IN THE SUPERIOR COURTS OF THE GAMBIA

IN THE COURT OF APPEAL OF THE GAMBIA

CIVIL APPEAL NO: GCA 046/2019

IN THE MATTER OF THE COMMISSION OF INQUIRY INTO THE FINANCIAL ACTIVITIES OF PUBLIC BODIES, ENTERPRISES AND OFFICES, AS REGARDS THEIR DEALINGS WITH FORMER PRESIDENT YAHYA A.J.J. JAMMEH AND CONNECTED MATTERS

AND

IN THE MATTER OF SECTIONS 200, 204(1), (2) & (3) OF THE CONSTITUTION OF THE REPUBLIC OF THE GAMBIA, 1997

BETWEEN:

M.A KHARAFI & SONS LIMITED ..... APPELLANT/APPLICANT

AND

THE ATTORNEY GENERAL ..... RESPONDENT

CORAM:

HON. JUSTICE A. BAH PCA
HON. JUSTICE O.M.M.NJIE JCA
HON. JUSTICE B.V.P. MAHONEY

APPEARNACES: C.GAYE FOR THE APPELLANTS/APPLICANTS
A. CEESAY AND M.B. SOWE FOR THE RESPONDENT

DATED: 1ST JUNE 2020

LEAD RULING BY HON. JUSTICE O.M.M.NJIE JCA

By a Notice of Appeal filed in this court on the 26th June 2019, the appellants/applicants seek to challenge the adverse findings of the Commission of Inquiry into the Financial Activities of Public Bodies, Enterprises and Offices as regards their dealings with Former President Yahya A.J.J.Jammeh and connected matters.

The relevant Notice of Adverse Findings being contested contains these conclusions:

Considering all the circumstances the Commission strongly recommends a just solution as follows:

1. Of the USD7,367,426, Ex-President Jammeh is liable to pay USD5 Million to the Government; and
2. Kharafi USD2, 367,426 to Government plus interest at 5% per annum from 30th June 2004 to 29th March 2019. After payment of its said liability Kharafi's said lease over Kairaba is to remain unchallengeable.
3. The state cannot manage Kairaba well and should seek monetary compensation rather than the asset itself.
4. If the State takes over Kairaba after fifteen years, it might send a wrong message to future investors about the security of their assets in the Country.

In respect of the same appeal, on the 26th June 2019, the appellants/applicants filed a Notice of Motion which bears these prayers:

1. An order for stay of execution of the Adverse Findings and Recommendations made against the Appellant/Applicant by the Commission of Inquiry into the financial activities of public bodies, enterprises and offices as regards their dealings with former President Yahya A. J.J. Jammeh and connected matters dated the 29th March 2019 pending the determination of this appeal to The Court of Appeal of The Gambia.

2. Such further orders as this Honourable Court may deem fit to make under the circumstances.

The Motion is supported by an affidavit deposed to by one Omar Joof, a legal Clerk in the Chambers of the applicants' Counsel and exhibited to it are the said Notice of Adverse Findings and the Notice of Appeal. In opposing the Motion, the respondent filed an affidavit in opposition deposed to on the 21st October 2019 by one Lamin S Jobarteh a State Counsel at the respondent's Chambers.

To argue the Motion for Stay of Execution, the applicants' Counsel filed a brief dated 23rd December 2019 and the respondents' Counsel replied to it by a brief of argument dated the 18th February 2020.

After the said briefs were adopted and the matter set for ruling, the court on its own accord, bearing in mind the legal issues thrown up by the motion for stay of execution, identified two main issues and in accordance with the law and the practice of the Court, invited Counsels on both sides to file briefs of argument in relation to those supplementary issues. That procedure, in my opinion, is in tandem with the dictum of Lord Clyde in the Privy Council case of **Njie (No 2) v Cora (No2) [1997-2001] GR 258 at 261** where his Lordship said this:

"In such circumstances before proceeding to found on it the parties should have been given the opportunity to make such observations as they may have wished to make on the point"

Those issues identified by the Court itself, broadly speaking, are these:

1. Whether the adverse findings or recommendations of a Commission of Inquiry can, as a matter of law, be executed with or without a Government White Paper and whether or not a Government White Paper is a legal instrument.

2. Whether an application for stay of execution of the adverse findings and recommendations of a Commission of Inquiry should come to the Court of Appeal as an original as opposed to a repeat application in view of Sections 202(2) and 204 of the Constitution and Rule 32 of the Rules of this Court.

The two sides in this appeal subsequently filed and exchanged briefs or argument on those two issues.

On issue 1 set out above, Counsel for the applicants submitted that the adverse findings or recommendations of a Commission of Inquiry can indeed be executed with or without a White Paper and that there is no requirement under the Constitution that a White Paper ought to be publish before a Commission's report can be executed, referring to the Ghanaian case of **Republic v Charles Wereko-Brobbey & Kwadwo Okyere Mpiani AC/2010** which, he argued, held thus:

"The Government White Paper is a tool of participatory democracy not unalterable policy commitment. A White Paper performs the dual role of presenting firm Government Policies while at the same time inviting opinions upon them."

Counsel further submitted that the requirement that is stipulated in the Constitution is for a report to be published by the Government after the Commission of Inquiry submits its report to them.

On the sub-issue of whether or not a White Paper is legal instrument, Counsel for the applicants submitted that it is a Government Notice issued pursuant to **Section 203 of the Constitution in that Section 3 of the Interpretation Act Cap 4:01 Volume 1 Revised Laws of The Gambia 2009** provides as follows:

"A Government Notice means any public announcement not of a legislative character made by or by command of the President or by a Minister or public officer"

Counsel also referred to **Sections 202(1) and 203(a) of the Constitution**. He submitted that the legal status of a White Paper is to show Government's position regarding the findings and recommendations made by a Commission and went on to rely on the Ghanaian case of **Quayson v AG [1981] CA GLR 295 wherein** it was held that:

"The Government is not bound by the findings and recommendations of a Commission of Inquiry; it was equally not permissible in law for Government to purport to act on a finding or recommendation when none existed."

On the same issue 1 of whether the adverse findings or recommendations of a Commission of Inquiry can be executed, Counsel for the respondent/Attorney General answered that the adverse findings or recommendation of a Commission of Inquiry cannot be executed without a White Paper, placing reliance on **Sections 203 and 204 of the Constitution**.

Counsel further submitted that the said adverse findings or recommendations are merely advisory and not binding and he cited the case of **The State V Abdoulie Conteh [2002-2008] 1 GLR 150 at 177** where it was stated thus:

"The report of the Commission of Inquiry is not a decision but consists of recommendations only. The inconclusiveness of the findings and recommendations of the Commission of Inquiry arise from the fact that the proceedings were investigatory and that Government still has to decide whether or not to take action on them."

Counsel for the Attorney General made the clarification that the findings of a Commission of Inquiry are treated as a judgment only for the purpose of an appeal. He further relied on our Supreme Court case of **Feryale Ghanem v Attorney General, Civil Suit No. SC 001/2018, a ruling delivered on the 5th June 2018**, wherein it was held that a Commission of Inquiry being a creature of the executive is not an adjudicatory body; its findings and recommendation are subject to Government approval as the outcome of its work is determined by the reaction of the President of the Republic.

Counsel also cited the Sierra Leone Court of Appeal case of **Continental Commodities v Attorney General [2006] SLCA 2.**

Therefore, for Counsel for the respondent, the findings or recommendations of a Commission of Inquiry are subject to the publication of a White Paper and cannot be acted upon or executed without it.

On the second issue identified by the court as to whether an application for stay of execution ought to come to this Court as an original as opposed to a repeat application, Counsel for the applicants referred to **Section 202(2) and 204 of the Constitution and Rule 32 of the Rules of this Court** and submitted that although a Commission of Inquiry is not a Court of law, for the purposes of the said provisions it may be regarded as a Court in fulfilment of the conditions mentioned in the said **Section 202(2) and Rule 32.**

Counsel submitted that because the Commission of Inquiry had a limited life span and is now non-existent, the provisions of **Rule 32** on repeat application cannot apply to its findings.

As to the notion of applying for a stay of execution at the High Court, Counsel posited that cannot in law be done as the High

Court did not make the findings and recommendations and therefore it does not have the jurisdiction to grant a stay of execution in respect of them.

Counsel for the applicants also made the point that by virtue of the provisions of **Section 204 of the Constitution** making Commission findings appealable to this Court, applications for their stay of execution should, as of right, be made to this Court as well.

On the same issue, Counsel for the respondent/Attorney General on the other hand, referring to **Rules 31 and 32 of the Rules of this Court** submitted that an application for stay of execution of the findings or recommendation of a Commission of Inquiry ought to come to this Court as an original application, the reason being that once a Commission submits its report, it ceases to exist.

Counsel for the respondent also made reference to this Court's recent decision in the case of **Toni Ghatas v The Attorney General, Civil Appeal No. 046/2019, a ruling delivered on the 4th March 2019** and where an original application for stay of execution of the findings of the same Commission of Inquiry that is under consideration here was granted by another panel of this Court.

I will now turn to my own analysis and conclusion on the first issue set out by the Court.

Let me at the onset state that because of the legal requirements that need to be met for an application for stay of execution to be granted, it is imperative that the court resolves the first issue it set out to see whether it is actually necessary to deal with the substantive application for stay of execution itself.

It can clearly be seen from the Notice of Adverse findings before the Court that what the applicants are seeking a stay of execution of, is the recommendations (albeit strong ones) of the said Commission of Inquiry. It was precisely for that reason that the

court itself asked the question whether the adverse findings or recommendations of a Commission of Inquiry can, as a matter of law, be executed, with or without a Government White Paper.

The Court posed that question because ordinarily it is judgments or orders of a Court of law that can, as a matter of law, be executed.

The applicant has, however, applied to the court for an order for stay of execution of the adverse findings and recommendations of a Commission of Inquiry.

In his brief of argument in support of application for stay of execution, Counsel identifies this classic issue for adjudication by the court:

"Whether the appellant/applicant has placed sufficient material, documentary or otherwise, before the court to warrant the Court to exercise its discretion in the applicant's favour by the grant of a stay of execution."

The reason given by the applicants for needing an order of stay of execution is that in the White Paper that followed the Commission's adverse findings and recommendations, the Government is demanding payment of the sum of US$2,367,426.00 plus interest within 30 days. The applicants also lament that the Government is entitled to enforce any judgment in its favour but the applicants would not be able to do the same.

Counsel for the applicants also expressed the fear that unless the court grants them a stay of execution, the Government will attach the Kairaba Beach Hotel or put it under receivership.

In support of their application, the applicants rely on various case law in this jurisdiction such as **Meridien BIAO Bank (Gambia) Ltd v SSHFC and similar cases** in the **1997-2001 Volume of The Gambia Law Reports** and the relatively more recent cases such as

Bai Matarr Drammeh & Others v Deborah Hannah Forster & Others and so on in the 2002 – 2008 Volume 2 of The Gambia Law Reports.

I hasten to point out that all the said cases being relied on by Counsel, together with the principles enunciated therein, are cases dealing with stay of execution of Court orders or judgments and not with stay of execution of the adverse findings or recommendations of Commissions of Inquiry.

The power of the High Court and, on a repeat application, the Court of Appeal, to grant a stay of execution is derived from the Rules of the **High Court, and Order 43 Rule 18, and Sub-rule (1) thereof states as follows:**

"The Court may, at or after the time of giving judgment or making an order, stay execution."

That rule therefore refers to judgments and orders and nothing else, certainly not a finding or recommendation of a Commission of Inquiry. It goes without saying that judgments or orders of Courts of law are in themselves capable of being executed and that all that needs to done after an order is made in favour of party is for him or her to have issued the appropriate writ of execution and same forwarded to the Sheriff for execution. How the Sheriff operates is guided by law. His or her office is established by **Section 3 of the Sheriff's and Civil Process Act 1992 Cap. 9:01** which stqates thus:

"There is hereby established within the Judicial Service the office of the Sheriff."

As to whom the Sheriff is answerable, **Section 4(4) of the same Act states:**

"The Sheriff shall, with respect to the proper performance of his or her duties be directly accountable to the Chief Justice."

On how the Sheriff should perform his or her duty, **Section 7 of the Act provides:**

"The Sheriff shall enforce judgments or orders of court in a manner provided by the Rules of Court."

Thus, by necessary implication, reading the said Act, the Sheriff shall only enforce judgments and orders of court and nothing else.

Also, pertinently, in dealing with the meaning of execution, **Halsbury's Laws of England 3rd Edition Volume 16 at page 2** contain these words:

"The word execution in its widest sense signifies the enforcement of or giving effect to the judgments or orders of courts of justice. In a narrow sense, it means the enforcement of those judgments or orders by a public officer under the writs of fieri facias, legit, capias, sequestration, attachment, possession, delivery, fieri facias de bonis ecclesiasticis, etc."

Besides those writs, **Halsbury's** also mentions other analogous methods of enforcing judgments and orders such as garnishee proceedings and charging orders.

Again, importantly, with regards to stay of execution, **Halsbury's (supra) at page 34 has this to say:**

"When a judgment or order is for the payment of a sum of money or costs, the court may stay execution until such time as it thinks fit **(R.S.C Ord. 42, r. 17 (1) (b);** it has the inherent jurisdiction over all judgments or orders which it has made, under which it can stay execution in all cases either for a definite or unlimited period."

Therefore, clearly, as far as execution and stay of execution are concerned, the law, both in this Country and in England refer only to judgments and orders and nothing else. Now, are the adverse findings or recommendations of a Commission of Inquiry under our laws judgments or orders? I do not think so.

As I alluded to in this Court's unreported ruling delivered on the 18th January 2018 in the case of **Mohamed Bazzi v The Commission and The Attorney General GCA 029/2017,** The Commission Inquiry we are dealing with here, as contained in **Legal Notice No. 15 of 2017**, was setup pursuant to the powers vested in the President of The Republic under **Section 200 of The 1997 Constitution and the Commission of Inquiry Act Cap.30:01**.

On the functions and powers of a Commission set up under the provisions of the Constitution aforementioned, **Section 202(1)** states that a Commission of Inquiry shall –

(a) Make a full and impartial investigation into the matter in respect of which the Commission is established; and
(b) Furnish in writing a report on the results of the inquiry, including the statement of the reasons leading to the conclusions of the Commission.

Similarly, on the duties of Commissioners, **Section 7 of the Commission of Inquiry Act** provides that the Commissioners, after taking the oath prescribed under **Section 5 of the Act** shall –

(a) Make a full, faithful and impartial inquiry into the matter in respect of which the Commission is established, and conduct the inquiry in accordance with the directions, if any in the Commission;
(b) In due course furnish to the President, in writing, the results of the inquiry, including a full statement of the proceedings

of the Commission, and of the reasons leading to the conclusions arrived at or reported.

Additionally, as enunciated by the Hon Chief Justice Hassan B Jallow in the Supreme Court case of **Feryale Ghanem v Attorney General Civil Suit No. SC: 001/2018, ruling delivered on the 5th June 2018:**

"The Commission is not a law making body; it has no legislative powers and does not fall within the legislature; it is an investigative, fact finding body which makes findings and recommendations that are subject to the approval of the government. Whilst the Commission has a duty to act fairly, impartially and independently it is nonetheless not an adjudicatory body. It is not a Court of law – superior or otherwise."

It is therefore clear from the said provisions of the Constitution and the Commission of Inquiry Act, and the said dictum of the his Lordship the Chief Justice that a Commission of Inquiry does not adjudicate between the State and a person who appears before it but that it carries out an investigation into the issues and matters that are within its terms of reference as per the legal instrument that established it. Its report, submitted to the Executive Branch of government, is neither a judgment nor an order which is capable in of itself of being executed as perceived by the law.

Following on from that, the next question that ought to be asked is what is the legal status of a Commission of Inquiry's written pronouncement at the end of its investigative work? As indicated by the Hon. Chief Justice in the **Feryale Ghanem case cited above, based on Section 204** of the Constitution, what a Commission of Inquiry comes up with at the end of its legal mandate is that it makes findings and recommendations that are subject to the approval of the Government of the day. Thus, a Commission of Inquiry does not and legally cannot render a judgment or a final

order. In other words, a Commission of Inquiry cannot legally render a binding decision which may be executed or enforced as if it were a judgment or order.

From the above analysis, it necessarily follows that the provisions in Rules giving a Superior Court the power to grant a stay of execution of a judgment or order does not apply to a finding or recommendation emanating from a Commission of Inquiry as such a finding or recommendation is not a judgment or order as envisaged by the law. See also the case of **The State v Abdoulie Conteh [2002-2008] 1 GLR 150 at 177 where Agim PCA** (as he then was) said this:

"The adverse findings and recommendations of the Commission of Inquiry are merely advisory and not conclusive and binding. See **Governor of Oyo State v Folayan [1995] 9 SCNJ 50."**

As also stated by the Hon. Chief Justice in Feryale Ghanem (supra), the Commission of Inquiry is part and parcel of the Executive arm of the government of The Gambia; it is therefore not part of the Judicial Arm of the government and has no adjudicatory authority.

As per **Section 120(2) of the 1997** Constitution, I quote "the judicial powers of The Gambia are vested in the Courts and shall be exercised by them according to the respective jurisdiction conferred on them by law."

Consequently, my view is that the adverse findings or recommendations of a Commission of Inquiry cannot be executed or enforced by the State; they are not judgments or orders of an adjudicatory body and therefore applications for stay of execution as provided under the rules of court cannot legally be applicable to them.

The view I expressed above is in line with that of the Indian Supreme Court in the case of **Shri Ram Krishna Dalmia v Shri Justice S.R. Tendulkar & Others [1959] SCR 279**, wherein the said Court held as follows:

".... the only power that the Commission has is to inquire and make a report and embody therein its recommendation. The Commission has no power of adjudication in the sense of passing an order which can be enforced proprio vigore. A clear distinction must, on the authorities, be drawn between a decision which, by itself, has no force and no penal effect and a decision which becomes enforceable immediately or which may become enforceable by some action being taken."

As stated earlier herein, in this jurisdiction too, the role of a Commission of Inquiry is not to adjudicate but it is, as **per Section 202(1) (a) of the Constitution and Section 7(a)** of the Commission of Inquiry Act, to investigate or conduct an inquiry into the matters assigned to it.

After completing its assignment, a Commission of Inquiry does not render a judgment or make any order, but it is as stated in **Section 202(1) (b) of the Constitution and Section 7 of the Commission of Inquiry Act**, to furnish a report to the President which embodies the reasons for its conclusions on the subject matter concerned.

I hasten to point out, however, that **Section 204(2) of the Constitution** does provide thus:

"A person against whom any such adverse finding has been made may appeal against such adverse to the Court of Appeal as of right as if the finding were a judgment of the High Court; and on hearing of the appeal the report shall be treated as if it were such a judgment."

Clearly, from the Constitution, it is only for the purpose of an appeal that a report of a Commission of Inquiry is looked on or treated by the law as a judgment and not otherwise; certainly not for the purpose of execution that the law would treat it as a decision capable of being executed such that an application for stay of execution can be brought in respect of it. That view is in line with the position stated by this Court in **The State v Abdoulie Conteh** case where again **Agim PCA at 177 said:**

"That is why **S.204 (2) and (3)** grant a special dispensation to a person against whom an adverse finding is made to appeal to this Court. Although upon such an appeal the findings will be treated for the purpose of the appeal as a judgment of the High Court, that does not render it a judgment for all purposes."

However, I am mindful of the pronouncements of this court on the issue of the status of a Commission of Inquiry in the case of **Attorney General v Pap C.O. Secka [2002-2008] 2 GLR 73**. There per Agim PCA (as he then was) at page 86 it was stated thus:

"By virtue of **Sections 200, 202, 204 and 206 of the 1997 Constitution**, the Commission of Inquiry established under the **Section 200 of the 1997 Constitution** is a judicial Commission of Inquiry with investigative and adjudicatory powers and functions. It is in substance an adjudicatory authority. Its exact status in the Gambia judicial hierarchy is the cornerstone for the determination of the question in issue here."

His Lordship went on to say at page 91 that:

"It is obvious that the status of a Commission of Inquiry cannot be determined by reference to **Section 120 of the Constitution** only."

And **Agim PCA at page 93** then said this:

"Since the Commission of Inquiry has all the powers, rights and privileges of a judge of the High Court at trial, and the High Court is listed by **Section 120(1) (a) as a Superior Court**, a fortiori, the Commission of Inquiry is a Superior Court."

However, in the view of the Supreme Court's pronouncement, per The Hon Chief Justice in **Feryale Ghanem (supra),** that a Commission of Inquiry is not a Court of law, superior or otherwise, I take the view that the position stated by Agim PCA, that a Commission of Inquiry is a superior court, has in effect been overturned by the Supreme Court and we are bound by the principle of stare decisis to abide by and apply the position of the apex court in that regard.

Also, to my mind, the powers of the High Court given by the Constitution to the Commission is limited to the manner it conducts its investigations and to the making of interim orders. To buttress that point I would again refer to another dictum of the **Chief Justice in Feryale Ghanem (supra)** where he said:

"A Commission of Inquiry is thus an instrument of good governance designed to enable the state to investigate expeditiously and effectively matters of public interest and concern and to make remedial measures for the public good. Whilst it is not a court of law, a Commission should be able to exercise some of the powers of a court if it is to discharge its mission effectively. Hence the vesting of the powers of a High Court Judge at trial in the Commission in respect of the matters set out in **Section 202(2) of the Constitution."**

I will now deal with the sub-issue of what a White paper is; in other words, is it a legal instrument properly so-called. My view is that a

White Paper is a written announcement or statement of government policy on a particular issue of public interest.

In the **Continental Commodities and Services Company Limited** case (supra), the Court of Appeal of Sierra Leone, per Sir John Muria JA, at page 5, had this say on the matter, with which I agree:

"The status of a Government White Paper had already been decided by this Court in **Matilda Victoria Sesay v Attorney General and Minister of Justice (4th June 2004) CA Misc App.7/2004**, where it was held that a Government White Paper does not form part of the Report of the Commission of Inquiry and that the right of appeal under **Section 149(4)** is against and adverse finding in the Report of the Commission of Inquiry and not against adverse statements contained in the Government White Paper."

In this jurisdiction, **Section 203(a) of the Constitution provides** that:

"the President shall within six months (of receipt of the report of a Commission of Inquiry) publish the report and his or her comments on the report, together with a statement of any action taken, or the reason for not taking any action, thereon..."

So in the context of a Commission of Inquiry, a White Paper fulfils the Constitutional requirement for the President of the Republic, in publishing the Commission's report, to also publish a statement of any action taken or the reason for not taking any action on the Commission's report.

For that reason, I am in agreement with Counsel for the applicant's submission that a White Paper is akin to a government notice published to satisfy the requirements of **Section 203 of the Constitution.** That description fits the definition of a government

notice found in **Section 3 of the Interpretation Action which states:**

"A Government Notice means any public announcement not of a legislative character made by or by the command of the President or by a Minister or public officer"

A White Paper certainly does not emanate from the Commission of Inquiry, and it is, as a result, not part of the report of the Commission; it is not of a legislative character and it is certainly not a judgment or order of a court of law. Therefore, a White Paper published pursuant to a Commission's report does not make the latter capable of being executed any more than the Commission's report on its own can be executed as if were a judgment or order of a court of law or tribunal.

The reference in **Section 203** of the Constitution to actions that may be taken by the President to my mind means actions that the Executive branch of government is legally able to take as empowered by the Constitution or other laws. It certainly does not mean the exercise of judicial or quasi-judicial powers by the Executive in the form of pronouncements in a White Paper.

If, following the publication of a report of a Commission of Inquiry, together with any adverse findings and or recommendations, the Executive intends to have imposed any penalty or to benefit from any relief that it would ordinarily not be entitled to without a judgment or Court order, then in my view the Executive must take the requisite Court action, whether Civil or Criminal, in order to have those penalties imposed or to benefit from those remedies that it may desire.

I say this because since the Commission's report, with or without a White Paper, cannot be enforced/executed as would be the case a

judgment or court order, the same cannot be relied on to impose the requisite sanction.

If the intention was for a Commission of Inquiry to have the power to impose criminal penalty or to grant civil remedies which could be executed/enforced, then in my view, that would have been clearly spelt out in the Constitution or the Act.

That is essentially what was done in Ghana. I say that because in the unreported Ghanaian case cited by Counsel for the applicants - **The Republic v Wereko-Brobbey & Another dated the 10th August 2010, Samuel Marful-Sau JA (as he then was), siting as a High Court Judge**, stated thus:

"Before the 1969 Constitution, findings of Commissions of Inquiry were prima facie evidence of the facts found and the persons affected suffer no liability until the Attorney General decided to prosecute and secure a conviction.

In **Akainyah and another v The Republic [1968] GLR 548 at 555, Apaloo JA (as he then was)** stated that no liability to suffer any penalty attached to any person against whom the Commission makes adverse finding until the Attorney General, in exercise of the power conferred on him by **Section 4 of the Act**, invokes the judicial powers of the courts and procures a conviction.

Unlike the findings of the pre-1969 Commission, the post 1969 Commissions attracted automatic Constitutional sanctions until the person affected succeed in setting aside the findings on appeal. For example **under article 94(2)(d) of the 1992 Constitution** a person, being a public officer who is found by a Commission of Inquiry to have defrauded the State or misused or abused his office, or wilfully acted in a manner prejudicial to the interest of the State and the findings have not been set aside on appeal or judicial review, shall not be qualified to be a member of parliament. Further,

by article 62 of the 1992 Constitution, a person affected by the adverse finding of a Commission of Inquiry shall not be qualified for election as the President of Ghana.

By these Constitutional arrangements the Attorney General is not required to take any legal steps to secure the criminal liabilities to be suffered by persons affected by the adverse findings or reports of the Commissions of Inquiry, which are deemed to be judgments of the High Court against the persons affected and not just a prima facie evidence."

In this jurisdiction, our Constitution or other laws do not provide for the suffering of liabilities by persons against adverse findings are made by a Commission of Inquiry. Therefore, after such findings are made, the Attorney General, as was the case in Ghana pre-1969, would have to take the appropriate legal steps, through the law courts, to ensure that such liabilities are suffered by those persons.

There is of course also nothing legally wrong with the Executive, pursuant to the adverse findings of the Commission, to demand for payment of monies found to be outstanding against those persons, before initiating court action if there is no out of court settlement

Let me also point out here that to be fair to the members of the Commission Inquiry, under the Chairmanship of Mr S.B.S Janneh, they have rightly confined themselves to their legal mandate in this case, by not purporting to make a binding decision or order, in that they have clearly indicated in the Notice of Adverse Findings exhibited to the application that they were merely making strong recommendations to the President of The Republic.

I therefore also agree with Counsel for the respondent/Attorney General when he submitted in his brief of argument that the adverse findings or recommendations of a Commission are merely

advisory and not binding. However, the so-called execution he alluded to after the issuance of a white paper pursuant to **Sections 203 and 204 of the Constitution** is the actions that the executive can legally take such as dismissals from employment, prosecutions, and other court actions, but not executions as known to the law as mentioned earlier herein.

Counsel for the respondent has relied on this Court's decision in **Toni Ghattas v Attorney General (supra),** an appeal emanating from the same Commission of Inquiry as this appeal and in which a different panel of this Court entertained and granted an application for stay of execution. I will, with all due respect, depart from that decision in that there, the legal issue concerning the enforceability in law of a Commission of Inquiry's recommendation or finding was neither argued nor adjudicated upon and consequently that ruling is not, with respect, of any assistance in dealing with that issue.

In the result, I hold that the application is improper, as an application for stay of execution cannot legally be brought in respect of Commission of Inquiry's recommendation or finding as same, with or without a White Paper, is not a judgment or court order lawfully capable of being executed.

In view of that position, it would be an exercise in futility to deal with the Courts second issue of whether an application for stay of execution of the adverse findings and recommendations of a Commission of Inquiry should come to the Court of Appeal as an original as opposed to a repeat application since either way such an application would legally be incompetent

The application for stay of execution is therefore hereby dismissed.

There shall be no order as to costs.

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HON.JUSTICE O.M.M. NJIE
JUSTICE OF APPEAL

SUPPORTING RULING OF HON. JUSTICE A. BAH, PCA

I am in agreement with the well-reasoned lead ruling of my Learned Brother Hon, Justice O.M.M Njie JCA and the conclusions arrived at therein.

Indeed the position arrived at by this Court in this matter is a novel one. A position, which was well considered in the discussions and deliberations leading to this decision by Hon Justice O.M.M Njie JCA. Let me also thank the counsel on both sides especially that of the Appellant for the helpful contributions by providing useful authorities for the consideration of the Court in arriving at its present position in this matter.

As stated in the lead judgment, the application under determination is for a stay of execution of the adverse findings and recommendations made against the Appellant/Applicant by the Commission of Inquiry into the Financial Activities of Public Bodies, Enterprises and Offices as regards their dealings with Former President Yahya A.J.J Jammeh and connected matters. The said adverse findings are attached as 'OJ1' to the affidavit in support of the motion seeking for the stay of execution and the terms of the 'just solution' strongly recommended by the Commission under the circumstances and contained therein are already reproduced in the lead judgment and I need not repeat same here.

The said 'just solution' recommended by the Commission being mere recommendations no matter how strong, agitated the mind of the Court as to the legal implication of such recommendations and whether the Court could grant a stay of execution of the same as a matter of law when such findings and recommendations are not

equated to court orders and judgments. Such legal issues so thrown up warranted the Court to suo motu raise two issues for consideration first and invited the parties to address the Court on it, as courts are enjoined to do in such circumstances. See: ***Alhaji (Chief) S.D. Akere & Ors v. The Governor of Oyo State & Ors (2012) LPELR 7806 (SC): Longe v FBN Plc (2010) 6NWLR (Pt. 1189) 1 SC.***

The said two issues if I make reproduce are as follows:

1) Whether the adverse findings or recommendations of the Commission of Inquiry can, as a matter of law, be executed with or without a Government White Paper and whether or not a Government White Paper is a legal Instrument.

2) Whether an application for stay of execution of the adverse findings and recommendations of a Commission of Inquiry should come to the Court of Appeal as an original as opposed to a repeat application in view of **Sections 202(2) and 204 of the Constitution and Rule 32 of the Rules of this Court**.

Clearly, the above issues touch on the jurisdiction of the Court to entertain and determine the application for stay of execution and needs to be resolve first to avoid a voyage in futility. See ***Edward Graham v. Lucy Mansah (2002-2008) 1 GLR p22.*** The determination of the first issue in the lead judgment and to which I concur, has however rendered redundant a determination of the second issue. It is therefore to the first issue that I shall add my piece.

A resolution of the first issue calls for a determination first and foremost of the status or effect of the adverse findings and recommendations of a Commission of Inquiry. The issue has been laid to rest by this Court in its decision in ***The State v Abdoulie Conteh (2002-2008)1 GLR 150 at 177*** where the Court clearly pronounced as follows:

> *"The report of the Commission of Inquiry is not a decision but consists of recommendations only. Government is at liberty to*

take action or not take action or accept the recommendations. See ***S. 203(a) of the 1997 Constitution, Olagunju v Oyeniray & Ors (1996)6SCNJ 55, Military Governor of Imo State v Nwauwa*** *(supra). The adverse findings and recommendations of the Commission of Inquiry are merely advisory and not conclusive and binding. See* ***Governor of Oyo State v Folayan (1995) 9 SCNJ 50.*** *This certainly cannot ground the plea of res judicata which is based on a binding and conclusive verdict. The inconclusiveness of the findings and recommendations of the Commission of Inquiry arise from the fact that the proceedings were investigatory and that Government still has to decide whether or not to take action on them. The inconclusiveness does not affect the efficacy of the findings should Government decide to act on them. That is why* ***S.204 (2) and (3) grants*** *a special dispensation to a person against whom an adverse finding is made to appeal to this Court. Although upon such an appeal, the findings will be treated for the purpose of the appeal as a judgment of the High Court that does not render it a judgment for all purposes. It certainly cannot be regarded as judgment for the purpose of res judicata."*

Clearly therefore, findings or recommendations of a Commission of Inquiry (as in this case) are merely advisory and not binding nor conclusive. They arose out of an investigative proceedings as provided in ***Section 202(1) of the Constitution 1997*** which provides that the Commission of Inquiry shall:-

a) Make a full and impartial investigation into the matter in respect of which the Commission is established; and

b) Furnish in writing a report on the results of the inquiry, including the statement of the reasons leading to the conclusions of the Commission.

See also ***Section 7 of the Commission of Inquiry Act supra.***

Undoubtedly therefore, the findings and/ recommendations of a Commission of Inquiry being inconclusive are subject to the approval

or acceptance of the executive (who is even at liberty to reject them) before any action could be taken upon them. As rightly argued on behalf of the Respondent, such findings and recommendations are subject to the consideration and determination of the President in terms of ***Section 203 of the Constitution, 1997***. Indeed by virtue of the said ***Section 203***, on receipt of the report of a Commission of Inquiry-

a) The President shall within six months publish the report and his or her comments on the report, together with a statement of any action taken, or the reason for not taking any action, thereon; or

The above constitutional requirement buttresses the fact that the findings and/recommendations of a Commission of Inquiry simplicita are not conclusive and binding. They are subject to the approval of the Government and who also determines its outcome as was firmly establish by our Supreme Court in its decision in **Feryale Ghanem v Attorney General (supra)** where His Lordship the Honourable Chief Justice Hassan B. Jallow has laid the issue to rest when he pronounced as follows:

> *"The Commission is not a law making body; it has no legislative powers and does not fall within the legislature; it is an investigative, fact finding body which makes findings and recommendations that are subject to the approval of the Government. Whilst the Commission has a duty to act fairly, impartially and independently, it is nonetheless not an adjudicatory body. It is not a court of law superior or otherwise. The final outcome of its work is determined by the President..."*

Now the position or the decision of the President on a report of a Commission of Inquiry is communicated to the public by what has come to be commonly known as the "Government White Paper". I shall not deliberate on the status and purpose of a Government White Paper for it has been ably analysed and determined in the lead judgment. Suffice it to say that a Government white Paper does not form part of a Commission of Inquiry report. It is extrinsic to it and

only communicates to the general public the Government's position on the report. Thus any decisions taken or made therein are merely administrative in nature and cannot be appealed against to this Court. It is only the report of a Commission of Inquiry that is deemed as a judgment of the High Court for purposes of appeal against any adverse finding pursuant to ***Section (204) (2) & (3) of the Constitution supra***.

Having affirmed that the adverse findings and/recommendations of a Commission of Inquiry are mere recommendations with no binding force, the question that begs to be answered then is "*whether such findings or recommendations could be executed as a matter of law with or without a Government White Paper*". The arguments canvassed on both sides have been aptly captured in the lead judgment and need no reproduction. The President by virtue of ***Section 203(1)(a) of the Constitution supra*** is not only obliged to publish alongside a Commission's report his or her comments on the report, but to do so together with a statement of any action taken or the reason for not taking any action thereon. What this provision clearly indicates is that the President as argued by both sides is empowered to take action on a report of a Commission of Inquiry even before it is published and or before the issuance of a White Paper.

It is the fear of such an action being taken that has prompted the instant application for a stay of execution of the adverse findings and recommendations of the Commission of Inquiry made against the Appellant/Applicant. The crux of the matter now calls for a determination of the action to be taken by the President. The Constitution is very silent on the nature of action that the President could take on the report of a Commission of Inquiry and its legal effect if any. Bearing in mind that the findings and/or recommendations of a Commission of Inquiry are merely advisory and of no binding effect, it is my considered opinion that any enforcement action taken on them by the government without recourse to the courts of law for lawful enforcement could only be administrative in nature. Such findings and/or recommendations cannot be executed or enforced as a matter of law like ordinary court judgments and

orders without recourse to the law courts. A Government White Paper cannot also vest on them such a legal effect. Their status as mere recommendations remains irrespective of whether a White Paper is issued or not.

Neither the Executive nor a Commission of Inquiry is an adjudicatory body. That is vested in the judicature. The like powers of a judge at trial vested on a Commission of Inquiry must not be over stretched. It is only to enable such a Commission execute its mandate. Hence it is not vested with all the powers of a judge or a court and its report is only treated as a judgment of a High Court for the purposes of an appeal and not for all purposes. If the legislature had intended otherwise, it would have clearly stated so. Likewise if the legislature had intended for a Commission of Inquiry to have the power to make final binding orders and issue penalties and sanctions akin to the courts of law and which could be executed in law, the legislature would have clearly stated so in its enabling legislation.

The term "*Execution*" in its legal context has already been laid to rest in the lead judgment and according to ***Oxford Learner's Dictionary 7th Edition, p.508*** the term "*execution*" *(in Law) means "The act of following the instructions in a legal document."*.....

It is settled that courts' orders and decisions are meant to be obeyed and carried out subject to a stay of execution which is itself an order of court. The person or office empowered under the law to execute or enforce such orders and decisions is the Office of the Sheriff as pointed out in the lead judgment. By virtue of ***Section 7 of The Sheriff and Civil Process Act supra***, "*The Sheriff shall enforce judgments or orders of court in a manner provided by the Rules of Court." The operative phrase herein is "judgments or orders of court"*. It follows therefore, that the Commission of Inquiry not being a court of law, its findings and/recommendations cannot be equated to orders and judgments of the courts which could be executed by the Office of the Sheriff unless stayed by the court itself.

Furthermore, the fact that an appeal lies as of right to the Court of Appeal against the adverse findings of a Commission of Inquiry does

not render such findings to be executory at that stage. Likewise, a Government White Paper simplicita if I may reiterate does not render same executory. Much more would have to be done. Am in agreement with the lead judgment that a White Paper cannot change the status of the adverse findings or recommendations of a Commission of Inquiry from mere recommendations to orders or decisions of a court that could be executed in law. Indeed the doctrine of separation of powers must be respected by each arm of government. The function of each of the three arms are clearly defined and set in our Constitution, the grund norm. Thus any action taken or to be taken by each arm must be within the provisions of the said Constitution, or else it will be declared ultra vires the powers given to that arm of government. See: ***Towoju & Ors v The Governor of Kwara State & Ors (2005) LPELR 5390 (CA)*** which I find persuasive.

I am therefore of the considered judgment that "the any action taken" anticipated in ***Section 203 (a) of the Constitution supra*** on the report of a Commission of Inquiry could only mean in addition to administrative actions that could be taken, initiating the machinery of justice for the enforcement of the findings and recommendations contained in such a report and not resorting to what is commonly term as self-help in breach of the fundamental rights of the persons concerned. Such a report could be used as the basis for initiating a civil action for recovery or criminal prosecution where a person is found to be criminally liable. It is certainly not permissible in our modern law systems and democracies to find a person liable especially criminal liability without first affording such a person the opportunity of a trial before a court of law. One must be mindful that people appearing before the commissions do so as witnesses and not as persons on trial. Thus fair hearing and justice dictates that before they are condemned with penalties and sanctions, they be heard in their defence first.

All said and done, the fact still remains that the mere adverse findings and/recommendations of a Commission of Inquiry not being executory as a matter of law, there is nothing to stay. They are akin to declaratory judgments which cannot be executed and therefore there

is nothing to stay. The only recourse as in this case is to appeal against same.

It is thus for all the above reasons and for the fuller reasons contained in the lead ruling and the analysis in the supporting decision of My Learned Brother B.V.P Mahoney JCA, that I am in full agreement with the conclusion in the lead ruling that the instant application for stay of execution is improper under the circumstances. I too therefore dismiss this application and abide by the order as to no costs.

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HON. JUSTICE A. BAH
PRESIDENT OF COURT OF APPEAL

SUPPORTING RULING OF HON. JUSTICE B. V. P. MAHONEY JCA

I have read the lead Ruling of Hon. Justice O. M. M. Njie JCA and I agree with the conclusions and thorough reasoning stated therein. I also agree with the further reasoning in the supporting decision of Hon. Justice A. Bah PCA.

I believe the misconception and controversy surrounding the execution of Commission of Inquiry decisions arises from the military government during the transition period from the First Republic to the Second Republic. After the 22nd July 1994 takeover, the 1970 Constitution of The Gambia was suspended and the legislature and executive were fused and vested in the Armed Forces Provisional Ruling Council (AFPRC) by Decree No. 1 of 1994: the Constitution (Suspension and Modification) Decree. The Gambia was governed by the military under the AFPRC

which promulgated laws in the form of Decrees which Decrees were made part of the Laws of The Gambia in the 1997 Constitution despite not having been approved by the legislature.

The Commissions of Inquiry Act Cap 30:01 Vol. 5 Laws of The Gambia is the **original law governing Commissions of Inquiry** dated 16th April 1903. Under the Act, the President may issue a Commission of Inquiry to make an inquiry into any matter for which the Commission was established and to furnish the President with a Report including the reasons for conclusions of the inquiry. There are powers to summon and examine witnesses and penalties for refusing to cooperate with the Commission. The Act is silent on the effect of the conclusions of the Commission made in its Report.

The 1970 Constitution of The Gambia made no provisions for Commissions of Inquiry but the 1997 Constitution did. The Commission of Inquiry Act 1903 must be read to conform with the provisions on Commissions of Inquiry in the 1997 Constitution; however the said 1997 Constitution did not provide for the effect of the conclusions of the Commissions of Inquiry or the effect of the Executive's acceptance of the conclusions.

The military government however, during the transition period, issued a **Decree on commissions** called the Public Assets and Properties (Recovery) Act Cap 29:01 Vol. 5 Laws of The Gambia. This Decree gave power to the President to issue Commissions of Inquiry and to furnish the Cabinet with a Report on its findings and orders. The Cabinet in turn would issue a White Paper which is defined in the Decree as the Cabinet's decision which is final and legally binding. In addition to the power to summon witnesses, the Commissions under the Decree have power to make findings and orders for payment to the Treasury and for forfeiture of assets and even prohibition orders from serving in the public service. The Commissions' decisions are not appealable to any Court.

As stated in the lead Judgment, judgments and orders of courts are enforceable as explicitly provided for in our laws. This begs the question: are Commissions of Inquiry courts or judicial tribunals or adjudicatory bodies?

The 1997 Constitution did provide that a Commission shall have the powers of a High Court Judge but only in respect of summoning witnesses, production of documents, examination of witnesses abroad and making interim orders; and for the purposes of an appeal over the findings of a Commission, the report is to be treated as a Judgment. These provisions, however, do not mean that the Commission of Inquiry is a court or makes final enforceable orders or judgments.

This is what Hon. Justice H. B. Jallow CJ stated in the case of **Feryale Ghanem v Attorney General, Civil Suit No. SC 001/2018,** unreported Ruling dated 5th June 2018:

'The Commission is not a law making body, it has no legislative powers and does not fall within the legislature; it is an investigative, fact finding body which makes findings and recommendations that are subject to the approval of the Government. Whilst the Commission has a duty to act fairly, impartially and independently it is nonetheless not an adjudicatory body. It is not a Court of Law – superior or otherwise.'

This pronouncement says it all. See further the decision in **The State v Abdoulie Conteh (2002-2008) 1 GLR 150** quoted from in the supporting decision of Hon. Justice A. Bah PCA. Commissions of Inquiry are investigative bodies and not courts. They do not make final orders or issue judgments when such are vested in the judiciary. The Executive also cannot transform the findings and conclusions of the inquiry into binding and enforceable orders and judgments which would be tantamount to usurping the functions of the Judiciary and a violation of the right to fair hearing and an affront to the rule of law.

The Executive may make administrative decisions as a remedy to cure lapses identified by Commissions of Inquiry but not judicial decisions.

In the final analysis, I fully accept the reasoning in the lead Ruling of Hon. Justice O. M. M. Njie JCA and the supporting decision of the President of the Court of Appeal. The Applicant/Appellant has every right to appeal the findings and conclusions of the Commission of Inquiry to clear its name but neither the Commission of Inquiry nor the Government White Paper can make enforceable judicial orders that are capable of execution – that is in the Judiciary's province. Since there is no enforceable order before this Court capable of execution, there is nothing to be stayed.

HON. JUSTICE B. V. P. MAHONEY JCA
JUSTICE OF APPEAL