

IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE, FINANCIAL & ECONOMIC CRIME DIVISION 2, HELD IN ACCRA ON TUESDAY, THE 26<sup>TH</sup> DAY OF MAY, 2020 BEFORE HER LADYSHIP JUSTICE AFIA SERWAH ASARE-BOTWE (MRS.)

CONSOLIDATED SUITS

SUIT NO: MSFT /0022/2020

KROLL ASSOCIATED U.K. LIMITED  
NEXUS PALACE  
25 FARRINGTON STREET  
LONDON, EC4 4B

} APPELLANT/APPLICANT

VRS.

THE AUDITOR-GENERAL -----RESPONDENT/RESPONDENT  
AUDIT SERVICE  
ACCRA

- AND -

SUIT NO. CM/MISC/0315/2020

1. YAW OSAFO MARFO  
OFFICE OF THE PRESIDENT ANNEX  
RIDGE, ACCRA

2. MICHAEL AYENSU  
MINISTRY OF FINANCE  
MINISTRIES-ACCRA

3. ABRAHAM KOFI TAWIAH  
MINISTRY OF FINANCE  
MINISTRIES-ACCRA

} APPELLANTS

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2020/05/26  
REGISTRAR  
HIGH COURT  
FINANCE & ECONOMIC CRIME COURT  
LAW COURT COMPLEX - ACCRA

4. EVA ASSELBA MENDS  
MINISTRY OF FINANCE  
MINISTRIES-ACCRA

5. PATRICK NOMO  
MINISTRY OF FINANCE  
MINISTRIES-ACCRA

VRS.

THE AUDITOR-GENERAL ----- RESPONDENT  
GHANA AUDIT SERVICE  
ACCRA

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PARTIES: MR. ALBERT TOBIAS HAMMOND REPRESENTS  
THE APPELLANT/APPLICANT (KROLL &  
ASSOCIATES UK LIMITED)

2<sup>ND</sup> AND 3<sup>RD</sup> APPELLANTS IN SUIT NO  
CM/MISC/0315/2020 PRESENT AND  
REPRESENTS THE OTHERS

COUNSEL: MR. YAW OPPONF FOR THE APPELLANTS IN SUIT  
NO. CM/MISC/0315/2020 PRESENT

MR. CHARLES ZWENNES FOR THE  
APPELLANTS/APPLICANTS IN SUIT  
MSFT/001/2020 PRESENT WITH MR. AGGREY  
ORLEANS

MR. VINCENT ODIKRO NYAME FOR THE  
RESPONDENT/RESPONDENT PRESENT WITH MR.  
RICHARD AGBOTAME

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## **RULING**

This is an application brought for and on behalf of Kroll Associates UK Limited, the Appellant/Applicant in Suit No. MSFT/011/2020 seeking special directions in the matter of an Appeal against Disallowance and Surcharge by the Auditor-General under order 54A Rule 8 of C.I.102 and Order 32 Rule (1)(1) of C.I 47 and the Inherent Jurisdiction of this Court.

For ease of reference, the Appellant/Applicant in Suit No. MSFT/0011/2020 may hereafter be referred to as “Kroll”.

## **THE FACTS**

The antecedents of this case as evidenced by the Motion Paper, supporting affidavit and other processes on record are that Kroll caused their lawyers to file a Notice of Appeal containing inter alia Grounds of Appeal.

The antecedents of this application are that on the 20<sup>th</sup> of December, 2019, the Appellant/Applicant herein, being aggrieved with the Disallowance and Surcharge made on them in respect of Certificate No. 2017/2018/MDA1 for the payment of an amount of Five Million Five Hundred and Ten thousand Three Hundred and Fifty-Three Cedis and Seventy-Three Pesewas (GH¢5,510,353.73) by the Respondent (hereafter referred to as “the Auditor-General”, following an audit on the accounts of the Ministry of Finance for the period 1<sup>st</sup> July 2017 to 31<sup>st</sup> December 2018, caused an Appeal to be lodged on the following grounds;

### **GROUND OF APPEAL IN RESPECT OF KROLL**

1. The Respondent came to a wrong finding of facts when he concluded, in the absence of proof before him of performance, that the contract had not been performed.
2. The Respondent acted in breach of the rules of natural justice and violated the Appellant's right to be heard on the fact that the contract had indeed been performed.
3. The Respondent wrongly found the payment to have been made contrary to law, despite the fact that it was made efficiently in exchange for value-for-money service duly and properly rendered by the Appellant as a contractor for services.
4. The findings of the Respondent were not properly so called, as same were made *ultra vires* and in contravention of Articles 187(2), (5) & (6) of the Constitution 1992.
5. The Appellant relies on the presumption of regularity pertaining to the Government's adherence to all the internal processes and Government procedures in the engagement of the supplier services under the contract. Further, the Respondent erred by a misapplication of article 181 of the 1992 Constitution.

The relief being sought is solely to for the Disallowance and Surcharge imposed by the Auditor-General be set aside.

It must be mentioned that on the 19<sup>th</sup> of May, 2020, this Court with the agreement of the parties, and pursuant to Order 31 rule 2 of the High Court Civil (Procedure Rules) 2004, (C.I.47) consolidated Suit NOs. MSFT 0011/2020 and CM/MISC 0315.

The said rule states;

*Consolidation of proceedings*

2. *Where two or more causes or matters are pending in the same Court and it appears to the Court*

*(a) that some common question of law or fact arises in both or all of them; or*

*(b) that the rights to relief claimed are in respect of or arise out of the same transaction or series of transactions; or*

*(c) that for some other reason it is desirable to make an order under this rule,*

*the Court may order those causes or matters to be consolidated on such terms as it considers just, or may order them to be tried at the same time or one immediately after another, or may order any of them to be stayed until the determination of any other of them.*

Still on the antecedents of this case, it is worth mentioning that the Appellants in Suit No. CM/MISC/0315/2020 (hereafter referred to as “Mr. Osafo Marfo and others”), also being dissatisfied with the Notice of specification and certification of disallowance and/or surcharge made by the Auditor-General dated the 22<sup>nd</sup> day of October, 2019 also caused an appeal to be lodged against same on the following grounds;

**GROUND OF APPEAL OF MR. OSAFO MARFO AND OTHERS**

1. The determination by the Auditor-General that, the payment of the sum of GH¢4,869,421. 87 was without approval from Parliament and the Public Procurement Authority (PPA) and thus

offends Article 181 of the Constitution 1992 and the Public Procurement Act, violated the appellants' right to a hearing and as same did not form part of either the Audit Observations issued to the Ministry of Finance under section 29 of the Audit Service Act, 2000 (Act 584), or the Final Report of the Auditor-General laid before Parliament pursuant to article 187(5) of the Constitution, 1992.

2. The findings violated the 1<sup>st</sup> appellant's right to a fair hearing as the Auditor-General, in contravention of section 29 of Act 584 and articles 23 and 296 of the Constitution, failed to serve 1<sup>st</sup> appellant with any audit observations containing any breaches by him before proceeding to issue the notice of intention to disallow / surcharge.
3. The Auditor-General acted unreasonably, capriciously and maliciously towards all the appellants, in blatant violation of his duty as a public officer, when he refused to inspect and study the evidence of work done by Kroll Associates UK Limited, as requested by the 1<sup>st</sup> appellant in his response to the notice of intention to disallow/surcharge, before proceeding to serve the notice of disallowance and surcharge.
4. The Auditor-General committed a grave and fundamental error of law in purporting to investigate and make findings of breaches of the procurement law by the appellants when he had no such authority at law.

It is on the basis of these appeals that two interlocutory applications have been filed by the appellants in both cases.

The first application was brought by Mr. Osafo Maafo and Others praying for an order committing the Auditor-General for contempt of court. It was the case of the Applicants that in accordance with Order 54A Rules 5(1) and (2) of C.I 47 pursuant amendment by C.I.102, the refusal of the Respondent to file the legally mandated documents within the stipulated time amounts to contempt of court.

This Court per a Ruling dated the 12<sup>th</sup> day of May, 2020, held that the Auditor-General, Mr. Domelevo, was in contempt of Court within the meaning of the Rules, and cautioned and discharged him.

### **THE INSTANT APPLICATION/THE CASE OF THE APPLICANT**

The instant application for special directions was filed on the 18<sup>th</sup> of February, 2020. The grounds therefor per the affidavit in support are stated below;

- a) That the Notice of Specification and Certification of Disallowance and/or Surcharge on the Appellant/Applicant under Certificate Number 2017/2018/MDA 1 calls on it to refund an amount of One Million, Thirty One Thousand, Four Hundred And Sixty Dollars And Fifty Cents (USD1, 031,460.50) in the cedi equivalent was paid to it by the Ministry of Finance for consultancy services it was contracted to render in respect of asset recovery for the Government of Ghana.  
(Attached as Exhibit 1 is a copy of the contract).

- b) That having lodged the appeal, the exoneration of the Appellant/Applicant lies in providing proof of the work for which it was engaged having been carried out pursuant to the terms of the Contract of engagement entered into with the Government if

Ghana under the auspices of the Ministry of National Security and the Ministry of Finance.

- c) That the propriety of the work carried out and the information obtained is the property of the Ghana and does not allow for the Appellant/Applicant to divulge or disclose same to the Respondent/Respondent.
- d) That the work carried out and the information obtained through same is of a highly sensitive and confidential nature and the release or disclosure of same to the Respondent/Respondent will be irreversibly damaging to the interest of National Security and would have a deleterious effect on the quality of the information itself.
- e) That the information is also of National Security importance as the identities of the operatives are kept private and confidential in order to ensure their continued effectiveness in the discharge of their work under the Contract, which is still ongoing.
- f) That for this reason, the Appellant/ Applicant could not comply fully with the terms of Order 54A Rule 2(1) of C.I.102 at the time of filing its Appeal since the documents to be relied upon could not be released or divulged to the Respondent/Respondent.
- g) That it is in the interest of justice that Special Directions are made by this Honourable Court in order to protect the value and integrity of this information and at the same time to ascertain whether work to the value paid has indeed been carried out by the Appellant/Applicant to the satisfaction of the audit process.



(Exhibit 2 attached to the affidavit in support is a letter from the Minister in Charge of National Security corroborating the assertion that the documents and information requiring special directions are of National Security importance).

That document, authored by the Chief Analyst of the Ministry, to sum up, is to the effect that *“Kroll has been contracted by the Government of Ghana under the auspices of this Ministry [National Security] over which I am in charge, to investigate allegations of wrong doing in state-owned entities, gather evidence in respect of same, and to devise strategies for the recoveries of those state assets. These special tasks render the work that they produce of a highly sensitive and confidential nature and directly impactful on national security.” (Emphases mine).*

- h) That in the circumstances, the prayer is that Special Directions be given that the information in the possession of the Appellant/Applicant is first shown and divulged to this Court *ex parte and in camera* before any further orders for disclosure if so considered to be necessary be made.

Per Exhibit 2, it is “proposed for information in the following categories of sensitivity to be treated by the Court hearing the appeal in the following manner;

1. That the application and the hearing the appeal be heard in chambers;

2. Informative Reports if Kroll already serving ongoing prosecutions to be reported to the Auditor-General upon evaluation by the Judge;
3. Informative Reports of Kroll which are ongoing to be reported on to the Judge only, with background and general areas of investigation as well as hours rendered covered by the fee paid;
4. Informative Reports and investigations on prospective recoveries on high asset targets to be reported to the Judge only in limited terms without liberty to report to the Auditor-General on the grounds of National Security.
5. Informative Reports and investigations on highly confidential national security matters undertaken in addition to the Cocobod matter.”

The document gives further particulars of evidence in the control of the Ministry of National Security (and by extension the Appellant/Applicant) which will not be elucidated at this time for the reason that the issue of them being of national security importance would first have to be determined one way or the other.

(Emphases mine)

A passing comment must be made regarding the fact that Mr. Yaw Oppong was given the chance to express his opinion on the matter to the effect that per his interpretation of section 8 of the Courts Act, 1993 (Act 456), a reference to the Supreme Court would only be necessary where there is a refusal to produce a document. In this case, he says, there is no refusal to produce the document, except that

it should be for the eyes of the Judge only, to the exclusion of the Respondent/Respondent.

### **THE CASE OF THE RECONDENT/RESPONDENT**

The Respondent filed a very brief affidavit in opposition essentially opposing the application for special directions because it has no basis in law and improperly invokes the jurisdiction of the court. In his argument, Mr. Odikro Nyame for the Respondent has asked that this matter be dismissed because the issue of the documents being confidential and having national security implications was only recently raised.

### **RELEVANT LAW**

In the course of the legal arguments before this court on Friday, the 22<sup>nd</sup> of May, 2020, the following legislations, parts of which are reproduced below, were canvassed and discussed;

#### **Article 135 of the Constitution of 1992**

*(1) The Supreme Court shall have exclusive jurisdiction to determine whether an official document shall not be produced in court because its production or the disclosure of its contents will be prejudicial to the security of the State or will be injurious to the public interest.*

*(2) Where any issue referred to in clause (1) of this article arises as to the production or otherwise of an official document in any proceedings before any court, other than the Supreme Court, the proceedings in that other court shall be suspended while the Supreme Court examines the document and determines whether the document should be produced or not; and the Supreme Court shall make the appropriate order.*

(3) *The proceedings of the Supreme Court as to whether an official document may be produced shall be held in camera.*

**Section 8 of the Courts Act, 1993 (Act 456)**

*Section 8—Production of Official Documents in Court.*

(1) *The Supreme Court shall have exclusive jurisdiction to determine whether an official document shall not be produced in court because its production or the disclosure of its contents will be prejudicial to the security of the State or will be injurious to the public interest.*

(2) *Where any issue referred to in subsection (1) of this section arises as to the production or otherwise of an official document in any proceedings before any court, other than the Supreme Court the proceedings in that other court shall be suspended while the Supreme Court examines the document and determines whether the document should be produced or not; and the Supreme Court shall make the appropriate order.*

(3) *The proceedings of the Supreme Court as to whether an official document may be produced shall be held in camera.*

(4) *For the purpose of this section, the Supreme Court may—*

*(a) order any person or authority that has custody, legal or otherwise of the document to produce it; and any person so ordered shall produce the document for the purpose of inspection by the Supreme Court; and*

*(b) determine whether or not the document shall be produced in the Court from which the reference was made after hearing the*

parties to it or their legal representatives or after having given them the opportunity of being heard.

(5) Where the Supreme Court is of the opinion that the document should be produced it shall make an order that the person or authority that has custody of the document shall produce it or shall produce so much of the contents of it as is essential for the proceeding in accordance with the terms of the order.

(6) Where the question of the production of an official document arises in any proceedings in the Supreme Court in the circumstances mentioned in subsection (1) of this section, the Supreme Court shall be governed, with such modifications as may be necessary, by the provisions of this section for the determination of the question that has arisen.

(7) Where there is a doubt as to whether any document referred to in clause (2) of article 121 of the Constitution (which prohibits the production by public officers of certain documents in proceedings before the Parliament) is injurious to the public interest or prejudicial to the security of the State, the Speaker or the National Security Council as the case may be, shall refer the matter to the Supreme Court for determination by that Court whether the production or the disclosure of the contents of the document would be injurious to the public interest or prejudicial to the security of the state.

(8) Subsections (4) and (5) of this section shall, with such modifications as may be necessary, apply to a determination by the Supreme Court under subsection (7) as they apply to a determination under subsection (2) of this section.

**Section 106 of the Evidence Act, 1975 (NRCD 323);**

Section 106—State Secrets.

(1) Except as otherwise provided by section 107 or by any other enactment, the Government has a privilege to refuse to disclose and to prevent any person from disclosing a state secret unless the need to preserve the confidentiality of the information is outweighed by the need for disclosure in the interest of justice.

(2) A "state secret" is information considered confidential by the Government, that has not been officially disclosed to the public, and which it would be prejudicial to the security of the state or injurious to the public interest to disclose.

(3) The Government's privilege under subsection (1) may be claimed only by the member of the National Redemption Council responsible for administering the subject matter which the secret of state concerns, or by a person authorised in writing to claim the privilege by such member.

(4) In an action in a court when the Government's privilege under subsection (1) is claimed, other than for an official document, the court may determine the claim itself, or, on its own motion or at the request of a party or the Government, shall stay the proceedings and refer the claim of privilege to the Court of Appeal for determination.

In the case of parts of NRCDC 323 reproduced immediately above, sight must not be lost of the fact that further to that, a new Constitution has been promulgated and the Court of Appeal, which used to be the Apex Court is no longer in that position and that the jurisdiction is now exercised by the Supreme Court.

The subsidiary legislations and/or Rules of Court canvassed and discussed by counsel are;

**Order 1 rules 1 and 2 of the High Court (Civil Procedure) Rules, 2004 (C.I.47;**

## Application of Rules

1. (1) *These Rules shall apply to all civil proceedings in the High Court and the Circuit Court, except that the application by the Circuit Court shall be with such modifications as may be necessary.*

(2) *These Rules shall be interpreted and applied so as to achieve speedy and effective justice, avoid delays and unnecessary expense, and ensure that as far as possible, all matters in dispute between parties may be completely, effectively and finally determined and multiplicity of proceedings concerning any of such matters avoided.*

## Publicity of proceedings

2. (1) *All proceedings of the Court including the announcement of its decision shall be held in public except as may be otherwise ordered by the Court in the interest of public morality, safety or public order.*

## **Order 32 Rule 1 of C.I.47;**

### *Purpose of application*

1. (1) *In every action to which this rule applies, an application for directions shall be made to enable the Court consider the preparations for trial, so that*

*(a) all matters which have not already been dealt with, may so far as possible, be dealt with; and*

*(b) directions may be given as to the future course of the action as appear best to secure the just, expeditious and inexpensive disposal of it.*

### *Evidence of particular facts*

3. (1) Without prejudice to rule 2, the Court may at or before the trial of an action, order that evidence of any particular fact shall be given at the trial in such manner as may be specified by the order.

(2) The power conferred by subrule (1) extends in particular to ordering that evidence of any particular fact may be given at the trial

(a) by statement on oath of information or belief; or

(b) by the production of documents or entries in books; or

(c) by copies of documents or entries in books; or

(d) in the case of a fact which is or was a matter of common knowledge either generally or in a particular district, by the production of any publication of general circulation which contains a statement of that fact.

**And finally, Order 21 Rules 8 and 9 of C.I. 47;**

Inspection of documents referred to in pleadings and affidavits

8. (1) A party may at any time serve a notice on any other party in whose pleading or affidavit reference is made to a document to produce the document for the inspection of the party giving the notice and to permit the party giving the notice to take copies of it.

(2) A party on whom notice to inspect documents is served shall within four days after service of the notice inform the party giving the notice of a date within seven days after the service of the notice to inspect documents and of a time between 9.30 a.m. and 4.30 p.m. when the documents may be inspected at the office of the lawyer of the party served, or at some other convenient place, and shall at the time and place named make the documents available for inspection.



(3) A party on whom notice to inspect documents is served shall within four days after service of the notice inform the party giving the notice, of documents the production of which are objected to and the grounds of the objection.

*Order for production for inspection*

9. (1) If a party who is required by rule 7 to serve a notice or who is served with a notice under rule 8 (1)

(a) fails to serve the notice under rule 7, 8 (2) or 8 (3);

(b) objects to produce any documents for inspection; or

(c) offers inspection at an unreasonable time or place,

the Court may subject to rule 11 (1), on the application of the party entitled to inspection, make an order for production of the documents in question for inspection at such time and place, and in such manner, as it thinks fit.

(2) Notwithstanding sub rule (1), but subject to rule 11 (1), the Court may, on the application of any party to a cause or matter, order any other party to permit the party applying, to inspect any documents in the possession, custody or power of that other party which relates to any issue in the cause or matter.

(3) An application for an order under subrule (2) shall be supported by an affidavit specifying or describing the documents of which inspection is sought and stating the belief of the deponent that they are in the possession, custody or power of the other party and that they relate to an issue in the cause or matter.

After having heard and considered the respective arguments of counsel for the parties, the main issue to be determined is whether this Court has the jurisdiction to deal with the instant application.

Firstly, sight must not be lost of two main considerations;

- a) The treatment relating to the protection of the identities of the individuals who may have dealt with the matters which, the Appellant/Applicant says are confidential and have national security implications. That matter, very briefly, would not have caused any difficulty at all for this court to order an in camera hearing.
- b) The other matter relates to information and documents which are of a highly sensitive and confidential nature and directly impactful on national security. The prayer of the Appellant/Applicant is that the said information and documents in the possession of the Appellant/Applicant is first shown and divulged to this Court *ex parte and in camera* before any further orders for disclosure if so considered to be necessary be made.

The question though is whether this Court has the jurisdiction to make such an order in the light of the express provisions of Article 135 of the Constitution and Section 8 of the Courts Act, 1993 (Act 459) which have been reproduced supra.

In my view, to be able to enable the Appellant/Applicant to divulge the information and documents *ex parte and in camera* before any further orders for disclosure to the Respondent or any other party so considered to be necessary be made, the court would first have to make a finding of fact that the content of the said information or documents if disclosed, would be prejudicial to national security.

That is very clearly beyond the jurisdiction of this Court, because, the Supreme Court shall have exclusive jurisdiction to determine whether an official document shall not be produced in court because its production or the disclosure of its contents will be prejudicial to the security of the State.

This is of course based on the fact that the documents in question qualify to be described as “public” or “official” documents.

"Official document" means any document purporting to be made, used, or issued by any public officer for any purpose relating to his office. (See s. 163 of the Criminal and Other Offences Act, 1960 (Act 29).

In this case, there is no doubt that the documents being offered for “the eyes only” of the Judge would be classified as official documents because they are supposed to evidence the justification or otherwise of the payment of public funds to the Appellant/Applicant for work done, which is the fundamental matter to be determined in the substantive appeal.

Exhibit 2 also quite clearly, would corroborate the fact that those documents which are the subject-matter of this application are classifiable as “public” or “official documents”.

In the case of the **REPUBLIC v. EUGENE BAFFOE-BONNIE & 4 OTHERS (Reference No. J1/06/2018 dated the 7<sup>th</sup> of June, 2018)** (reported online on [www.dennislawgh.com](http://www.dennislawgh.com)), the Supreme Court, dealing with the disclosure of documents under various circumstances stated in relation to official (or public documents);

*“The discretion of the prosecution [In reference to the State or State actors] to withhold disclosure is however reviewable by the trial judge or magistrate and in appropriate cases by the Supreme Court in respect of public documents. See Article 135 (1) that provides:*

*“The Supreme Court shall have exclusive jurisdiction to determine whether an official document shall not be produced in court because its production or the disclosure of its contents will be prejudicial to the security of the State or will be injurious to the public interest.”*”

This means that it is the Supreme Court which would exclusively have to examine the information and/or documents *in camera*, and make a determination as to whether or not they would be considered as State Secrets or prejudicial to national security.

Please see the case of **MRS. MARGARET BANFUL & ANOTHER v. THE ATTORNEY-GENERAL & ANOTHER (suit No. J1/7/2016 dated 22<sup>ND</sup> JUNE, 2017)**, in which on 12<sup>th</sup> July 2016, the Court pursuant to Article 135, held in-camera proceedings and the Deputy Attorney General submitted the documents. The court, having examined the same, on 28<sup>th</sup> July 2016 concluded that the State Secrets Act did not apply to the documents.

This matter should be determined at this preliminary stage before the substantive question of whether or not the Appeal is meritorious can be dealt with. This is because the status and treatment of the documents going forward, first has to be dealt with.

This Court is not unaware of the fact that under Order 54A Rule 7, sub-rule 2 of C.I. 47 as amended by C.I.102, the hearing date of an appeal shall not exceed four weeks from the date of service of the Auditor-General’s reply on the appellant. The exigencies of the

interlocutory applications in this appeal, however, demand that they be dealt with to clear the way for the substantive appeal.

In the circumstances, the matter of the status of the documents to be examined and determined whether or not they are prejudicial to national security is referred to the Supreme Court, which has the exclusive jurisdiction to do so.

The case is adjourned to 15<sup>th</sup> June, 2020 for mention.

(SGD)  
**AFIA SERWAH ASARE-BOTWE (MRS.)**  
**(JUSTICE OF THE HIGH COURT)**

**CERTIFIED TRUE COPY**  
*[Signature]* 29/05/2020  
.....REGISTRAR  
HIGH COURT  
FINANCE & ECONOMIC CRIME COURT,  
LAW COURT COMPLEX - ACCRA