

13TH OCTOBER, 2016.

BENTSI-ENCHILL LETSA & ANKOMAH
#4 MOMOTSE AVENUE,
ADABRAKA, ACCRA.

ATTN: ACE ANAN ANKOMAH ESQ.

**RE: DISQUALIFICATION OF THE PRESIDENTIAL CANDIDATE FOR
THE NATIONAL DEMOCRATIC PARTY (NDP) FOR THE 2016
PRESIDENTIAL ELECTIONS.**

- 1.0 We write as solicitors for and on behalf of the Electoral Commission of the Republic of Ghana (hereafter simply called "Our Client").
- 2.0 Your letter dated the 11th day of October, 2016 to our client, questioning the legal basis of our client's decision to disqualify the Presidential Candidate for the National Democratic Party (NDP) (hereafter "your clients") has been referred to us by our client with instructions to respond to same and we hereby do.
- 3.0 In your letter under reference, you noted first of all that your clients "duly...or caused to be duly submitted" to our client their relevant completed nomination forms with respect to the 2016 Presidential Elections and in respect of which forms our client announced in a Press Statement on the 10th day of October, 2016 that it was unable to accept.
- 4.0 In your aforesaid letter to our client, you communicated to our client your clients' disagreement with our client's decision to reject the nomination papers of the NDP's presidential candidate on the ground that our client has "no power to proceed" in the manner in which our client decided that it was unable to accept your client's nomination.

5.0 Our response to your argument that our client has no power to proceed in the manner in which it did is that, our reading of the rules regulating the submission of nomination papers for purposes of contesting the presidential elections confirms that the submission of nomination forms does not result in the **automatic acceptance** of such forms by our client.

6.0 The point made at paragraph 5.0 above is buttressed by regulation 9 (1) and (2) of the Public Elections Regulations, 2016 (C.I. 94). Regulation 9 (1) of C.I. 94 which provides as follows:

"9. (1) Whenever the nomination paper and the statutory declaration of a candidate are delivered and the deposit is paid in accordance with these Regulations, the candidate shall be considered to stand nominated, unless proof is given to the satisfaction of the returning officer of the candidate's death, withdrawal or **disqualification**".

7.0 The statutory provisions above quoted only represents one of the preliminary steps in the nomination process. Regulation 9(2) then says that:

"(2) The returning officer shall inform a candidate that the candidate's nomination is invalid where

- (a) the particulars of the candidate or the persons subscribing to the nomination paper are not as required by law; or
- (b) the nomination paper is not subscribed to as required by law..."

8.0 The rule goes on to say that the returning officer;

"...shall give the candidate an opportunity to make amendments or any alteration necessary, **within the stipulated nomination period**".

9.0 Our understanding of the rules referred to above is that, the returning officer's obligation to give candidates "an opportunity to

make amendments or any alteration necessary" to ensure that their forms comply with the requirements of law and the candidate's corresponding right to an opportunity to make such necessary amendments and alterations, is conditional upon such obligation and correlative right being exercised and enjoyed respectively "**within the stipulated nomination period**".

10.0 Where the circumstances of the case render it impossible to make the necessary amendments or alterations for purposes of ensuring that a candidate's nomination complies with the law, the effect is that the candidate's nomination form does not comply with the requirements of the law regulating their nomination resulting in non-compliance under regulation 9(3) of C.I. 94 which says that:

"(3) Where a candidate fails to comply with subregulation (2), **the returning officer shall** consider the nomination paper of the candidate as invalid **and shall**;

- (a) endorse and sign on the nomination paper the reasons for that decision; and
- (b) **inform the Commission**".

11.0 We note particularly that regulation 9(3) does not exempt or specify any excusable failure either on the part of the returning officer or the candidate to comply with the amendment or alteration, nor is there any indulgence permitted under regulation 9(2) of C.I. 94. The rule is emphatic that the consequences of the failure to effect the alterations and amendment "**within the stipulated nomination period**" is that the candidate's nomination is invalid. No provision is made for extension of time in C.I. 94.

12.0 Our client's instructions to us are that in the particular case of your clients, upon presentation of their nomination papers, they were given the opportunity prescribed by regulation 9(2) of C.I. 94 to make the necessary amendments and alterations to correct those errors which the returning officer was capable of detecting without further checks and your clients accordingly effected the appropriate amendments or alterations.

- 13.0 With regard to the non-compliant errors in respect of which our client expressed its inability to accept your clients' nomination papers however, we have been instructed by our client that it was impossible to comply with the strict time period specified by the rules within which your clients are by law permitted to amend or alter their nomination papers to comply with the requirements of the law regulating same **especially that your clients presented their nomination papers a day to the expiry of the nomination period although your clients and all candidates were urged to submit their nomination papers as early as possible.**
- 14.0 In their regard, we must point out that, our client does not take over responsibility for correctly filling out the nomination papers of candidates only because the law requires the returning officer to draw their attention to statutorily non-compliant errors.
- 15.0 We note further that the rules regulating the submission of nomination forms by presidential candidates (C.I. 94) were made pursuant to the constitutional requirements of article 296 of the 1992 Constitution with the effect that C.I. 94 specifically provides the procedure for dealing with such matters.
- 16.0 The point made in paragraph 13.0 above is that, C.I. 94 says categorically that where the returning officer considers the nomination paper of the candidate as invalid the returning officer's obligation is to report the matter to the Commission subsequent to which a decision is taken.
- 17.0 Our client's instructions to us in so far as its inability to accept your client's nomination papers is concerned is that, the process prescribed by C.I. 94 was duly followed for which reason our client maintains that it acted in accordance with due process, the procedure it applied being the statutorily regulated position.
- 18.0 Having said that, we note that your argument to the effect that our client has no power to proceed in the manner in which it did is anchored on your view that "although section 27 of the Representation of the People Act, 1992 (PNDCL 284) provides that a person who registers twice may be disqualified from voting, there

must have been a conviction for the offence and then a term of imprisonment imposed before a disqualification can take effect". We disagree very strongly with this view.

- 19.0 In the first place, we take the view that the criminal sanctions that a person may suffer as a result of committing an electoral offence is only one of the **consequences** for violating the statutory provisions regulating registration as a voter. This **consequence** is the pain that the individual who commits the offence suffers for violating the rules on registration as a voter. This **consequence** is not a condition sine qua non for disqualification.
- 20.0 Our view is that, to the extent that our client, which has the constitutional mandate to deliver free, fair and credible elections in this Republic can establish that a person has fallen foul of the rules regulating registration as a voter for which reason such a person is incompetent to have their name on the register, our client has a statutory obligation to bar such a person from participating in the electoral process. Such bar is totally and completely exclusive of the criminal process. This argument is the basis upon which our client proceeds to clean the register periodically without any conviction of such persons.
- 21.0 We argue further that the effect of your view, if we concur to it is that, although our client can establish that a person has violated the rules on registration our client ought to permit such a person to participate in the electoral process unless and until such a person is convicted by recourse to the criminal process. Where our client accede to this thinking, our client will be failing in its constitutional obligation to deliver free, fair and credible elections if it adopted your view.
- 22.0 The second reason for which we disagree with your view and which is linked to the argument just made is that, section 7 (1) and (2) of PNDCL 284 stipulates clearly the qualification of voters. It says as follows:

"Section 7—Qualification of Voters.

(1) A person qualifies to be registered as a voter if—

- (a) he is a citizen of Ghana of eighteen years of age or above; and
- (b) he is of sound mind; and
- (c) he is resident in the polling division; and
- (d) he is not otherwise disqualified to be registered as a voter by any law for the time being in force.

(2) No person shall be entitled to have his name included at any one time in the register of more than one constituency or in more than one divisional register in a constituency.

23.0 Having regard to the very unequivocal provisions of section 7(1) and especially (2) of PNDCL 284, there can be no doubt that a person is disqualified from participating in the electoral process as soon as it is established that such a person does not meet the qualification criteria set out in the statute. Such a person therefore is automatically disqualified and their prosecution is only an additional sanction for their misconduct. Prosecution is therefore not a condition sine qua non to disqualification.

24.0 Another reason for which we are unable to agree with your view of the effect of section 27 of PNDCL 284 is that the offence created under section 27(b) of PNDCL 287 does not apply to registered voters. It applies only in circumstances where a person is in the process of registering as a voter. It is not applicable to offences arising from a person's registration. For the avoidance of doubt, Section 27 (b) of PNDCL 284 provides as follows;

“A person who:

- (b) **having applied** to have his name included in a divisional register, **without withdrawing his application, applies** to have his name included in another divisional register”.

- 25.0 This provision is clear and devoid of any ambiguity. The offence arises in the course of registration but not upon the completion of registration. The offence created by section 27(b) is committed where in the process of applying to register in a divisional register, the same person applies to register in another divisional register without withdrawing his earlier application. Such a situation is completely different from a situation where the person has already registered his name in two different registers and has been identified with two numbers such as with the case of Salifu Abdulai.
- 26.0 Having regard to the facts applicable to the matter in respect of which your client was disqualified, we are in no doubt that section 27 of PNDCL 287 provides no saving grace for your client.
- 27.0 The arguments just made about your view on the effect of section 27 of PNDCL 284 apart, an application of your literal approach to interpreting section 27 of PNDCL 284 will yield absurd results.
- 28.0 We have noted that to emphasize your argument that a conviction must precede disqualification, you highlighted the phrase "**is disqualified for a period of five years from the date of the expiration of the term of imprisonment, from being registered as a voter or voting at an election**". We have taken the liberty of underlining part of it.
- 29.0 The phrase just referred to makes it clear that the disqualification only takes place "five years **from the date of the expiration of the term of imprisonment**". The effect of a literal application of the section as urged by you is that, even when the Court has convicted the person and has for that matter established ***beyond reasonable doubt*** that the person was not qualified to be registered as a voter, the person is entitled to register and vote at a public election during the period between his conviction and the completion of his term of imprisonment.
- 30.0 We respectfully disagree with your argument that a person convicted of an offence under section 27 of PNDCL 284 is still entitled to enjoy the rights of a validly registered voter until he has finished serving his term of imprisonment.

- 31.0 Before it is argued that upon conviction such a person will be in custody anyway, we add immediately that the law in Ghana is that prisoners are entitled to register to vote and vote at public elections.
- 32.0 Furthermore, per your argument, a person convicted under section 27 of PNDCL 284 is still entitled to continue to enjoy all the rights of a validly registered voter only because the judge exercised their discretion to impose a fine rather than a term of imprisonment, although the offence such a person committed is the same for which another citizen was convicted by another judge but was unfortunate to have a term of imprisonment imposed on him rather than a fine.
- 33.0 We therefore do not accept your argument that the proper meaning to be assigned to section 27 of PNDCL 284 is that it has an effect in futuro, upon conviction which commences only after the expiration of the term of imprisonment.
- 34.0 We also argue that your reliance on section 43 of PNDCL 284 to justify your argument on section 27 of the same law does not persuade us at all. First of all, the record contemplated by section 43 of PNDCL 284, as clearly pointed out in the section, refers to a record of convictions made on the basis of convictions for the offences created under sections 27, 28, 29 and 41 of the Law.
- 35.0 The clear meaning of section 43 of PNDCL 284 is that the register contemplated by the section applies restrictively to convictions under the sections specified. A person disqualified from participating in the electoral process by our client in the exercise of its statutory responsibility so to do (exclusive of the criminal process) on any of the statutory grounds for disqualification ought not to have his name on the register prescribed by section 43 of PNDCL 284.
- 36.0 To demonstrate further why we cannot agree with your argument relying on section 43 of PNDCL 284, it is important to point out here that a conviction under section 36 of the same law which deals with **Interference with Electioneering Activities** attracts the same sanction as that stated in section 27 but such a conviction is not required to be entered in the register provided for under section 43.

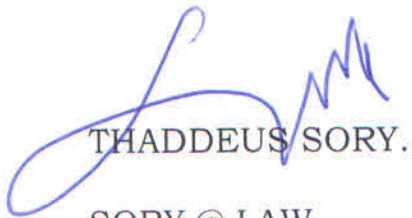
- 37.0 Further to the arguments above made with regard to section 43 of PNDCL 284, we think it important to add that following the massive call upon our client by Ghanaians, **your client being one of the loudest of them**, to sanitize the electoral system and for that matter ensure the credibility of the voters' register to boost confidence in the electoral register and process, our client introduced the biometric registration system which has played a very effective and efficient role in dealing with multiple registrations.
- 38.0 Accordingly, where more than one set of biometric data appears in the data base, the Automatic Fingerprint Identification System excludes the offending duplicate or multiple sets of fingerprint in order to ensure a clean register, devoid of impersonation and prevent multiple voting. This process as already argued, is exclusive of the criminal process.
- 39.0 We find your clients' insistence even more absurd because their candidate has been a strong advocate for a new register, to ensure a credible electoral register free of minors, foreigners and multiple registrations. That your client now seeks to have multiple registrants included on the register, with the right to vote more than once, and upend the credibility of the voters' register and the integrity of the elections, simply to advance her personal goals and ambitions, we find unacceptable.
- 40.0 Our client's exclusion list therefore is completely different from the record of convictions contemplated by section 43 of PNDCL 284. This section clearly does not deal with other categories of disqualified voters who also suffer the same penalty as those whose names must be included in the record required by section 43.
- 41.0 It will be clearly subversive of the integrity of the electoral process to insist, as you now seem to be doing, that although our client's biometric verification cleared out all offending registration such persons should be allowed to enjoy the full rights of validly registered voters only because they have not been convicted and their names cannot be found in the record prescribed by section 43 of PNDCL 284.

- 42.0 Our argument is that, there can be no enterprise more ruinous of the giant efforts made by our client to improve the credibility and safeguard the integrity of the voters' register and the electoral process than allowing persons who undoubtedly had multiple status on the past voters' register for which reason they have been excluded from the current register, to continue to exercise the rights of validly registered voters only because their names are not on the section 43 list of PNDCL 284.
- 43.0 The effect of the arguments we have made so far is that PNDCL 284 has only too early suffered the problem of the elderly statute as it is known in the law of interpretation which means that it must be interpreted in the light of the guiding principles of the Interpretation Act, 2009 (Act 792), purposively.
- 44.0 We believe our arguments so far deal with your concerns regarding the presence of Salifu Abdulai's name on our client's exclusion list. It is important that your clients appreciate that the mere possession of a Voter ID Card does not qualify one as a validly registered voter. In so far as nominations are concerned, the persons who nominate another as their presidential candidate must be a registered voter. This means, such a person's name must be found on the current register of voters but not a past one or a multiple list or an exception list.
- 45.0 It is for this reason that properly structured and functioning political parties provide the Electoral Commission with external hard drives after major electoral activities (and following announcements at IPAC) and are provided with Voters Register, Multiple Lists and Exception Lists. Your client was at liberty to request for copies of the register and did not exercise that right.
- 46.0 We also believe that our arguments also deal with the issues you raised in your letter on regulation 9 of C.I. 94. The seven days statutory period specified in regulation 9(4) of C.I. 94 requires our client to take a decision based on the returning officer's position that the nomination papers of a candidate are invalid. During those seven days, our client is required to take a decision on the returning officer's position.

47.0 Having taken that decision as required by regulation 9(4) of C.I. 94 which spells out the procedure for dealing with the matter, our client finds no legal basis to rescind its decision especially that the statutory provisions upon which your letter is grounded do not allow our client such discretion.

48.0 We do not doubt your clients' resolve to pursue their cause to the ends afforded them by law but we trust that your clients will, as dutiful citizens of the Republic of Ghana, support our client's constitutional mandate and effort to deliver free, fair and credible elections. The smooth sailing process of our democratic evolution should be our mutual concern as well as primary and collective responsibility.

Yours faithfully,



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