IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA - A. D. 2020

SUIT NO. J1/9/2020

NATIONAL DEMOCRATIC CONGRESS **PLAINTIFF**
ACCRA

VRS.

1. **THE ATTORNEY GENERAL**
2. **THE ELECTORAL COMMISSION** **DEFENDANTS**

LEGAL SUBMISSIONS BY 1ST DEFENDANT
Pursuant to Order of Court dated 4th June, 2020

Introduction

Respectfully, on 26th March, 2020, the plaintiff herein, a political party registered under the laws of Ghana, invoked the original jurisdiction of this Court for the reliefs endorsed on its writ of summons. The defendants subsequently filed their respective statements of case in accordance with the rules of this Court.

At the first hearing of the suit, on 4th June, 2020, this Honourable Court before hearing the parties, ordered the 2nd defendant "*to offer legal basis for not allowing the existing voter ID card to be used in the registration exercise*". The Court gave the other parties to the action the liberty to also file submissions in respect of the issue.

Consequent on the orders of the Court, these submissions are filed by 1st defendant.

For clarity of presentation, the legal arguments will be presented in the following order:

A. Observations on the Order of the Court
B. Substantive responses on the issue in respect of which legal arguments have been ordered by the Court
    i. The 2nd defendant's duty to deliver credible elections in Ghana
    ii. 2nd defendant's discretion under article 45(a) not subject to external direction or control
    iii. Plaintiff owes a duty to establish unconstitutionality in the process proposed to be embarked upon by 2nd defendant.

iv. Is there a valid "existing" voter identification card that can be used for the upcoming voter registration exercise, and if so, which one is this?
v. Current voter register is flawed and undermines the right to vote.

C. Conclusion.

Where necessary, in order to aid further a better appreciation of the legal submissions, sub-topics may be introduced under the foregoing heads of submissions.

OBSERVATIONS ON THE ORDER OF THE COURT.

1. Respectfully, we feel compelled to make preliminary remarks about the order in respect of which legal arguments have been invited from the parties. This is in view of the circumstances in which the order was made. The record will show that 4th June, 2020 was the first hearing of the instant action. No submission whatsoever was made by any of the parties in substantiation of, or in defence of the action by plaintiff before the order was made.

2. The plaintiff's suit falls into two quite distinct parts. First is the primary contention that the 2nd defendant lacked the constitutional capacity to compile a register of voters, because in the plaintiff's view, there was only one register of voters which could be compiled *only once* by the 2nd defendant under the Constitution, 1992. Impliedly, it is only the register of voters compiled for the maiden elections of 1992 which was valid. What the 2nd defendant could subsequently do was to revise that register. The second part to this case is the claim which the plaintiff characterised as "**IN THE ALTERNATIVE**", that, the non-inclusion of the existing voter identification (ID) card in the proposed compilation of a new register of voters was unconstitutional. This was manifestly contradictory of the first part of the plaintiff's claim in this suit.

3. A plethora of issues had been raised in the statement of case filed by the defendants in defence of the action. Even before the plaintiff had the opportunity to establish its case, or the defendants the chance to show why the plaintiff's case was bad, including objections to the constitutional impropriety of the instant action, the Court straight away, made the order referred to above. We accordingly proceed to comply with the order of the Court. We respectfully pray however to make a few observations on the directives.

4. An order by this Court to the effect that, the 2nd defendant must "*offer legal basis for not allowing the existing voter ID card to be used as a form of identification in the registration exercise*", is akin to requiring of the defendant ***"to show cause why***" the old ID card must not be used in the upcoming registration exercise. It may appear to be shifting the burden of proof to the 2nd defendant, which in the circumstances of the instant case, would, very respectfully, be a bit premature. This is because, just as in any civil case, the burden of proof in a constitutional action is always on the plaintiff. The plaintiff bears the burden of proof in an action to prove the material bases of any allegation of unconstitutionality made by it. It is only when, prima facie, same had been established that the defendants will be required to "***show cause why***". This point is most important because the actions of a public institution complained of are presumed to be regular and constitutional until the contrary is established by plaintiff.

5. **Section 11 (1)** of the **Evidence Act, 1975 (NRCD 323)** states that "*for evidential purposes, the burden of persuasion means the obligation of a party to introduce sufficient evidence* to avoid *a ruling against him* on the issue". Further, **section 14(1)** of the **Evidence Act** also stipulates that except as is provided by law, unless and until it is shifted, *a party* has the b*urden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence*.

6. Consistent with the letter and spirit of the laws of evidence, this Court in **Asare-Baah III & Others v. Attorney-General & Electoral Commission** [2010] SCGLR 463, underscored the need for a plaintiff in a constitutional action to identify and prove "*all alleged acts of statutory and constitutional invalidity, breaches or violations, inconsistencies or non-compliance*".

7. To sidestep this and order a defendant to, in effect, show cause why a part of the plaintiff's complaint should not be the case, would seem, in our humble view, to prematurely displacing the burden of proof to the prejudice of the defendants. Same also has the real likelihood of unfortunately causing undue misapprehensions and public misperceptions about the true import of the order made by the Court, in this matter which is of immense national interest. There are other reasons of legal significance which would, with the greatest respect, seem to suggest that the course taken by the Court, in the circumstances of the instant action, with the greatest respect, might have been a little premature.

8. Firstly, as stated above, the first part of the plaintiff's action is a challenge of the constitutional validity in the compilation of a register of voters. This contention is anchored on a rather strained, narrow and unnatural construction of article 45(a) of the Constitution. It is in direct contradiction of the second part, which deals with the propriety of excluding the old voter ID card as a means of identification for the 2020 registration exercise. A question that arises is, whether this Court by its order of 4th June, 2020, has come to the conclusion that the first part of the plaintiff's relief is frivolous, or that same is inconsequential, for it to call for a justification by the 2nd defendant about plaintiff's reliefs in the second part of the action.

9. This is a material point because if plaintiff were, for argument purposes, to succeed in respect of its first claim, the issue of the exclusion of the old voter ID card becomes redundant. If the 2nd defendant has no such constitutional power to compile a new register of voters after the preparation of the one utilised for the conduct of the 1992 elections, the issue of the exclusion of any document does not arise. That is why we respectfully observe that the causes of action under the "**ALTERNATIVE**" reliefs are very distinct and should not even be pursued in the same action as the first relief sought. The bases for those claims are really not linked at all, and in fact, contradict each other. Questions legitimately arise as to the maintainability by the same plaintiff of two separate causes of action, which contradict each other, in one writ.

10. Secondly, the record will show that the defendants had raised a plethora of objections to the constitutional propriety of the plaintiff's writ. The most fundamental of the objections was the defendant's claim of the absence of a cause of action, to the extent that, as of now, there is no constitutional instrument which could form the invocation of this Court's original jurisdiction. We respectfully hold the view that a failure to consider this objection by the defendants, and to proceed to call on the 2nd defendant effectively "*to offer legal basis …*" in response to the 2nd part of the plaintiff's claim has the tendency to cause some prejudice to the case of the defendants in this suit. If there is no cause of action at the time of the invocation of the Court's jurisdiction under articles 2(1) and 130(1), same cannot arise on account of subsequent events made possible by an adjournment of the instant case for the parties to file legal arguments in the matter. This will do grave damage to the effect of articles 2(1) and 130(1) of the Constitution as well as the rights of the defendants.

11. The Attorney-General, in her peculiar role and duty under article 88 of the Constitution to defend the public interest, brings the foregoing to the attention of the Court. The remarks we make herein constitute mere

observations and nothing more. We proceed to address the merits of the issue posed by the Court.

SUBSTANTIVE RESPONSES ON THE ISSUE IN RESPECT OF WHICH LEGAL ARGUMENTS HAVE BEEN ORDERED

The 2nd defendant's duty to deliver credible elections in Ghana.

12. We commence our address of the question posed by the Court with an examination of the relevance of the process of voter registration in Ghana. In our submission, certain broad principles are undeniable and have to be agreed upon by all parties to this action, in order to aid in an efficient adjudication of the merits of the instant action. The starting point is that, the exercise of the constitutional power to control all aspects of the process of voter registration, solely vested in the 2nd defendant by **article 45(a)**, must be examined in conjunction with the duty to deliver a credible election in Ghana. By the combined effect of **articles 42**, **45(a)** and **(c), 46** and **51** of the Constitution, the 2nd defendant owes a very important duty to the people of Ghana to set up and supervise a process for the conduct of elections, every stage of which is credible and reliable. In so doing, the Court is respectfully entreated to be mindful of the fact that press of time or convenience does not have to diminish the constitutional obligations of the 2nd defendant. Convenience or expediency is not a general excuse for the dereliction of duties or ignoring standards expected under the Constitution for the delivery of a free and fair election.

13. The foregoing submission fully takes cognisance of the fact that an election is a process, and safeguarding the right to vote is a very important part of the vehicle for arriving at the end of a free and fair election in Ghana. **Article 42**, that provision of the Constitution which guarantees the right to vote, is laden with numerous fundamental requirements for its exercise. Indeed, some of the preconditions for the exercise of the right to vote are not spelt out in article 42 but are subject to the discretion vested in the 2nd defendant as the constitutional body responsible for conducting and supervising all public elections and referenda in Ghana. We summarise some of the key fundamental preconditions for the exercise of the right to vote as follows:

The person seeking to exercise the right to vote must:

i. be a Ghanaian citizen;
ii. be of 18 years of age or above;
iii. be of sound mind;

iv. have registered as a Ghanaian for the purposes of public elections and referenda;
v. comply with the rules governing registration determined by the 2nd defendant (not in article 42)
vi. present himself at a polling station to vote and comply with the rules governing the conduct of the election set by the 2nd defendant (not in article 42).

It ought to be borne in mind that even after a satisfaction of all these requirements of the right to vote, the 2nd defendant may annul the vote of a voter validly registered to vote, if the vote is not cast in accordance with the rules of the election. This will not result in a declaration by the Court that the right to vote was denied. This is because the primary concern of the Court is, and ought to be, protection of the sanctity of the electoral process.

14. In our submission, **article 42** of the 1992 Constitution connects the right of every citizen of Ghana of 18 years of age or above and of sound mind to vote with the entitlement to **"be registered as a voter for the purposes of public elections and referenda."** A sound and secure registration process in which only qualified Ghanaians take part is thus a ***requirement*** for the right to vote and not a ***limitation*** of the right. Therefore, in principle, plaintiff's contention that the specification of some instruments of verification of the Ghanaian identity of a potential applicant for registration, will inhibit the exercise of the right to vote, is seriously flawed and baseless, unless it can fully satisfy the Court of same with cogent evidence in accordance with the burden and standard referred to supra.

15. We respectfully invite the Court to take judicial notice of the predilection of the plaintiff as a party to suits in this Honourable Court, to when it finds necessary, advance the right to vote to ward off processes which seek to sanitise the electoral process. Joined as the 3rd respondent in **In re: Presidential Election Petition; Akufo-Addo, Bawumia & Obetsebi-Lamptey (No.4) v. Mahama, Electoral Commission & National Democratic Congress (No.4)** [2013] SCGLR (Special Edition) 73, hereinafter simply referred to as the "**Election Petition Case**", the cornerstone for the plaintiff herein's case to preserve the outcome of the disputed presidential election in 2012, conducted pursuant to the **Public Elections (Registration of Voters) Regulations, 2012 (CI 72)**, was the "*right to vote*". It claimed that an annulment of votes by this Honourable Court would erode the right to vote.

Like an apparition hitherto closely concealed in its case, the plaintiff herein has once again brandished the "right to vote" as the main basis to block the constitutional attempt by the 2nd defendant to sanitise the register of voters prepared pursuant to C. I. 72.

16. In our submission, the duty of the Court is to determine whether the performance by the 2nd defendant of its undisputed function under **article 45(a)** of the Constitution to compile a new register of voters, in the light of the relevant provisions in **articles 42, 45(c), 46** and **51**, will result in a credible election. The Court must do this in a most scientific manner. The Court ought to take full account of the evidence attached to the plaintiff's affidavit in verification – **Exhibit NDC 2, in which various flaws with the existing voter register as well as the biometric verification system were pointed out by the 2nd defendant**. The 2nd defendant, from Exhibit NDC 2, in point of fact, indicated that it would be more convenient and economical to prepare a new register of voters, than attempt to "clean" the old one.

17. Further, the Court is urged to ignore the allegation by the plaintiff herein that about 18 million people are supposed to be on the register of voters. Same is one of the many unsubstantiated allegations of fact in respect of which plaintiff bears the burden of proof, but which it has neglected to discharge in this action. We contend that to the extent that the credibility of the register of voters itself has been disputed by the 2nd defendant herein, no party can rely on figures contained in that register to extrapolate that there is supposed to be over 18 million people or X amount on the register of votes.

18. The Court will note that the plaintiff in these proceedings, has been harping on only one element of the right to vote, that is, that all Ghanaians of sound mind at least, 18 years of age must be on the register of voters. Whilst absolutely agreeing with the plaintiff on this proposition, it is necessary to point out how the plaintiff's case completely, and in a most reprehensible and inexcusable way, ignores the other requirements of the right to vote, i.e. the need to protect the integrity of the register of voters from persons who are not entitled to be there on account of a want of qualification. We describe the neglect of the plaintiff in addressing the Court on what it takes to deliver a credible election as "reprehensible", because plaintiff owed a duty in the spirit of intellectual honesty, in anchoring its submissions on the right to vote, to fully examine all the other requirements of the right to vote, particularly the need for the State to set up an electoral process which will guard against voter fraud and ineligibilities. We urge the Court to deem the loud silence of plaintiff in addressing the need for a strong electoral

system free from abuses, as indicative of a questionable lack of interest in same.

19. We respectfully contend that the State's interest to set up an electoral system, which can effectively guarantee the due exercise of the right to vote by persons constitutionally entitled to so do, devoid of abuses and corruption by unscrupulous elements, is beyond question. Same is fundamental. It is a necessary factor for the protection of the right to vote, and has, in fact, been emphasised by this Court in recent decisions. Even when this Honourable Court had occasion to declare section 7(5) of the **Representation of the People Act, 1992 (PNDCL 284)** as an unconstitutional interference with the right of prisoners to vote in **Ahumah-Ocansey v. Electoral Commission; Centre for Human Rights & Civil Liberties (CHURCIL) v. Attorney-General & Electoral Commission (Consolidated)** (supra), Dotse JSC, at page 656 of the report, observed as follows:

"*… the 1992 Constitution, even though has very progressive and strong provisions which guarantee and protect the fundamental human rights, liberties and other freedoms enjoyable by citizens of Ghana, has provisions which also regulate and control the enjoyment of those rights, freedoms and liberties by operation of articles 12 (2), 14(1)(a)-(g), (21(2) and (4)(a)-(d) and 24(4) just to mention a few.* ***It will therefore mean that the Constitution gives and protects the rights by the right hand, and takes away some of those rights in the interest of protecting certain public interest issues of property, morality, safety, security, etc. by the left hand****. Similar sentiments were expressed by the Supreme Court speaking with one voice through Prof. Ocran JSC of blessed memory in the case of Gorman v. Republic [2003-2004] 2 SCGLR 784 as follows:*

> *'****However, we must always guard against a sweeping invocation of fundamental human rights as a catch-all defence of the rights of defendants. People tend to overlook the fact that the Constitution adopts the view of human rights that seek to balance the rights of the individual as against the legitimate interests of the community.*** *While the balance is decidedly tilted in favour of the individual, the public interest and the protection of the general public are very much part of the discourse on human rights in our Constitution'….*"

20. In **Apaloo v. Electoral Commission** [2000-2001] SCGLR 1, this Honourable Court, per *Atuguba JSC*, underscored the responsibility of the

2nd defendant herein for all aspects of the electoral process, when it stated as follows:

"*The ascertainment of the identity of a prospective voter is part of the conduct of public elections and as the Constitution places that duty on the Electoral Commission, it can only do so by itself and its proper agents… to surrender the judgment of the presiding officer as to the identity of a voter to the candidate's polling agents, is in effect, to delegate that function to those agents, contrary to articles 45 (c) and 46 of the Constitution.*"

21. We submit on the strength of the above, that, by the combined effect of **articles 42, 45(a)** and **(c)**, **46** and **51** the 2nd defendant owes an enormous duty to deliver credible elections to the people of Ghana, and is thus clothed with sufficient legal basis to exclude the old voter ID card as a means of identification, if the interests of a credible electoral process so require. The Court will take judicial notice of the fact that the history of Ghana's electoral system is replete with numerous instances of people wielding fake ID cards, impersonation and multiple voting. Later on in these submissions, we will illustrate how in the "**Election Petition case**" the Court found the practice of multiple voting and other electoral malpractices established. There, thus, can be no question about the legitimacy or importance of the State's interest in undertaking a process which boosts the integrity of the register of voters. Further, the state's interest in an orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying and verifying the details of all applicants for registration. The electoral system cannot inspire confidence if no safeguards exist to detect or deter fraud or to confirm the identity of voters.

    As held in the United States case of **William Crawford v. Marion County Election Board** 553 U.S. (2008), "*there was a real risk that voter fraud could affect a close election's outcome.*"

2nd defendant's discretion under article 45(a) not subject to external direction or control

22. Allied to the constitutional burden placed on the 2nd defendant to conduct credible and sound elections in Ghana, is the extent of autonomy granted

it by the Constitution in the performance of some of its functions. In the Statement of Case of the Attorney-General filed on *9th April, 2020*, we devoted **pages 20 – 26** for a discussion of the extent of independence accorded the 2nd defendant by the Constitution, in so far as the performance of its duty to compile and revise a register of voters is concerned. Having regard to the fundamental relevance of those submissions as legal justification for the 2nd defendant's decision not to include "the old voter ID card for the purpose of identification in the upcoming registration exercise, we will summarise the key points made therein in these submissions.

23. The first observation we make is that the Constitution does not specify which document(s) should be used by the 2nd defendant in the discharge of its duties under **article 45(a)** to compile and revise the register of voters at such periods as may be determined by law. This Court in **Abu Ramadan & Nimako (No.1) v. Electoral Commission & Attorney-General (No.1); Danso-Acheampong v. Electoral Commission & Attorney-General (Consolidated)** [2013-2014] 2 SCGLR 1654 (simply referred to herein as *Abu Ramadan No.1*) and **Abu Ramadan & Nimako (No.2) v. Electoral Commission & Attorney-General** [2015-2016] 1 SCGLR 1 (simply referred to herein as *Abu Ramadan No.2)*, which actually was the closest opportunity the Court had to spell rules for the 2nd defendant's **article 45(a)** function, in keeping with constitutional wisdom, rightly failed to specify document(s) that may be used as an instrument of identification in a voter registration exercise. The Court, quite clearly, left it to the independent discretion of the 2nd defendant.

24. Respectfully, we have to clarify that the denial by this Court of a declaration of unconstitutionality in the use of the existing voter identification card sought by plaintiffs in "*Abu Ramadan No.1*", was not a pronouncement by the Court that the card ought to be necessarily used by the EC in all voter registration exercises, or, a specification by the Court as to which instruments of identification to be used by the EC in subsequent voter registration exercises. The Court in fact, steered clear from such an endeavour and elected to stick to its earlier admonition that the EC owed a duty to devise "*mechanisms, structures, systems, processes and procedures must be such, as on balance, would guard, protect and preserve the sanctity and credibility of the rights guaranteed"* under **article 42**.

    The Court in fact underscored the need to *"safeguard the entire registration process"* and protect it *"...from underage persons, non-citizens and voter fraudsters alike, in order to avoid the process being perceived as flawed.*"

25. It is submitted that the reason why this Court did not pronounce on or specify which instruments of identification can be used in the 2nd defendant's voter registration functions under article 45(a), was amplified in "*Abu Ramadan No.2*".

26. In "*Abu Ramadan No.2*", the Court took full opportunity to clearly delineate the extent of its judicial review powers over the EC and indeed, other constitutionally independent bodies, as well as the scope of independence of the EC in respect of its various functions. Many of the holdings of the Court were in fact devoted to this. At pages 30 - 31 of the report, also reproduced as holding (5), the Court per *Gbadegbe JSC*, held thus:

"…*The court's original jurisdiction thus enables it to determine the limits of the exercise of the repository's powers. It is observed that in the exercise of the Supreme Court's original jurisdiction,* ***it was not permissible for the court to substitute its own decision for that of the body or persons exercising a discretion conferred on it by the Constitution. This is necessary to keep the court itself within its proper limits in order to give effect to the supremacy of the law, which appeared to be the foundation of the original jurisdiction. The court's function is to set the limits on the exercise of the discretion, which by the decision made within these boundaries cannot be impugned***".

27. At pages 36 – 39 (also reproduced as holding 10), the Court again speaking through *Gbadegbe JSC*, had this very important and instructive statement to make:

"… *By article 46, the first defendant Electoral Commission is endowed with independence in the performance of its functions ….*
In our opinion, and as part of the function to declare what the law is, the above words which are unambiguous ***insulate the Electoral Commission form any external direction and/or control in the performance of the functions conferred under article 45 …***
A fair consideration of the functions of the first defendant Electoral Commission reveals that the demand which was made on its by the plaintiffs regarding the presence of ineligible and deceased persons and the latter's refusal to acquiesce in the said demands, which provoked the

*action herein, relates to its mandate under article 45(a) of the Constitution… **A careful scrutiny of the 1992 Constitution reveals that its functions under article 45(a) is not subject to any other provision.** Therefore, in performing the said function, we cannot make an order compelling the Electoral Commission to act in a particular manner ….*
In further consideration, we would like to refer to some specific provisions of the Constitution that have placed a fetter on the exercise of the independence bestowed on the first defendant Electoral Commission by article 46. …
*The effect of the specific provisions in articles 47(1) and (5) and 48(1) and (2) is that where the Constitution intended the exercise of any of the functions conferred on the Electoral Commission to be subject to any other person or law, it is so provided. Accordingly, **where no such provisions have been specifically made, the effect is that the Constitution intended the Electoral Commission to exercise its discretion without the control or direction of any person or authority***."

36. The Court would note that, once again, the Court stopped short of specifying which instruments of identification can be used in the 2nd defendant's voter registration functions under article 45(a), just as it did not do in "*Abu Ramadan No.1*".

37. Respectfully, the meaning and effect of the decisions of the Court in the two "Abu Ramadan" cases (cited supra) is that, this Court's jurisdiction to declare acts and omissions by constitutionally independent bodies like the 2nd defendant herein, extend to only decisions in respect of which a patent unconstitutionality has been established. In so far as a matter lies within the 2nd defendant's discretion, the only basis on which the Court may declare a choice made by it, is where that choice infringes the Constitution. That is why on the issue of the claim by the plaintiffs in *Abu Ramadan (No. 2)* for the EC to at least, resort to "validation", *Benin JSC* in his concurring opinion, held at page 51 that:

> "*… **even if there is provision in the law and/or regulations for validation, the court cannot compel the first defendant to follow that method unless it is the only mode that is sanctioned by the law or regulations. If the law provides for alternative ways of performing the task, the discretion is vested in the actor in deciding** within the limits*

imposed by article 296 of the Constitution as to which one of them would best suit the task on hand."

38. The logical implication of this Court's upholding of the absolute independence of the 2nd defendant, in so far as its article 45(a) function is concerned in **Abu Ramadan (No.2)**, is that, the duty to compile the register of voters and revise same at such periods as may be determined by law, is not one the Constitution subjects to any provision. The EC's discretion to determine what to use or how it may do it, is not subject to any external direction or control whatsoever. The EC decides the manner in which it prepares or revises the register of voters, the kind of instruments that it specifies as necessary to establish one's identity as a Ghanaian and any other material factors connected therewith.

39. Respectfully, even though this Court in **Abu Ramadan (No.2)** described the EC's power to compile a register of voters as not subject to any external control or direction whatsoever, in the spirit of intellectual honesty, we have expressed the sincere view that, the Constitution would enjoin the following to be done or complied with by the 2nd defendant when compiling and/or revising the register of voters under article 45(a):

    (a) In accordance with article 51, the EC must publish regulations providing for the registration and matters related thereto. Those regulations must comply with article 11(7) of the Constitution.

    (b) Secondly, there is an implied duty to use materials or means which will assure a reasonably accurate and credible register of voters. The Constitution does not restrict the Commission as to which **particular document to use** in compiling the register of voters.

    Thus, the Commission may specify in its regulations that a document produced under any statute (for instance, a passport, a driver's licence, national identification card, etc.) may be produced as evidence of identification for purposes of article 42. The 2nd defendant may exclude any of these instruments too, if considered necessary by it. It may include an old voter registration card, or it may exclude same. That decision will be constitutionally valid, when taken in context of the factors spelt out herein.

    (c) Thirdly, the Commission ought to ensure that any document it settles on as proof of identity will reasonably guarantee that only Ghanaians

of eighteen (18) years of age, and of sound mind, are registered to vote in consonance with article 42.

40. Once the factors spelt out above are satisfied, the process by which the 2nd defendant prepared the register of voters may not be questioned. That is why the Supreme Court in the second "**Abu Ramadan case**" (No.2) (supra) held per *Benin JSC* at page 46 thus:

> "*But the Courts have been careful not to impose themselves on other institutions of State as to how they should perform their functions. This caution is important because the law determines the extent of each institution's mandate; it is not the court which determined that. But the court has a duty to bring other institutions to order if they stray from the path of legality".*

41. It is pertinent to note that in exercise of its discretion to determine the kind of instruments it considers necessary to establish one's identity for the purposes of registration, the 2nd defendant has in the various constitutional instruments published since 1995, prescribed various means of identification.

Please find attached to the supplementary affidavit in verification and marked **Exhibits** "**AG 1**", "**AG2**" and "**AG3**" C. I. 12, C.I. 72 and C. I. 91.

<u>Plaintiff owes a duty to establish unconstitutionality in the process proposed to be embarked upon by 2nd defendant</u>.

42. The purpose of the submissions under this sub-topic is to show that the plaintiff in an action of this nature, bears the burden to adduce evidence in support of the serious allegations of unconstitutionality it levels against the 2nd defendant. In our submission, **article 297(d)** of the Constitution having explicitly conferred on the 2nd defendant the power to amend or revoke any constitutional instrument previously made by it, raises a presumption of regularity regarding an expression of regularity thereunder. **Article 297(d)** provides thus:

"*where a power is conferred to make any constitutional or statutory instrument, regulation or rule or pass any resolution or give any direction, the power shall be construed as including the power, exercisable in the same manner, to amend or to revoke the constitutional or statutory instrument, regulation, rules of resolution or direction as the case may be*."

43. Thus, having duly exercised the power conferred by **article 297(d)** to amend the **Public Elections (Registration of Voter Regulations), 2016 (CI 91)**, through the laying before Parliament of a proposed constitutional instrument under **article 11(7)**, it is our humble contention that a presumption of regularity is raised in respect of the instrument. A plaintiff before this Court who makes a claim of unconstitutionality, bears the full burden of proving each material allegation of unconstitutionality.

44. It is beyond doubt that **NRCD 323** further accords a presumption of regularity to the constitutional and statutory functions of the 2nd defendant as a body constitutionality clothed with the power to perform those functions, particularly the duty to compile a register of voters. This is the burden of **section 37(1)** of **NRCD 323**. Other relevant sections of **NRCD 323**, relating to the burden of producing evidence particularly, **sections 11(4)** and **14** fortify the proposition that, to start with, it is entirely the burden of the plaintiff to adduce evidence to substantiate its claims in the instant action. We submit that this burden is not made any lighter by virtue of the nature of this action as a constitutional action.

    Please see: **Asare-Baah III & Others v. Attorney-General & Electoral Commission** (supra).

    Also: **Ackah v. Pergah Transport Ltd** [2010] SCGLR 728

45. It is thus the duty of Plaintiff to allege and prove the necessary facts with sufficient clarity, i.e.

    i. The alleged inadequacy of ID cards produced by the National Identification Authority (NIA) as instruments of identification in the upcoming voter registration exercise;

    ii. the exact number of Ghanaians of voting age who have been registered by the NIA;

    iii. the exact number of Ghanaians who are not of voting age but who have been registered out of the total number registered by the NIA;

    iv. the number of persons who have passports in Ghana;

    v. very materially, how many persons (with proper evidence, not bare assertions), will allegedly be disenfranchised, if all the three (3) means of identification recognised by the proposed constitutional instrument are enforced.

Is there a valid "existing" voter identification card that can be used for the upcoming voter registration exercise, and if so, which one is this?

46. Respectfully, in respect of the submissions urging the Court to uphold the use of the old voter ID card as a means of establishing the identity and eligibility of a Ghanaian to register to vote, the Court will observe that all the plaintiff does is to suggest that the "existing" voter ID cards ought to be allowed in the identification process for registration for a new voter ID card. To deny same, the plaintiff contends, will "unnecessarily burden cardholders", is "unreasonable, arbitrary and capricious" and will be a "fetter on the right to be registered and to vote".

    The plaintiff conspicuously fails to indicate which "*existing voter ID card*" it alludes to.

47. In our submission, the plaintiff owed a duty to indicate precisely which "existing voter ID card", it seeks to preserve for use in the upcoming voter registration exercise. This is very material and failure to indicate, fatal. This is because many voter ID cards have been produced pursuant to different constitutional instruments since the coming into force of the Constitution, 1992 on 7th January, 1993. Indeed, the first voter ID card accepted for the purpose of electing a President and Members of Parliament was issued before the coming into force of the Constitution.

48. It is our respectful contention that, as recently as 2014, this Court in **Consolidated Writs Nos. J1/11/2014 & JI/9/2014 - Abu Ramadan & Nimako (No.1) v. Electoral Commission & Attorney-General (No.1); Danso-Acheampong v. Electoral Commission & Attorney-General (Consolidated)** reported at [2013-2014] 2 SCGLR 1654, hereinafter simply referred to as **Abu Ramadan (No.1)**, outlawed all voter ID cards save the ones procured under the **Public Elections (Regulation of Voter Registrations, 1995** (C. I. 12). The Plaintiffs in Writ No. J1/11/2014, had sued for the following reliefs:

> i. "A declaration that upon a true and proper interpretation of Article 42 of the Constitution of the Republic of Ghana, 1992 (hereinafter, the "Constitution") the use of the National Health Insurance Card (hereinafter, the Health ID Card) as proof of qualification to register as a voter pursuant to the Public Elections (Registration of Voters) Regulation 2012, (CI 72) is unconstitutional, void and of no effect.
> ii. A declaration that upon a true and proper interpretation of Article 42 of the Constitution the use of the so called "existing voter identification card" as proof of qualification to register as a voter pursuant to CI 72 would

be tantamount to an applicant registering twice or more and is therefore unconstitutional, void and of no effect.

iii. An order of perpetual injunction restraining the Electoral Commission from using the Health ID Card, the so-called "existing voter identification card" or any other document that does not prove or establish qualification to register to vote under Article 42 in any public election and referenda held in Ghana."

Attached to a supplementary affidavit in verification and marked as **Exhibit "AG 4**" is a copy of the writ filed by plaintiffs in *Writ No. J1/11/2014* in **Abu Ramadan (No.1)**.

49. This Court granted the following reliefs in favour of the plaintiffs in *Writ No. J1/11/2014* in **Abu Ramadan (No.1)**:

"*BY COURT:*

We hereby unanimously grant the following reliefs

a. *Relief (1) granted; a declaration that upon a true and proper interpretation of Article 42 of the 1992 Constitution, the use of the National Health Insurance Card to register a voter pursuant to Regulation 1(3)(d) of the Public Election (Registration of Voters) Regulations, 2012 (CI 72) is inconsistent with Article 42 of the 1992 Constitution, and is to the effect of this inconsistency void. Accordingly, by virtue of the power conferred on this Court by Article 2(2) of the 1992 Constitution, the said Regulation 1(3)(d) of CI 72 is struck down.*

b. *Relief (2) is denied to the extent that upon true and proper interpretation of Article 42 of the 1992 Constitution the use of the existing voter registration card under regulation 1(3)(e) of CI 72 is referable to voter identification card acquired before the coming into force of CI 72.*

c. *An order of perpetual injunction restraining the Electoral Commission from using the National Health Insurance Card in its present form and* ***a voter identification card other than as explained under relief (2) for the purposes of registering a voter under Article 42 of the 1992 Constitution***."

Attached to the supplementary affidavit in verification filed by 1st defendant herein and marked as **Exhibit AG5** is a copy of the judgment containing the orders specifically granted by the Court in Abu Ramadan (No.1) dated 30th July, 2014.

50. Respectfully, in our submission, brutal as it may seem, the effect of the third order made by this Court in **Abu Ramadan (No.1)** is to perpetually injunct the use of any ID Card in place as of 30th July, 2014, other than the card specifically described or referred to in relief 2, i.e. *"**voter identification card acquired before the coming into force of CI 72***". In point of fact, this is exactly what the Supreme Court did in that case! There was the explicit grant of a perpetual inunction restraining the "*restraining the Electoral Commission from using the National Health Insurance Card in its present form [which is not in dispute in the instant case] and **a voter identification card other than as explained under relief (2) for the purposes of registering a voter under Article 42 of the 1992 Constitution***." The voter ID card categorically saved by the Supreme Court was the one explained under relief 2. Relief (2) clearly upheld the use of existing voter ID cards acquired before the coming into force of C. I. 72.

51. It is for this reason that the 1st defendant herein submits that the failure of the plaintiff to specify exactly what it meant by "existing voter ID cards" is most unhelpful. This is because, if plaintiff's use of the expression is in reference to ID cards obtained under C. I. 72, same was perpetually injuncted by the Supreme Court in **Abu Ramadan (No. 1)**. Its use cannot be justified. Orders made by this Court in exercise of its original jurisdiction have full force of constitutionality. **Article 2(2)** of the Constitution vests the Court with the power "*for the purposes of a declaration under clause (1) ... to make such orders and give such directions as it may consider appropriate for giving effect, or enabling effect to be given, to the declaration so made*".

52. In our submission, the grant of the order of perpetual injunction by this Court in relation to a voter ID card other than as explained by the Court under relief (2) for the purpose of registering a voter under article 42 of the Constitution, was made in exercise of the consequential powers directly conferred on the Court by **article 2(2)** of the Constitution. Same cannot be

questioned. It is therefore perplexing how the plaintiff seeks to rely on cards procured under C. I. 72 for the purpose of registering persons under C. I. 72, when same had been explicitly perpetually injuncted. To hold otherwise will be inconsistent with the second order made by the Court in **Abu Ramadan (No.1)**. The perpetual injunction granted was to permanently prohibit the 2nd defendant from utilising a voter ID card, other than those procured before C. I. 72, in registering a person **under article 42**.

53. It is worthy to note that following the conduct of a fresh voter registration exercise pursuant to C. I. 72, ID cards procured under the previous enactment, C.I. 12, were revoked. In other words, the lifetime of a card obtained under C. I. 12 lapsed with a registration under C. I. 72. ID cards obtained under C. I. 72 were also perpetually injuncted for the purpose of registering under article 42 by the Supreme Court.

Current voter register is flawed and undermines the right to vote.

54. We began our submissions by showing that, by the combined effect of **articles 42**, **45(a)** and **(c), 46** and **51** of the Constitution, the primary reason for the creation of the 2nd defendant is to set up and supervise a process for the conduct of elections, every stage of which is credible and reliable. In these submissions, we will show that the current register of voters in the possession of the 2nd defendant is far from reliable. In a country whose recent history has been characterised by very close presidential and parliamentary elections, there is the utmost need and justification for a system to be devised which will reasonably assure an accurate register of voters, so as to ultimately ensure that the right to vote is properly protected. The existence of any system or situation which encourages persons who are not entitled to be on the register of persons to get on same, or which encourages double registration and multiple voting undermines the principle of equal suffrage by eroding the one person, one vote principle. This results in a suppression of the will of the people and achieves inequality in the weight to be accorded the vote of an individual voter under the Constitution. In our submission, this is an important element of the article 42 right that the Court ought to advert its mind to in the adjudication of the reliefs claimed by plaintiff herein.

55. So far, the plaintiff has invited the Court to look only at the right of all Ghanaians of 18 years and above to vote, without examining the other very

key components of the right to vote stated herein. We urge the Court to resist this invitation by plaintiffs which portends a dangerous implication for the ultimate credibility of the register of voters. As a corollary to the submissions above, we proceed to demonstrate how the current register of voters in Ghana has been rendered unreliable and inaccurate.

56. **The first point** is that the voter registration exercise undertaken in 2012 resulted in a carry-over of the "sins and ills" with the old voter registration system in Ghana hitherto. The first constitutional instrument regulating voter registration which provided for a system to assess the eligibility of a potential applicant for registration was **C. I. 72** of 2012. However, a quick study of the system of identification used for the voter registration exercise in place before the enactment of **C. I. 72** would illustrate that the register of voters prepared under C. I. 72 carried over "the sins and ills of the past".

57. The requirement for identification for registration under the law in force before 2012 – **C.I.12** was provided for under **Regulation 1(1)** thereof. It stipulated thus:

> "*A person who—*
> *(a) is a citizen of Ghana;*
> *(b) is of 18 years of age or above;*
> *(c) is of a sound mind;*
> *(d) is resident or ordinarily resident in an electoral area; and*
> *(e) is not prohibited by any law in force from registering as a voter*
>
> *is entitled to have his name included in a register of voters for the electoral area during a period set aside for the registration of voters*."

58. Thus, a clear feature of **C.I. 12** was the absence of any identification requirement. It failed to meet the threshold of constitutionality as it did not assure the due qualification of a person to register to vote. The proof of citizenship and age – vital elements of eligibility were totally lacking. In essence, there was no identification. It was well possible for a person to just appear before an electoral officer and get registered to vote. Without a doubt, this situation provided a sure recipe for the creation of a register whose reliability no one could vouch for.

59. In our submission, in simple terms, the register of voters prepared in 1995 pursuant to the processes set out in **C.I. 12** failed to satisfy the

constitutional standard as same suffered from fundamental defects, flaws and possible breaches. If one takes account of this Court's decision in the **Abu Ramadan** line of cases, particularly, **Abu Ramadan (No.1)**, the logical conclusion to be drawn is that any system of identification or proof of eligibility in a constitutional instrument enacted by the 2nd defendant that does not guarantee the basic requirements of citizenship and eligibility to be registered to vote, is a gross infringement of article 42. To this extent, one can easily say that **C. I. 12** actually infringed on the right to vote enshrined in **article 42**. It is for this reason that C. I. 12 was revoked.

60. **C. I. 72** of 2012 revoked C. I. 12 of 1995. Regulation 1 of **C.I. 72** attempted to bring the eligibility criteria in compliance with article 42 of the Constitution. For the first time, proof of identification requirements for prospective voters were stipulated as follows:

"*(1) A person is entitled to have the name of that person included in the register of voters of an electoral area, if that person is*

(a) a citizen of Ghana;

(b) eighteen years of age or above;

(c) of a sound mind;

(d) resident or ordinarily resident in an electoral area; and

(e) not prohibited by any law in force from registering as a voter.

(2) For the purpose of paragraph (d) of sub-regulation (1), a person who is confined in a penal institution located in an electoral area is resident in that electoral area.

(3) A person who applies for registration as a voter ***shall provide as evidence of identification*** *one of the following:*

(a) a passport;

(b) a driver's license;

(c) a national identification card;

(d) a National Health Insurance card;

(e) an existing voter identification card*; or*

(f) one voter registration identification guarantee form as set out in Form One of the Schedule that has been completed as signed by two registered voters

(4) Despite paragraph (f) of sub regulation (3), a registered voter shall not guarantee the identity of more than five persons."

61. Respectfully, Regulation 1(3)(d) was struck down by this Court as unconstitutional. An order for the 2nd defendant to delete names of persons who carried out registration under Regulation 1(3)(d) was subsequently made by this Court. We will, later on in these submissions, address you on why we are of the firm view that this order for deleting of persons who registered with the NHIS card was not duly carried out by the 2nd defendant. However, we will immediately proceed to indicate to the Court that a major problem associated with registration conducted under C. I. 72 was the use of voter ID cards obtained under C. I. 12 as proof of identification of a potential applicant for registration to vote. Having regard to the indisputable fundamental defects and ineligibilities cards obtained under C. I. 12 were subject to, it is our contention that the use of those cards for registration under **C. I. 72** only resulted in a repetition of the flaws with **C.I. 12**. The door was still left ajar indirectly. Indeed, it is correct to say that C. I. 72 only attempted a cosmetic cure for the palpable violation of the right to vote occasioned by C. I. 12. The window was still wide open for ineligible voters to get on the register of voters prepared in 2012 through the use of cards obtained under C. I. 12 for registration under C. I. 72.

62. The 1st defendant takes cognisance of the effort by this Honourable Court to deal with the question of ineligibilities on the register of voters in the Abu Ramadan cases through the order for deletion of some names of persons who registered with the NHIS card, and is grateful. However, 1st defendant will be quick to indicate that the process sanctioned by the Court, with the greatest respect, did not cure all of the problem of ineligibilities on the register of voters. It is about time this Court grabbed the bull by the horns. Respectfully, in our submission, the process of striking out names of persons who registered with NHIS cards was not fully complied with by the 2nd defendant. It resulted in a perpetuation of the wrong. We shall return, later on in these submissions, to argue this point. However, in addition to the presence of persons who registered with NHIS cards still being on the register of voters compiled pursuant to **C. I. 72**, there is the huge and, I dare say, even greater fundamental defect of maintaining on the 2012 register persons who registered with cards obtained under **C. I. 12**, who were not subject to any eligibility verification process whatsoever.

The deadly toxin that had affected the fruits of **C. I. 12** became the seeds for products of **C. I. 72**. If the use of "existing voter ID cards", construed to mean ID cards obtained before and including C. I. 72 is allowed, we will continue to generate poisoned fruits. The soundest and most efficient way to protect the right of the Ghanaian under article 42 going forward is to start with a *tabular rasa* shorn and stripped of all the constitutional breaches, ineligibilities and violations of the C.I. 12/C.I. 72 eras.

63. **The second reason** we advance in support of our contention that the current register of voters is flawed, can be found in the actual processes embarked upon by the 2nd defendant to compile a new register of voters after the coming into force of **C. I. 72**. The records will show that, pursuant to C. I. 72, the 2nd defendant set out to undertake processes to register voters. In addition to the proof of eligibility requirements stated in the law, the 2nd defendant developed a Training Manual for the compilation of the new register of voters in 2012. Remarkably, at page 16 of the Training Manual, under the sub-heading "Proof of Eligibility", the 2nd defendant added more requirements which effectively relaxed the rules for registration and in fact, unlawfully operated as an unconstitutional amendment to C. I. 72. The following could be found at the said page 16:

> …***presenting a proof of eligibility is however not mandatory*** *even though will help speed up the process*.

64. In effect, whereas **C.I. 72** mandated a proof of eligibility, the 2nd defendant in instructions to its officers, authorised them not to demand a proof of eligibility in order to "speed up the process". How preposterous! It is respectfully submitted that the import of what the 2nd defendant did by issuing instructions in its Training Manual for its officers not to require proof of eligibility before registering applicants, contrary to the explicit stipulations of C. I. 72, was to leave the door ajar and ensure a recurrence of the situation hitherto prevailing under **C. I. 72**. A situation permitting persons whose eligibility could not be guaranteed was clearly authorised by the Training Manual. The sanctity of the registration process theoretically assured by Regulation 1 of C. I. 72 was practically eroded "*on the ground*" by instructions given to officers of the 2nd defendant! In reality, if a prospective voter did not offer "proof of eligibility", officers of 2nd respondent stood ready and willing to register such a person.

65. In our submission, the sins and ills of C. I. 12, where no evidence of identification was required, were in a wholesale fashion, conveyed unto

the registration process carried out under C. I. 72. The constitutional compliance of the product of such a process cannot be guaranteed. Neither can the product be brandished around by anybody in purported defence of the right to vote under article 42, as the plaintiff herein is seeking to do. The position the plaintiff has sought to press on the Court is to invite the Court to shut its eyes to the gross fundamental weaknesses and flaws the registration process in 2012 was plagued with. This, a court of equity and justice cannot do. The highest court of the land, it is submitted, should be very concerned about a decision which have the result of weakening the electoral system, thereby ultimately undermining the democratic enterprise of the nation.

66. We respectfully submit that the effect of the purported variation of Regulation 1 of C. I. 72 by the Training Manual developed by the 2nd defendant, was to, through the backdoor, amend a constitutional instrument.

Please see: ***Professor Stephen Kwaku Asare v Attorney-General & Another*** (unreported) Writ No. J1/1/2016 – 22nd June, 2017.

67. Respectfully, we now turn attention to our earlier assertion that the 2nd defendant did not carry out the orders of this Honourable Court for the deletion of persons who had registered with he NHIS card. This constitutes the **third reason** why we contend that the current register of voters suffers from fundamental flaws and defects. In **Abu Ramadan & Nimako(No.2) v. Electoral Commission & Attorney-General** [2015-2016] 1 SCGLR 1 (simply referred to herein as *Abu Ramadan No.2*), the plaintiffs therein invoked the jurisdiction of this Court once again, following a failure to get the 2nd defendant herein to compile a new voters register or to clean the existing register using a validation process to remove the names of persons who had been registered as voters using the NHIS cards. This Court held (holding 8) as follows:

"*(8) Following the previous decision of the Supreme Court in the Abu Ramadan, Nimako & Danso-Acheampong Case by which the use of the NHIS cards for registration had been declared unconstitutional,* ***the continued presence of names on the register, deriving their identification from the said NHIS cards had rendered the register not reasonably accurate or credible. In so holding, the court has not disregarded the***

report of the panel, which was part of the processes before the court in the instant proceedings as exhibit ABU6, that the register of voters was bloated, a fact which was not controverted by the defendants. *However, the court would reject the contention of the plaintiffs that by virtue of the said infraction, the entire register had the attribute of unconstitutionality… As the registrations were made under a law that was then in force, they were made in good faith and the subsequent declaration of the unconstitutionality of the use of the NHIS cards should not automatically render them void. The legitimate way of treating them was have them deleted by means of processes established under the law…*
Per curiam: … Accordingly, by way of answer to issues (2) and (3), we are of the opinion that although the presence of the names of ineligible and deceased persons on the register of voters renders same neither reasonably accurate nor credible, the register is not thereby rendered inconsistent with article 45(a) of the 1992 Constitution."

68. The effect of the judgment of the Court in **Abu Ramadan (No.2)** was to order the 2nd defendant to take steps immediately to delete the names of registrants who had presented NHIS cards or to "clean" the register of voters so as to comply with the provisions of the Constitution. The 2nd defendant did not comply with the orders of the Court. This necessitated the plaintiffs to bring a post-judgment application in this Court for clarification and further directions in respect of the orders given by the Court. In the course of the hearing of the application (hereinafter simply referred to as **Abu Ramadan No.3** for short), this Court by an interim order, directed the 2nd defendant herein to provide in writing to the court the full list of persons who had utilised the NHIS card as a means of identification to register and also to submit in writing to the court the modalities it intended to ensure full compliance with the court's consequential orders made in **Abu Ramadan (No.2)**. The 2nd defendant herein submitted to the court the names of 56,739 as the list of NHIS registrants on the electoral roll. The plaintiffs/applicants in **Abu Ramadan (No.3)** challenged and raised objections to the accuracy and credibility of the list of the NHIS registrants filed by 2nd defendant herein. On the main issue before the Court, this Court held (holding 5) as follows:

"*(5) After due consideration of the objections by the applicants tendered in the list of persons being NHIS registrants on the electoral roll submitted by the first defendant Electoral Commission, in compliance with the court's order,* ***the Supreme Court would hold that it was precluded in the instant post-judgment application for clarification from veering into issues that were not immediately covered by the application***. *The determination of those questions did not properly belong to an application indicating what the court had meant by the portions of the judgment on which the instant application was based, namely, the consequential orders made under article 2(2) of the 1992 Constitution.*
Per curiam: We are of the opinion that ***an inquiry into the authenticity and credibility of the list submitted might result in the modification or alteration of the substance of the judgment.*** *The issues raised by the objections to the list submitted by the first respondent Electoral Commission seek to introduce new elements which are outside the orders on which this post-judgment clarificatory application is based.*"

69. Respectfully, it is beyond doubt that this Court declined to conduct ***an inquiry into the authenticity and credibility of the list submitted*** by the Electoral Commission regarding the claim of only 56, 739 persons having registered with the NHIS card. The contention of the plaintiffs in **Abu Ramadan (No.3)**, to the effect that there were millions of people, if not hundreds of thousands, who registered with the NHIS card (which claim was corroborated by the case of the defendants in Abu Ramadan No. 1) was thus not determined by the Court. In the circumstances, this Court, with the greatest respect, lost an opportunity to completely eliminate from the electoral roll persons who had registered with the NHIS card.

70. What is beyond dispute is that a far greater number of people than as eventually claimed by the 2nd defendant herein in the Abu Ramadan cases, got on the electoral roll with the NHIS card, pursuant to registration processes conducted under C. I. 72 and under the **Public Elections (Registration of Voters) Regulations, 2016 (C. I. 19)** in 2016. In point of fact, and this, respectfully is very important, the only times that registration with the NHIS card was completely rendered impossible by dint of the rulings of the Supreme Court in the **Abu Ramadan series of cases** were the limited registration exercises conducted in 2018 and 2019.

71. Quite instructively, the Attorney-General in **Abu Ramadan (No.1)** stated in formal submissions to this Honourable Court, that the register of voters contained a majority who registered with the NHIS card. We are not about to change, alter or depart from this position of the Attorney-General in 2016. We have attached a copy of the statement of case filed by the Attorney-General in 2016 to this affidavit in verification as "**Exhibit AG6**". We are of the respectful view that, where the principal legal adviser to the Government of Ghana has, in formal proceedings, indicated that majority of voters unlawfully registered with the NHIS card on the electoral roll, same ought to be taken seriously. Same also belies the claim by the 2nd defendant herein in **Abu Ramadan (No.3)** that only 56, 739 persons registered with the NHIS card (an allegation which was neither tested nor probed by this Court on account of the ruling given.

72. The continued presence on the register of voters of persons who registered with the NHIS card in 2012 and 2016, in the words of the Supreme Court in **Abu Ramadan (No.2)**, has rendered the register of voters "*neither reasonably accurate nor credible*". In our submission, the Court with the greatest respect, has to take a position in this matter which will eternally lay to rest the long outstanding issues affecting the credibility and accuracy of the register of voters. It is gratifying to note that the 2nd defendant has at long last, demonstrated a strong inclination to rid the register of voters of persons who unlawfully registered under the erstwhile C. I. 72 and under C. I. 91 in 2016. This effort can only be supported rather than resisted. The Court has the unique opportunity of correcting the ills and sins of the compilation of various registers of voters before 2018, and must not miss it.

73. Respectfully, we cannot lay out the legal justification for the compilation of a new register of voters without alluding to the evidence of a doubtful register of voters used for the conduct of the 2012 elections, as demonstrated in **In re: Presidential Election Petition; Akufo-Addo, Bawumia & Obetsebi-Lamptey (No.4) v. Mahama, Electoral Commission & National Democratic Congress (No.4)** [2013] SCGLR (Special Edition) 73, (hereinafter simply referred to as the **Election Petition case**). This will constitute **the fourth reason** for our contention

that the register of voters is severely and fundamentally flawed. As we submitted in our original statement of case filed on 9th April, 2020, the severe inaccuracies with the current voter register, which the 2nd defendant herein seeks to rectify via the compilation of a new one, came to the fore. Different versions of the register of voters containing different figures came to the attention of the Court. *Adinyira JSC*, who concurred in the majority verdict dismissing the petitioners' claims, noted in her judgment at pages 221 – 222 of the report thus:

> "*Another reason given by the Electoral Commission for the variation in the Voters Register was that initially, they had a figure of 13, 917, 366 but after the registration of Ghanaians working in diplomatic missions and international organisations of which Ghana is a member, Ghanaian students on government scholarship, security personnel, soldiers and policemen who were returning home from peace keeping duties, this figure jumped from 13, 917, 266 to 14, 168, 890. This was a difference of* ***241,524****.*
>
> *The petitioners asked for a production of the names and bio-data of this 241,524. The Electoral Commission provided* ***2,883*** *names,* ***705*** *of which were supposed to be for diplomatic missions. The petitioners in examining the 705 names, found 51 of them to be diplomatic names, with same ages, except the voter ID number. The petitioners further showed evidence of double registration at the Mampong Anglican Primary School. The Electoral Commission though conceding those instances of double registration, said those persons could only vote once due to the use of biometric verification.*"

74. Respectfully, this is what transpired in this Honourable Court in the "**Election Petition case**". The inaccuracies and variations in the register of voters prepared in 2012, which the 2nd defendant now seek to effectively cure, were demonstrated. Supporting the opinion of the minority in upholding the claim of the petitioners, *Dotse JSC*, at page 387 had this to say:

> "***There is no doubt, that the petitioners claim of a bloated voters register has been admitted by the second respondent Electoral Commission in paragraph (8) of its second amended answer***.
> *The explanation for this phenomenon has been attributed to error. Explaining further, the second respondent stated that this error resulted in the figure of 14, 158, 890 instead of 14, 031, 791 being announced as the total registered voters who turned out for the 7 and 8 December*

2012 presidential elections. They however state that the error would only affect the turn out percentage and change the percentage from 79.43% to 80.15%".

75. It is correct to submit at this point that the inaccuracy and lack of credibility of the current register of voters, which the plaintiff herein seems to be very comfortable with, were actually admitted by the 2nd defendant herein in the **Election Petition case**. In the cross-examination of the Chairman of 2nd respondent, Dr. Afari-Gyan, clear evidence of the unreliability of the voters register was established. The voters' register was proved to be laden with many cases of multiple registration by individuals. This evidence of multiple registration was purportedly justified through a reference to the registration of Ghanaians abroad. **Pages 35-38** of the record of proceedings for **6th June, 2013** in the **Election Petition case** illustrated this. Even though the disparity of **241,524** was alleged to be the result of registration carried out in the various foreign missions of Ghana, the Electoral Commission could only produce **705** names of persons registered in those diplomatic missions. Out of these **705** people, **50** cases of multiple registrations were admitted to by Dr. Afari-Gyan. This constitutes approximately 14%. If in just a list of 705 people registered abroad, 50 cases of double registration can be found, then extrapolating the same percentage in respect of the total voters register of 14,031,680 announced as the total registered voters who turned out for the 7 and 8 December 2012 presidential elections will result in a figure of some **1, 990, 000** double registration. This is serious and should be of great concern in a country in which the winner of a presidential election in two out of the past 3 contests has won by not more than 60,000.

76. Respectfully, **the fifth reason** for asserting that the current register is flawed and urgently requires a constructive "rehabilitation" can be found in the records of the 2nd defendant itself. As we indicated in our original statement of case, the plaintiff as part of its case, has attached **Exhibit "NDC2**" - a summary of a case presented by the 2nd defendant to the Inter Party Advisory Committee (IPAC) and the general public on understanding the need for a new Biometric Voter Management System and the Compilation of a new Voters Register. It is respectfully submitted that plaintiff's own Exhibit "NDC2" carefully examined, makes the case for a new biometric voter management system and a new register of voters, more compelling. The exhibit highlights the challenges and difficulties

with the old system, summarises the features of the new technologically advanced system to be procured by the 2nd defendant and conducts a head to head analysis of the two systems. Clearly, this Honourable Court can see severe problems like the obsoleteness of the equipment in the old system which is not supported by the manufacturer, a shutting out of the Information Technology (IT) staff of 2nd defendant (which is very dangerous in the sense that it lends itself to foreign manipulation), lack of a backup or disaster recovery plan, worn out sensors, etc.

77. On page 5 of Exhibit "NDC 2", the Court will notice that a cost implication analysis of an upgrading of the old system as against the acquisition of a new one has been made, in addition to the general analysis of the strengths of both approaches. The Court will note that it is clearly shown that the cost of the acquisition of a new system is much lower than the cost of replacing the old system. In point of fact, savings of about Eighteen million United States dollars (US$18, 364, 500), i.e. One Hundred and Four Million, Six Hundred and Seventy-seven Thousand, Six hundred and Fifty Ghana (GHC104,677,650) are indicated to be made when a new system is acquired. Quite clearly, having regard to the technological advantage to be derived from the acquisition of a new system together with the cost savings, it is more prudent for a new biometric voter registration system and a fresh voter registration exercise to be undertaken.

Conclusion

78. Respectfully, it is constitutionally imperative that steps be taken to correct the wrongs associated with the current register of voters through a compilation of a new register in a way that does not provide room for a recurrence of the same wrongs. In our submission, in a constitutional system such as ours, the citizenry should be able to directly elect their President and Members of Parliament in a sound and secure manner. If the President and representatives of the people are not voted for in a manner that is credible, the country will head into an abyss for, the election would not have represented the will of the people. The will of the people would have been supplanted, and the right to vote under article 42, imperilled. The will of the people can only be exercised by the eligible voter. It is necessary that the highest court of the land expresses a firm resolve to consign the sins and ills of previous voter registration exercises undertaken up to 2016 to history, by upholding the 2nd defendant's non-inclusion of

the old voter identification card as means of establishing entitlement to register to vote. This will be the most logical and soundest way of ensuring a register of voters with a greatly reduced risk of importation of the fundamental flaws, defects and irregularities which impede the constitutional functions of the 2nd defendant under articles 42 and 45(a) of the Constitution.

Respectfully submitted.

DATED AT ATTORNEY-GENERAL'S CHAMBERS, ACCRA THIS 8TH DAY OF JUNE, 2020

Godfred Yeboah Dame

DEPUTY ATTORNEY-GENERAL
For: THE ATTORNEY-GENERAL

The Registrar,

Supreme Court,

Accra.

AND TO:

1. The above-named Plaintiff or its lawyer, Godwin Kudzo Tameklo, Ayine and Felli Law Offices, East Legon, Accra.;

2. 1st defendant or its lawyer, Justin A. Amenuvor, Amenuvor & Associates, Accra.