

IN THE SUPERIOR COURTS OF THE GAMBIA



IN THE SUPREME COURT OF THE GAMBIA

CIVIL SUIT NO: SC/002/2020

BETWEEN:

GAMBIA PARTICIPATES
CENTER FOR RESEARCH AND
POLICY DEVELOPMENT

... 1ST PLAINTIFF

... 2ND PLAINTIFF

AND

THE CLERK OF THE NATIONAL ASSEMBLY
AUDITOR GENERAL
THE MINISTER OF FINANCE AND
ECONOMIC AFFAIRS
ATTORNEY GENERAL

1ST DEFENDANT
2ND DEFENDANT

3RD DEFENDANT
4TH DEFENDANT



IN THE MATTER OF SECTIONS 5 (A), 94, 95, 112(B), 113, 151, 152 OF
THE CONSTITUTION OF THE REPUBLIC OF THE GAMBIA

AND

IN THE MATTER OF SECTIONS 3, 4 AND 5 OF THE NATIONAL ASSEMBLY
SALARIES AND PENSION ACT, 1998 AND SECTION 21 OF THE NATIONAL
ASSEMBLY (POWER AND PRIVILEGES) ACT, SECTION 14 OF THE
FINANCE AND AUDIT ACT, 2014, CLAUSE 70 OF THE STANDING ORDERS
OF THE NATIONAL ASSEMBLY.

CORAM:

Hon. Justice H.B. Jallow	...	(Chief Justice)
Hon. Justice G.B. Semega-Janneh	...	(JSC)
Hon. Justice R.C. Sock	...	(JSC)
Hon. Justice M.M. Sey	...	(JSC)
Hon. Justice A. Bâh	...	(JSC)

Counsel:

Mrs. Hawa Sisay-Sabally - for the Plaintiffs

Ms. Ida Drameh for the 1st Defendant

Mr. Binga D for the 2nd, 3rd and 4th Defendants

Mr. Abdoulie Fatty for the AMICI - (Activista – The Gambia and Transparency International)

Judgment Delivered on 4th May, 2021

JUDGMENT

G.B. Semega-Janneh - JSC This suit calls on the original jurisdiction of the Supreme Court and was commenced by a writ of summons in which the plaintiffs are seeking the following reliefs:

- a. a declaration that the amendment done by the National Assembly by including a budget line item of D54.4 million is in contravention of sections 151, 152 and 155 of the Constitution and a violation of section 47 of the Public Finance Act, 2014;
- b. a declaration that the approval of the annual estimates of revenue and expenditure for the year 2021 with the inclusion of the sum of D54.4 million as loan to National Assembly members and staff of the National Assembly Service was a usurpation of the powers given to the President in section 152 of the Constitution and a violation of clause 70 of the Standing Orders of the National Assembly;
- c. an order directing the Auditor General not to grant approval for the withdrawal of the sum of D54.4 million

or any part of it by the National Assembly or the National Assembly Service;

- d. an order directing the Minister of Finance and Economic Affairs not to pay from the Consolidated Fund or any fund of Government the sum of D54.4 million or any money at all to the National Assembly members as loan pursuant to the approved estimates of revenue and expenditure of the Government for the year 2021;
- e. an order severing and striking down the part of the Appropriation Act authorizing the payment of the sum of D54.4 million as loan to the National Assembly members and staff of the National Assembly Service;
- f. an injunction against the Clerk of the National Assembly and the National Assembly restraining them from raising warrants or preparing payment vouchers or any document that would facilitate the processing of the payment of the sum of D54.4 million or any part of it to the staff of the National Assembly Service and the National Assembly members;
- g. Such further or other orders this Honourable Court may deem fit to make.

On the 28th day of December, 2020, the plaintiffs/applicants filed a motion on notice, of the same date, for interim reliefs pending the determination of this suit. The reliefs sought are as follows:

- a. An injunction against the Clerk of the National Assembly, his subordinates, any intended beneficiary and whomsoever from applying for, raising of warrants, preparing payment vouchers or any document to access the sum of D54.4 million or any part of it by himself, staff of the National Service, the

National Assembly members pending the hearing and determination of this suit;

- b. An order directing the Minister of Finance and Economic Affairs to hold the sum of D54.4 million allocated to the National Assembly members and staff of the National Assembly Service in the public interest and not to pay same pending further orders of this Court;
- c. An order directing the Auditor General not to grant approval for the payment of the sum of D54.4 million pending further orders of this Court;
- d. Such further or other orders this Court may deem fit to make in the circumstances.

By a ruling of this Court, per Hon. Justice H.B. Jallow C.J, dated the 28th day of January, 2021, the Court held that it was not a proper case to grant the interim reliefs sought and, accordingly, dismissed the motion on notice.

In delivering the ruling, the Court had decided to incorporate the reasons for the decision in the final judgment in this suit. I now proceed to do so.

The principles of law relating to interlocutory/interim injunctions and similar restraining orders are well settled. In this jurisdiction, the common law position was well restated by this Court, per Hon. Justice H.B. Jallow C.J, in the cases of **United Democratic Party (NO.1) and Others Vs. Attorney General (NO.1) (SCCS NO.3/2000)** and **Ya Kumba Jaiteh Vs. Clerk of the National Assembly and Others SC NO.001/2019**.

Under common law, the fundamental purpose of granting an order in an application such as the current one is "to prevent a

litigant, who must necessarily suffer the law's delay, from losing from that delay the fruits of his litigation" as per Lord Wilberforce in **Hoffman – La Roche and CO. AG Vs. Secretary of State for Trade and Industry (1974) 2 ALL ER 1128 at 1146a.**

I need not dwell much or at all on the various principles and relevant factors in determining whether a grant of an interim injunction is appropriate in the instant application given the fact that there are relevant and direct statutory provisions guiding a decision on the matter. Section 17(2) of the State Proceedings Act, 1957 CAP 8:03 of the Laws of The Gambia, Vol. 13 provides:

"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"

It is by virtue of this provision that no relief pertaining to an injunction or specific performance will be granted by a court against the State in any civil proceedings.

It is open to one to argue a distinction between a grant of an interim injunction and an injunction in the nature of a final order or relief. In my opinion, the answer is that the provision is, by necessary implication, equally applicable to interim injunction and bars this Court from granting such an order against the State; the principle that the lesser is subsumed in the greater applies. Section 17(4) on the other hand states that: –

"The court shall not in any civil proceedings grant any injunction or make any order against an officer of the State, if the effect of granting the injunction or making the order

would be to give any relief against the State which could not have been attained in proceedings against the State”

Subsection (4) of section 17 prevents the litigant from obtaining through the back door that which he/she could not get through the front door. In the instant application, granting an injunction, for example, against the Clerk of the National Assembly would have the same effect as granting the injunction against the State because the objective in both situations is the same, that is, to stop the State from disbursing the D54.4 million or any part thereof to any member or members of the National Assembly or staff of the National Assembly Service.

For these reasons, this Court could not grant any of the reliefs sought in the said motion on notice.

Let me now deal with the substantive suit.

In the main suit, the plaintiffs, on the basis of their affidavit verifying facts sworn to by Sait Matty Jaw on the 28th day of December, 2020, set down their statement of case. The same applies to the 1st defendant, whose affidavit verifying facts was sworn to by Momodou A. Sise, the Clerk of the National Assembly, on the 15th day of January, 2021. In respect of the 2nd, 3rd and 4th defendants, the affidavit verifying facts relied upon, is sworn to by Bunja Dabo, state counsel, on the 25th day of January, 2021.

It is clear to me that as regards the fundamental facts, the parties are in agreement with little or no significant variance. I will reproduce verbatim the essential facts as stated in their respective statements of case.

In the plaintiff's statement of case dated the 28th day of December, 2020, it is stated:

"it is the case of the plaintiffs that when the Minister of Finance and Economic Affairs laid before the National Assembly of The Gambia the 2021 Estimates of Revenue and Expenditure of the Government (the Budget) on 12th November, 2020, the estimates did not contain a provision for a loan scheme for the National Assembly. That during the debate on 26th November, 2020, a nominated member of the National Assembly in the person of Honourable Ya Kumba Jaiteh moved a motion for the National Assembly to adopt and include a budget line of D54.4 million to be administered under a loan scheme for legislators and staff of the National Assembly Service. The motion was passed by a majority of votes.

The Finance and Public Accounts Committee of the National Assembly did not include in their report to the plenary session of the National Assembly the said loan scheme."

As regards the 1st defendant, paragraph 3 of the statement of case states:

"3. The Approved Estimates of Revenue and Expenditure 2021, contained a provision for a loan scheme for the National Assembly. The item was inserted upon the application by the National Assembly to the Minister. The said line item was then inserted therein by the Minister of Finance and Economic Affairs before the said Estimates of Revenue and Expenditure, 2021, were approved and published. The National Assembly did not at any time insert the said loan item into the

Estimates of Revenue and Expenditure, 2021. Same was inserted by the Ministry of Finance and Economic Affairs which has the authority to do so. The Minister and not any motion of the National Assembly inserted the loan into the Estimates of Revenue and Expenditure, 2021"

The substance of the factual case of the 2nd, 3rd and 4th defendants is provided in paragraphs 2, 3 and 4 of their statement of case as follows:

- "2. The 2nd 3rd and 4th defendants deny that the Estimates of Revenue and Expenditure for the year, 2021, was amended by the National Assembly to include a budget line item of D54,400,000.00 (Fifty Four Million and Four Hundred Thousand). The 2nd 3rd and 4th defendants' case is that when the 3rd Defendant prepared and presented the draft Estimates of Revenue and Expenditure for the year 2021 before the National Assembly for approval, the National Assembly on 26th November, 2020, passed a motion for the draft Estimates to be amended to include a loan scheme to be established for the National Assembly Members and Staff.
3. Following the passage of the said motion, the 3rd Defendant amended the draft Estimates of Revenue and Expenditure and created a budget line for a loan scheme of D54, 400, 000.00 to form part of the Estimates. The National Assembly then proceeded to approve the Estimates of Revenue and Expenditure for the year 2021. The approved Estimates of Revenue and Expenditure allocated D246,

406,737.00, inclusive of the D54,400,000.00 loan scheme, to the National Assembly.

4. After the approval of the Estimates of Revenue and Expenditure an Appropriation Bill was introduced in the National Assembly. The Appropriation Act was passed by the National Assembly for the period 1st January, 2021, to 31st December, 2021. The Appropriation Act was assented to by His Excellency the President on the 30th day of December, 2020."

The plaintiffs, after a brief statement of the facts, submitted that the issues that arise for the determination by this Court are as follows:

- (1) Whether having regard to the provisions of sections 151 and 152 of the Constitution, the National Assembly has the power to **amend** the Estimates of the Revenue and Expenditure of The Gambia for the year 2021 by **creating** a budget line item of a loan scheme for its members and staff of the National Assembly Service.
- (2) Is the action of the National Assembly which **created** a loan scheme in the Estimates of the Revenue and Expenditure for the year 2021 in line with section 95 of the Constitution and does it implement section 112(b) of the Constitution?
- (3) Whether the action of the National Assembly **to create** a loan scheme in the Estimates of Revenue and Expenditure is within the ambit of sections 113 and 114 of the Constitution:

(Emphasis provided)

In their Statement of Case, the 2nd, 3rd and 4th defendants adopted the issues raised by the plaintiffs but proceeded to state as follows:

1. Whether having read together the provisions of sections 151, 152 and 155 of the 1997 Constitution the National Assembly can **make a proposal** for the Minister of Finance and Economic Affairs to amend the Estimates of the Revenue and Expenditure for The Gambia for the year 2021 by adding a line item to their budget of a loan scheme for members and staff of the National Assembly Service?
2. Whether the action of the National Assembly **to approve** a loan Scheme in the Estimates of Revenue and Expenditure for the year 2021 is in line with section 112(b) of the Constitution?
3. Whether the action of the National Assembly to **approve** a loan scheme in the Estimates of Revenue and Expenditure is within the ambit of sections 113 and 114 of the Constitution.

(Emphasis provided)

The 1st defendant did not adopt the issues raised by the plaintiffs nor proposed issues to be determined by the Court. The 1st defendant argued generally against the case of the plaintiffs.

I will firstly deal with the specific issues raised in the statement of case of the plaintiffs and that of the 2nd, 3rd and 4th defendants.

These issues, I think, encompass any issue that can be discerned in the statement of case of the 1st defendant, and due consideration, accordingly, will be given to relevant points of argument in the statement of case of the 1st defendant.

In their statement of case, the 2nd, 3rd and 4th defendants purport to adopt the issues raised by the plaintiffs for the consideration of the Court. Ordinarily, the opposing party would adopt the issues raised by the other party and not proceed to reproduce the issues already stated. Strangely, the 2nd, 3rd and 4th defendants drew up three issues which outwardly seem to correspond with the three issues raised by the plaintiffs but which upon closer scrutiny would disclose choice of words and phrases which infer different meaning or sense from the corresponding paragraphed issues of the plaintiffs' statement of case. Bearing that in mind, I now proceed in dealing with the issues.

In my considered opinion, the single most significant consideration for the Court is to determine the purport, meaning and effect of the action of the National Assembly and consequences thereof in the context, primarily, of the Constitution and any other relevant law. Given the statements in the respective statements of case and the respective affidavits verifying the facts, it is apparent to me that there is no dispute that during the proceedings of the National assembly of 26th November, 2020, a motion was moved to amend the draft Estimates of Revenue and Expenditure to include a loan scheme for the benefit of the National Assembly members and staff of the National Assembly Service. Again, there is no dispute that the motion was passed by a majority of members. It is also not disputed, in my view, that following the passage of the motion

the draft Estimates of Revenue and Expenditure was amended to include funds in the sum of D54, 400,000.00 (fifty four million and four hundred thousand dalasis) for the establishment of a revolving loan scheme for National Assembly members and staff. The said sum of D54.4million is duly reflected in the approved Estimates of Revenue and Expenditure for the year 2021 under budget line bearing number 2111280.

Mrs. Hawa Sisay-Sabally, learned counsel for the plaintiffs, argued that the process initiated by the motion and leading to the inclusion of the sum of D54, 400, 000 (fifty four million, four hundred thousand dalasis) in the approved Estimates of Revenue and Expenditure is in breach of section 152 of the Constitution. She further argued that it is immaterial whether an Appropriation Act would include (and it does include) the loan to the National Assembly because **"the power the National Assembly arrogated to itself when it approved the loan for its members in the budget is a power it does not have. Consequently, the provisions of sections 151 and 152 of the Constitution have been contravened by the National Assembly."** Other constitutional sections, namely, sections 95, 101 (ii) and (iii), 112 (b), 113 and 114 and also section 47 of the Public Finance Act, 2014, were referred to in support of the submission of breach of sections 151 and 152.

Mr. Binga D, learned counsel for the 2nd, 3rd and 4th defendants, for his part, submitted **that the process did not contravene section 152 of the Constitution because it was the 3rd defendant who granted the request of the National Assembly and, accordingly, amended the draft Estimates of Revenue and Expenditure.** In support of his submissions, he further argued that the National Assembly has the "power to

amend the estimates and this means that the National Assembly can add and vary any estimate which it deems necessary or otherwise. **This would include the creation of new budget lines."**

Learned counsel, Ms. I. Drameh's argument is that the provision for a loan scheme for the members and staff of the National Assembly contained in the approved Estimates of Revenue and Expenditure **"was inserted upon application by the National Assembly to the Minister"** and that it was the Minister who inserted the loan item by his Ministry which has the authority. She emphasized that it was **"the Minister and not any motion of the National Assembly that inserted the loan into the Estimates of Revenue and Expenditure, 2021"**

Government Ministries, Departments and other State bodies are expected to and should deliver their estimates to the President through the Ministry of Finance and Economic Affairs well before thirty days before the end of the financial year which is the period before which the President is required by section 152 (1) to cause the Minister of Finance and Economic Affairs to prepare and lay the Estimates of Revenue and Expenditure before the National Assembly. In the instant case, the loan scheme was included at the time the draft Estimates of Revenue and Expenditure was laid before the National Assembly for consideration and approval pursuant to section 152, in particular, subsections (1), (1A), (3) and (3A). It is provided thus:

- (1) The President shall cause the Minister responsible for finance to prepare and lay before the National Assembly at least thirty days before the end of the financial year, estimates of revenue and expenditure of

The Gambia for the following financial year. The estimates shall include any estimates which, under this Constitution, are to be submitted directly to the President by the Chief Justice or any other authority for presentation by the President to the National Assembly.

- (1A) The National Assembly **shall**, within fourteen days of the estimates being laid before it, **give consideration to and approve the estimates.**
- (2) When estimates of expenditure have been approved by the National Assembly, an Appropriation Bill shall be introduced in the National Assembly for the issue from the Consolidated Fund of the sums necessary to meet that expenditure (other than expenditure charged on the Consolidated Fund), under separate votes for the several services required and for the purposes specified therein.
- (3A) The National Assembly shall, within seven days of the introduction of the Appropriation Bill, give consideration to and pass the Bill.

In my view, the power to approve may include, by implication, the power to disapprove. The power to amend is clearly given recognition by section 101 (4) which provide as follows:

- "4. Without prejudice to the power of the National Assembly to make any amendment (**whether by the increase or reduction of charges, or the amount of any payment or withdrawal, or otherwise**) the National Assembly shall not give

consideration to a Bill that in the opinion of the person presiding makes provisions for:

- i. the imposition of taxation or the alteration of taxation;
- ii. **the imposition of any charges on the Consolidated Fund or any other public fund of The Gambia or alteration of any such charges;**
- iii. **the payment, issue or withdrawal from the Consolidated Revenue Fund or any other public fund of The Gambia of moneys not charged thereon or any increase in the amount of such payment, issue or withdrawal;**
or
- iv. the composition or remission of any debt due to the Government.

Subsection 4 of section 101, however, gives an indication of the extent or limit of the power of the National Assembly to amend in respect of financial and related matters **(whether by the increase or reduction of any tax or charges, or the amount of any payment or withdrawal or otherwise.)** It is my view that it does so by way of amendment **but the power does not include the creation of a new or fresh charge on the Consolidated Fund** in respect of the Estimates of Revenue and Expenditure which is the exclusive preserve of the President acting through the Ministry of Finance and Economic Affairs. It is for these reasons, primarily, that I, with all due respect, reject that part of learned counsel's, Mr. Binga D, submission which says the power of the National Assembly to amend the

Estimates, extend to creating new budget lines or fresh expenditure in the Estimates. In my view, the National Assembly, on its own, cannot and is not permitted by the provisions of the Constitution, in particular, section 152 and subsection (4) of section 101, to create a new or fresh charge, by way of an amendment, on the Consolidated Fund in the context of the laying before the National Assembly of the Estimates of Revenue and Expenditure. To conclude otherwise, would have the unwarranted effect of blurring the time honoured and constitutionally recognized principle of the separation of powers and responsibilities of the three arms of Government and, in this regard, the Executive and Legislature.

The argument of the 1st, 2nd, 3rd and 4th defendants seem to continue in a drive to create the impression that it was the Minister who made the change by insertion that created the new charge of D54, 400, 000.00 as seed money for the establishment of a revolving loan scheme for the members and staff of the National Assembly. The physical insertion or change in the document depicting the content of the Estimates of Revenue and Expenditure is of less significance or relevance in relation to the process that ushered in the new charge of a revolving loan scheme on the Consolidated Fund.

In my considered view, the Minister of Finance and Economic Affairs was the instrument for wrongly and unlawfully effecting the resolution or command of National Assembly resulting from the passage of the motion of the 26th day of November, 2020. When the draft Estimates of Revenue and Expenditure was laid before the National Assembly, it was the bounden duty of the National Assembly to comply with the provisions of section 152 (1A) of the Constitution which provides:

"The National Assembly **shall** within fourteen days of the Estimates being raised before it **give consideration to and approve the Estimates**"

and not pass a resolution creating a new expenditure in the Estimates of Revenue and Expenditure which resulted in a new charge on the Consolidated Fund. In my view, by virtue of the provisions of section 101 and 152 of the Constitution, the National Assembly cannot initiate or originate expenditure during the laying of the Estimates of Revenue and Expenditure; and any motion or resolution to create a charge on the Consolidated Fund must be brought by the Executive or on behalf of the Executive.

In spite of the submission of Mr. Binga D, learned counsel, that the power of the National Assembly to amend includes the power to create new budget lines in the Estimates of Revenue and Expenditure, the statements of case and arguments of the 1st 2nd 3rd and 4th defendants strongly suggest an acceptance on their part of the contrary. Their case and the thrust of their arguments are that it was the Minister of Finance and Economic Affairs who apparently accepted their proposal or application to introduce in the Estimates of Revenue and Expenditure, 2021, a new provision of funds as seed money for the establishment of a loan scheme for members and staff of the National Assembly under a new Budget line numbered **2111280**. It is clear in the respective statements of case and arguments that it was never the case of the defendants that the National Assembly included the new charge in the Estimates of Revenue and Expenditure on the basis of a power granted to them under the Constitution. Instead they claim it was the Minister who introduced the new charge in the estimates and that he has the authority to do so. The fact of the matter, it appears to me, is that the introduction

of the new charge by the Minister, if at all, was made on behalf of the National Assembly and not the Executive, given the process and manner by which the new expenditure came to be included in the Estimates of Revenue and Expenditure.

I do not think it serves any good purpose dealing in detail with section 151 of the Constitution in relation to the issue of the revolving loan scheme included in the Estimates of Revenue and Expenditure, 2021. Section 151 deals with withdrawal from the Consolidated Fund and it provides as follows:

151. Withdrawals from Consolidated and Other Funds

(1) No money shall be withdrawn from the Consolidated Fund except:

(a) to meet expenditure charged on that fund by this Constitution or an act of the National Assembly; or

(b) where the issue of that money has been authorized by an Appropriation Act, a Supplementary Appropriation Act or in accordance with subsection (4) of this section.

(2) No money shall be withdrawn from any other public fund of The Gambia unless the issue of that money has been authorized by law.

(3) No money shall be withdrawn from the Consolidated Fund or any other public fund of The Gambia (including a withdrawal under subsection (4)) unless the withdrawal has been approved by the Auditor-General or a member of the National Audit Office designated by him or her for the

purpose and it is made in the manner prescribed by an Act of the National Assembly.

- (4) If the Appropriation Bill in respect of any financial year has not been passed into law by the beginning of that financial year, the President may authorize the withdrawal of money from the Consolidated Fund for the purpose of meeting expenditure necessary to carry on the services of the Government for a period not exceeding four months from the beginning of the financial year.
- (5) The withdrawal of funds in accordance with subsection (4) shall not exceed one third of the sums authorized for the relevant services by the Appropriation Act for the immediately preceding financial year.
- (6) Where money is charged on the Consolidated Fund or any other public fund by law, it shall be paid out of that fund to the person or authority to whom it is due.**

In the event the process leading to the inclusion of the fund for the loan scheme in the estimates and therefrom in the Appropriation Bill and then the Appropriation Act does not offend or contravene the provisions of the Constitution and section 47 of the Public Finance Act relating to the preparation and laying out of the Estimates by the Executive and approval by the National Assembly, the fund becomes lawfully and properly charged on Consolidation Fund, and therefore, the determination of its potential withdrawal becomes otiose as the fund can be withdrawn pursuant to section 151, in particular, subsections (1) and (6) of the Constitution.

Section 155 of the Constitution deals with loans. Under this section, the National Assembly does not and cannot grant a loan out of any public fund or account. Subsection (1) of the section 155 provides:

- (1) The National Assembly may by resolution supported by the votes of the majority of all the members authorize the Government to enter into an agreement for the granting of a loan out of any public fund or public account.

It is clear from section 155 (1)(2)(3) and (4) that the National Assembly **can only authorize and give approval** to loan agreements on the raising of loans by the Government **on behalf of itself or any other person or authority**. It seems the National Assembly controls the purse and watches over the Consolidated Fund and other public funds relating to loan agreements that Government is a party to but cannot dip its hand in the public purse: only the Executive can do so upon the approval of the National Assembly.

However, let me for a moment assume that the National Assembly has the power to introduce by way of an amendment a new expenditure in the estimates as a fresh charge on the Consolidated Fund. In the context of the suit and laid estimates the new provision of seed money in the sum of D54, 4 million for the establishment of a revolving loan scheme for members and staff of the National Assembly, broadly speaking, is a loan of public funds to anyone of the intended recipients. In my view, such an intended loan would be subject to the pre-conditions and requirements contained in section 155 of the Constitution (and section 47 of the Public Finance Act, 2014,) which provides, in the relevant subsections, as follows:

155. Loans

- (1) The National Assembly may by resolution, supported by the votes of a majority of all the members, authorize the Government to enter into an agreement for the granting of a loan out of any public fund or public account.
- (2) An agreement to which subsection (1) refers shall be laid before the National Assembly and shall not come into effect until it is approved by the National Assembly.
- (3) No loan shall be raised by the Government **on behalf of itself or any other person or authority** otherwise than by or under the authority of an Act of the National Assembly.
- (4) An Act of the National Assembly authorizing the raising of a loan shall provide:
 - (a) **that the terms and conditions of a loan shall be laid before the National Assembly and that the loan agreements shall not come into operation until they have been approved by the National Assembly; and**
 - (b) that any money received in respect of a loan shall be paid into the Consolidated Fund or some other public fund of The Gambia

Clearly, in the instant case, there is non-compliance with the relevant subsections of section 155, particularly subsection (4) (a), of the Constitution and section 47 of the Public Finance Act, 2014, which provides as follows:

1. **Subject to subsections (2), (3) and (4) the Minister has the sole authority to lend State funds;**
2. **Prior to extending a loan the Ministry shall assess the risk to the State in providing such loan, and propose the level of interest rate to cover the cost and credit risk of the State. The proposal and the method used in the risk assessment shall be in written form sent to the Minister**
3. **Unless the Cabinet has determined otherwise the borrower shall pay the State such interest rate as the Minister has determined to cover the cost and credit risk of the State**
4. **The National Assembly shall approve agreements for the granting of a loan of any public fund or public account.**

The result is that the inclusion of the sum of D54,4 million under Budget line numbered **2111280** is in breach of section 155 of the Constitution and section 47 of the Public Finance Act, 2014, and is, therefore, null and void and of no effect. This is so irrespective of whether or not it was the Minister of Finance who included the said loans under budget line numbered **2111280** in the Estimates of Revenue and Expenditure; non compliance by either the Minister or the National Assembly or both is fatal to the grant of the loans.

In considering the powers and authority of the National Assembly, one ought to bear in mind that, unlike the British Parliament whose powers and authority are seemingly limitless, those of our National Assembly are not because the National Assembly is subject to the Constitution, which, in accordance with its section 4, is the Supreme Law of The Gambia; the powers and authority of the National Assembly are derived from and limited by the Constitution.

The establishment of a revolving loan scheme for the members and staff of the National Assembly, per se, in my view, is not repugnant to the tenor and tenets of the Constitution. The National Assembly is, like the Executive, an integral part of the State's structures and governance; in fact, it is commonly referred to as the second arm of the State.

Just like the revolving loan scheme set up for the Civil Service, I see nothing inconsistent with or in contravention of the Constitution on setting up a similar loan scheme for the members and staff of the National Assembly but the establishment ought to go through proper process such as an enabling legislation (or regulation) to allow for the setting up of the governing and administrative structures, including necessary rules or regulations, to safeguard the public funds, before provision of the seed money is made in the Estimates

It does not appear to be, and no evidence is available, of bad faith or conduct to improperly enrich members and staff of the National Assembly. The motion, I can safely presume, was debated openly in the chamber of the National Assembly. I observe and note that the revolving loan scheme is not intended solely for and limited to the current members and staff of the National Assembly; it is clearly intended to also cover future

members and staff. The revolving aspect is meant to sustain the availability of funds for the scheme. A loan is not a gift and needs to be repaid especially in respect of public funds; and it is for this reason that safeguards are provided under sections 151 and 155 of the Constitution and section 47 of the Public Finance Act, 2014.

Central to the safeguards for the protection of the Consolidated Fund and other public funds is the balanced apportionment and separation of the powers and responsibilities of the Executive and Legislature in respect of the control and administration of these funds. The Executive has the responsibility of preparing detailed proposals of the budget and also of lending public funds and entering into financial agreements such as loans and guarantees. The Legislature, on the other hand, exercises financial scrutiny and oversight on these matters through its powers of amendment and approval. (See sections 101, 151, 152 and 155 of the Constitution and sections 14 and 47 of the Public Finance Act, 2014.)

There appears to be confusion between the Finance and Audit Act, 1963 and the Public Finance Act, 2014. It is correct that in the title of this suit reference is made to section 14 of the Finance and Audit Act 2014, and no reference made to the Public Finance Act, 2014, or section 47 of the Act. Section 14 of the Finance and Audit Act, 1963, provides:

14 Powers of Auditor-General

- (1) In the exercise of his or her duties under this Act, the Auditor General may;

- (a) call on any officer for any explanations and information he or she may require in order to enable him or her to discharge his or her duties;
 - (b) with the concurrence of the service head of any officer's department, authorize the officer to conduct on his or her behalf any inquiry, examination or audit and such officer shall report thereon to the Auditor-General;
 - (c) without payment of any fees, cause search to be made in and extracts to be taken from any book, document or record in any public office;
 - (d) lay before the Attorney-General a case in writing as to any question regarding the interpretation of any Act or regulations concerning the powers of the Auditor-General on the discharge of his or her duties.
- (2) In the exercise of his or her duties under this Act, the Auditor-General or any person duly authorized thereto by him or her shall have access to all books, vouchers, documents, cash, stamps, securities, stores or other Government property of any kind whatsoever in the possession of any public officer.

Section 14 of the Finance and Audit Act, 1963, has no relevance to the issues of this suit. No reference to the Finance and Audit Act, 1963, is made in the statements of case and arguments of the parties. The only reference to the Finance and Audit Act, 1963, is made in paragraph 3 of the reply to the statement of case of the 1st defendant in these terms:

"3. The argument that a revolving loan scheme was passed into law by the Appropriation Act, 2021, and the Executive properly approved such loan ignores the fact that all loans are authorized by either statute or the Constitution with laid down procedure to be followed and in this case sections 14 and 47 of the Finance and Audit Act, 2014, were not followed,"

There is no Finance and Audit Act, 2014. The Finance and Audit Act we have in our laws is the Finance and Audit Act of 1963. The Finance and Audit Act, 1963, and the Public Finance Act, 2014, are, in error, being conflated. It is clear that the Act the parties have in mind is the Public Finance Act, 2014, judging from the ample references to it, in particular, section 47, by all the parties in their respective statement of case and submissions.

In her reference to section 14, in her quoted submission, Mrs. Hawa Sisay-Sabally, learned counsel, must have in mind section 14 of the Public Finance Act, 2014, which provides as follows:

"14. Long-term expenditure commitments.

A person shall not introduce in the National Assembly any Bill that provides for withdrawal from the consolidated fund for any transaction, which creates or is likely to create long-term expenditure commitments **without the prior consent of the Minister."**

This section, other than the reference to it by learned counsel, Mrs. Hawa Sisay-Sabally, has not been given proper attention in the arguments by learned counsel of the parties and yet it does have some relevance to the issues in this suit. In my view, section 14 of the Public Finance Act, 2014, and sections 151 and 152 of the Constitution, 1997, show that where in a context

outside the laying of the Estimates of Revenue and Expenditure, **the National Assembly were to pass a Bill that created a charge on the Consolidated Fund, access to such funds can only be made through the Executive and not directly by the Legislature** as was aptly captured in the Ugandan case of **Parliamentary Commission and Nwesigye Wilson**, Constitutional Appeal NO.08 of 2016, where the Supreme Court of Uganda endorsed the decision of the Constitutional Court of Uganda by holding at page 14 and 15 of the judgment in these words:

“... it is important to bear in mind that there is one Consolidated Fund to which monies of Uganda are deposited as per article 153 of the Constitution. It is the President who is charged with the responsibility of preparing or causing to be prepared, estimates of revenue and expenditure of Government to be laid before Parliament as per article 155 (1) of the Constitution ... Anybody who wants to create a charge on the Consolidated Fund must first inform the government and article 93 is meant to achieve that.”

For our purpose, read section 150 of our Constitution for article 153 of the Ugandan Constitution and section 152 (1) for article 155 (1) and for article 93, sections 101 and 152 of the Constitution and section 14 of the Public Finance Act, 2014, to see how the holding of the Ugandan Supreme Court illuminates and reflects on the issues, particularly, the central issue of this suit.

It's clear to me that the provision of funds for the establishment of the revolving loan scheme before the setting up of the scheme in terms of the governing and administrative structures, including necessary rules or regulations, is like the proverbial saying of putting the cart before the horse. In such a scenario, there cannot be movement of the funds even though available because there would be no administrative machinery to receive and administer the loans in a manner consistent with the requirements of the Constitution and related legislation unlike the case of the revolving loan scheme in respect of the Civil Service. It is almost incomprehensible that funds can be provided in the budget for a non-existent recipient, that is, the requisite machinery for the revolving loan scheme.

The plaintiffs have made submissions in respect of sections 112(b), 113 and 114 of the Constitution. Accordingly, the defendants made their own submissions in response. Reproduced below are the sections:

"112 The responsibilities of the members of the National Assembly shall include the following:

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

"113. Freedom of speech and debate

There shall be freedom of speech and debate in the National Assembly and that freedom shall not be impeached or questioned in any court or place outside the National Assembly"

"114. Privilege of the National Assembly

Without prejudice to the generality of section 113 no civil or criminal proceedings shall be instituted against a member of the National Assembly in any court or other place outside the National Assembly by reason of anything said to him or her in the National Assembly"

In the given facts of the case, it is clear to me that the matters contained in the sections have little or no relevance to the inclusion of the loan scheme as a budget line of the Estimates of Revenue and Expenditure. Section 112(b) is an exhortation to members of the National Assembly to conduct themselves properly and to discharge their duties and functions in the national interest.

Section 113 allows members to debate matters in the National assembly without the fear of being sued or prosecuted for what has been said in the Assembly. This does not necessarily protect a member if same is repeated outside the Assembly. For example, slanderous statements made in the National Assembly are protected but is open to be pursued by the person slandered if repeated outside the National Assembly. Section 114 carries a similar import in respect of anything said to a member of the National Assembly.

Similarly, a great deal of argument was made in respect of section 108 of The Constitution. Section 108 provides:

"(1) Subject to the provisions of this Constitution the National Assembly may regulate its own procedure and, in particular, may make Standing Orders for the conduct of its own proceedings.

(2) Notwithstanding anything to the contrary in this Constitution or in any other law, no decision, order or direction of the National Assembly or any of its Committees or the Speaker relating to the Standing Orders of the National Assembly, or to the application or interpretation of Standing Orders, or any act done by the National Assembly or the Speaker under any Standing Orders, shall be enquired into by any court."

In this case, the Court is not inquiring into the powers of the National Assembly to regulate its procedure or how it makes Standing Orders for conduct of its own proceedings. The powers conferred by section 108 are clear and are intended to give the National Assembly flexibility in the conduct of its proceedings and to avoid continual interruption of its proceedings by litigation. However, this case does not concern the matters contained in section 108 but the allegation that the National Assembly made a decision and acted in a manner that contravenes relevant provisions of the Constitution such as sections 152 and 155 of the Constitution and section 47 of the Public Finance Act, 2014.

Before closing let me deal briefly with the issue of **locus standi** raised in the statement of case of the 1st defendant. The matter ought to have been raised by motion but, perhaps, due to the way the suit was progressing, it could not be done in that

manner. There is no detailed argument but it is indicated in paragraph 4 of the 1st defendant's statement of case that the 1st defendant was relying on the case of **Lamin J. Darboe Vs. The Attorney General and Minister of Justice, Supreme Court Civil Suit NO.002/2017**, a decision in a ruling by this Court per the Honourable Justice H.B. Jallow C.J. In my view, the decision in the ruling of the Darboe case cannot support the submission on locus standi by counsel for the 1st defendant. In the Darboe case, the thrust of the argument of the plaintiff was to show internal contradictions in the Constitution and failed to make any allegation pursuant to section 5(a) and (b) of the Constitution which provides:

"5 A person who alleges that:

- (a) any Act of the National Assembly or anything done under the authority of an Act of the National Assembly, or
- (b) any act or omission of any person or authority, is inconsistent with; or is in contravention of a provision of this constitution, may bring an action in a court of competent jurisdiction for a declaration to that effect"

Speaking on the issue of **locus Standi** in the Darboe case, in the ruling, the Honourable Chief Justice had this to say"

"This action, however, relates neither to an Act of the National Assembly or matter done under the authority of such Act as required by section 5 (1) of the Constitution nor to the acts or omissions of any person or authority as required under section 5(1) (b) of the Constitution."

The same cannot be said of the claims of the plaintiffs in this suit. The claims in paragraph (a) and (b) of the writ of summons make allegations of contravention of the Constitution consistent with the requirements of section 5 particularly clause 5(1) (b).

The Court thanks the AMICI for their contributions and encouragement to this Court to have in mind the principles canvassed by them when considering the important issues raised in this suit. The Constitution, in my view, has included in its body provisions that are reflected in some international instruments that The Gambia has not domesticated by enactment of specific statutes.

It is generally accepted in legal circles in The Gambia, and in fact has been observed by the courts of The Gambia, that The Gambia is in the dualist school of thought and the courts apply international treaties and conventions only after domestication. However, the courts have found themselves not completely restricted and they feel free to draw inspiration from international experiences in the interpretation of laws that are similar to provisions in our statutes and laws.

In the circumstances, I find and hold that it was the National Assembly, by its motion of the 26th November, 2020, that, for all intents and purposes, amended and included the sum of D54.4 million as funding for the loan scheme for members and staff of the National Assembly in contravention of sections 152 and 155 of the Constitution and section 47 of the Public Finance Act, 2014. There is no evidence that the defendants have reached the point when it could be said that they have withdrawn the said sum or part of it in contravention of section 151 or given loans out of the said sum in contravention of section 155 of the Constitution. In the event disbursement has already been done,

any and all sums so disbursed should be recovered and/or returned forthwith.

In the premises, the plaintiffs are entitled to a declaration that the inclusion of the sum of **D54.4 million** by the National Assembly in the Estimates of Revenue and Expenditure contravened the provisions of sections 152 and 155 of the Constitution and violated section 47 of the Public Finance Act and I so declare. Prayer (b) of the plaintiffs' writ of summons is covered by this declaration to the extent that section 152 was contravened by the said act of the National Assembly. Prayers (c) which seeks to prevent the Auditor-General from giving approval for the withdrawal of the said sum of D54.4 million; (d) which seeks to stop the Minister of Finance from paying out the said sum of D54.4 million and (f) which seeks to restrain the Clerk of the National Assembly from initiating any process or doing anything for the paying out of the said sum of D54.4 million cannot be granted being in the nature of an injunction against the state as already explained. Consequently, prayers (c) (d) and (f) are hereby refused and dismissed.

Prayer (e) calls for an order severing and striking down the part of the Appropriation Act authorizing the payment of the sum of D54.4 million as loan to the National Assembly members and staff of the National Assembly. The said sum is a component of the sum of D246, 406,737 allocated to the National Assembly by the Appropriation Act, 2021. The manner in which the sum of D54.4 million came to be included in the Estimates and eventually in the Appropriation Act, 2021, was, as stated before, improper and contravened provisions of the Constitution, particularly section 152 and 155 of the Constitution and violated section 47 of the Public Finance Act. The impropriety of the

process does not affect the entire Appropriation Act and, therefore, the entire Act cannot come under scrutiny for striking down by reason of the contravention of the provisions of the Constitution. However, it is within the powers of this Court to sever that part of the Act that offends against the provisions of the Constitution, where practicable, without destroying the effect and purpose of the Act. (See generally the Supreme Court case of **Jammeh Vs. Attorney General [1997-2001] GR P.839**) I am of the view that the said sum of D54.4 million can be conveniently severed from the rest of the Appropriation Act, 2021, because it is a matter of a simple arithmetical process of deducting the sum of D54.4 million from the sum of D246,406,73 allocated to the National Assembly in the Appropriation Act, 2021. By reason of the matters aforesaid, I hereby strike out from the Appropriation Act, 2021, the sum of D54.4 million which is a component of the D246, 406,737 allocated to the National Assembly and, thereby, leaving an outstanding sum of D192, 406,737 of the allocation.

No order as to costs.



(Signed)

Hon. Mr. Justice Gibril B. Semega-Janneh - JSC

(Signed)

I agree

Hon. Mr. Justice H.B. Jallow - CJ

I agree

(Signed)

Hon. Mr. Justice R.C. Sock - JSC



I agree

(Signed)

Hon. Mrs. Justice M.M. Sey - JSC

I agree

(Signed)

Hon. Mrs. Justice A. Bah – JSC