

It is a legal requirement for the Supreme Court to give reasons when departing from its previous decision(s) in exercise of its powers under Article 129(3) of the 1992 Constitution.

Article 129(3) of the Constitution

Article 129 (3) of the 1992 Constitution provides as that :

"The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law."

As can be seen from the above article, it is expressly provided that decisions of the Supreme Court are *normally* (emphasis by the writer) binding on it (Supreme Court) but it (Supreme Court) may depart from its previous decision when *'it appears right to do so'*. It further provides that all lower courts are bound to follow decisions of the Supreme Court on questions of law.

This constitutional provision is to ensure, among others, that there is certainty in judicial decisions, a requirement for any civilised society. What is not in doubt is the fact that once the Supreme Court departs from a previous decision, all other courts are bound to follow and apply any such decision.

The purpose of this article is to demonstrate that it is a legal and constitutional requirement for the Supreme Court, in exercise of its powers under Article 129(3), to give reasons when departing from a previous decision.

Whether all decisions of the Supreme Court on questions of law are binding on lower courts

It is the view of the writer that a decision which is not based on any legal provision and which is unconstitutional and wrongful if given by the Supreme Court cannot be said to be binding. An extreme example of this is if the Supreme Court, for instance, decides that the fundamental human rights provisions are unconstitutional. Any such decision will be unconstitutional and against the express provision of law and as such void.

A void decision is of no effect and in that case, lower courts cannot be said to be bound by any such void decision. It is a basic principle of law that a void decision is a nullity. As held by Lord Denning in *United Africa Company Limited v Macfoy*¹

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is

¹ *United Africa Company Limited v Macfoy (1961) 3 All ER 1169 PC at page 5 of the judgment.*

also bad and incurably bad. You cannot put something on it and expect it to stay there. It will collapse."

The courts in Ghana have consistently held that a void decision is not binding. In *Mosi v Bagyina* the court held that ²

"Where a judgment or an order is void either because it is given or made without jurisdiction or because it is not warranted by any law or rule or procedure, the party affected is entitled ex debito justitiae to have it set aside, and the court or a judge is under a legal obligation to set it aside. No judicial discretion arises here."

It can therefore be stated that though decisions of the Supreme Court are binding on all lower courts in Ghana, where a decision is plainly and obviously wrong on the face of it, then in such an instance, a lower court might refuse to apply this decision. Such an instance is not uncommon and, in some cases, lower courts have refused to apply decisions of the Supreme Court which are wrongful.³ In the case of *Awutu Ellis Kaati & Others v The Republic*, the Court of Appeal per Dennis Adjei JA held that:

*"We are of the opinion that by Article 11 of the Constitution 1992, the existing law is superior to judgments and even though we are bound by the decision of the Supreme Court, we have no doubt in our mind that where a decision given is contrary to statute, we are bound by statute. In respect of the holding that a Police officer cannot act as an independent witness, we are bound by Section 120 of the Evidence Act, NRCD 323 and not the holding in the case of *Frimpong alias Iboman v Republic*(supra) and we hold that Police and Military officers can act as independent witnesses"*

It is also not in doubt that every court is bound by statute and no court has immunity from the provisions of statute hence in *Republic vs High Court, Exparte National Lotteries Authority* ⁴ the Supreme Court per Date Baah held that:

"No judge has authority to grant immunity to a party from the consequences of breaching an Act of Parliament. But this was the effect of the order granted by the learned judge. The judicial oath enjoins judges to uphold the law, rather than condoning breaches of Acts of parliament by their orders. The end of the judicial oath set out in the Second Schedule of the 1992 Constitution is as follows: I will at all times uphold, preserve, protect and defend the Constitution and laws of the Republic of Ghana' This oath is surely inconsistent with any judicial order that permits the infringement of an Act of Parliament."

It is submitted that where a decision of the Supreme Court is against statute that decision is void and lower courts will not be bound under Article 129(3) of the 1992 Constitution.

² *Mosi v Bagyina* [1963] 1 GLR 337 - 348

³ *Awutu Ellis Kaati & others v The Republic* (unreported case dated 15th November, 2015, CA)

⁴ 2009 SCGLR 390 @402,

Article 296 of the 1992 Constitutionⁱ

Under Article 296 any person vested with discretionary power is required not to act arbitrarily. It is provided in Article 296 as follows:

Where in this Constitution or in any other law discretionary power is vested in any person or authority,

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

As can be seen from the above provisions of Article 296, every person vested with discretionary power has a duty to be fair and candid. The discretion is not to be exercised in an arbitrary, capricious or biased way. It is not in doubt that the duty of all judges is to apply the law. It is also not in doubt that in the application of the law, there is a wide exercise of discretion by a judge. What is required under the Constitution is that every decision of a judge which involves the exercise of a discretion has to be in accordance with the provisions of Article 296.

Crabbe JSC *in R v Registrar of High Court; Exparte Attorney General*⁵ reiterated the grounds upon which the exercise of judicial discretion may be impeached including:

“

- I. where it can be demonstrated that the judge or judicial officer violated the duty to be fair and candid;*
- II. where the discretion was exercised capriciously or arbitrary;*
- III. that the judge or judicial officer was biased either by resentment or prejudices;*
- IV. the trial judge did not act in accordance with due process of law.”*

The Evolution of the Law

Society is not static but dynamic, judicial decisions, just like society, are subject to change based on the evolution of the people. In the opinion of the writer, it is of utmost

⁵ *R v Registrar of High Court; Exparte Attorney General (1982-83) GLR 407*

importance that the courts keep pace albeit a cautious one, with respect to general changes in society which have arisen in at least 3 (three) different instances. These instances of change are, change in an existing law by the legislature, change to correct an erroneous decision given by the Supreme Court and lastly but not the least, change in the general norms of the society where the legislature is slow to enact laws to correct a rapidly changing act. This third situation may result from an act(s) of the society which though not sanctioned by law has taken root and become firmly established within the society to the extent that no one is punished for such act.

The fact that law is evolving is evident from the pre-slavery times when it was legal for human beings to sell their fellow human beings as chattel. This practice was the existing law and was enforced until abolished by the legislature in the year 1874⁶, and subsequently by other countries. This example is to show that the phenomena of change in laws is worldwide and an incidence of development and or natural progression of society.

The 1992 Constitution provides for the fundamental human rights of the people which gives a clear incidence of the development of law with time. This development demonstrates the evolution of the people from a period of slavery, where they had little or no rights, to a period where they now enjoy fundamental human rights and freedoms under the 1992 Constitution.

Legislative function of Parliament under Article 93(2) and judicial power of the judiciary under Article 125 of the 1992 Constitution

Under the 1992 Constitution, the legislative function by virtue of Article 93(2) is vested in Parliament and it is the institution with the mandate to enact laws. The judiciary under Article 125 is required to administer justice and under Article 125(3), the judicial power of Ghana is vested in the Judiciary.

It is a truism that under Article 2 of the Constitution, the Supreme Court is given power to interpret and enforce the provisions of the Constitution.⁷ The Supreme Court is further given the power to make orders and give directions as it considers appropriate when interpreting the Constitution⁸.

It is not in doubt that the avenue for determination of any dispute is the court. It is also a fact that we have a hierarchical court system with the Supreme Court as the apex court of the land as stipulated in Article 126 of the 1992 Constitution which provides as follows:

"The Judiciary shall consist of

a) the Superior Court of Judicature comprising,

⁶ *Ghana then Gold Coast was subject to laws passed in the British Parliament*

⁷ *Republic v. High Court (Commercial Division), Accra: Ex Parte Attorney-General (Balkan Energy Ghana Ltd & Ors Interested Parties) [2011] 2 SCGLR 1183 at page 1191,*

⁸ *Chraj Vrs Attorney General and Others [2011] GHASC 19 (6 April 2011)*

- (i) *the Supreme Court,*
- (ii) *the Court of Appeal, and*
- (iii) *the High Court and Regional Tribunals;*

(b) *such lower courts or tribunals as Parliament may by law establish."*

The Constitution is a document which also embodies the spirit and aspirations of Ghanaians

The Constitution came into being after it was voted in favour by majority of the people at a referendum. It is expressly provided in Article 1(1) 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 and within the limits laid down in this Constitution."

It is the supreme law and *any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void* as provided in Article 1(2) of the Constitution⁹

The Supreme Court rightly held in *Tuffuor v Attorney General*¹⁰ that the Constitution is a document which embodies the history and the will of the people. It held further that the Constitution has a spirit apart from the letter and acts as a source of strength and power to the people. This statement is in tandem with the thinking of notable legal philosophers including Friedrich Carl Von Savigny, who believed in the organic nature of law as a product of the spirit (a common conviction; a kindred consciousness, an inward necessity which became known as the *Volkgeist*)¹¹. According to Savigny, custom is the natural and fundamental form of law.

The need for certainty in law

The need for certainty of law is not in doubt. Irrespective of the view of the various schools of jurisprudence, one thing which is central is the fact that law has to be certain. The Realist school of law holds the view that, law is defined in terms of judicial decisions. According to this school of law, law originates not from a set of rules but what the court determines to be the law. The well-known aphorism of Oliver Wendell Holmes is blunt and to the effect that, *'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law'*.¹²

Friedrich Carl Von Savigny of the historical school of law's basic theory is that, *"It is impossible to create law out of whole cloth-it grows in a slow, unconscious, organic way*

⁹ *Wood CJ in Abu Ramadan & Nimako (No.1) v. Electoral Commission & Attorney-General (No.1)* stated that *"a clearly unambiguous constitutional provision which underscores the supremacy of the 1992 Constitution is the Article 1(2)"*

¹⁰ *Tuffuor v Attorney General* [1980] GLR 637

¹¹ *Texas A&M Law Scholarship Texas A&M Law School, Volkgeist and a Piece of Sulphur, Frank W. Elliott, at page 818.*

¹² *Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harvard Law Review 460-61 (1897).*

from its primitive beginning in the minds of the people of a nation". He describes this way of thinking as a "common conviction," a "kindred consciousness," an "inward necessity" which he refers to as "Volksggeist"¹³. Savigny believed that, "Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its individuality."¹⁴ To him, the essence of the law is the people, hence law has to be made taking cognizance of societal change and its effect on the citizenry.

According to Holmes, a judge's concern is to deliver justice in the case before him, and if that requires a creative interpretation of existing rules, he should resort to it. Holmes believed that judges and lawyers are well acquainted with the historical, social, and economic aspects of law. He favored a pragmatic approach to law, where judges and lawyers interpret the law as it is, without considering "what it ought to be". This school of law is in tandem with the popular saying "Law is in the bosom of the judge".

Hans Kelsen, the Austrian legal philosopher came up with his "Grundnorm" or the basic law which all laws should trace their foundation from. According to this school of law, any law not traced and or having the "grundnorm" as its base is not a proper law¹⁵. As stated by *Andrei Marmor* in his publication, *The Pure Theory of Law*, in *The Stanford Encyclopedia of Philosophy*¹⁶

"Be this as it may, even if Kelsen erred about the details of the unity of legal systems, his main insight remains true, and quite important. It is true that law is essentially systematic, and it is also true that the idea of legal validity and law's systematic nature are very closely linked. Norms are legally valid within a given system, they have to form part of a system of norms that is in force in a given place and time."

What is not in doubt is that all the various schools of law agree on the fact that there should be certainty in law. This is because the mark of any good law is for the people to guide their actions against known and certain law.

Historical evolution of the rules of Equity.

The fact that certainty is fundamental can be seen in the evolution of the common law as it previously existed and the rules of equity. Equity, emerged as a result of the deficiency of the common law in dealing with core unjust issues which were legal under common law. It provided remedies in situations in which precedent or statutory law was not applicable and or equitable.

¹³ *Texas A&M Law Scholarship Texas A&M Law School, Volksggeist and a Piece of Sulphur, Frank W. Elliott, at page 818.*

¹⁴ *Savigny and the Historical School of Law, Chapter 5, Oxford Academic, <https://doi.org/10.1093/acprof:oso/9780199691555.003.0006> Pages214–252, Published November 201*

¹⁵ *The North-East Law Journal, Aniket Mishra- Kelsen's pure theory of law is based on the pyramidal structure of the hierarchy of norms which derives their validity from the basic norm, which has been termed as "Grundnorm". Thus, the basic norm or Grundnorm determines the context and gives validity to other norms derived from it.*

¹⁶ *Marmor, Andrei, "The Pure Theory of Law", The Stanford Encyclopedia ofPhilosophy (Fall 2021 Edition), Edward N. Zalta (ed.), URL=<<https://plato.stanford.edu/archives/fall2021/entries/lawphil-theory/>>.*

At the end of the 13th century, the reliefs available in civil cases in the English King's common-law courts were largely limited to the payment of damages and the recovery of the possession of property. The common law courts refused to extend and diversify reliefs to cater for new and more complex situations. The people appealed to the King because the courts had afforded either no remedy or one that was ineffective, for instance, claims for specific performance¹⁷. These petitions were referred to the Lord Chancellor, who was the King's Principal Minister whose function was to remedy the defects in the common law which had come up as a result of the strict application of the rules of common law¹⁸.

By the mid-14th century, the Court of Chancery was recognized as a new and distinct court. Because of the essence of certainty in law, after a period of time, the Chancellor was forced to come up with rules of equity. At the inception, the Chancellors were not bound by precedents or rules of law; emphasis had been put mainly upon the discretionary treatment of needs of individual cases and to do what was right in the circumstances of each case. Eventually, the people complained that equity was so uncertain that it varied with the length of the Chancellor's foot¹⁹. This had restrictive influence on the development of precedent in the Chancery. This draws attention to the need for certainty in law, for without it there will be chaos in society.

Article 129(3) and the certainty of law

It may be argued that under Article 129(3), an uncertainty is created with respect to the right of departure by the Supreme Court of its previous decisions, this is however not the case as no uncertainty is created. It is not in doubt that certainty is a requirement of law. Without law (and a good law requires certainty), society will become what Thomas Hobbes describes in the Leviathan as:

*"No arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short."*²⁰

In fact, a law which is not known cannot be said to have fulfilled the requirement of a good law. It is based on this that the 1992 Constitution makes it a fundamental human right provision for a person not to be convicted for an offence unless the offence is defined and the penalty for it is prescribed in a written law²¹. It also prohibits charging and or finding a person guilty for an offence which did not exist at the time the offence was committed²².

¹⁷ *Snell's Principles of Equity, The Hon. Sir Robert Megarry & P. V. Baker, 27th Edition, at page 12, the common law courts had no power to order specific performance and only very limited power of granting injunctions while the Court of Chancery usually could not give damages.*

¹⁸ <https://www.britannica.com/topic/Chancery-Division/additional-info#history>

¹⁹ John Selden; <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095755848>

²⁰ Thomas Hobbes Leviathan Quote Art Print. 60 Colours/2 Sizes. Nasty Brutish Short. Political Philosophy Brand: Folio Creations

²¹ Article 19(11) of the 1992 Constitution

²² Article 19(5) of the 1992 Constitution

These constitutional provisions are rationalized by the fact that laws should be certain. Indeed, it is a truism that a law which is uncertain erodes the confidence of the citizenry and has the potential of bringing chaos in the society.

It is the view of the writer that in so far as Article 129(3) gives the Supreme Court the constitutional right to depart from its previous decisions, the requirement of certainty has been fulfilled.

Requirement that every judgement should be supported by reasons

The fact that every judgment should be supported by reasons is not far-fetched. A judgment without reasons is not a judgment. The reasons for departing from a previous decision must be sufficiently clear to provide parties before the court with reasons for a decision with respect to the determination of a dispute and for the citizenry to be guided by the provisions of law in their act(s) and or action. It is also to protect against the arbitrary exercise of power.

It is a fact that it is not everything that is contained in a decision that is binding nor is it everything that is said in a decision that constitutes binding judicial precedent. As Cecilia Koranteng-Addow J. held in *Republic vrs. Director of Prisons & Anor. Ex Parte Shackleford*²³:

"it is the reason or principle on which a question before a court has been decided, which is binding as a precedent. It is the ratio decidendi of a judgment of a superior court which sets a precedent for itself or inferior courts to follow".

The requirement of supporting judgments with reasons has been emphasised by the courts in a myriad of cases. Kpegah JSC quoted with approval Apaloo, J.A. (as he then was) in *Akill Vrs. White Cross Insurance Co. Ltd.*, C.A. 73/66, judgment of the Court of Appeal, 26 June, 1967 (unreported) in *The Republic v. Judicial Committee of The Central Region House of Chiefs; Ex Parte: Supi Mark Aaba & Ors*²⁴ that :

"Trial Courts should assign reasons for their conclusions. Judges and Magistrates cannot be too often reminded that what the parties submit their differences to, is, the reasoned determination of a human judicial tribunal not to the oracular pronouncement of any deity. Where the conclusion is reasoned, it will, even if erroneous dispel any suspicion of arbitrariness which an unreasoned conclusion is likely to engender in the minds of unsuccessful litigants."

The Court in *Mainoo v. Republic*²⁵, quoted with approval Lord Denning's address to the Law Society of England where he stated as follows:

²³ *Republic vrs. Director of Prisons & Anor. Ex Parte Shackleford (1981) GLR 554 at 564*

²⁴ *The Central Region House of Chiefs; Ex Parte: Supi Mark Aaba & Ors (2001-2002) SCGLR 545*

²⁵ *Mainoo v. Republic (1984-86)2 GLR 727 @730*

"Give reasons for your decisions; for if you give no reasons, it will be construed as a judgment given without reason and an unreasonable one."

It is emphasised that judges are required to give reasons for their judgments, for without reasons judgments could easily be defined as arbitrary and capricious and not fair and or candid. It is based on a principle that one cannot be fair unless full reasons have been given for a determination of a case. It is only in that instance that one can be said to have acted fairly.

Ansah JSC in *Francis Assumaning and 64 Ors v Divestiture Implementation and Anor*²⁶ held that:

"There can be no doubt that a decision of any court is worth that name if reasons are given in support thereof. See Annous v Appoh [1980] GLR 883, CA; Efjisah v Ansah [2005-06] SCGLR 943. It must be the expectation of parties appearing in court that at the end of a hearing, he shall be given reasons why a particular verdict was entered for or against him. The reasons are varied. A party will like to know why a decision went one way or the other, for or against him so as to decide whether to agree with it or be aggrieved by the decision and appeal against it and on what grounds. When parties go to law, they do not expect or envisage an appearance at a pantomime. They expect a judge to read a judgment delivering a verdict buttressed with reasons."

The Supreme Court is required to give reasons when it departs from a previous decision in exercise of its powers under Article 129(3) of the Constitution

It is the view of the writer that it is mandatory for the Supreme Court to give reasons when it is departing from its previous decision. The writer reiterates that the Supreme Court has in numerous decisions held that reasons have to be given for decisions by courts. Kpegah JSC in *Republic v. Judicial Committee of The Central Region House of Chiefs; Ex Parte: Supi Mark Aaba & Ors.* quoted with approval Apaloo JA (as he then was) in *Akill Vrs. White Cross Insurance Co. Ltd.*, C.A. 73/66, judgment of the Court of Appeal, 26 June, 1967 (unreported) that:

"Trial Courts should assign reasons for their conclusions. Judges and Magistrates cannot be too often reminded that what the parties submit their differences to, is, the reasoned determination of a human judicial tribunal not to the oracular pronouncement of any deity. Where the conclusion is reasoned, it will, even if erroneous dispel any suspicion of arbitrariness which an unreasoned conclusion is likely to engender in the minds of unsuccessful litigants."

²⁶ *Francis Assumaning and 64 Ors v Divestiture Implementation and Anor* [2008] 3 GMJ 35 SC

The Republic v. Judicial Committee of The Central Region House of Chiefs; Ex Parte: Supi Mark Aaba & Ors.

The writer deems it important to give a summary of the facts in the above-mentioned case to show that the Supreme Court is aware of the requirement to give reasons when departing from its previous position. The facts of the case are that on the 23rd day of September 1996, the judicial committee of the Central Regional House of Chiefs delivered judgment in a chieftaincy suit. A chieftaincy petition was filed before the judicial committee of the Central Regional House of Chiefs by one Michael Conduah over the succession to the Omanhene stool of the Edina Traditional area. The judgment of the judicial committee upheld the Petitioner's claim and stated that reasons for the judgment would be given later.

The committee did not fix any date for delivery of the reasons. The parties had the expectation that hearing notices will be issued for the reasons to be given, however, no notice was sent. Sometime in October 1996, the Daily Graphic released a publication stating that the judicial committee had delivered its ruling in the matter on the 11th day of September 1996. This publication was false because if the judicial committee announced its decision on the 23rd day of September 1996, and adjourned for reasons to be given, it could not then be true that the committee delivered a ruling on the 11th day of September 1996. However, the publication made an impact.

The Respondents (Appellants) caused their lawyer to write to the Registrar of the Regional House of Chiefs informing him of the newspaper publication and also inviting his comments. The Registrar did not react. Appellants then commenced proceedings before the High Court, Cape Coast, seeking an order of certiorari to quash the judgment of the judicial committee of the Central Regional House of Chiefs dated the 23rd day of September 1996. The grounds of the application were error of law, breach of natural justice and abuse of jurisdiction.

In the High Court and the Court of Appeal, Counsel for the Appellants, argued that it was wrong for the judicial committee of the Central Regional House of Chiefs to deliver judgment and reserve their reasons for a later date. Counsel for Appellants argued that upon meticulous reading of rule 11 of CI 27, the judicial committee of the Central Regional House of Chiefs is required to state the decision with the reasons simultaneously. The failure to do so amounted to an error of law on the face of the judgment, and the judgment should be quashed as being null and void.

Appellants' interpretation of the rule was rejected; hence, their application was dismissed. In the Court of Appeal, the court suo motu raised the point that though the judicial committee was not bound to announce the decision together with the reasons simultaneously, the judicial committee was nevertheless under an obligation to give its reasons within a reasonable period. The Court of Appeal found that the judicial committee was bound to follow the procedure applicable in the High Court, but having reached that conclusion, the court failed to apply the relevant law applicable.

What is most important about this case is that in arriving at this decision, the Supreme Court did not consider and or draw its attention to the constitutional provision in Article

157(3) which stipulates that a judge who has presided over a matter and heard the case is constitutionally required to give judgment.²⁷

Even though the Supreme Court was right that reasons should be given in any judgment or decision, this particular decision was wrong and against the provisions of Article 157(3) of the 1992 Constitution. It is not in doubt that this decision was a wrong decision.

The Republic v. The High Court, Accra Ex-Parte: Expendable Polystyrene Products Limited (Exparte EPP)

The Supreme Court had the opportunity to rectify its error in *Exparte Abba*, in the *Exparte EPP* case. The writer deems it important to also give the facts in the above-mentioned case.

The *Exparte EPP* case concerns an application invoking the supervisory jurisdiction of the Supreme Court, under Article 132 of the Constitution for an Order of Certiorari directed to the High Court, Accra, to quash its judgment given on the 25th day of January 2002. The ground for the application was to the effect that the judgment of the 25th day of January 2002 was null and void because at the time it was given, the six-week period prescribed by the rules, for judgment to be delivered had elapsed. An action was instituted against the Applicant in the High Court who was then the Defendant, seeking the export value of sea food assessed at FF.88,318,50 or its equivalent; interest at the commercial bank lending rate calculated from the date of first demand until the date of payment and damages for breach of contract.

After the hearing of evidence in the case had been completed, the Plaintiff filed its address on 8th December 1999 and Defendant also filed its address on the 28th day of January 2000. The case was then adjourned for judgment by the trial High Court which was eventually delivered on the 25th day of January 2002, in favour of the Plaintiff for all the reliefs sought.

According to the Applicant since the judgment was delivered almost 2 years after the close of the case in the High Court, instead of the stipulated 6 weeks as contained in Order 63 (2A) of L.N. 140A as amended by L.I 1107, the judgment was null and void and ought to be so declared and quashed by certiorari. The existing law, that is, *Exparte Aaba*, at the time supported this position of the Applicant.

The Supreme Court departed from its decision in *Exparte Aaba* in exercise of its power under Article 129(3) and applied Article 157(3) of the 1992 Constitution which makes it mandatory that a judge who has sat on a case cannot refuse to give judgment.

Reasons given by the Supreme Court in the Exparte EPP case

In departing from the earlier position in *Exparte Aaba*, the Supreme Court in *Exparte EPP*, gave reasons for their departure from the *Exparte Aaba* decision²⁸. It held that its

²⁷ *Republic v Central Regional House of Chiefs Judicial Committee; Ex Parte Aaba [2001-2002] 1 GLR 221*

²⁸ *The Republic v. The High Court, Accra Ex-Parte: Expendable Polystyrene Products Limited [2001-2002] SCGLR 749*

attention was not drawn to the provisions of Article 157 and held per Bamford JSC who gave the lead judgement as follows:

'The respondent has asked that we depart from that finding by virtue of our power under Article 129(3) the constitution namely:

"Article 129(3) the Supreme Court may while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so, and all other courts shall be bound to follow the decisions of the Supreme Court on question of law".

I have carefully considered the above-mentioned case. It appears to me that the Courts attention was not directed, to nor did not consider the relevant provisions of the Constitution which I have referred to in this judgment. In my opinion if it had done so, I have no doubt that a different conclusion would have been arrived at which would conform with my views as expressed in this Ruling.

Therefore, the judgment in the Ex-parte Supi Aaba case supra with due respect was given per incuriam and Applicant's reliance on it is unhelpful to this case."

As can be seen above, extensive reasons were given by the Supreme Court as to why it departed from *Exparte Aaba*.

Under Article 296 it is constitutional requirement for reasons to be given

It is the view of the writer that every judgment including a departure by the Supreme Court under Article 129(3) requires that reasons be given. This requirement to provide reasons is a constitutional requirement under Article 296 of the Constitution.

It is reiterated that under Article 296, any person including judges, who is vested with discretionary powers under the Constitution is required to exercise this discretion in a fair and candid manner. The Constitution stipulates that the exercise of the discretion should not be capricious and arbitrary. It further provides that save judges, any person who is given discretionary power is to publish by constitutional instrument or statutory instrument and or regulations that are not inconsistent with the Constitution to govern the exercise of this discretion.²⁹

It is not in doubt the extensive provisions as contained in Article 296 on how to exercise discretion is to prevent abuse of the exercise of this discretion. Judges exercise discretionary power in their functions and it is a fundamental requirement that in the exercise of their powers, they are guided by the exercise of this power.

²⁹ Article 296(c) of the 1992 Constitution

Conclusion

It is the view of the writer that it is a constitutional requirement that when the Supreme Court departs from its previous decision under Article 129(3) of the Constitution, reasons must be given. This should not be debatable and or difficult, in that, the Supreme Court will definitely have solid reasons for departing from a previous decision. It is only fair and right that the court is mandatorily required to provide the reason(s) which informed it to depart from its previous decision, not only to the parties who appeared before it, but to the entire world, more particularly the citizens of Ghana. This is because under Article 125(1) of the 1992 Constitution it is provided that:

"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."

If this constitutional provision is to be given meaning, then the people from whom justice emanates and for whom the judiciary is mandated to administer justice in the Republic on their behalf are entitled as of right to be given reasons for a departure by the Supreme Court from a previous decision.

It is true that by giving reasons for the departure the Supreme Court will be fulfilling one essential requirement of law not only to the parties who appear before them but to the citizens.

The Supreme Court of Ghana has the authority and discretion to depart from its own decisions if it thinks it is appropriate to do so, as stipulated in Article 129(3) of the 1992 Constitution. What is paramount is that judges give reasons for departing from their previous decisions.

It is only when reasons are given that the position of the law can be said to be certain. This is because the reasoning behind a judgment quells all doubts and suspicions as to the nature of the discretion applied by the courts in determining the issues before it. By giving reasons for departing from a previous decision, the Supreme Court will be fulfilling one essential requirement of law, not only to the parties who appear before them but to the entire world.
