IN THE ELECTRONIC COMMUNICATIONS TRIBUNAL

ACCRA

AD 2018

APPEAL NO: ECT/APP/009/2018

A 2 Z LIMITED

(doing business as Sepkele FM Likpe)

Accra APPELLANT

VERSUS

NATIONAL COMMUNICATIONS AUTHORITY

Accra RESPONDENT

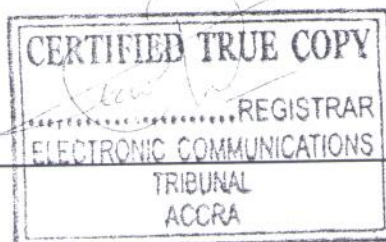
10th December 2018

CORAM: JUSTICE DATE-BAH (PRESIDING), PROFESSOR QUAYNOR, MR AKPADZI

DECISION

PROF. DATE-BAH JSC (RETIRED): This case was initiated by a Notice of Appeal filed by the Appellant on 27th February 2018, expressing dissatisfaction with the decision of the Respondent dated 1st February 2018 and stating the following grounds of appeal:

a) "The decision of Respondent purporting to impose the fine of Two Million and Forty Thousand Ghana Cedis (GHc 2,040,000.00) was ultra vires and illegal as the said decision was based on a Schedule of Penalties which is ultra vires its parent Act (Act 775) which provides a maximum fine of three thousand penalty units for any infringement of Act.



b) The Respondent failed to observe Section 13 of the Electronic Communications Act, 2008 (Act 775) by refusing, failing or neglecting to give the Appellant the opportunity to remedy the breach which had occasioned the decision to revoke the licence.

c) Respondent breached the rules of natural justice by not giving the Appellant the opportunity to present its views before the revocation and or address the concerns raised by Appellant in various communication(*sic*) with the Respondent before reaching the final decision to revoke the licence.

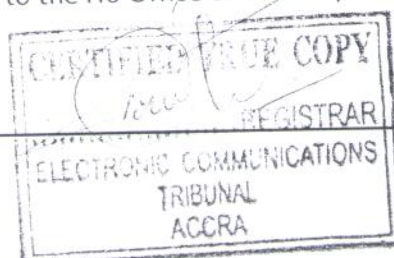
d) The Respondent is estopped from closing down A2Z Radio Station for failing to renew A2Z's authorization after receiving the full payment and documents for renewal of authorization which Respondent acknowledged by stamping on the forwarding letter as received on 16th June, 2017 and issuing an official letter.

e) The Respondent based its decision on N7 of the Schedule of Penalties which first required the Respondent to make a demand on the Appellant as well as a default on the part of the Appellant before the fine was imposed which said conditions were not met.

f) The Respondent made a mistake in computing the number of days Appellant was alleged to be in default thereby occasioning a grave miscarriage of justice to Appellant in the fine imposed on Appellant when the Appellant had made no such default."

The relief sought by the Appellant is that the decision of the Respondent to close down the Appellant's FM Radio Station at Likpe, Hohoe, dated 1st February 2018 should be reversed and the Appellant given an opportunity to renew its Authorisation and to continue its business without any interference from the Respondent.

The Appellant argues its case in a Statement of Case filed on the 25th April 2018. The Appellant indicates that it is a limited liability company which obtained an FM Broadcasting Authorisation from the Respondent on 22nd December, 2011 on an assigned frequency. It has subsequently operated a commercial radio station called Sekpele FM at Likpe in the Hohoe Municipality. It was a term of the FM Authorisation that it was to be renewed three months prior to its expiry on 21st December 2016. Appellant admits that it was unable to renew the Authorisation before this due date. However, the Appellant avers that on 16th June 2017 it submitted an application to the Ho Office of the Respondent for renewal of its Authorisation,



supported by the payment of the total fee required and the required documents, save two documents.

The Appellant further avers that it continued to operate its commercial radio station until it received a letter dated 22nd June, 2017 from the Respondent, informing the Appellant of the Respondent's intention to close down the radio station in thirty days for failing to renew its Authorisation. In response to this letter, the Appellant informed the Respondent that it had paid the full fee for the renewal of its Authorisation and submitted the required documents to the Ho Office of the Respondent. The Appellant also next submitted the remaining documents to the Ho Office of the Respondent. However, the officers at the Ho Office refused to accept the remainder of the documents, but rather returned the documents initially submitted by the Appellant, which they had on 16th June 2017 received without objection. They now instructed the Appellant to send all the documents to the Head Office of the Respondent in Accra. When the Appellant complied with this instruction, Respondent's officers at the Head Office refused to accept the documents.

By a letter dated 26th September, 2017, the Respondent imposed a penalty of Four Million and Eighty Thousand Ghana Cedis (GHS 4,080,000.00) on the Appellant for failing to submit to the Respondent "in a manner and at the times as may be reasonably requested, documents, accounts, estimates, returns and other information that may be required under the Authorisation". The penalty was imposed for a period of 408 days, starting from 21st December, 2016 to June 2017. In response to this, the Appellant formally informed the Respondent, by a letter dated 4th October 2017 that it had paid the full fee for renewal of its Authorisation, prior to the Respondent's Notice to Suspend Operations.

Subsequently, the Respondent reduced the fine it had imposed on the Appellant by fifty per cent, ordering the Appellant to pay two million, six hundred and fifty thousand Ghana Cedis (GHS 2,650,000). The Respondent warned the Appellant that it would revoke its Authorisation if the revised penalty was not paid. By a letter dated 1st February 2018, the Respondent purported to revoke the Appellant's Authorisation, on the ground of failure to pay the penalty for not submitting the required set of documents. The Respondent also directed the Appellant to cease broadcasting with immediate effect. It is against this decision of 1st February that the Appellant has brought this appeal before this Tribunal.

In the Respondent's Statement of Case, it confirms that an FM Radio Authorisation was granted to the Appellant as averred by the Appellant and that the Authorisation was due to expire on 21st December 2016. It stressed that by paragraph 5 of the Appellant's Authorisation the Appellant was supposed to apply for a renewal of its Authorisation three months prior to its expiry. The Respondent points out that the Appellant failed to renew its Authorisation prior to its date of expiry. This is a fact admitted by the Appellant in its Statement of Case.

The Respondent avers that it served notice on the Appellant by a letter entitled "Notice of Suspension", dated 22nd June, 2017, giving the Appellant a thirty day notice of its intention to revoke the Appellant's Authorisation. After the expiry of this notice, the Respondent proceeded to impose the penalty already described above. The Respondent avers that the Appellant appealed to it by a letter dated 4th October, 2017. Accordingly, the Respondent reduced the penalty imposed on the Appellant by a letter dated 22nd December 2017. The Respondent says that because the Appellant failed to respond to its letter of 22nd December 2017 it revoked the Appellant's Authorisation on 1st February 2017 and proceeded to close down the station.

These are the facts underlying the Appellant's appeal to this Tribunal. Its grounds of appeal will now be considered *seriatim.*

Ground (a)

"The decision of Respondent purporting to impose the fine of Two Million and Forty Thousand Ghana Cedis (GHc 2,040,000.00) was ultra vires and illegal as the said decision was based on a Schedule of Penalties which is ultra vires its parent Act (Act 775) which provides a maximum fine of three thousand penalty units for any infringement of Act."

The Appellant's argument in support of this ground was that section 73(1) of the Electronic Communications Act 2008 (Act 775) provided that a person who knowingly fails to comply with or acts in contravention of the Act commits an offence and is liable on conviction to a fine of not more than 3,000 penalty units or to a term of imprisonment of not more than five years or to both. The Appellant therefore contends that the prescribed number of penalty units that may be imposed under the Act is what is thus specified. It submits that the fine imposed by the Respondent on the Appellant exceeded the maximum allowed to be imposed

on a corporate entity. Its contention is that to the extent that the prescribed penalty is ultra vires the parent Act, Act 775, it is illegal and should be quashed.

The Respondent answers this argument in its Statement of Case by contending that by the power conferred on it by Regulation 137 of the Electronic Communications Regulations 2011 (LI 1993) it has the mandate to impose pecuniary penalties unless the penalty has been specifically provided for under the Regulations.

The issue between the parties is in fact covered by a precedent of this Tribunal. A similar issue was determined by this Tribunal in *Genesis Media Ltd. v National Communication Authority*, (Appeal no. ECT/APP/001/2017) decided on 18th June 2018. In that case this Tribunal held as follows:

> "Under grounds (a) and (b), the Appellant challenges the legality of the fine exacted under the "Schedule of Penalties", on account of its quantum. The Appellant submits that the fine imposed on it is in contravention of that for which the parent Act provides. Accordingly, it is its case that Number N7 is unlawful and ultra vires its parent Act, Act 775. The Appellant submits that since, under section 73 of Act 775, a person who knowingly fails to comply with or acts in contravention of the Act is liable on conviction to pay a fine of not more than three thousand penalty units or to serve a term of imprisonment of not more than five years or both, any penalty imposed under the Act which is more harsh than this is ultra vires. Furthermore, the Appellant also points out that section 97(3) of Act 775 provides that the penalty for contravention of the regulations shall be a fine of not more than two thousand penalty units. It therefore argues that since the Electronic Communications Regulations 2011 (LI 1991) states that it is made on the authority of the Minister responsible for Communications and in exercise of the Minister's powers under the parent Act, no fine made under any regulation issued under Act 775 should exceed two thousand penalty units.
>
> This latter argument is, however, flawed, since section 97(3) of Act 775 has been repealed. Section 4 of the Electronic Communications (Amendment) Act, 2016 (Act 910) provides that: "The principal enactment is amended by the repeal of subsection (3) of section 97." Thus there is no longer any upper cap on the quantum of fines that

may be imposed to sanction offences created by regulations under Act 775. Moreover, the Schedule of Penalties does not appear to be regulations in themselves. It is rather a setting out of penalties that the Respondent is authorised to determine under enabling power contained in the Regulations. Regulation 137 of LI 1991 provides as follows:

> "(1) Where there is a breach of a provision of these Regulations, the Authority may impose a pecuniary penalty as the Authority may determine, unless a penalty is otherwise provided for in these Regulations.
>
> (2) The Authority shall for the purposes of sub-regulation (1) publish the pecuniary penalties for breaches in a manner as the Authority determines."

For instance, in prescribing pecuniary penalties to be applied to particular offences, the Respondent, in the section referred to as N in the the Schedule of Penalties, indicates that it is acting pursuant to section 72(1) of Act 775 and Regulation 137 of LI 1991. Regulation 137 of LI 1991 has already been set out above. Section 72(1) (e) provides that: "The Authority may in furtherance of its functions....(e)impose a pecuniary penalty on a licensee for breach of a condition of a licence,..."

In the light of the statutory provisions set out above, the Appellant's submission, on these two grounds of appeal, that Number N7 in the Schedule of Penalties is ultra vires its parent Act (Act775) and the Regulations under it (LI 1991) and therefore the fine imposed on it is unauthorised, illegal and without basis cannot be upheld by this Tribunal."

Clearly, the precedent cited above requires this Tribunal to dismiss ground (a) of the Appellant's grounds of appeal.

<u>Ground (b)</u>

"The Respondent failed to observe Section 13 of the Electronic Communications Act, 2008 (Act 775) by refusing, failing or neglecting to give the Appellant the opportunity to remedy the breach which had occasioned the decision to revoke the licence."

Under this ground, the Appellant contends that before exercising its power to suspend or revoke the Appellant's Authorisation under section 13 of the Electronic Communication Act, 2008 the Respondent was under a duty to give it or any other offender an opportunity to rectify the breach in question. Accordingly, having failed in this duty, the Respondent's decision to revoke the Appellant's Authorisation cannot be allowed to stand, as the Respondent is in breach of section 13 of Act 775.

The Respondent replies to the Appellant's argument on this ground by asserting that it did comply with section 13 of the Electronic Communication Act, 2008 and, secondly, that in any case the Appellant was not even entitled to notice under section 13 of Act 775, since its Authorisation had already expired at the time it was served with notice of revocation.

In arguing its compliance with section 13, the Respondent relies on Exhibit R2 appended to its Statement of Case which is a letter to the Appellant, dated 22nd June 2017, with the caption "Notice of Suspension of Operations". In this letter, the Respondent indicates to the Appellant that according to its records the Appellant has failed to renew its Authorisation which expired on 11th December 2016. It points out that this is a breach of the conditions of the Authorisation. It further draws attention to the fact that this state of affairs contravenes section 2(4) of the Electronic Communications Act, 2008, which states that: "Except as provided by this Act or any other law not inconsistent with this Act, a person shall not operate a broadcasting system or provide a Broadcasting service without a frequency Authorisation by the Authority."

The letter goes on further to indicate that the Appellant, by failing to apply for Authorisation, was operating illegally. It then quotes and relies on section 13(1)(b) of Act 775, which states that "the Authority may suspend or revoke a licence or a frequency Authorisation where the licensee or the Authorisation holder has failed to comply materially with a lawful direction of the Authority."

Ground (b) is quite easy to dispose of, on the facts set out thus far. The Appellant itself admits that its Authorisation expired in December 2016. An Authorisation which has expired does not need to be suspended or revoked. It no longer exists. Accordingly, there is no need to resort to section 13 of Act 775 to revoke it or suspend it. Where the holder of an Authorisation

CERTIFIED TRUE COPY
REGISTRAR
ELECTRONIC COMMUNICATIONS
TRIBUNAL
ACCRA

allows it to expire, before applying for its renewal, it takes itself outside the due process provisions contained in section 13(2) of Act 775.

Accordingly, ground (b) is dismissed.

Ground (c)

"Respondent breached the rules of natural justice by not giving the Appellant the opportunity to present its views before the revocation and or address the concerns raised by Appellant in various communication with the Respondent before reaching the final decision to revoke the licence."

As explained in relation to Ground (b), what the facts in this case establish is the expiry of the Appellant's Authorisation, rather than its revocation. At the time of any purported revocation, the Authorisation had already expired. What has expired, cannot be revoked. Accordingly, breach of natural justice before an alleged revocation is a moot issue that it is not necessary for this Tribunal to consider. Accordingly, the appeal cannot succeed on this ground.

Ground (d)

"The Respondent is estopped from closing down A2Z Radio Station for failing to renew A2Z's authorization after receiving the full payment and documents for renewal of authorization which Respondent acknowledged by stamping on the forwarding letter as received on 16th June, 2017 and issuing an official letter."

Ground (d) raises the issue of whether the Respondent's conduct after the expiry of the Appellant's Authorisation was sufficient to amount to estoppel, preventing it from exercising its statutory powers to close down the Appellant's radio station.

The Appellant relies on section 26 of the Evidence Act, 1975 (NRCD 323) which provides that:

"Except as otherwise provided by law, including a rule of equity, when a party has, by that party's own statement, act or omission, intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon that belief, the truth of the thing shall be conclusively presumed against that party or the successors in interest of that party in proceedings between

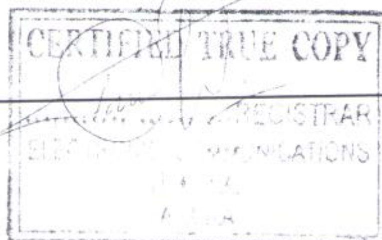
a) that party or the successors in interest of that party, and

b) the relying person or successors in interest of that person."

The Appellant's case is that on 16th June 2017, it submitted the full fee for renewing its Authorisation as well as the completed application form, all required documents necessary for renewing its Authorisation, save two, to the Ho Office of the Respondent. The Respondent accepted the payment and issued a receipt for it and also accepted the documents without objection. The Appellant avers that it relied on the Respondent's conduct in accepting the fee for the renewal of Authorisation and proceeded to carry on transmission. It asserts that it was led to believe that it was in good standing with the Respondent. It therefore claims that the Respondent is estopped from claiming that the Appellant was in default of renewing its Authorisation and from closing down its radio station.

The Respondent in its Statement of Case denies any estoppel. The Respondent submits that the rule of estoppel cannot be used to prevent a public body from enforcing powers conferred on it under an enactment. The Respondent contends that since the Appellant's Authorisation had expired at the time of its action to close it down, it was the Respondent's duty under Act 775 to ensure that the Appellant's station was closed down so as to prevent it from continuing to perpetuate an illegality. The Respondent argues that this action was not inconsistent with section 26 of the Evidence Act, since the first part of that provision states: "except otherwise provided for by law including a rule of equity...".

Analysis of the facts of the case leads one inevitably to the conclusion that there cannot be estoppel on these facts. The Appellant's Authorisation had expired. All that it had done by June 2017 was to apply for a renewal and pay the requisite fee. It admits that it had not even submitted all the requisite documents. The Respondent had a discretion as to whether to renew the Authorisation or not. It was not obliged to renew the Appellant's Authorisation. The mere fact of applying for the renewal cannot therefore raise estoppel. Thousands of applications are received every day by Government agencies. The mere acceptance of such applications should not reasonably raise any particular expectation, save that the application will be considered on its merits. Raising an estoppel from the mere acceptance of an application would be a very dangerous principle to establish in relation to a public body. The Respondent would be within its rights to refuse the renewal. A public body to whom an application has been made should be allowed to exercise its statutory powers according to its



discretion, fairly exercised. It would be against public policy for its decision to be dictated by notions of estoppel. The decision contained in the Respondent's letter of 1st February 2018 to revoke the Appellant's Authorisation was in fact unnecessary. The Authorisation had already expired anyway. The direction in the same letter to shut down broadcasting transmission immediately was consequentially lawful.

Accordingly, ground (d) is also dismissed.

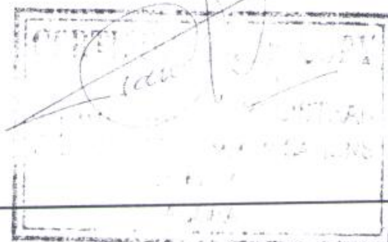
Ground (e)

"The Respondent based its decision on N7 of the Schedule of Penalties which first required the Respondent to make a demand on the Appellant as well as a default on the part of the Appellant before the fine was imposed which said conditions were not met."

The Appellant complained that the Respondent purported to base its fine on N7 of the Schedule of Penalties. It argued that the Respondent's right to impose the penalty had not yet accrued since the Respondent had not requested the Appellant to produce any documents.

The Appellant thus raises an issue which was considered and settled by this Tribunal in *Ghana Independent Broadcasters Association v National Communication Authority.* ECT/APP/002/2017, decided on 18th June 2018. In that case the Tribunal expressed the following view:

> "The Appellant also makes the point that for a person to be guilty of the offence of failing to produce documents, accounts etc to the Respondent, there must have been a request made by the Respondent under section 19 of Act 775, which the Appellant denies was ever made. The Appellant also submits that for a person to be in breach of Regulation 103(h) of LI 1991 which places an obligation on a Class 1 licensee to submit to the NCA "in a manner and at the times as may be reasonably requested documents, accounts, estimates, returns and other information that may be required under the licence and, in general, give the Authority's inspectors the necessary facilities to carry out inspections of the communications system," there must be a valid Authorisation or licence under which the request for information is made.



In other words, the Appellant argues that this provision presupposes that the person who has an obligation to furnish the information requested is the holder of an Authorisation or a licence. Therefore, the holder of an expired Authorisation or licence is not subject to the obligation to provide information. Rather the correct sanction to apply to a person whose Authorisation has expired is the sanction for failure to renew and not the sanction for refusal to submit documents requested under the Authorisation, since there is no longer an Authorisation.

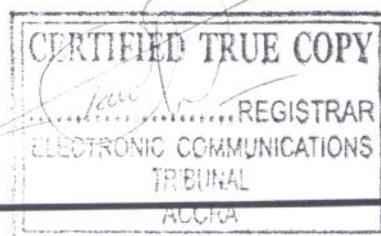
The Respondent, in its Statement of Case, dismisses these arguments of the Appellant on this ground as unmeritorious. It submits that once the Appellant's members had submitted applications for renewal and yet failed to submit the complete set of documents required to conclude the renewal process, they became liable for the offence of failure to provide the required documents. The Appellant's members did not have the right to choose which penalty should be applied to them. The Respondent asserts that:

> "It is amply clear that having failed to submit all the documents required and having been notified of the need to submit the documents that they failed to submit, their infraction is a failure to provide documents and they can be penalised under the Schedule of Penalties."

The Respondent concludes its submission on this ground as follows:

> "Respectfully, the Appellants, having failed to comply with the request to produce documents as indicated above, had breached a requirement of the licences granted them. The Respondent was thus right in imposing penalties in accordance with the Schedule of Penalties and we submit that the Appellants' appeal must be dismissed on this ground."

This conclusion is flawed in that, by the Respondent's own showing, the licences or Authorisations of the Appellant's members had expired. Accordingly, obligations under licences or Authorisations could not be used as a basis for requesting the information demanded by the Respondent.



The Respondent is right in pointing out that the Appellant's members do not have the right to determine what offences they are "charged with" and what penalties should be invoked against them. That is the prerogative of the Respondent, subject to it not infringing the rationality test embodied in the *Wednesbury* principles (See *Associated Provincial Picture Houses v Wednesbury Corpn* [1948] 1KB 223 and *Tema Development Corporation & Musah v Atta Baffuor* [2005-2006] SCGLR 121).

However, once a particular offence has been has been laid at the door of the Appellant's members, this Tribunal has the jurisdiction to examine the legality of the accusation and whether the penalty applied to the Appellant's members is supported by the facts of their respective cases and thus lawful. This Tribunal thus needs to examine the facts of the case of each member of the Appellant on whose behalf it has brought this appeal in order to determine whether there is evidence to support the application of the sanction applied to each of them."

Applying *Ghana Independent Broadcasters Association v National Communication Authority*, it is clear that the Respondent had no legal basis for imposing a penalty on the Appellant. Given the facts of this case, particularly the fact that the Appellant's FM radio Authorisation expired in December 2016, it could not properly be charged with the offence in relation to which the penalty or fine was purportedly exacted by the Respondent. The penalty is thus quashed.

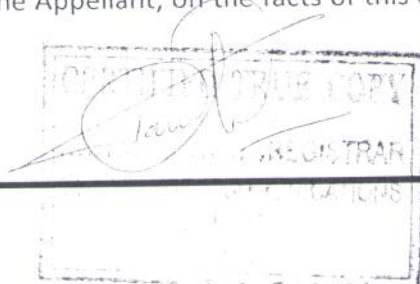
Ground (f)

"The Respondent made a mistake in computing the number of days Appellant was alleged to be in default thereby occasioning a grave miscarriage of justice to Appellant in the fine imposed on Appellant when the Appellant had made no such default."

Since the penalty imposed on the Appellant has been quashed for the reasons adduced under Ground (e), the mode of calculation falls away. The penalty is quashed and so the quantum of it is no longer relevant.

Decision

In the result, this Tribunal quashes the penalty or fine imposed on the Appellant, since it was improperly applied to the Appellant, on the facts of this case, although the Respondent has



the power to impose fines or penalties in appropriate cases. The Appellant's Authorisation having expired in December 2016, it lost the legal right to continue broadcasting on its assigned frequency. The Respondent has the legal power to close it down. Accordingly, the Respondent's decision of 1st February 2018 to close down the Appellant's radio station cannot be reversed, as sought by the Appellant. Furthermore, the Tribunal is unable to order the Respondent to allow the Appellant to complete the process of renewing its Authorisation. However, in accordance with the need for stability in operations and not disrupting consumer expectations, the Tribunal considers that it would be in the interest of the industry for the parties to this case to reach an accommodation by which the Appellant's Authorisatioon is renewed, in accordance with the Respondent's due processes.

JUSTICE SAMUEL KOFI DATE-BAH (PRESIDING)

PROFESSOR NII NARKU QUAYNOR (MEMBER)

BIADELA MORTEY AKPADZI (MEMBER)

COUNSEL:

NOOR- DEEN SAEED (WITH EVA ANGELINA DANIELS KLU) FOR APPELLANT

ROBERT APAYA FOR RESPONDENT