

IN THE SUPREME COURT OF THE GAMBIA
SUPREME COURT NO: 001/2019

IN THE MATTER OF SECTIONS 5 AND 127(1) (C) OF THE CONSTITUTION OF
THE REPUBLIC OF THE GAMBIA, SECTION 5(A) OF THE SUPREME COURT ACT

IN THE MATTER OF SECTION 88, 90 AND 91 OF THE CONSTITUTION OF THE
REPUBLIC OF THE GAMBIA

BETWEEN:

YA KUMBA JAITEH	...	PLAINTIFF
AND		
CLERK OF THE NATIONAL ASSEMBLY	...	1 ST DEFENDANT
THE SPEAKER OF THE NATIONAL ASSEMBLY	...	2 ND DEFENDANT
FODAY GASSAMA	...	3 RD DEFENDANT
THE ATTORNEY GENERAL	...	4 TH DEFENDANT

PLAINTIFF'S STATEMENT OF CASE

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AND		
CLERK OF THE NATIONAL ASSEMBLY	...	1ST DEFENDANT
THE SPEAKER OF THE NATIONAL ASSEMBLY	...	2ND DEFENDANT
FODAY GASSAMA	...	3RD DEFENDANT
THE ATTORNEY GENERAL	...	4TH DEFENDANT

PLAINTIFF'S STATEMENT OF CASE

INTRODUCTION

1. By a writ filed on the 5th of March 2019, the Plaintiff invoked the original jurisdiction of this Honourable Court and sought the following orders:
 - 1.1. A declaration that the seat of a member of the National Assembly may only be vacated pursuant to Section 91(1) and not in any other circumstance.
 - 1.2. A declaration that no person or authority other than the Supreme Court of The Gambia is competent to determine the question of whether or not the plaintiff's seat or any other member's seat in the National Assembly have or has become vacant.
 - 1.3. A declaration that the purported termination of the Plaintiff's membership of the National Assembly through an Executive decision communicated to the Plaintiff by letter referenced PR/C/66/Vol.4/(66-EOC) and dated 25th February 2019 is null and void and of no effect.
 - 1.4. A declaration that Plaintiff is a member of the National Assembly her seat not having been vacated through an event of disqualification.
 - 1.5. An order directing the Defendants and any other person or authority of whatever description not to interfere, impede or obstruct the Plaintiff in the performance of her constitutional functions as a member of the National Assembly until she ceases to be a member by virtue of Section 91 of the Constitution of the Republic of The Gambia.

- 1.6. An order restraining the 2nd Defendant from administering the prescribed oath under section 88(2) onto the 3rd Defendant.
- 1.7. An order restraining the 1st and 2nd Defendant from attempting in any manner to bestow upon the 3rd Defendant any right, privilege or role as member of the National Assembly.
- 1.8. An order restraining the 3rd Defendant from parading himself as a member of the National Assembly in any manner or form.
- 1.9. An order that the swearing into office of the 3rd Defendant by the 2nd Defendant on 18th of March 2019 was unconstitutional, null and void.
- 1.10. Any further or other orders as this Honourable Court may deem fit to make.
2. The basis for the Plaintiff's claim is that she was at all material times a member of the National Assembly of The Gambia having (i) qualified for membership under Section 89 of the Constitution; (ii) been nominated as such member by the President; (iii) taken part in the election of Speaker and Deputy Speaker in the National Assembly; and (iv) taken the prescribed oaths before the Speaker in the General Assembly of April 2017.
3. The Plaintiff alleges that the President, without legal authority, on the 25th February 2019, purported to vacate the Plaintiff's seat in the National Assembly by withdrawing the Plaintiff's nomination 1 year and 12 months after her tenure commenced and by purporting to nominate the 3rd Defendant as a Member of the National Assembly.
4. The Plaintiff further alleges that the 1st Defendant, acting upon the decision of the President, sought to interfere, impede or obstruct the Plaintiff by preventing her from carrying out her duties and by preventing her from conducting meetings as Chairperson of the Standing Committee on Trade as well as requesting the return of her Diplomatic Passport and Official Motor Vehicle.
5. The Plaintiff is aggrieved by the said executive decision and the actions of the Defendants and consequently brought this action to challenge the constitutionality of the same.
6. By motion on notice filed on the 5th of March 2019, the Plaintiff sought the following orders:
 - 6.1. An order restraining the 2nd Defendant from administering the prescribed oath under section 88(2) onto the 3rd Defendant.
 - 6.2. An order restraining the 1st and 2nd Defendant from attempting in any manner to bestow upon the 3rd Defendant any right, privilege or role as member of the National Assembly.
 - 6.3. An order restraining the 3rd Defendant from parading himself as a member of the National Assembly in any manner or form.

7. By ruling delivered on the 15th day of March 2019 this Honourable Court held as follows:
 - 7.1. That on the basis of the principle favouring the presumption of regularity of all official acts, the applicable principles of law relating to the grant of interim restraining orders the court has come to the conclusion that the interim orders applied for by the plaintiff/applicant Ya Kumba Kaiteh should not be granted. The application is accordingly dismissed in its entirety.
 - 7.2. All arrangements for the assumption of office by the 3rd Defendant/Respondent Foday Gassama as a nominated member of the National Assembly should proceed.
 - 7.3. Pending the determination of the suit, the Plaintiff/Applicant should not interfere with that process or with the execution by the third respondent of his duties.
 - 7.4. The Court's decision is subject to and without prejudice to the final decision of the Court as to whether the nomination of Ya Kumba Jaiteh Plaintiff/Applicant was validly revoked or otherwise.
 - 7.5. Reasons for the dismissal will be incorporated in the final judgment of the court in this case.
8. Consequently the 3rd Defendant was sworn into office by the 2nd Defendant on 18th of March 2019. It is humbly submitted that by such act reliefs 7 and 8 were overtaken by events and unfortunately are now merely academic.

FACTS

9. The facts of this case are set out in the Affidavit of Verifying Facts deposed to on the 5th day of March 2019.
10. It is the Plaintiff's case that she is a member of the United Democratic Party and a Legal Practitioner having been enrolled to the Bar on the 13th of October 2016. The Plaintiff states that she was at all material times, qualified for membership of the National Assembly having met all the conditions of qualification as set out in Section 89 (1) of the Constitution viz:
 - (1) *A person is qualified for election to the National Assembly if he or she –*
 - (a) *is a citizen of The Gambia;*
 - (b) *has attained the age of twenty-one years;*
 - (c) *has been ordinarily resident in the constituency for a period of at least one year prior to nomination day;*
 - (d) *is able to speak the English language with a degree of proficiency sufficient to enable him or her to take part in the proceedings of the National Assembly; and*
 - (e) *has made such declaration of his or her assets to the Independent Electoral Commission as is required in accordance with section 43.*
 - (2) *The provisions of paragraphs (a), (b) and (d) of subsection (1) shall apply to a nominated candidate who shall also be required to make a declaration of his or her assets to the Independent Electoral Commission."*

11. Prior to the National Assembly elections held in April 2017, the Plaintiff contested in the United Democratic Party primaries for the Serrekunda West Parliamentary constituency but lost to the incumbent. Fortunately, subsequent to the National Assembly Elections held on the 6th April 2017 and before the General Assembly of the 11th April 2017, the President, acting pursuant to Section 88(1)(b) of the Constitution, **nominated** the Plaintiff as one of the 5 nominated members to sit in the National Assembly.
12. The Plaintiff therefore presented herself to the National Assembly on the 11th April 2017 and participated in the elections for Speaker and Deputy Speaker. The Plaintiff subsequently took the prescribed oaths as a nominated member pursuant to Section 88(2) of the Constitution. For the sake of clarity the prescribed oath is the oath of allegiance which was:

"I Ya Kumba Jaiteh, do swear that I will be faithful and bear true allegiance to the Republic of The Gambia according to Law. So help me God"¹.
13. It is the Plaintiff's case that since the 11th April 2017, she has carried out her role, responsibilities, duties and functions as a National Assembly member and since then the provisions of Section 91 which govern the tenure of members of the National Assembly apply to her. Section 91 is set out in full below:

91. Tenure of seats of members of the National Assembly

1. *A member of the National Assembly shall vacate his or her seat in the National Assembly -*
 - a. *On the dissolution of the National Assembly;*
 - b. *Subject to subsection (2), if any circumstance arises which, if he or she were not a member will cause him or her to be disqualified for election as a member or nomination as a member;*
 - c. *If he or she resigns his or her office as a member;*
 - d. *If he or she ceases to be a political member of another party of which he or she was a member at the time of his or her election:*

Provided that nothing in this paragraph shall apply on a merger of political parties at the national level where such merger is authorised by the constitution of the parties concerned;

- e. *If, having been elected a member as an independent candidate, he or she joins a political party;*
- f. *If he or she is recalled by the electorate in accordance with the Act of the National Assembly to give effect to section 92;*
- g. *If without the permission in writing of the speaker or reasonable cause, he or she is absent from ten or more sittings of the National Assembly during any period that the National Assembly is in session and continues to meet;*

¹ See page 16 for the distinction between the oath of allegiance and the oath of office and its relevance to the status of a Member of the National Assembly.

h. If he or she is found in contempt of the National Assembly and is expelled on a resolution supported by not less than three-quarters of all the members of the National Assembly.

(2) An act of the National Assembly may, in order to permit any member who has been-

- a. Sentenced to death;*
- b. Convicted or found guilty of any offence or subject to any findings to which subsection (1) of section 90 refers;*
- c. adjudged to be found of unsound mind; or*
- d. adjudged or otherwise declared to be bankrupt,*

to appeal against any decision in accordance with any law, provided that, subject to such conditions as may be specified, the decision shall not have effect for the purposes of this section until such time as maybe so prescribed.

(3) The clerk of the National Assembly shall immediately inform the Independent Electoral Commission of any vacancy among the members of the National Assembly.

14. It is the Plaintiff's case that she is the only Member of the National Assembly (save for the Speaker) who is a legal practitioner and is one of the only female members of Parliament. The Plaintiff says that she therefore serves a vital role in the Assembly. And is either the Chairperson or Vice Chairperson in all the Committees that she serves. The Plaintiff says that her membership in the said committees is based on a consideration of:

- (a) Background,
- (b) Representation in other groups or delegations,
- (c) Political pluralism, and
- (d) Gender representation; amongst others².

15. The Plaintiff says that she is a member of the following Standing Committees in Parliament³:

- a. Standing Orders Committee
- b. Public Accounts Committee
- c. Foreign Affairs Standing Committee
- d. Select Committee on Trade, NEPAD, Regional Integration, WTO, WB, and LDC.
- e. Select Committee on Human Rights and Constitutional matters.
- f. Standing Committee on Local Government.

16. It is the Plaintiff's case that she is aware that the Executive of the Government is very unhappy with the reform agenda that she has championed in the National Assembly and that she has received several indications and references as to their dissatisfaction. The Plaintiff lists some of the said reforms to include:

² Committee Selection Parliamentary document (YKJ1).

³ List of committees of the National Assembly for 2017-2022 (YKJ2).

- a. As chair of the Trade Committee, the investigation of the recent government policy decision to increase tax on bagged cement which led to scarcity of cement in the market.
 - b. As Vice Chair of the local government committee, the pursuit of a reform agenda of decentralization and possible amendments to the Local Government Act that would reduce Central Government power of Local Councils.
 - c. As Chair of the Standing Orders Committee, the review of the standing orders which led to the presentation of a draft for review to the Assembly that if adopted would reduce some of the powers of the 2nd Defendant.
17. The Plaintiff says that she is the Chairperson of the National Assembly Select Committee on Trade and as such Chairperson she has conducted and presided over the affairs of the said Committee in the best interest of The Gambia and influenced only by her conscience and God.
 18. The matters that led to the present case commenced on the 25th of February 2019, when the Plaintiff was served with a letter dated 25th February 2019 with Reference PR/C/66/Vol. 4/(66-EOC)⁴ from the Secretary General and Head of the Civil Service which said letter conveyed an Executive Decision revoking the Plaintiff's nomination with immediate effect.
 19. It is the Plaintiff's case that by the said letter and action aforesaid, the Executive and the Deputy Clerk have interfered with the Plaintiff's tenure as a member of the National Assembly and obstructed the Plaintiff in the carrying out of her functions as a member of the National Assembly. The said letter did not allege that any of the conditions set out in Section 91 of the Constitution that would cause the Plaintiff's seat to be vacated had arisen. The Plaintiff says that none of the said conditions have arisen.
 20. The Plaintiff immediately responded by a letter on the same date and challenged the authority of the Secretary General to write to her⁵. The Plaintiff further denied that the President had power to withdraw her nomination or cause her seat to be vacated. The Plaintiff accused the Secretary General and Executive of attempting to subvert or interfere with the membership of the Assembly.
 21. A caucus of the National Assembly was immediately held and a resolution was passed to declare the actions of the Executive as null and void⁶.
 22. On the 26th February 2019, whilst the Plaintiff was presiding over a televised meeting of the National Assembly Select Committee on Trade. The Deputy Clerk of the National Assembly interrupted the meeting in the Committee Room and caused the meeting to be suspended. The Deputy of the 1st Defendant then informed the Plaintiff that he was under pressure from the payroll and prevent her from carrying out her functions as a member of the National Assembly.

⁴ Letter exhibited as part of YKJ 3

⁵ Plaintiff's response also part of YKJ 3

⁶ Resolution exhibited to the Plaintiff's affidavit as YKJ 4

23. The Plaintiff was subsequently served with a letter dated the 1st of March 2019 with reference MG 142749/(26)⁷ wherein the 1st Defendant requested the Plaintiff to return her Diplomatic Passport and Official Vehicle. Further, on the same date the Executive stationed police officers at the National Assembly building to attempt to prevent the Plaintiff from carrying out her duties.
24. Three days later, by a publication titled 'Media Advisory' dated the 4th day of March 2019 with reference OP/291/249/01/PART III (179-ABS)⁸ the Office of the President released a notice to the general public wherein it was declared that the President acting pursuant to Section 88(1)(b) of the Constitution had nominated the 3rd Defendant to the National Assembly. The 3rd Defendant promptly granted a media interview wherein he purported to accept the nomination.
25. It is the Plaintiff's case that the 1st 3rd and 4th Defendants have by their actions, violated the constitution and unlawfully interfered with the Plaintiff in a bid to impede her in the carrying out of her functions. This is the case of the Plaintiff.

ISSUES

26. This matter raises several issues that strike at the heart of the principle of separation of powers and the supremacy of the Constitution. It is submitted that the issues may be summarized as follows:
 - (i) Whether the seat of a nominated member of the National Assembly may be vacated in any manner not provided for in Section 91(1) of the Constitution?
 - (ii) Whether the President of the Republic has the power to cause to be vacated, the seat of a nominated member of the National Assembly?
 - (iii) Whether any body or entity apart from the Supreme Court can determine the question of whether or not the seat of a member of nominated member has been vacated?
27. It is submitted that these issues are intertwined and one may not be argued without reference to the other. This Statement of Case shall attempt to answer these questions through meticulous reference to the Constitution and precedent of the Supreme Court.

ARGUMENTS

Distinction between Nominated member and elected member

28. First and foremost, it is submitted that save for two specific criteria, the Constitution makes no distinction between the rights, powers and privileges of a nominated member of the National Assembly and an elected member. The distinctions referred to are:
 - 28.1. A nominated member does not need to be ordinarily resident in any constituency prior to being nominated as required in Section 89(1)(c). Section 89(2) clearly exempts Section 89(1)(c) from applying to a nominated member.

⁷ Letter dated the 1st day of March, 2019 exhibited to the Plaintiff's affidavit as YKJ 5

⁸ Media advisory exhibited to the Plaintiff's affidavit as YKJ 6

28.2. Section 90(3) which provides that all the events of disqualification set out in Section 91 of the Constitution apply to a nominated member except the provisions as to time limits for elections.

It is submitted that except for the foregoing, any reference to members of the national assembly means all members of the national assembly without exception. This is clearly set out in Section 230 of the Constitution (Interpretation) which states:

“All the members” in relation to the National Assembly, means all the members for the time being of the National Assembly”

This Honourable court is urged to so hold.

Separation of Powers.

29. The Constitution of The Gambia clearly prescribes the principle of separation of powers. In the foreword of the Constitution (1997) it is stated thus:

“This Constitution guarantees participatory democracy that reflects the undiluted choice of the people. The functions of the arms of government have been clearly defined, their independence amply secured with adequate checks and balances to ensure that they work harmoniously together for our common good.” (emphasis ours).

30. The doctrine has been aptly defined by E.C.S Wade and Godfrey Philips, **Constitutional Law, Eighth Ed.** as:

*“To avoid confusion of thought it is important to note that separation of powers may mean three different things: (a) that the same persons should not form part of more than one of the three organs of government, e.g. that Ministers should not sit in Parliament; (b) that **one organ of government should not control or interfere with the exercise of its function by another organ** e.g. that the Judiciary should be independent of the Executive or that Ministers should not be responsible to Parliament; (c) that one organ of government should not exercise the functions of another e.g. that Ministers should not have legislative powers.”*
pg 24

31. It is submitted that in our context, this definition holds true. The National Assembly is accountable only to the Constitution, the laws of The Gambia and The Gambian people. The members of the assembly are not subject to influence by any other person or entity. This is clearly set out in Section 112(b) which provides:

“The responsibilities of the members of the National Assembly shall include the following –

(a) ...

*(b) all members shall regard themselves as **servants of the people of The Gambia**, desist from any conduct by which they seek improperly to enrich themselves or alienate themselves from the people, and shall discharge their duties and functions in **the interest of the nation as a whole and in doing so shall be influenced by the dictates of conscience and national interest.**”*

As a member of the National Assembly there is no obligation to constituency, party or President. The obligation of a member of the National Assembly is to the nation as a whole and not to any particular group. In the present case it is submitted that the Plaintiff was not beholden to the President and not subject to his influence which include to any implied power of the President to remove her from the Assembly.

32. To further emphasize this principle, the attention of this Honourable Court is drawn to the Constitution of the Republic of The Gambia 1997 (Amendment) Act 2017 which deleted Section 91(1)(d) of the Constitution that had provided as follows:

"A member of the National Assembly shall vacate his or her seat in the National assembly –

- (d) If he or she ceases to be a member of the political party of which he or she was a member at the time of his or her election."*

As a consequence, apart from a disqualification under Section 91 (as amended), it is submitted that no other entity can cause a National Assembly Member's seat to be vacated⁹.

Presidential Powers of appointment

33. It is submitted that the power of the President under Section 88(1)(b) is to nominate 5 persons to the National Assembly. Such persons have to be previously qualified in the same manner as persons who are qualified for election to the National Assembly under Section 89(1). It is submitted that the power of the President does not extend beyond nomination. The nominee to the National Assembly, is by the nomination, put in the same position as Member-elect following a successful election. A reading of Section 88 and 89 of the Constitution make it very clear that there is a distinction between criteria for qualification to be a National Assembly Member and the fact of nomination or election.

34. Section 88 provides as follows:

- (1) The National Assembly shall comprise -*
(a) forty-eight members elected from the constituencies demarcated by the Boundaries Commission; and
(b) five members nominated by the President.

- (2) Before taking his or her seat in the National Assembly, a member shall take the prescribed oaths before the Speaker.*

Provided that a member may take part in the election of a Speaker and Deputy Speaker before taking such oaths.

35. Section 89 provides as follows:

- 1) A person is qualified for election to the National Assembly if her or she -*
a) is a citizen of The Gambia;

⁹ It is noted that there is no Act of Recall of Members enacted pursuant to Section 92.

- b) *has attained the age of twenty one years;*
 - c) *has ordinarily been resident in the constituency for a period of at least one year prior to nomination day;*
 - d) *is able to speak the English Language with a degree of proficiency sufficient to enable him or her to take part in the proceedings of the National Assembly; and*
 - e) *has made such declaration of his or her assets to the Independent Electoral Commission as is required in accordance with section 43.*
- 2) *The provisions of paragraphs (a), (b) and (d) of subsection (1) shall apply to a nominated candidate who shall also be required to make a declaration of his or her assets to the Independent Electoral Commission.*

36. In effect, if a member of the National Assembly does not have one of the qualification criteria (under Section 89) then he cannot take the prescribed oaths to become a member of the Assembly (under Section 88). The Independent Electoral Commission is the body empowered to validate that a person has qualified to stand for election and thus become a member of the National Assembly. By this validation, the fact of election serves the purpose of being the vehicle that transmits a qualified person to the National Assembly to be sworn in. Similarly, the President of the Republic is granted the same power and privilege to validate that a nominee is qualified and the act of nomination serves as a vehicle to transmit such a nominated member to the National Assembly to be sworn in. It is submitted that after the prescribed oath is taken, neither the IEC, the electorate, a political party or the President have the power to cause a National Assembly member's seat to be vacated. This is simply because the fact of qualification is to be separated from the vehicle that validates such qualification. Once a seat is taken, a member can only be disqualified. The process of their validation cannot be reversed.

37. Further, while Section 92 provides as follows:

'92. Recall of members of the National Assembly

An Act of the National Assembly may make provision for the recall of an elected member of the National Assembly. Such an Act shall -

- (a) *require that a petition for recall shall be supported by at least one third of the registered voters in the constituency; and*
- (b) *prescribe the grounds for recall and the powers of, and procedures to be adopted by, the Independent Electoral Commission on receipt of such a petition.'*

there exists no Act of Recall and the Constitution clearly no longer empowers a political party to cause a seat to be vacated. Therefore, only the National Assembly may through Section 90 and 91 proceed to disqualify a member and by so doing cause a seat to be vacated. In simple terms, the fact of the **validity** of an election or nomination is not an ongoing process that must subsist at all times during the tenure of a member of the National Assembly such that if this fact is extinguished, revoked or reversed, then such tenure ends. The fact of nomination or election occurs once. It is validated by the competent authority

once, and it is confirmed by the National Assembly once. The authority that validates cannot hold such validation as a threatening whip over the head of the member of the National Assembly as a means to vacate their seat. Only an event of disqualification can do this. This Honourable Court is urged to so hold.

38. This Honourable Court is further urged to consider that there is no power given to the President to vacate or cause to be vacated, the seat of a nominated member of the National Assembly. To create such an implied power upon the President would result in the creation of a situation of an irreconcilable conflict of interest upon all nominated members. Several fundamental functions of the Assembly serve as a check and counter measure against the executive and the President. These include:

38.1. The power to investigate under Section 109(2)(a):

'Committees may be appointed -

- (a) to investigate or inquire into the activities or administration of ministries or departments of the Government, and such investigation or inquiry may extend to making proposals or legislation; or*
- (b) to investigate any matter of public importance.'*

38.2. Conferment of powers and responsibilities on the President under Section 76.(2):

'In addition to the powers conferred on him or her by the Constitution, the President shall have such powers and responsibilities as may be conferred on him or her by or under an Act of the National Assembly.'

38.3. Vote of censure against Ministers or the Vice President – Section 75:

Vote of censure

- 1. The National Assembly may, by resolution supported by the votes of two-thirds of all the members, pass a vote of censure against a Minister or Vice-President on the grounds of -*
 - a. His or her inability, arising from any cause, to perform the functions of his or her office;*
 - b. Abuse of office or violation of any provision of this constitution;*
 - c. His or her misconduct in office.*
- 2. A vote of censure shall be initiated by a petition, signed by not less than one-third of all Members of the National Assembly to the President through the Speaker stating the grounds on which they are dissatisfied with the conduct of performance of the Minister or Vice-President.*
- 3. The President shall cause a copy of the petition to be given to the Minister or Vice-President immediately he or she receives it.*
- 4. The motion for the resolution of censure shall not be debated until after the expiry of Fourteen days from the day the petition is sent to the President.*

5. *The Minister or Vice-President concerned has the right to attend and be heard during the debate on the motion.*
6. *In this section, "misconduct in office" means that the person concerned has -*
 - a. *Conducted himself or herself in a manner which brings or is likely to bring his or her office into contempt or disrepute.*
 - b. *dishonestly done any act which is prejudicial or inimical to the economy of The Gambia or dishonestly omitted to act with similar consequences.*

38.4. Removal of the President from office – Section 67.

Misconduct by the President

1. *The president may be removed in accordance with this section on any of the following grounds -*
 - a. *Abuse of office, wilful violation of the oath of allegiance or the President's oath of office, or wilful violation of any provision of this constitution; or*
 - b. *Misconduct in that -*
 - (i) *he or she has conducted himself or herself in a manner which brings or is likely to bring the office of the President into contempt or disrepute; or*
 - (ii) *he or she has dishonestly done any act which is prejudicial or inimical to the economy of the Gambia or dishonestly omitted to act with similar consequences.*
2. *Where the speaker receives a notice in writing signed by not less than one-half of all the members of the National Assembly of a motion for the removal of the President on any grounds set out in subsection (1), specifying particulars of allegations (with any necessary documentation) and requesting that a tribunal be appointed to investigate the allegations, the speaker shall -*
 - a. *Inform the President of the notice*
 - b. *Requesting the Chief Justice to appoint a tribunal consisting a Justice of the Supreme Court, as chairperson, and not less than four other persons selected by the Chief Justice, at least two of whom shall be persons who hold or have held high judicial office.*
3. *The tribunal shall investigate the matter and shall report to the National Assembly through the Speaker whether or not it finds the allegations specified in the motion to have been substantiated. The President shall have the right to appear and be legally represented before the tribunal.*
4. *If the tribunal reports to the National Assembly that it finds that the particulars of allegations against the President contained in the motion have not been substantiated, no further proceedings shall be taken under this section in respect of that allegation.*

5. *Where the tribunal reports to the National Assembly that it finds that the particulars of any such allegation have been substantiated the National Assembly may, on a motion supported by the votes of not less than two-thirds of all the members, resolve that the President has been guilty of such abuse of office, violation of oath, violation of the constitution, or misconduct or misbehaviour as to render him or unfit to continue to hold office of President; and where the National Assembly so resolves, the President shall immediately cease to hold office.*

It would be impossible for a nominated member to carry out any of the above functions with such a severe and irreconcilable conflict of interest. It is submitted that this is not the intent of the Constitution. This Honourable Court is urged to so hold that the President does not have the power to cause to be vacated, the seat of a nominated member.

39. It is further submitted that there is no power granted to the President in the Constitution to vacate or cause to be vacated, the seat of a nominated member or any member of the National Assembly. Where the Constitution has sought to grant the President the power to appoint and remove from office, it did so expressly viz:

- 39.1. The power to appoint and remove from office, members of the Independent Electoral Commission – Section 42.

- (3) *The Members of the Commission shall be appointed by the President in consultation with the Judicial Service Commission and the Public Service Commission.*

- (6) *The President may remove a member of the Commission from office -*

- 39.2. The power to appoint a District Seyfo – Section 58(1)

- (1) *The President shall appoint a District Seyfo in consultation with the Minister responsible for local government.*

- 39.3. The power to appoint and remove the Vice President – Section 70(3)

- The Vice President shall be appointed by the President.*

and 70(5).

- (5) *The office of the Vice President shall become vacant -*

- (a) on the termination of his or her appointment by the President,...*

- 39.4. The power to appoint and revoke the appointment of a Secretary of State – Section 71(3) and 71 (4).

- (3) *Ministers shall be appointed by the President and shall, before assuming functions of their office, take and subscribe to the prescribed oaths.*

- (4) *The office of a Minister shall become vacant -*

- (a)
- (b) *on his appointment being revoked by the President;*

39.5. The power to appoint the Director of Public Prosecutions – Section 84(2)

- (2) *The Director of Public Prosecution shall be appointed by the President.*

39.6. The power to appoint the Chief Justice and Judges of the Superior courts – Section 138(1) and (2)

- (1) *The Chief Justice shall be appointed by the President after consultation with the Judicial Service Commission.*
- (2) *All other judges of the superior courts except the judges of the Special Criminal court shall be appointed by the President on the recommendation of the Judicial Service Commission.*

and power to terminate -Section 141(2)(c).

- (2) *Subject to the provisions of this section, a judge of a Superior Court*

(a)

(b)

- (c) may have his or her appointment terminated by the President in consultation with the Judicial Service Commission.*

40. No such express power was given in the case of members of the National Assembly and it is submitted that such power cannot be implied without grossly creating a conflict within the provisions of the Constitution. It is noted that the Respondents consider that Section 231(1) of the Constitution grants the President the power to revoke the nomination of the Plaintiff and by extension cause her to vacate her seat in the National Assembly. Section 231(1) provides:

Construction of various powers

Where any power is conferred by this Constitution to make any proclamation, order, regulation, rule or pass any resolution or given any direction or make any declaration or designation, it shall be deemed to include the power, exercisable in like manner and subject to like conditions, if any, to amend or revoke same

It is submitted that Section 231 does not grant a power to revoke a nomination and in any event as has been argued above a nomination cannot be withdrawn after the substantive swearing in. Section 231 is a general provision of construction and cannot even remotely be associated to the idea that the express provisions of disqualification under Section 91 should infer a Presidential power of removal. Even if such an idea could be entertained, it is submitted that Section 91 is a specific and exhaustive list and cannot be overridden by a general provision of the Constitution. We refer to the case of **COMMERCIAL TAX OFFICER, RAJASTHAN v. M/S BINANI CEMENT LTD. & ANR. (Civil Appeal No. 336 of 2003) FEBRUARY 19, 2014** wherein it was held that:

'Where a Statute contains both a general provision as well as specific provision, the latter must prevail - In other words, where a general statute and a specific statute relating to the same subject matter cannot be reconciled, the special or

specific statute ordinarily will control - The principle finds its origins in the latin maxim of generalia specialibus non derogant, i.e., general law yields to special law should they operate in the same field on same subject.

When there is an apparent conflict between two independent provisions of law, the special provision must prevail - This rule has application in construction of taxing statutes along with the proposition that the provisions must be given the most beneficial interpretation - While determining the question whether a statute is a general or a special one, focus must be on the principal subject-matter coupled with a particular perspective with reference to the intendment of the Act - With this basic principle in mind, the provisions must be examined to find out whether it is possible to construe harmoniously the two provisions - Once it is held that intention of the legislation is to exclude the general provision then the rule "general provision should yield to special provision" is squarely attracted - The rule of statutory construction that the specific governs the general is not an absolute rule but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other direction.'

This Honourable Court is also referred to **Sullivan, R., Sullivan and Driedger on the Construction of Statutes 4th Edition (London: Butterworths, 2002), page 273** wherein it was held:

"Implied exception (generalia specialibus non derogant). When two provisions are in conflict and one of them deals specifically with the matter in question while the other is of more general application, the conflict may be avoided by applying the specific provision to the exclusion of the more general one. The specific prevails over the general; it does not matter which was enacted first. This strategy for the resolution of conflict is usually referred to by the Latin name generalia specialibus non derogant. The English term "implied exception" is adopted ... for, in effect, the specific provision implicitly carves out an exception to the general one...."

This Honourable Court is urged to hold that the only basis on which the seat of a National Assembly member can be vacated is pursuant to Section 91 and that Section 231(1) cannot override this provision.

41. To assume that the President has the power to vacate or cause to be vacated, a seat in the National Assembly would be to create a fundamental inconsistency within the Constitution. This proposition is supported by sections of the Constitution viz:

41.1. A member of the National Assembly is not a member of the public service. Section 166(4)(a) provides:

In this Constitution, an office in the Public Service does not include - the offices of President, Vice-President, Speaker or Deputy Speaker of the National Assembly, Minister or Member of the National Assembly (emphasis ours).

Further, a member of the National Assembly is additionally distinguished from any other person serving in a public capacity in that they do not take the Oath for the due execution of Office. The Second Schedule of the

Oaths Act Cap 35:03 provides for the oaths to be taken by certain officers in The Gambia. The Schedule provides that the Vice President, Ministers, Secretary General, Secretary to Cabinet and even the Speaker take both the Oath of Allegiance and the Oath for the due execution of Office. However members of the National Assembly take only the Oath of Allegiance. Both oaths are set out below:

Oath of Allegiance

I A.B., do swear that I will be faithful and bear true allegiance to the Republic of The Gambia according to Law. So help me God.

Oath for the Due Execution of Office

I, A. B., do swear that I will execute the functions of the office of without fear or favour, affection or ill-will, according to the Constitution and other laws of The Gambia. So help me God.

It is submitted that the Constitution and the Oaths Act are both consistent and great care is taken to set apart members of the National Assembly to explicitly provide that they are not members of the Public Service and not holders of any office in the Public Service. As such they are subject only to disqualification and not to any authority capable of terminating their appointment or control over their function.

- 41.2. Power to appoint someone to the Public Services includes the power to exercise disciplinary control over that person. Section 167(a) provides:

In this Constitution - power to appoint any person to hold or act in any office in the Public Service shall include the power to confirm appointments, to exercise disciplinary control over and to remove persons holding or acting in such offices and to re-appoint or re-instate any person appointed in exercise of the power in question unless such power is expressly or by necessary implication vested in some other person or authority;

- 41.3. A person who holds an office in the public service shall not hold office in any political party. Section 170(1) provides:

A person holding an office in a public service shall not hold office in any political party.

Clearly therefore the law did not intend that a member of the National Assembly could be construed in any way shape or form to be a public officer.


It is abundantly clear therefore that any attempt to apply a definition to a nominated member or indeed any member of the national assembly that would bring them under the purview of Presidential control or influence, including removal – would disrupt the very essence of the separation of powers so carefully crafted into our Constitution. Clearly a member of the National Assembly including a nominated Member cannot be associated with such a definition.

42. It is submitted therefore that the Presidential power to nominate the Plaintiff did not include the power to revoke that nomination after the Plaintiff took the prescribed oath and became a member of the National Assembly. The President does not have the right or power to cause the seat of the Plaintiff to be vacated and the Defendants correspondingly do not have the power to take any act in furtherance of that objective.

CONCLUSION

43. We submit that the Plaintiff has made out a case for the grant of the reliefs' sought in this suit and we urge this Hon. Court to so grant.

Dated this 14th day of May, 2019.


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