the effect of over voting on results?

Much as the 2nd Respondent would not readily admit on over vote, he told the court that an over vote if established will result in annulment of the results as it cannot be determined which candidate had benefited from the illegal vote and the integrity of the election would have been compromised.

There is no gain saying that over-voting if established would affect the result of the election and impact a sufficient number of votes to have done so. DR. Afari-Gyan told the court that before annulling results because of over voting he would do a check on the face of the pink sheet. However his evidence is that he did not see any pink sheet before declaring the presidential election results. So therefore he did not have the opportunity to do any check to determine from the face of the pink sheets that there was no over voting.

Where therefore, the evidence of over-voting was introduced on the face of the pink sheets, and the error/mistake as the Respondents contend cannot be explained on the face of the pink sheet, then that is an irregularity that affects the result.

I will consequently hold that where there is over voting the results must be annulled.

When confronted with same “pink sheets,” the 2nd Respondent admitted that on the face of the “pink sheets,” there was over voting. He went on to say that in a case of over voting the results of the election at the affected polling station should be cancelled.

Under Article 45 (c) it is the 2nd Respondent who is mandated to conduct and supervise all public elections and referenda and the court cannot decide for him what should be done in the case of over voting in the absence of any law to the contrary.

The petitioners are asking the court to annul 745,569 votes as a result of the over-voting.

Admittedly, when the 2nd petitioner was in the box, and was confronted with a number of “pink sheets” and asked to indicate whether on their face there was any basis for saying there was over-voting, he answered there was none.

They also included “pink sheets” on which A1 or B1 has a blank interpreting this to mean zero.

I do not consider this interpretation as a valid basis in proof of over-voting.

The polling stations affected are to be excluded from the polling stations to be affected by the over-voting category as indicated in volume 2B of the written address of counsel for petitioners using Respondents preferred Data set.

After the written addresses have been filed, counsel for parties were given the opportunity to react to the filed addresses but the figures were not disputed.

ABSENCE OF PRESIDING OFFICER'S SIGNATURE

Article 49 of the 1992 constitution sets out voting at election and referenda

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

(2) Immediately after the close of the poll, the presiding officer shall in the presence of such of the candidate or their representative 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 candidate or their representative 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.”

The petitioners claim under this head is that in a number of polling stations, the results of which were declared, the presiding officers did not sign the “pink sheets’. It is their case that the signature is crucial because it is a mandatory constitutional requirement but not an administrative directory.

In all the petitioners were relying on 924 pink sheets which they presented to DR. AFARI-GYAN who admitted them. He also conceded that 905 more “pink sheets” were unsigned. Among these are 191 included in the petitioners’ 924.

The pink sheets without the presiding officers’ signatures therefore came to 1,638 involving 659,814.(sic)

The constitution, mirrors the will and aspirations of the Ghanaian people and it is the supreme law of the land.

Article 1 speaks of the supremacy of the constitution.

1 (1) states that –

“The sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner within the limits laid down in this constitution.

(2) This constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this constitution shall, to the extent of the inconsistency, be void. The preamble of the constitution states that:

“IN THE NAME OF THE ALMIGHTY GOD

We the people of Ghana;

IN EXERCISE of our natural and inalienable right to establish a frame work of government which shall secure for ourselves and posterity the blessings of liberty, equality of opportunity and prosperity;

IN A SPIRIT of friendship and peace with all people of the world; AND IN SOLEMN declaration and affirmation of our commitment to Freedom, Justice, probity and Accountability;

The principles that all powers of Government spring from the sovereign will of the people;

The principle of universal Adult suffrage;

The rule of Law;

The protection and preservation of Fundamental Human Rights and Freedoms, Unity and Stability for our nation;”

DO HEREBY ADOPT, ENACT, AND GLUE TO OURSELVES

In the Interpretation Act, of 1960, section 27 states that –

In an enactment made after the passing of this Act, “shall” shall be construed as imperative and -----

Article 49 (3) therefore imposes an obligation on the presiding officer to sign before the declaration of the results. The reason for this cannot be far fetched. He must sign to authenticate the results. If he does not sign, but goes ahead to declare the results, what will be their probative value?

DR. Afari-Gyan told the court that failure to sign is an irregularity. He did not go ahead to say what flows from this irregularity.

What is an irregularity?

In the case of BORYS WRZESNEWSKYJ VRS TED OPITZ, ATTORNEY-GENERAL OF CANADA, MARC MAYRAND (CHIEF ELECTORAL OFFICER) and ALLAN SPERLING (RETURNING OFFICER, ETOBICOKE CENTRE)

AND KEITH ARCHER (CHIEF ELECTORAL OFFICER OF BRITISH COMBIA)

The court by a majority of 4-3 allowed the appeal because the Appellant sought to have voters of several Canadian citizens

disqualified on account of administrative mistakes notwithstanding evidence that those citizens were entitled to vote.

In the dissenting opinion, the court said –

“Irregularities should be interpreted to mean failures to comply with the requirement of the Act, unless the deficiency is merely technical or trivial. For ‘irregularities’ to have affected the result of the elections,” they must be of a type that could affect the result of the election and impact a sufficient number of votes to have done so.....”

If the presiding officers failed to sign the pink sheets, that constituted infringement of Article 49 (3) of the constitution and to me that is fatal. It renders the result declared null and void. In the Apaloo case, the Gazette Notice issued by the Electoral Commission in infringement of the Constitutional Instrument was declared null and void. What then happens to the results declared by the presiding officers in contravention of Article 49(3) by failure to sign the pink sheets?

The 2nd respondent told the court, that in spite of the failure to sign, he will accept the results because the polling Agents did sign. What is the role of the polling Agent at the polling station?

Under cross-examination by counsel for petitioners, this is what transpired;

Q. You are aware that the functions of a polling agent are strictly circumscribed?

A. My Lords, I would say so.

Q. They are not election officials?

A. In the strict sense of term, no.

Q. I would like you to read Rule 19(4) of C.I. 75?

A. WITNESS READS OUT.

Q. So I am suggesting to you that it is not the business of the polling agents to supervise the work of the election officials but to observe the conduct of the poll?

A. My Lords, I agree that the agent is not supposed to supervise but he plays an active role at the station.

At the pages 25-26 of the record of proceedings for the same day, Dr. Afari-Gyan made the point about the very limited role of polling agents abundantly clear.

Q. A polling agent is not involved in the actual administration of the election?

A. My Lords, you are correct.

Q. He does not count votes after the election?

A. My Lords no.

Q. He counts?

A. He does not.

Q. He also does not inspect the ID cards of persons who are in the queue to vote?

A. My Lords No.

Q. He cannot confront anybody directly at the polling station?

A. My Lords no and for that matter nobody can confront anybody directly at the polling station.

Q. If he has any objection to anything happening he has to inform the presiding officer?

A. My Lord yes.

Q. So the presiding officer is in charge of the polling station?

A. My Lords absolutely.

Q. He has the final say on any matter?

A. So far as it is connected with the election yes.

Q. In fact the presiding officer can ask the polling agent to leave the polling station.

A. Yes if the polling agent misconducts himself or herself.

Q. And who determines who misconducts himself, it is the presiding officer?

A. Yes it is the presiding officer but misconduct they are trained to know how mis-conducting oneself in a polling station is. (sic)

The polling Agent is not an electoral officer and the fact that he has signed the “pink sheet” cannot legalize that which is otherwise an illegality.

If even a law properly so passed cannot co-exist with the constitution if it is inconsistent with any provision of the constitution, that law to the extent of its inconsistency is null

and void, how can the court give effect to that which is unconstitutional?

Article 49 is an entrenched provision and parliament by itself cannot even amend it. How can a court under the guise of interpretation give any other meaning to 49(3) other than what is stated in the clause. The golden rule of interpretation is that words must be given their ordinary meaning unless same shall lead to absurdity. The clause is clear and unambiguous and does not call for the interpretation jurisdiction of this court. None of the conditions as laid down in *TUFFOUR VRS THE ATTORNEY-GENERAL* [1980] SCLR is present here and I would therefore not even attempt to embark on that exercise of interpreting the “shall” or find reasons why the presiding officer might have failed to sign.

The Respondents do not deny the failure of the presiding officers to sign but contend that that should not be a basis for annulling lawfully cast votes. Counsel for the 3rd Respondent submitted that if that is done, it will mean retrospectively punishing the voters whose votes will be annulled through no fault of theirs.

I wholly agree with counsel in that regard. In the circumstances, what is the way out?

THE RIGHT TO VOTE

It is provided by the 1992 constitution, Article 42 that:

“Every citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and is entitled to be

registered as a voter for the purposes of public elections and referenda.”

The right to vote is an inalienable right guaranteed and jealously guarded by the constitution. The only limitation being age and unsoundness of mind.

The respondents’ case is that annulling the votes of Ghanaians who have exercised their franchise in accordance with Article 42 will be disenfranchising them and thus deny them their right to vote.

The principle is that an election should not be invalidated by reason of any act or omission by an electoral officer or any other person in breach of his official duty in connection with the election or ----- if it appears to the tribunal having cognizance of the question that the election was conducted substantially in accordance with the law as to the election, and that the act or omission did not affect the result.

In this petition however where the evidence on the “pink sheets” on their faces indicates that the election was not conducted substantially in accordance with the law as to the election, and that the act or omission did affect the result, then the result will be invalidated.

The citizen’s right to vote has been upheld by this court in numerous cases and in particular AHUMA OCANSEY and TEHN-ADDY already referred to.

I happened to be part of the decision in AHUMA OCANSEY's case and I still stand by my opinion therein expressed.

For this reason, I will not by annulling votes under the three categories indirectly deny the voters their fundamental and inalienable right to vote as enshrined in the constitution.

Consequently, where votes have been annulled as a result of violations, irregularities etc, I will call for a run off of the elections.

VOTING WITHOUT BIOMETRIC VERIFICATION

Under Article 45 of the constitution, the 2nd Respondent is mandated to conduct public elections. In this wise, the commission is uniquely empowered to enact regulations to govern the performance of its functions to ensure the sanctity of the citizens' franchise and the integrity of the electoral system.

In pursuance of its mandate, the commission enacted Regulation C. I. 75, regulating the conduct of public elections.

Regulation 18(1) makes it mandatory for every polling station to be provided with a biometric verification device. The Regulation reads as follows:

“The returning officer shall provide a presiding officer with

- (a) a number of ballot boxes and ballot papers;
- (b) a biometric verification equipment; and
- (c) any other equipment or materials that the commission considers necessary”

Regulation 47 (1) of C. I. 75 defines a biometric verification equipment to mean:

“a device provided at a polling station by the electoral commission for the purpose of establishing by fingerprint the identity of the voter.”

By regulation 30 –

“(1) A presiding officer may, before delivering a ballot paper to a person who is to vote at the election, require the person to produce (a) a voter identification card, or

(b) any other evidence determined by the commission, in order to establish by finger print or facial recognition that the person is the registered voter whose name and voter identification number and particulars appear in the register.”

(2) The voter shall go through a biometric verification process.” (emphasis mine)

Under Regulation 34 (1) of the Instrument –

“Where the proceedings at a polling station are interrupted or obstructed by (a) riot, open violence, storm, flood, or other natural catastrophe, or (b) the breakdown of an equipment, the presiding officer shall in consultation with the returning officer and subject to the approval of the commission, adjourn the proceedings to the following day.”

The Biometric verification process is therefore a mandatory component of the 2012 presidential election.

On the petitioners' claim that voters were permitted to vote without being biometrically verified, the Respondents answer is that the entries in column C3 on the "pink sheets" were filled in error.

The evidence of the 2nd Respondent is that column C3 was not required to be filled in at all by the presiding officers. According to him, that column was created to take care of those voters who had been registered during the biometric registration but whose biometric data had been lost as a result of some difficulties encountered by the 2nd Respondent. This is what Dr. Afari-Gyan told the court:

As an election administrator, he thought his duty was to give every such person the chance to cast his ballot. 2nd Respondent therefore advised this facility to allow such persons to vote without going through biometric verification. They would be required to fill in Form 1C before voting. When the idea was mooted to the political parties, they all rejected it. He therefore gave instructions that form 1C should not be sent to the polling stations. The C3 column was therefore not supposed to be filled.

"...C3 was put there in an attempt to take care of those people who through no fault of theirs would have valid voter ID cards in their possession but whose names will not appear on the register and therefore could not vote. But let me add that when we discussed this with the political parties, some of them vehemently said no that we will not allow any persons to be verified other than by the use of verification machine. I am just explaining why the C3 came there. The parties said no and we could understand that argument that facility is not given to one person, it is being given to every presiding officer. So you are given this facility

to 26,002 and it is possible to abuse it. So we do not want it and we agreed that that facility would not be used. Unfortunately, the forms had already been printed, these are offshore items, so we could not take off the C3. And what we said, and we have already said this in an earlier communication, was that we will tell all the presiding officers to leave that space blank because they had already been printed and there was no way that we could take it off. And that explains the origin of C3 on the pink sheet. It was a very serious problem.”

The question in C3 is as follows:

“What is the number of ballots issued to voters verified by the use of form 1C (but not by use of BVD”?)

Dr. Afari-Gyan’s explanation as to how column C3 appeared on the “pink sheets” turned out to be false under cross-examination as indeed he later admitted that C. I. 75 (mandating the use of biometric verification came into force long before 20th October, 2012 when the order for printing the “pink sheets” was given.

It was the evidence of Dr. Afari-Gyan that the commission instructed that the form 1C should not be taken to the polling station at all. How come then that they were taken to the polling stations? If they were not taken, how come column C3 was filled with reference to the form?

Under cross-examination, this is what transpired between Dr. Afari-Gyan and counsel for the petitioners –

“Q. Now Dr. Afari-Gyan you are aware that in the December, 2012 elections, entries were made in C3 all over the country.

A. Yes my Lords.

Q. I am suggesting to you that in fact no such instruction was given to any official to enter zero.

A. My Lords, I disagree, instructions was clearly given. Those entries I believe were made in error.

Q. Now the figures that entered there were obviously generated from the election am I right?

A. My Lords, I would believe so.

Q. You believe so, or you don't know?

A. My Lords, I believe that they are figures that are intended to relate to the election.

Q. And do you have any idea where those figures should have been placed other than in C3 column?

A. Well, in the situations that I have analyzed, they are almost invariably the same figure in C. I. and in C3 and then it was

entered at the ----- and this will give rise to a very curious situation.

Q. My question was that the numbers that had been put in C3 you agree had been generated from the elections. Where do you think it should be put instead of C3?

A. My Lords since that number was a repetition of C1 and C3 my indication is that it should not have been there at all.

Q. So where it is not equal to C1 where would it have been?

A. My Lords, he is asking me something in the abstracts and is difficult for me to know where it should have been.

Q. So your answer is that it is difficult for you to tell where it should be.

A. My Lords, in the instant that I am saying that there should have been nothing in that column so if something is entered...”

It will be recalled that Dr. Afari-Gyan earlier on in answer to a question by my brother Dotse JSC. as to how the alleged instructions to presiding officers not to fill in question C3 was given (whether written or oral), he told the court he could not remember.

The petitioners have introduced the evidence on the “pink sheets”. It was for the 2nd Respondent to establish how the alleged error came about.

Where a defence goes beyond mere denial then the burden shifts to the defendant, here the Respondent to prove the error.

See the case of PICKFORD VRS ICI[1998] 3AER

The “pink sheets” were generated by the 2nd Respondent photocopies of which were given to the petitioners. The entries thereon constitute prima facie evidence which needed to be rebutted by the 2nd Respondent. Failure to rebut same is fatal to the defence of error/ mistake.

Indeed Dr. Afari-Gyan told the court in one case where the same figure was entered in C3 as it was entered in C1, that it was either or situation meaning either all the voters voted without being biometrically verified or they all went through the biometric verification process. To find exactly what happened, he said there should be a resort to the Biometric Verification Device. The Devices were not resorted to to tell the court that indeed the figures entered in column C3 were entered in error. These Devices are in the custody of the 2nd Respondent.

Their case is that even if voters voted without going through the verification process a call for annulment of the votes must be considered in the light of their fundamental Right to vote as enshrined under Article 42 of the constitution.

The Chairman of the 2nd Respondent told the court that in some cases, the presiding officers were given the discretion to permit

certain persons who are well- known in the community to vote without biometric verification. This is in contrast distinction to the NO VERIFICATION NO VOTE Slogan and an infringement of Regulation 30 of C. I. 75.

In the case of APALLO VRS ELECTORAL COMMISSION [2001-2002] SCGLR 1 the court held that the Regulation enacted by the 2nd Respondent constitute the only constitutionally valid and acceptable instrument by which the 2nd Respondent can regulate important matters in the conduct of public election.

Like the Gazette notice published by the 2nd Respondent, the discretion given to presiding officer to allow people like Omanhene to vote without going through Biometric verification Device is ultra vires C. I. 75 and therefore same is void.

The Indian case of A. C. JOSE VRS. SIVAN PILLAI & Others [1984] SCR (3) 74 at 75 paragraphs 86H-89G is authority for the contention that where certain election procedure are prescribed expressly by an enactment and its rules, the electoral commission is not at liberty to derogate from such rules or exercise any discretion.

In ruling against the exercise of discretion to the voting machines in some areas when the law did not support same the court held at paragraph 87A-B that:

“Where there is an Act and there are express Rules made thereunder, it is not open to the Commission to override the Act or the Rules and pass orders in direct disobedience to the mandate contained in the Act or the Rules. The powers of the Commission are meant to supplement rather than supplant the law (both statute

and Rules) in the matter of superintendence, direction and control as provided by Article 324”

It is unfortunate that the 2nd Respondent sought to introduce element of discretion into NO VERIFICATION NO VOTE under C. I. 75.

Voting without being biometrically verified is an infringement of the Law which cannot be countenanced under the present dispensation in an election petition. See the case of NEW NATIONAL PARTY VRS GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA and others (CCT 9/99) [1999] ZACC SA 191.

See Vol. 2B page 437 of petitioners filed address.

For this and other reasons, I am inclined to annul votes in all polling stations where the violation occurred.

DUPLICATE POLLING STATION CODE

The evidence of the Representatives of 1st and 3rd Respondents is that polling stations are identified by their unique names and code numbers. DR. Afari-Gyan representing 2nd Respondent also told the court that:

“The code is unique.....

The petitioners’ claim however is that there were multiple instances of same duplicate code numbers being used for different polling stations with different results. This they term a malpractice.

Under cross-examination, DR. Afari-Gyan was actually confronted with 5 pink sheets of same number of polling station name Juaso Court Hall with same code number but different results.

Again under cross-examination DR. Afari-Gyan admitted that 9 pairs of 18 “pink sheets” bore the same code numbers.

DR. Afari-Gyan again admitted another 16 polling stations with corresponding pink sheets bore the same polling station code.

There was another list of 16 (8 pairs) pink sheets which was tendered through DR. Afari-Gyan. He sought to explain away the anomaly with the suggestion that one of each pair had been used for special voting.

This list was tendered as Ex “Y”,

In all, the petitioners’ claim is that 35 polling stations were involved.

DR. Bawumia however told the court that the votes in terms of their impact of this elections is statistically insignificant-----

Again the petitioners said out of these 9 pairs i.e. 18 pink sheets with the same polling station codes were part of the list of 905 polling stations tendered as exhibit “P” (where the presiding officers did not sign the “pink sheets”. That being the case the

votes in respect of those polling stations have been annulled under no signature head.

DR. Afari-Gyan was able to explain that in some instances, special voting had taken place at the same polling station or where the registered voters there were too many the polling station would be split into two – A and B. This is plausible enough.

If therefore there are any such polling stations with the same polling station code, the number will be few and therefore as DR Bawumia himself told the court, same will be statistically insignificant. The malpractice if anything at all, will not affect the result so that malpractice is disallowed.

UNKNOWN POLLING STATIONS

The original claim by petitioners as contained in paragraph 20 Ground 2a was that:

“That there were 28 locations where elections took place which were not part of the twenty-six thousands and two (26,002) polling stations created by the 2nd respondent for purposes of the December 2012 elections.”

This number was reduced to 22 when the petitioners were asked to give further and better particulars. Even with these 22 polling stations, the petitioners did not appear to be desirous of pursuing.

Dr. Bawumia in his oral testimony had this to say:

“For the 22 locations, we could not find them on the list of 26,002, we could not match the names and the polling stations. Again as with the duplicate numbers category, my Lords, we have to be upfront statistically this category is insignificant, 99% of all the irregularities and violations that we are taking about are in four categories. Over voting, voting without biometric verification, the duplicate serial numbers and the non signatures by the presiding officer ... even if it is one polling station.”

The Representative of the 3rd Respondent answer to this allegation is that the 22 polling stations, formed part of the 26,002 polling stations for the 2012 Presidential election. His explanation is that the petitioners got the spelling of the polling station names and code numbers wrong. He filed Ex “JAN 5” in which he supplied the correct names and code numbers.

What is more, the petitioners sent their polling Agents to these polling stations where voting took place in the presence of their polling Agents.

I find no substance in this claim and so disallow same.

DUPLICATE SERIAL NUMBERS

The petitioners’ claim that serial numbers on the face of the pink sheets are security features and this is to ensure that the results

at each polling station would be entered on only one pink sheet, whose unique feature is the serial number.

This was denied by 2nd and 3rd Respondents who told the court that so far as elections are concerned, the serial numbers are of no significance and that for the purpose of the election, they are not security feature. They contended that these numbers were even generated by the commission but by the printer.

When the 2nd petitioner was asked whether the serial number is covered by any law or constitutional provision, this is what he said:

“This is why we say it is an irregularity. I am not aware that is covered by a law or constitution but ...you can be sure they will be dishonoured to a question.

Q. And I am suggesting to you that that is the case because you do not challenge the account of details on those ‘pink sheets’.

A. “What we are saying is that the details on those ‘pink sheets’ are questionable because we cannot trust the integrity of the form they are written on.”

In fact the petitioners did not say that no voting took place in those polling stations. If the pink sheets’ are questionable, what questions were asked and were answered by the petitioners?

No case was made under this head and I am inclined to dismiss same.

CONCLUSION

The number of votes annulled for the three irregularities and violations of over voting, voting without Biometric verification will negatively impact on the result declared by the 2nd Respondent having regard to the votes margin between the 1st petitioner and the 1st Respondent. If the invalid votes are deducted from the votes of the two, the 1st Respondent who was declared winner on 50.7% of the votes cast will not cross the threshold of 50%+1.

For this reason, I will and hereby declare that the 1st Respondent was not validly declared winner of the 2012 presidential election. The first relief of the petitioners is hereby granted.

The 2nd relief for a Declaration that Nana Addo Dankwa Akufo-Addo the 1st petitioner herein rather was validly elected president of the Republic of Ghana cannot be granted because of the order for re-running the election in polling stations where the votes are to be annulled. The 3rd relief has been granted in the polling stations where the election is to be re-run. The petition succeeds in part.

(SGD) R. C. OWUSU (MS)

JUSTICE OF THE SUPREME COURT