IN THE SUPERIOR COURT OF THE GAMBIA

IN THE SUPREME COURT OF THE GAMBIA

S.C. 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 SECTIONS 88, 90 AND 91 OF THE CONSTITUTION OF THE REPUBLIC OF THE GAMBIA

THE SUPREME COURT OF THE GAMBIA

BETWEEN

YA KUMBA JAITEH...PLAINTIFF

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

CORAM:

HON. JUSTICE H.B. JALLOW – CJ
HON. JUSTICE G.B.S. JANNEH – JSC
HON. JUSTICE R.C. SOCK – JSC
HON. JUSTICE A.D. YAHAYA – JSC
HON. JUSTICE C.S. JALLOW QC – JSC

Borry S. Touray, with him A.A. Bensouda, Y. Senghore, L.L. Darbo, S.K. Jobe and A. Ceesay Jallow for the Plaintiff

A. Tambadou Attorney General with him Binga D Director of Civil Litigation, A.M Yusuf Principal State Counsel and N. Jallow for the first, second and fourth Defendants

DATED: 28th DAY OF JANUARY 2020

JUDGMENT

On 5th March 2019 the plaintiff filed and caused a writ to be issued against the defendants pursuant to the original jurisdiction of this Court seeking **inter alia** a declaration by this court that

> " the purported termination of the plaintiff's membership of the National Assembly through an Executive decision communicated to the plaintiff by letter reference

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PR/C/66/VOL 4/(66- EOC) and dated **25th February 2019** is null and void and of no effect."

The plaintiff sought other declarations and orders from this Court, the particulars of which need not occupy us for the moment.

On the same day, the plaintiff filed a motion on notice seeking

1. "an order restraining the 2nd Defendant from administering the prescribed oath under section 88 (2) onto the 3rd Defendant pending the hearing and determination of this matter.
2. An order restraining the 1st and 2nd Defendants from attempting in any manner to bestow upon the 3rd Defendant any right, privilege or role as member of the National Assembly pending the hearing and determination of this matter.
3. An order restraining the 3rd Defendant from parading himself as a member of the National Assembly in any manner or form pending the hearing and determination of this matter."

The motion was supported by a 24 paragraph affidavit deposed to by the plaintiff herself and to which was attached several annexures. The plaintiff also filed an additional affidavit on 13th March 2019 deposed to

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by the plaintiff. No orders were sought against the 4th defendant Attorney General in this motion. The first defendant/respondent deposed to and filed a 25 paragraph affidavit in opposition to the motion, disclosing **inter alia** the consent of the second and fourth defendants/ respondents respectively the Speaker of the National Assembly, and the Attorney General to depose to the facts alleged in the affidavit in opposition.

At the hearing of the motion, Borry S. Touray, learned counsel for the plaintiff/ applicant, submitted that the Court has jurisdiction to grant the injunctions by virtue of the provisions of the Constitution and the rules of the Supreme Court; that the case raises a serious constitutional issue on the separation of powers and on the integrity of the National Assembly; that the balance of convenience to grant an injunction lies in favour of the plaintiff/applicant; that it is in the best interest of the nation that the **Status quo ante** be maintained; that damages cannot in this case serve as adequate compensation to the plaintiff/applicant or to any member of the public; and that the defendants/respondents will not suffer any prejudice if the court grants the orders. Learned counsel urged this Court to grant the application on the strength of the submissions and in the public interest and to maintain the status quo ante bellum. He relied in his submissions on section 125 of the Constitution, Rule 67 of the Supreme Court Rules and the cases of American Cyanamid Co. VS.

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Ethicon Ltd (1975) A.C and the case of Madikarreh Jabbie vs. Alhaji Lansana Sillah (2014 - 2015) GSCLR 246, a judgment of this Court.

Binga D. Esq. learned counsel for the Attorney General, representing the first, second and fourth defendants/ respondents in his reply submitted that the reasons for requesting the restraining order are not tenable. He submitted that in order for an injunction to lie, the following must be established:-

i. a legal right must be under threat;
ii. there must be a serious question of law to be tried;
iii. damages will not be adequate compensation in the event of an injunction being denied; and
iv. the balance of convenience must be in favour of the grant of an injunction.

Learned Counsel further submitted that what the plaintiff/applicant is challenging before the Court, i.e. the revocation of her nomination as a member of the National Assembly is not a legal right; that her nomination or continued membership of the National Assembly is not a legal right but a privilege conferred on her by the President and not a legally enforceable claim. Learned counsel also submitted that the balance of convenience lies in favour of the respondent as granting the injunction

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would interfere with the need to ensure that the National Assembly is properly constituted. He urged the Court not to grant the application by the plaintiff/applicant. He relied on the case of KOTOYE VS. CENTRAL BANK OF NIGERIA 2 L.C. Supreme Court of Nigeria with regard to the conditions for the grant of an injunction.

The third defendant Foday Gassama was not represented at this or any other stage of the case, did not appear and did not participate in the proceedings.

In his reply to the submissions of learned counsel for the respondents, Mr. Borry S. Touray, learned counsel for the plaintiff/applicant, argued that the protection afforded to the plaintiff by section 91 of the Constitution relating to the tenure of members of the National Assembly has conferred on the plaintiff a legal right to such membership and that such a right should be legally enforced by grant of the application for the restraining orders.

On 15th of March, 2019, the Court unanimously dismissed the application in its entirety. The Court also considered it necessary to emphasise that

> "all arrangements for the assumption of office by the 3rd defendant/respondent Foday Gassama as a nominated member of the National Assembly should proceed."

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The Court also ordered the plaintiff/applicant "pending the determination of the suit, not to interfere with that process or with the execution by the 3rd respondent of his duties". The reasons for the ruling, the Court indicated, would be incorporated into the final judgment on the merits.

The law relating to the grant of interim restraining orders, such as the ones sought in the plaintiff's application, is well settled. The considerations that a court might take into account in determining such an application have been laid down, though not necessarily exhaustively, in the case of AMERICAN CYANAMID CO. VS. ETHICON LTD (1975) 1 ALL ER 504 and in MADIKARREH JABBIE_ALHAJI LANSANA SILLAH (2014 - 2015) GSCLR 246, both of them relied upon respectively by learned counsel for the parties.

This Court had occasion in the case of UNITED DEMOCRATIC PARTY (NO I) and OTHERS VS. ATTORNEY GENERAL (NO I) (SCCS NO3/2000) in a ruling by Jallow H.B, JSC, as he then was, sitting as a single judge of the Supreme Court, to state the position of the law in these terms:-

> " An interlocutory interim injunction is primarily granted in an appropriate case as per Lord Wilberforce in Hoffman- La

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Roche & Co AG v Secretary of State for Trade and Industry (1974) 2 ALL ER 1128 at 1146a in order: "to prevent a litigant, who must necessarily suffer the law's delay, from losing by that delay the fruit of his litigation." It is a discretionary remedy but the discretion: "is not one to be exercised according to the fancy of whoever is to exercise the jurisdiction of equity, but is a discretion to be exercised according to the rules which have been established by a long series of decisions." (as per Lord Blackburn in Doherty v Allman (1873) 3 AC 709.) The House of Lords in the celebrated case of American Cyanamid Co v Ethicon Ltd (1975) 1 ALL ER 504 laid down a series of guiding tests or principles for the exercise of the discretion. These tests and principles were not meant to be exhaustive. The basic requirement is that the court should be satisfied that the applicant has a cause of action recognized at law and that it is just and convenient to grant interlocutory relief. Each case needs to be examined in the light of its particular circumstances. There may be special factors which need to be taken into account, particularly where the defendant – respondent against whom the interim injunction is sought is a

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public body or authority with statutory responsibilities to discharge."

In that case, decided in 2001, this Court was faced with the issue whether the removal or termination of the chairman and a member of the Independent Electoral Commission was in accordance with or in contravention of the Constitution. The plaintiff's application for an interim order suspending the appointment of any replacements of the two officials was dismissed by the Court.

In the instant case the principal facts are not in dispute. The plaintiff was nominated by the President of the Republic as a member of the National Assembly, pursuant to section 88 (1) (b) of the Constitution and, in due course after being subscribed to the oath of office on 11th April 2017 assumed her seat in the Assembly; that on 25th February 2019 the Secretary General, Office of the President, conveyed to the plaintiff in writing the "Executive decision to revoke" her "nomination as National Assembly Member, with immediate effect"; and that on 4th March 2019 the office of the President announced that the President, acting pursuant to section 8891) (b) of the Constitution, had nominated the 3rd defendant to the National Assembly. The orders sought are not against the State but against firstly the Speaker of the National Assembly to prevent her

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administering the prescribed oath to the third defendant; secondly against the Clerk and Speaker both of the National Assembly from bestowing "any right, privilege or roles as a member of the National Assembly" on the 3rd defendant; and thirdly against the 3rd defendant from presenting himself as a member of the National Assembly. It is nonetheless evident that, notwithstanding the omission of any application for a restraining order against the Attorney General representing the State in this case, the effect, if not also the real object of the plaintiff/applicant, of granting the orders sought against the other parties would be to restrain the implementation of the decision by the State i.e the 4th defendant, to revoke the membership of the plaintiff in the National Assembly and to appoint the 3rd defendant as her replacement. Under the circumstances, some of the considerations pertaining conventionally to the exercise of the judicial discretion on granting interim orders are not pertinent to the case. "Special factors" identified in the case of UDP vs Attorney General "need to be taken into account" particularly "where the defendant / respondent against whom the interim injunction is sought" directly or indirectly, "is a public body or authority with statutory responsibilities."

In dismissing the application in its entirety the Court was clearly of the view that this is not an appropriate case for the grant of any restraining

orders against the defendants/respondents. Neither the statutory law nor the principles of the common law would support the application. Section 17 (2) of the State Proceedings Act (Cap 8:03, Act No. 12 of 1957) provides as follows:-

> " where in any proceedings against the State, any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may instead make an order declaratory of the rights of the parties"

Thus no injunction or order for specific performance will be granted by the Court against the State in any proceedings against it. In a case such as the instant one where the State has been sued together with others, the Court will not grant an injunction against the others if it appears that the real object of the application or effect of the order is or would be to restrain the State and where the act or omission complained of still benefits from a presumption of regularity. The effect of granting the application in the instant case in restraining the State is evident. The object of the application in reaching that result has been clearly enunciated by learned counsel for the plaintiff/applicant as the

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restoration of the "Status quo ante bellum" i.e. for the Court to suspend the implementation of the decisions of the State in respect of the revocation of the nomination of the plaintiff and her subsequent replacement by the 3rd defendant. A relief or remedy that is not available against the State will not be granted indirectly by the courts. That would run counter to the spirit of the aforesaid provision of the State Proceedings Act and would be an improper exercise of the judicial discretion.

It would also run counter to the well-established legal principle captured in the maxim Omnia praesumuntur rite esse acta i.e. everything is presumed to be rightly and duly performed until the contrary is shown. There is thus a presumption of the regularity of official acts. It is of course a rebuttable presumption. But that is to be determined in the main suit. That presumption of regularity is the basis upon which the law will refrain from restraining public officers in the exercise of their statutory powers. It is good law and good sense. Public officers are called upon regularly to exercise statutory powers for the public good. It may well be that sometimes such powers are exercised erroneously or beyond the limits set by the law. Appropriate remedies exist to curb or control such excesses. Restraining orders against the State however are not amongst them, and for good reason. Public administration must be

allowed to continue and not be fettered by such orders. That is in the public interest.

In the case of UDP VS ATTORNEY GENERAL this Court dismissed an application for a restraining order against the defendant on the basis particularly of such a presumption. The Court held in words that are adopted for the instant case that:-

> "........... granting the interim order sought by the applicants would be to undermine that presumption in favour of the defendants actions even before the issues have been tried and settled by the full court. That would be erroneous and would not tend to proper public administration or the proper administration of justice"

It was for the foregoing reasons that the Court on 15th March 2019 dismissed the motion of the plaintiff/applicant for restraining orders against the first, second and third defendants. In doing so, the Court emphasised that its ruling and orders were subject to and without prejudice to its final decision as to whether the nomination of Ya Kumba Jaiteh the plaintiff as a member of the National Assembly was validly revoked. That is the question to which the Court now turns.

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In the writ issued at the instance of the plaintiff invoking the original jurisdiction of this Court, the plaintiff seeks the following reliefs:-

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;
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 has become vacant;
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;
4. a declaration that the plaintiff is a member of the National Assembly her seat not having been vacated through an event of disqualification;
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

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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;

6. a declaration that the purported nomination of the 3rd defendant as a Nominated member of the National Assembly is null and void and of no effect;
7. an order restraining the 2nd defendant from administering the prescribed oath under section 88(2) onto the 3rd defendant;
8. an order restraining the 1st and 2nd defendants from attempting in any manner to bestow upon the 3rd defendant any right, privilege or role as member of the National Assembly, and
9. an order restraining the 3rd defendant from parading himself as a member of the National Assembly in any manner or form.

The plaintiff filed a statement of case dated 14th May 2019. The Attorney General, the fourth defendant, filed a statement of case on behalf of the first, second and fourth defendants on 6th June 2019. At the oral hearing both parties adopted their written briefs with supplementary oral submissions respectively by Miss Y. Senghore, learned counsel for the plaintiff and the Attorney General Mr. Abubacarr Tambadou, appearing in person and on behalf of the first and second defendants.

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The facts in this case are not in dispute. There are thus no issues of fact to be resolved by the Court. The plaintiff was nominated as a member of the National Assembly by the President pursuant to Section 88 (1) (b) of the Constitution; on 25th February 2019 the plaintiff received a letter from the Secretary General, Office of the President, conveying the "Executive Decision to revoke" her "nomination as National Assembly Member, with immediate effect;" and subsequently the President nominated Foday Gassama, the third defendant, as a member of the National Assembly in replacement of the plaintiff. The principal issue for the determination of this Court is whether the revocation of the nomination of the plaintiff was valid or otherwise. The answer to that will impact on the nomination of the 3rd defendant, one way or the other,

Learned Counsel for the plaintiff, Miss Y. Senghore, submitted that the revocation is without any legal authority, as only section 91 of the Constitution sets out the conditions under which the seat of a member of the National Assembly, including a nominated member, can be vacated and that none of these conditions has been breached; that the President has no power to vacate or cause to be vacated the seat of a nominated member of the National Assembly; that wherever it is intended in the Constitution to grant the President a power of appointment and removal, it is so expressly stated for instance in relation to members of the Independent Electoral Commission (IEC) (section 42 of the Constitution),

District Seyfos (section 58 (1) of the Constitution), the Vice President (section 70 (3) of the Constitution), Ministers (section 71 of the Constitution), the Director of Public Prosecutions (DPP) (section 84 (2) of the Constitution) and Chief Justice and Judges of the Superior Courts(section 138 of the Constitution). Learned Counsel further submitted that section 91 being the only provision of the Constitution expressly providing for the vacation of the seat of a nominated member cannot be overridden by a general provision such as section 231(1) and that, in any case, it is undesirable and contrary to the separation of powers and the system of democracy provided for by the Constitution for the Executive branch of State, in the absence of any express provision to that effect, to vacate the seat of a nominated member in the National Assembly, another arm of State.

The Learned Attorney General, appearing in person and on behalf of the first and second defendants, submitted that the plaintiff had failed to discharge the burden of proof, i.e. identifying with specificity the constitutional or legal provision prohibiting the President from revoking the nomination of the plaintiff. He further submitted that section 231 (1) of the Constitution gives the President the power to revoke the plaintiff's nomination and that based on dictionary definitions i.e. Black's Law Dictionary, the English Oxford Dictionary and Oxford Living Dictionaries

the word "designation" in section 231 (1) is synonymous with "nomination" and "appointment", thus empowering the President to revoke the nomination of the plaintiff. He also relied on section 20 of the Interpretation Act (Cap 4.01 Laws of the Gambia) to support his proposition. He submitted further that there is no inconsistency between section 91 and section 231 (1) of the Constitution as would require the application of the rule of interpretation of generalia specialibus non derogant. The Learned Attorney General argued that in order to ensure consistency in the Constitution the provision for the recall of elected members by his or her constituents should be matched by the power of the President to revoke the tenure of a nominated member and that such consistency is provided for by section 231 (1) of the Constitution and by section 20 of the Interpretation Act. He submitted finally that "a nominated member is a member of the National Assembly serving at the pleasure of the President" and "the court should interfere with the lawful exercise of discretion" by the President only if the plaintiff can demonstrate that the President "has clearly abused this discretion"

Reliefs numbers 5, 7, 8, and 9 sought by the plaintiff are in the nature of restraining orders against some or all of the defendants and are essentially in the same terms as those sought earlier by the plaintiff in her motion of 5th March 2019, one difference being that whereas the

earlier were meant to be interim orders, the latter are sought as permanent injunctions. The difference in relation to reliefs other than relief No. 9 is not of any significance in this case. The reasons for dismissing that motion apply with equal force to the final restraining orders sought by the plaintiff in her writ. Accordingly reliefs numbers 5, 7, and 8 in the writ are hereby dismissed. Relief No.9 which is directed solely against the 3rd defendant, Foday Gassama, will be considered by the Court in the course of this Judgment.

The Supreme Court however, pursuant to Section 127(1) (a) of the Constitution, has exclusive original jurisdiction for the interpretation and enforcement of any provisions of the Constitution other than those relating to fundamental rights and freedoms. That jurisdiction entitles the Court to determine whether any other particular conduct or exercise of authority is valid and in accordance with the Constitution and, pursuant to section 17(2) of the State Proceedings Act to issue a declaration accordingly. Thus whilst in the instant case the Court may not grant an injunction or restraining order terms sought by the plaintiff, it can nonetheless determine whether the act of revocation of the nomination of the plaintiff is valid and in accordance with the Constitution and if the Court were to hold otherwise to proceed to issue a declaration to that

effect. Accordingly the Court will proceed to consider reliefs numbers 1,2,3,4, and 6 in the writ which are all in the nature of declaratory reliefs.

The Court observes that the letter from the Secretary General to the plaintiff (the revocation letter) did not indicate under what legal authority the revocation was being done. While such an omission may not be fatal to the act, it is nonetheless desirable, where public officials purport to exercise powers conferred on them by the law, particularly to the disadvantage of other persons, that the source of the legal or statutory authority for their actions is clearly identified in any communication to or with a disaffected party. That will facilitate better public administration as well as the resolution of any dispute that may arise therefrom. The omission has clearly impacted on the course of the proceedings in this case to the extent that the defendants have not identified any specific provision of law under which the revocation was carried out but rather rely on provisions of the Constitution, which were not referred to in the said letter, but are now canvassed before the court as justifying the act of revocation. Be that as it may, the case revolves essentially around an interpretation of sections 88,89,90,91,92 and 231(1) of the Constitution and of section 20 of the Interpretation Act (Cap 4:01 Laws of The Gambia).

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The Constitution has created a very detailed legal regime for the nomination of members of the National Assembly (section 88), their qualifications (section. 89), the grounds for their disqualification (section 90) and the circumstances under which a member of the National Assembly shall vacate his or her seat. Section 88 (1), (b) of the Constitution provides for the nomination by the President of five members of the National Assembly.

Pursuant to section 89(2) of the Constitution, some of the qualifications for election to the National Assembly are required also to be fulfilled by nominated members. Thus a nominated member is required to be a citizen of The Gambia, to have attained the age of twenty one years and to be able to speak the English language with proficiency.

The disqualifications for election as a member of the National Assembly set out in section 90 of the Constitution are, pursuant to subsection (3) of that section, applicable mutatis mutandis to nominated members. Thus any person who holds the citizenship or nationality of a country other than The Gambia or is of unsound mind etc is disqualified from nomination to the National Assembly.

Section 92 of the Constitution enumerates the circumstances under which a member shall vacate his or her seat in the National Assembly i.e. the conditions or circumstances which result in the termination of membership in the Assembly. Some of the conditions are applicable to a nominated member by implication e.g on the dissolution of the National Assembly (section 91(1) (a)) or upon the resignation or death of the member (section 91(1) (c)). Some others (eg section 91(1) (b)) expressly provide for their application to a nominated member. Thus if any circumstances arise which would have disqualified a person from nomination, the seat of such a person in the Assembly would become vacant as a result thereof.

The Learned Attorney General contends that these provisions notwithstanding, the President has authority under section 231(1) of the Constitution, having in his view "designated" the plaintiff as a nominated member, to revoke his nomination.

The learned Attorney General also relied on section 20 of the Interpretation Act (Cap 4.01 Laws of The Gambia) as authority for the revocation of the plaintiff's nomination as a member of the National Assembly.

Learned Counsel for the plaintiff contends otherwise as aforesaid.

Whilst section 88(1) (b) of the Constitution empowers the President to nominate five members of the National Assembly, it is clear that he does not enjoy an unfettered discretion to choose whoever he wishes. The nominee must satisfy some of the conditions stipulated in section 89(1) of the Constitution which provides for qualifications for membership of the National Assembly. Such a nominee must also be free from the disqualifications for membership of the National Assembly <u>mutatis mutandis</u> as are set out in section 90(1) of the Constitution. Any discretion of the nominating authority is thus not absolute but is subject to the conditions laid out in sections 89(1) and 90(1) of the Constitution. There is thus furthermore a linkage between the nomination made under Section 88 on the one hand and qualification for or disqualification from membership of the National Assembly on the other.

The question that remains is whether, having properly exercised the Constitutional discretion to nominate to membership of the Assembly, the relevant authority has the power to revoke such a nomination. More particularly do section 231(1) of the Constitution and section 20 of the Interpretation Act authorise the revocation of the membership of a nominated member in the National Assembly?

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In the interpretation or construction of the provisions of a statute, including the Constitution as in the instant case, the primary task of the Court is to ascertain and give effect to the plain and ordinary meaning of the language of the enactment unless to do so would result in an absurdity. Every enactment has a purpose; the Court must seek to ascertain and to promote the object and purpose of the enactment. Words, phrases, indeed whole sections should not be read in isolation from others. Often there are linkages between different enactments and between provisions in the same enactment which need to be read together and given effect in a holistic manner.

Section 231(1) of the Constitution provides as follows:-

> "where any power is conferred by this Constitution to make any proclamation, order, regulation, rule or pass any resolution or give 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 the same."

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The learned Attorney General has relied on the word "designation", in the section submitting that its dictionary meaning includes "appointment" and "nomination" and that therefore the nominating authority has the power under section 231(1) to revoke the nomination of the plaintiff as a member of the National Assembly. It is clear however from WHARTONS LAW LEXICON, the OXFORD DICTIONARY and the CAMBRIDGE ENGLISH DICTIONARY cited to this Court that "designation" whilst including "appointment" and "nomination" is indeed broader than these two meanings. It includes the acts of "characterisation," of "description," of "classification" etc.

Dictionaries are undoubtedly a good source of the meaning of words and phrases and can be relied upon by a court in appropriate circumstances. Yet even there, one must exercise caution, for as Justice Learned Hand of the U.S Circuit Court of Appeals remarked in the case of CABELL VS MARKHAM (148 F 2nd 737 2nd CIR 1945):-

> " of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and

developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning"

So which is it to be – appointment, nomination, description or characterisation? Should the word "designation" under the ejusdem generis canon of interpretation be subject to a more restrictive meaning that fits it into the class or categories of matters preceding it in the section or otherwise? In the case of OJUKWU VS. OBASANJO (2004) 7 S.C. (2004 (12) NWLR) the Supreme Court of Nigeria described this well – established cannon recognised by the common law as an:

> "Interpretation rule which the court applies in an appropriate case to confine the scope of general words as used in a statutory provision or document within the genus of those special words. In the construction of a statute, therefore, general terms following particular ones apply only to such person or thing as are ejusdem generis with those understood from the language of the statute to be confined to the particular terms. In other

words the general words or terms are to be read as comprehending only things of the same kind as that designated by the preceding particular expression unless there is something to show that a wider sense was intended."

Such an approach would, it seems to the Court, rule out "appointment" and "nomination" as being within the contemplation of the legislature in its use of the word "designation" in section 231(1) and limit it to the nature of some legislative or quasi legislative instrument or action in the nature of the preceding category of "proclamation, order, regulation, rule,..............., resolution, direction.................. or declaration" preceding it . Thus under the ejusdem generis rule the word "designation" would bear a restrictive meaning of the same genre as the preceding list. Section 231(1) would not then cover "appointment" or "nomination" and would not therefore provide any authority for revocation of an appointment or nomination.

The Court will in this case give the term "designation" a more expansive and generous and not a restricted meaning and proceed on the assumption that it does indeed cover "appointments" and "nominations". The question still remains, however, as to the

relationship between the general provision in section 231(1) and the more specific provisions in section 89 and 90 of the Constitution as regards this case.

Halsbury's Laws of England 4th Edition Vol. 44 per 755 sets out the common law rule of interpretation "generalia specialibus non derogant." which is applicable in The Gambia by virtue of section 2 of the Law of England Application Act (Cap 5.01 Laws of The Gambia) in the following terms:-

> "wherever there is a general enactment in a statute which if taken in its most comprehensive 'sense, would override a particular enactment in the same statute, the particular enactment must be operative, and the general enactment must be taken to affect only the parts of the statute to which it may properly apply."

Craies on Statute Law 5th Edition at page 205 also succinctly sets out the rule as follows:-

> "the rule is that whenever there is a particular enactment and a general enactment in the same

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statute, and the latter, taken in its most comprehensive sense, would override the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."

Thus the specific provision prevails over the general provision. The legislature, having given its attention to the particular subject and provided for it, must be reasonably presumed not to intend to alter that special provision by a general one. Thus, for instance, in the case of BONNIE & ORS VS. GHANA PORTS & HARBOURS AUTHORITY (2014) GHASC 123, the Supreme Court of Ghana, relying on this canon of interpretation, found and held the limitation period of 12 months under the Ports and Harbours Authority Law – a specific/particular law, to override the limitation period of 6 years under the Limitation Act – a general law – for actions founded on contract.

Section 231(1) of the Constitution is in the nature of a general law in relation to sections 89 and 90 of the Constitution and in several respects. It is not limited to the exercise of power by the President in making or amending or revoking appointments; it applies to all authorities granted such powers in the absence of provisions to the

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contrary; it is not limited to nominated members of the National Assembly; it appears to be open ended. On the other hand you have sections 89, 90 and 91 of the Constitution which, in setting out the qualifications for and disqualifications from and the tenure of members in the National Assembly, have specifically provided in great and specific detail for the qualifications for nominated members and the grounds upon which they lose membership of the Assembly. Revocation of membership by any authority is not provided for in these provisions in respect of a nominated member. All four provisions – i.e. section 89, section 90, 91 and section 231 are contained in the same enactment i.e. the Constitution and were enacted simultaneously. There is some inconsistency between the two sets of provisions to the extent that section 231(1) provides no grounds for such revocation whereas section 89 and 90 provide specific grounds for disqualification and cessation of tenure of a nominated member. Hence the learned Attorney General's contention that nominated members hold office at "the pleasure" of the President. But that cannot be the case, for an office to be held at the pleasure of some other authority in the face of provisions specifying the grounds upon which such office shall become vacant. Nor is it possible logically for the two sets of provisions to be read and applied together. On the one hand, an absolute discretion to revoke cannot be reconciled with the specific grounds for vacating a seat; on the other hand, the

existence and exercise of a discretion or power to revoke subject to the conditions for vacation of a seat would be superfluous as once the conditions for a vacancy are present there is nothing more to revoke.

Under the circumstances the Court finds and holds that this is a proper case for the application of the rule generalia specialibus non derogant. It could not have been the intention of the Legislature to simultaneously make a general law on revocation of appointment under section 231(1) of the Constitution that would override specific provisions under section 89, 90 and 91 of the Constitution relating to the qualifications, disqualification and cessation of tenure of nominated members. The general provisions in section 231(1) must be subject to the more specific provisions i.e. sections 89 and 90 on the subject matter. The latter must override the former. These provisions cannot be rendered irrelevant by section 231(1) of the Constitution in the matter of cessation of membership which is specifically dealt with by sections 89 and 90 of the same Constitution.

Thus a power, if any, granted to the President under section 231(1) to revoke any appointment cannot apply to a nominated member since this is only a general power on appointments and the Constitution has more specifically provided for the grounds on which the tenure of a nominated

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member in the National Assembly ceases. Those particular provisions prevail over the general provision. In effect the President has no power to revoke a nomination under section 231(1) nor does he have such power or authority under sections 89 or 90 as revocation is not therein provided for as one of the ways in which membership of a nominated member may come to an end in the National Assembly.

Section 20 of the Interpretation Act, which was also relied upon by the learned Attorney General provides as follows:-

> "where by or under any Act a power to make any appointment is conferred, then, unless the contrary intention appears, the authority having power to make the appointment shall also have power to suspend or dismiss any person appointed by it in exercise of the power"

Whilst this provision is, unlike section 231(1), expressly made applicable to "any appointment" the power to appoint is only recognised in this provision to include the power to dismiss where the contrary intention does not appear to be the case. Is there such a contrary intention in the instant case? The Court takes the view that there is indeed such an

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intention. The Court finds and holds that such a contrary intention is manifest in the specificity of the provisions of sections 89 and 90 and the very general nature of section 231(1) of the Constitution and that, accordingly, the power to dismiss under section 20 of the Interpretation Act is overridden by the provisions of sections 89, 90 and 91 of the Constitution in the matter of cessation of membership of the House. In the face of the said express Constitutional provisions as well as in the application of the rule generalia specialibus non derogant the implied power to dismiss provided for under section 20 of the Interpretation Act cannot apply to nominated members of the House.

It has also been contended by the respondents, in order to redress an alleged imbalance in the status of elected members who can be recalled from the National Assembly by their constituents under an Act made by the National Assembly pursuant to section 92 of the Constitution, the Court should imply a similar power of 'recall' or 'revocation' of the seat of nominated members by the President. The Court takes judicial notice that no such Act has been enacted and thus no such powers of recall currently exists and therefore there is no 'imbalance' to redress. Even if such a power of recall were to exist in law, it would provide no grounds for the courts to imply such a similar power in the case of nominated members in the absence of express provision. Section 88 of the

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Constitution, whilst granting the President the power to nominate five members of the National Assembly, does not provide for any power of revocation of such nomination by the President. The Court finds the omission to be not fortuitous but deliberate. Provisions authorising appointment by the executive have generally, where it is intended to vest the same authority with the power of termination or revocation, expressly provided for such a power, as in the case of offices referred to earlier in the judgment. The omission in section 88 of the Constitution, and indeed in other provisions, is intended to buttress the point that a nominated member of the National Assembly ceases to hold office only in accordance with the provisions of sections 89, 90 and 91 of the Constitution, and not by any act of revocation by some other person or authority. For the Court to imply such a power of revocation for any reason would engage the Court in the function of legislating, rather than interpreting the law. Legislation is a function of others, not of the courts. And it is best left to those others. Furthermore the courts should be cautious, indeed loath, to imply powers for the executive in the absence of express provision where, as in the instant case, the exercise of such powers would be to the disadvantage of the citizenry and with no demonstrated public interest to protect.

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The Court, in deciding this case, is guided not only by the letter of the Constitution but also by the spirit and purpose underpinning the system of governance provided for by the 1997 Constitution. The system is based on the principle of separation of powers between the three organs of state i.e. the Executive, the Legislature and the Judiciary. Although not always a neat and total separation the principle of governance is fundamental to the democratic system and the maintenance of the rule of law. In the case of the Judiciary it is secured inter alia by constitutional provisions on the independence of judicial officers and the security of tenure of judges. In the case of the legislature, the extensive constitutional provisions on the qualifications, disqualifications and tenure of members of the National Assembly together with the immunity they enjoy for their words and actions as such are crucial for their independence in the discharge of their functions. To assert that nominated members, once appointed, hold office at the pleasure of some other person or authority would be a gross violation of both the letter and spirit of the Constitution and undermine the independence of such members.

Accordingly and having regard to all the circumstances of the case, the court finds, holds and declares that the purported termination of the plaintiff's membership of the National Assembly through an Executive Decision communicated to her by letter reference **PR/C/66/VO14 (66-**

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Eoc) dated 25th February 2019 is unconstitutional, invalid, null and void and of no effect; that the plaintiff is accordingly a member of the National Assembly her seat not having been vacated as provided by law; and that the purported nomination of the 3rd defendant, Foday Gassama, as a member of the National Assembly is null and void and of no effect.

Whilst the court is precluded, for reasons stated earlier, from granting restraining orders against the first, second and fourth defendants, the situation of the third defendant **Foday Gassama** is different at this stage of the case. There is no longer any presumption of validity of nomination in his favour in the light of this judgement. His personal conduct, if unrestrained, is capable of violating and undermining the judgement of this court. Accordingly the third defendant, Foday Gassama, is hereby ordered not to, in any form or manner, act or present himself as a member of the National Assembly.

There will be no order as to costs.

(Signed)

Hon. Hassan B. Jallow

Chief Justice

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I agree (Signed)

Hon. Justice G.B.S. Janneh (JSC)

I agree (Signed)

Hon. Justice R.C Sock (JSC)

I agree (Signed)

Hon. Justice A.D Yahaya (JSC)

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I agree (Signed)

Hon. Justice C.S Jallow (JSC)