

**IN THE SUPERIOR COURTS OF THE GAMBIA**



**IN THE SUPREME COURT OF THE GAMBIA**

**SC: CA. NO. 003/2019**

**BETWEEN:**

**DR. OUSMAN GAJIGO ..... PLAINTIFF**

**AND**

**THE ATTORNEY GENERAL**

**AND MINISTER OF JUSTICE .....DEFENDANT**

**DATE: 18<sup>th</sup> day of March, 2021**

**CORAM: Hon. Justice Hassan B. Jallow (Chief Justice)**

**Hon: Justice R.C. Sock (JSC)**

**Hon: Justice M.M. Sey (JSC)**

**Hon. Justice A. Bah (JSC)**

**Hon. Justice E. F. M'Bai (JSC)**



**REPRESENTATION: Abdoulie Fatty (for the Plaintiff)**

**K. Tah and A.A. Ceesay (for the Defendant)**

**JUDGMENT**

**SOCK JSC** – Introducing the facts of his case, the Plaintiff states that as a citizen of The Gambia interested in issues of importance going to the

public life of the country, “he considers it necessary to engage with section 187(1) (a) and (b) of the 1997 Constitution” in that according to him The Gambia National Army (The Gambia National Guard Unit) Police Duties Regulations, Cap 19:01 “offends [sic] the above section of the Constitution .....

The Plaintiff then proceeds in his Statement of Case in paragraphs 3 to 10 to proffer arguments in support of the above contention, and in paragraph 11 recounts an incident on 1<sup>st</sup> May 2019 at the Kalagi (West Coast Region) military check point, giving rise to and forming the foundation of his present engagement in this suit with section 187 (1) (a) and (b) of the Constitution. Given the seminal importance of the incident at the Kalagi military checkpoint in contextualizing the issues raised in the instant case, I quote in extenso the said paragraph 11, which reads thus –

“11. The Plaintiff states that on 1<sup>st</sup> May 2019 he was driving when he approached the Kalagi (West Coast Region) military checkpoint. There was a mounting queue of several vehicles caused by the barriers erected by the military checkpoint. There was a single soldier standing at the checkpoint in the middle of the road. On either side of the soldier, there were three barriers on the road. The Plaintiff followed the vehicle directly in front of him and after the said vehicle was allowed to proceed, the soldier manning the checkpoint insisted that the Plaintiff reverse his vehicle and go behind the barrier until he authorized him to do so. The Plaintiff refused because he saw no justification or proper legal cause for the soldier to detain him. Refusing to pull over to the side of the road, the Plaintiff started to gently proceed to depart to continue his journey as he did not see the point of further engaging the soldier. As he drove off, the Plaintiff saw the soldier in the rear – view mirror draw his military rifle, proceeded to cocking it and aimed at his car. At that stage, the threat or risk of the soldier firing at the Plaintiff’s vehicle was real and imminent. The other soldiers sitting on the side of the road at a distance shouted and that was when the soldier lowered his gun.”

The Plaintiff believes that the actions of the soldier threatened him and amounted to “a serious violation of his constitutional rights expressed in Chapter IV of the Constitution.” (paragraph 12).

Even though the Plaintiff clearly accepts that his fundamental rights and freedoms under Chapter IV of the Constitution were allegedly violated on that fateful day at Kalagi and that redress for such violation is accessible “at the High Court, being the court of competent jurisdiction under section 37(1) of the Constitution”, the Plaintiff instead seeks “the interpretation and or enforcement of section 187(1) (a) (b) and 188 (2) of the Constitution, relying on section 127(1) (a) of the Constitution vesting the Supreme Court with exclusive original jurisdiction.”

Section 37(1) provides that “if any person alleges that any of the provisions of section 18 to 33 or section 36(5) of this Chapter [i.e. chapter IV] has been, is being or is likely to be contravened in relation to himself or herself by any person he or she may apply to the High Court for redress.”

The Plaintiff, however, states that he is not seeking redress for the alleged violation of his fundamental rights and freedoms, but seeks instead the interpretation and/or enforcement of sections 187(1)(a)(b) and 188 (2) of the Constitution relying on this Court’s exclusive original jurisdiction under section 127 (1) (a) of the Constitution for the interpretation or enforcement of any constitutional provision not dealing with fundamental rights and freedoms.

The Plaintiff has, therefore, formulated three issues for the determination of this Court, all three issues arising from the provisions of The Gambia National Army (The Gambia National Guard Unit) Police Duties Regulations, specifically regulation 3 on the duties of the National Guard, which reads thus –

“3. (1) In addition to their paramilitary responsibilities within The Gambia National Army, the National Guard shall, together with the

Police, be employed in the preservation of law and order, protection of property, prevention and detection of crimes, apprehension of offenders and the enforcement of all laws and regulations with which the Police are charged.

(2) Without prejudice to the generality of subregulation (1), the National Guard shall regularly carry out a surveillance of the whole of The Gambia, and in particular, the rural areas.

(3) In discharging its duties under this regulation, the National Guard may intervene in any place where public order may be threatened.

(4) In discharging its duties under this regulation, the National Guard shall be under the command of the Commander of the National Guard.”

The issues formulated by the plaintiff are whether the said Regulations, particularly regulation 3, –

1. Are, “ in terms of the duties of the National Guard, in conflict with the letter and sprit of sections 187 (1) (a) (b) and 188(2) of the Constitution;
2. Are, in terms of the duties of the National Guard, “at odds and inconsistent with the peace, stability, democratic values and ideals of The Gambia’s new democratic status;” and
3. Are, in terms of “the duties of the National Guard and the deployment of members of The Gambia armed forces at check points exercising police duties, powers and functions inconsistent with the letter and spirit of sections 187 (1) (a) (b) and 188 (2) of the Constitution in the absence of a National Assembly resolution declaring a public emergency or any such or similar proclamation under section 34 of the Constitution or under section 3 of the Emergency Powers Act 1965?”

The plaintiff urges the Court, in determining the above issues, to make the following declarations –

1. a declaration that the said Regulations specifically in relation to regulation 3 “is in direct contravention of section 187 (1) (a) (b) and (3) of the Constitution ..... and therefore unconstitutional .”;
2. a declaration that the said Regulations are “in direct conflict with fundamental rights enshrined in Chapter IV of the Constitution, specifically sections 17, 18, 19 and 21 of the Constitution because of the inherent values attached to fundamental rights and freedoms pursuant to section 17 of the Constitution, this specific section inclusive of the above Regulations ought to be repealed”
3. a declaration that the said Regulations are “at odds and inconsistent with the peace, stability and democratic values and ideals of The Gambia’s new democratic status and it is therefore, illegitimate and undemocratic, taking into account recent historical context and current peaceful state of affairs.”

Further and alternatively, the plaintiff seeks from this Court

4. an Order directing the Defendant to advise the Government of The Gambia to cease the deployment of members of The Gambia armed forces at check points and exercising police duties and functions during peace times, on grounds that it is inconsistent and in direct conflict with the letter and spirit of sections 187 and 188 of the Constitution.”

The defendant has, however, formulated one issue for this Court’s determination, namely,

“Whether the Armed Forces Act- Subsidiary Legislation; The Gambia National Army (The Gambia National Guard Unit) Police Duties Regulations in terms of the duties of the National Guard is inconsistent with or contravenes section 187 (1) (a) (b) and 188 (2) [of the Constitution ].”

Given its succinctness, I adopt the defendant's sole issue above as it goes to the heart of the matter before this Court. The plaintiff himself acknowledges at paragraph 8 of his statement of case that the said Regulations ".....in terms of the duties of the National Guard is directly implicated in this action and is therefore the main subject matter of this case."

In this regard, the plaintiff's main contention is that section 187 (1) (a) and (b) of the Constitution limits the Commander – in – Chief's power under section 188(2) of the Constitution to "give a Force Commander directions with respect to the operational use of the Commander's force in The Gambia for the purpose of maintaining and securing public safety and public order....."

The plaintiff, therefore, contends that whatever directions the Commander – in – Chief may issue as to the operations of a force in The Gambia are restricted to and confined within the parameters of the principal functions of the Armed Forces stated under section 187 (1) (a) (b) and, I would add, paragraph (c), which reads as follows:

187.

- (1) The Principal functions of the Armed Forces are –
  - (a) to preserve and defend the sovereignty and territorial integrity of The Gambia;
  - (b) to aid the civil authorities, at their request, in emergencies and in cases of natural disasters; and
  - (c) to engage, at the request of the civil authorities, in productive activities, such as engineering, health and education for the development of The Gambia.

In interpreting the above section, the Plaintiff posits that the "premier" task of the armed forces is "to quell an armed aggression so as to preserve the sovereignty and territorial integrity of the country"(paragraph 41 of his

statement of case), and “that the principal function of the armed forces in matters of civil assignments will only arise in exceptional and extraordinary circumstances such as times of civil emergencies ....or natural disasters emergencies” (paragraph 42). Interestingly, the plaintiff does not in his arguments include in the catalogue of the principal functions of the Armed Forces under section 187(1), the other principal activities under paragraph (c) above. Obviously, those activities, at the request of the civil authorities, cannot be regarded as undertaken by the Armed Forces for the preservation and defence of the sovereignty and territorial integrity of The Gambia, but rather, as stated in the said paragraph (c), “for the development of The Gambia.”

In my opinion, therefore, paragraph (c) of section 187 (1) of the Constitution does not accord with the plaintiff’s submission (at paragraph 50, pages 16 and 17 of his statement of case) –

“that section 187 (1) (a) and (b) of the Constitution specifically limits and sets out the overriding duty and functions of the armed forces which is concerned with preservation of and defence of the country as a sovereign state against armed aggression, either internal or external. This explicitly means that the principal function of the armed forces is to preserve and defend the sovereignty and territorial integrity of the country and in addition, to aid the civil authorities during emergencies, such as natural disasters and such similar or related incidences.”

Thus, as far as the plaintiff is concerned, the productive activities stated in section 187 (1) (c) as among the principal functions of the armed forces do not constitute a principal function of the armed forces even though it is so stated in the section. This interpretation in light of the clear provisions of that section by the plaintiff is untenable. Moreover, the form or manner of rendering aid to the civil authorities’ at their request, in emergencies and natural disasters or in engaging in productive activities (the category of which is not closed) by the armed forces is not defined or restricted to the

preservation and defence of the sovereignty and territorial integrity of The Gambia. Indeed “productive activities”, it is assumed, do include agricultural activities especially in the context of The Gambia. Thus one can reasonably conclude that the principal functions of the armed forces under section 187 (1) of the Constitution are not restricted and could include productive agricultural activities. They are neither water-tight nor confined to the maintenance of security in the face of internal or external aggression.

Moreover, the description of the functions under section 187 (1) as “principal” does not exclude other ‘secondary’ functions and activities. The same section 187 provides examples of such activities aimed at maintaining harmony and fostering understanding between the Armed Forces and the civilian population”. Subsection (2) (b) of section 187 provides that –

(b) the Armed Forces shall establish training programmes for their members at all levels to equip them with skills and trades, and a programme of secondment to civilian occupations, so as to enable members of the forces to return, after their service, to a full and productive civilian’s life.

The category of the functions of the armed forces under section 187 of the Constitution is therefore not exhaustive or limited as contended by the plaintiff.

Additionally, section 188 of the Constitution empowers the President, in addition “to his or her general power and authority as Commander-in-Chief [to] give a Force Commander directions with respect to the operational use of the Commander’s forces in The Gambia for the purpose of maintaining and securing public safety and public order, and the Force Commander shall comply with those directions.”

While acknowledging that the Commander-in-Chief may direct the operational use of the armed forces, the plaintiff contends such use ought



to be confined to maintaining and securing public safety and public order, a principal function of the armed forces and not of the police. The plaintiff argues that this discretionary power given to the Commander –in –Chief “shall thus only be invoked when exceptional and special circumstances arise necessitating or triggering a need for the President to invite the intervention of the armed forces.” (paragraph 33).

The defendant, on the other hand, argues that sections 188(2) of the Constitution “in effect provides for supplementary functions of the Armed Forces ..... It empowers the President to give directions to any force commander when it comes to operational issues for the purpose of maintaining and securing public safety and public order. The use of the terms ‘public safety and public order’ presupposes the possibility of regular army personnel operating within the civilian sphere and beyond the traditional sphere of armed combat” (Paragraphs 12-13). The defendant, however, accedes that even though the term ‘public order’ is used in our laws, it is nowhere defined.

I believe that, given its ordinary meaning, the phrase ‘public safety and public order’ connotes the protection of the general public and the maintenance of the rule of law among members of the public. The operational use of the armed forces “in The Gambia for the purpose of maintaining and securing public safety and public order “ together with the police is therefore one sanctioned by the Constitution and a use or function of the armed forces which under section 188(2) is one of the supplementary/subsidiary functions of the armed forces.

It is worthy of note that the provisions of section 188(2) are made “without prejudice” to the general power and authority of the President, as Commander–in–chief. Section 12 of The Gambia Armed Forces Act provides that included in the powers of the Commander – in – Chief is

“(b) the power to order any of the said Forces to engage in operations for the defence of The Gambia, for the preservation of public order, for the relief in case of emergency, or for any other purpose

appearing to the Commander –in – Chief to be expedient.” (emphasis supplied)

Consequently, The Gambia National Army (The Gambia National Guard Unit) Police Duties Regulations, made under section 147 of The Gambia Armed Forces Act, are in consonance with the powers of the Commander –in –Chief both under the Constitution and the Act to direct the operational use of the armed forces for any purpose including a purpose appearing to be expedient to the Commander – in – Chief.

Significantly, the Constitution does provide safeguards in the exercise of the functions of the armed forces, requiring under sub section (3) of section 187 that –

“It shall be the duty of the members of The Gambia Armed Forces to respect the fundamental rights and freedoms of the persons.”

Additionally, the Commander – in – Chief is under subsection (3) of section 188 required to “whenever practicable, consult the National Security Council” in the exercise of his or her powers.

In the light of the above, the plaintiff’s prayers for the following declarations are denied-

1. a declaration that the Gambia Armed Forces Act- Subsidiary Legislation: The Gambia National Army (The Gambia National Guard Unit) Police Duties Regulations .... specifically in relation to regulation 3 of the above Regulations, is in direct contravention of section 187 (1) (a) (b) and (3) of the Constitution of the Gambia; the said Regulations are unconstitutional.
2. a declaration that the said Regulations “is at odds and inconsistent with the peace, stability and democratic values and ideas of The Gambia’s new democratic status and it is therefore, illegitimate, and

undemocratic taking into account recent historical context and current peaceful state affairs.”

3. As to the plaintiff’s prayer for a declaration that the said Regulations are “in direct conflict with the fundamental rights enshrined in Chapter IV of the Constitution, specifically sections 17,18, 19 and 21 of the Constitution because of the inherent values attached to fundamental rights and freedoms pursuant to section 17 of the Constitution,” I would refer to paragraph 13 of the plaintiff’s statement of case, referenced earlier but worth repeating in the light of the declaration sought herein. It reads –

“13. The Plaintiff is not seeking monetary remedy or remedy in respect of the alleged violation of his fundamental rights and freedoms under Chapter IV (sections 18 – 33) of the Constitution. The Plaintiff is seeking the interpretation and or enforcement of sections 187 (1) (a) (b) and 188 (2) of The Constitution, relying on section 127 (1) (a) of the Constitution, vesting the Supreme Court with exclusive original jurisdiction”

In view of the plaintiff’s correct statement of the law regarding the interpretation and enforcement of sections of the Constitution relating to the fundamental rights and freedoms under Chapter IV, one wonders why the plaintiff is seeking a declaration from this Court to the effect that the said Regulations are “in direct conflict with the fundamental rights enshrined in Chapter IV of the Constitution.” However the interpretation of sections 187 (1) (a) (b) and 188 (2) of the Constitution, sought by the plaintiff, relying on this Court’s exclusive original jurisdiction under section 127 (1) (a) and (b) of the Constitution, is indeed within this Court’s remit and provides the plaintiff with locus standi. Notably, the defendant has not made an issue of the locus standi of the plaintiff, and rightly so, in spite of the arguments proffered by the plaintiff in this regard. However for a more detailed consideration of this court’s

jurisdiction under section 127 (1) (a) of the Constitution, please see the unpublished decision of this Court in the recent case of Bakary Bunja Dabo and 4 others and Attorney General and The Independent Electoral Commission, case No. SC 001/2020, Judgment delivered on 17<sup>th</sup> March 2021.

4. Finally, as to the order prayed for on behalf of the plaintiff, in the nature of an order of mandamus, the plaintiff has not shown the inconsistency or conflict of the said Regulations with “the letter and spirit of sections 187 and 188 of the Constitution” to warrant the said order or a declaration to that effect.

Consequently, the prayers sought by the plaintiff for the declarations and order, contained at pages 36 and 37 of his statement of case, are hereby denied and the case is dismissed in its entirety.



**(SIGNED)**  
**HON. JUSTICE R.C. SOCK (JSC)**

**I AGREE:**

**(SIGNED)**  
**HON. JUSTICE H. B. JALLOW (CJ)**

**I AGREE:**

**(SIGNED)**  
**HON. JUSTICE M. M. SEY (JSC)**

**I AGREE:**

**(SIGNED)**  
**HON. JUSTICE A. BAH (JSC)**

**I AGREE:**

**(SIGNED)**  
**HON. JUSTICE E. F. M'BAI (JSC)**