IN THE ELECTRONIC COMMUNICATIONS TRIBUNAL

ACCRA

AD 2018

APPEAL NO: ECT/APP/010/2018

FUTURE FM LTD APPELLANT

VERSUS

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ELECTRONIC COMMUNICATIONS
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ACCRA

NATIONAL COMMUNICATIONS AUTHORITY

Accra RESPONDENT

24th July 2018

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

DECISION

PROF. DATE-BAH JSC (RETIRED): On the 7th March 2018, the Appellant filed a Notice of Appeal with this Tribunal expressing dissatisfaction with a decision of the Respondent contained in its letter of 1st February 2018. The Notice of Appeal was filed pursuant to Section 91(1) of the Electronic Communications Act, 2008 (Act 775).

The letter of 1st February 2018 was written by the Director-General of the Respondent to the Director Legal of the Appellant and was in the following terms:

"REVOCATION OF AUTHORISATION

We make reference to our letter dated 22nd December, 2017 which communicated the reduced penalty for not submitting the complete set of required documents for the renewal of your expired Authorisation.

Regrettably, Future FM Limited has refused to respond to the above-mentioned letter.

2009. The Respondent failed to act on this application and it was not until the latter part of 2016 that the Respondent wrote to the Appellant to invite it to apply for a renewal of the authorisation and pay its application fee again. The Appellant duly repeated the process of applying for renewal of its broadcasting authorisation by producing all relevant documentation and paying the application fee in or about 6th January 2017.

The Appellant was subsequently notified by the Respondent to submit a number of documents which it was unable to, for reasons it claims were known to the Respondent. The main reason was that there was a dispute between the shareholders and directors of the company. The directors were therefore not willing to sign the forms for re-registration of the Appellant which would enable the Appellant to secure a Tax Clearance Certificate. The Appellant, accordingly, expressed surprise that the Respondent informed the Appellant in June 2017 that the Appellant had refused to submit a copy of its Tax Clearance Certificate and Audited Financial Reports for the past five years and therefore the Respondent intended to close down its station. The Appellant complied by re-submitting its Audited Financial Reports for 2011 to 2015, but informed the Respondent of its inability to submit the Tax Clearance Certificate as a result of the challenges already described, which the Appellant averred had been notified to the Respondent both in writing and verbally.

By a letter dated 28th September 2017, the Respondent informed the Appellant that it had operated without a valid authorisation from 23rd September 2008, in contravention of section 2(4) of the Electronic Communications Act, 2008, Act 775. It quoted the offence set out in Number N(7) of the Schedule of Penalties of the National Communications Authority, gazetted on 20th April 2015, and indicated that the Appellant was by the letter fined a total of Thirty-One Million, Nine Hundred and Thirty Thousand Ghana Cedis (GHC 31,930,000.00), being the penalty for not submitting the complete set of required documents for the renewal of the Appellant's authorisation for a total of 3193 days from 23rd September, 2008 to 22nd June, 2017, when the Appellant was served with a notice of suspension. The fine had been computed on the basis of ten thousand Ghana cedis for every day of breach of N(7) of the Schedule of Penalties. The letter concluded with a paragraph in which the Appellant was given notice that the Respondent would close down the Appellant's station and re-assign its frequency after 30 days from the date of the letter, if the penalty imposed was not paid and any outstanding documents not submitted.

By a letter dated 25th October 2017, the Appellant replied to the Respondent's letter of 28th September, offering an explanation as to why the Appellant still did not have a Tax Clearance Certificate.

On 23rd October 2017, the Respondent, following a reprieve granted by the Minister responsible for Communication, wrote to the Appellant indicating that the penalty imposed on it had been reduced by 50%. The Appellant was thus to pay Fifteen Million Nine Hundred and Sixty-Five Thousand Ghana Cedis (GHc 15,965,000.00). There was a further amnesty granted by the Board of the Respondent which was communicated by a letter dated 22nd December 2017. This amnesty further reduced the penalty payable by the Appellant to One Million and Ninety Five Thousand Ghana Cedis (GHC 1,095,000). The letter of 22nd December gave notice that the reduced fine was to be paid by the Appellant by 15th January, 2018 or else the Appellant's authorisation would be revoked and the station closed down.

Finally, on 1st February 2018, the Director General of the Respondent wrote to revoke the Appellant's frequency authorisation because of the Appellant's failure to respond to the Respondent's letter of 22nd December. In addition to revoking the Appellant's authorisation, the letter directed the Appellant to shut down its broadcasting transmission immediately.

The Appellant argues that the Respondent's decision of 1st February 2018 to revoke the Appellant's frequency authorisation is based on the decisions of 28th September 2017 and 22nd December 2017 and therefore they should be part of the discussion in this Appeal. The Appellant points out that the Respondent, in imposing the fine, originally relied on Number N(7) of the Schedule of Penalties. The legality of imposing the penalty is put in play by the first two grounds of appeal.

The Tribunal wishes to highlight the fact that in 2017 the Appellant was not a holder of an authorisation. This fact, according to previous decided cases of this Tribunal, means that the Appellant could not be lawfully charged with Number N(7) of the Schedule of Penalties. For instance, in *Ghana Independent Broadcasters Association v National Communication Authority* Case (No ECT/APP/002/2017 decided on 18th June 2018), this Tribunal said:

> "The crucial issue emerging from the facts set out above is the interpretation to be put on N(7) of the Schedule of Penalties. Was it intended to cover persons who were not licensees or holders of frequency authorisations? Is it

reasonable to interpret its severe financial sanctions to bring within their ambit applicants for licences and frequency authorisations? What would be the purpose of an interpretation that brings in such persons without frequency authorisations?

By the express language of the provision imposing the penalty, it applies to "documents, accounts, estimates, returns and other information that may be required under the Authorisation". This language presupposes that the person liable to the penalty is the holder of an authorisation. It does not make sense for the provision to be interpreted to enable a fine to be levied on a fresh applicant for an authorisation, before the grant of the authorisation. There is no need for the hefty sums that can be levied under the Schedule of Penalties to be exacted from a fresh applicant, when there is the simple remedy of dismissing its application for not complying with the preconditions for success in the application. An alternative remedy is to invoke the sanction applicable to persons whose authorisation has expired and have failed to renew it. The Appellant correctly points out that such a sanction is contained in Regulation 65 of LI 1991.

Regulation 65(1) and (11) provide as follows:

1. A person shall not use a radio frequency without authorisation from the Authority.

.....

(11) A person who acts in breach of any provision of regulation 65 to 77 commits an offence and is liable on summary conviction to a fine not exceeding five hundred penalty units."

The same considerations apply to an applicant for renewal of an authorisation. When the authorisation expires, the former holder of it reverts to the same position as a fresh applicant for it. Applying a purposive approach to the interpretation of the provision under consideration, the Tribunal is of the view

that, given its context, it does not apply to persons who do not have a current frequency authorisation."

This means that the penalty imposed on the Appellant should be quashed and it is hereby quashed.

However, the relief sought by the Appellant goes beyond the quashing of the penalty. The Appellant is seeking a quashing of the decision contained in the letter of 1st February 2018 which includes the immediate revocation of the Appellant's authorisation and the closing down of its operations. This is problematic. Even after the quashing of the Appellant's penalty, its authorisation remains expired. The authorisation expired as far back as 2008. Whatever the explanations or excuses that the Appellant has for its failure to renew, the fact remains that it is not the holder of a frequency authorisation and is therefore not entitled nor authorised to broadcast on its assigned frequency and commits an offence if it does so. The Respondent has the statutory right to close down the operations of the Appellant, if it is continuing to transmit after the expiry of its authorisation. The relief granted to the Appellant is thus limited to the quashing of the penalty imposed on the Appellant.

This decision of the Tribunal disposes of this Appeal. The Tribunal does not consider it necessary to decide on the remaining Grounds of Appeal. However, the Tribunal will deal with Ground (iii) in order to give guidance to the Respondent in its regulatory practice. It will be recalled that Ground (iii) states that the decision made by Respondent was in breach of the rules of natural justice, the Audi Alteram Partem rule. This is a cogent ground in relation to the imposition of a penalty on the Appellant. It is not persuasive in relation to the closing down of the Appellant's station since that action follows on the undisputed expiry of the Appellant's frequency authorisation. The expiry of the authorisation occurred by operation of law, without the need for any decision of the Respondent. Having occurred, the Respondent then has the regulatory authority to close down the station. Accordingly, the letter of 1st February 2018 from the Respondent purporting to revoke the authorisation of the Appellant was unnecessary. The authorisation did not exist for it to be revoked. What the Respondent had the right to do and which it did in that letter was to direct the shutting down of the Appellant's broadcasting transmission. Section 2(4) of the Electronic Communication Act, 2008 clearly gives the Respondent power to do this.

In responding to Ground (iii), the Respondent in its Statement of Case stated as follows:

> "What this means is that the rule of natural justice will be satisfied if the party against whom a decision is to be made is given a reasonable notice in writing before the decision is taken. There is abundant evidence in the instant case that the Appellant was informed severally through various letters about the infraction and was also given final notices through the Respondent's 22nd June 2017 letter **(exhibit R8)** and the 22nd December, 2017 letter **(exhibit R 13)** before the revocation of the Appellant's Authorisation. It was as a result of the hearing granted to the Appellant that the Appellant subsequently submitted additional documents for the renewal of its Authorisation minus the tax clearance certificate. The Appellant should therefore not be allowed to come back later and claim that it was not given a hearing."

The Respondent in this passage misses the point about what the *audi alteram partem* principle entails. Mere information to an affected party of an intended course of action is not enough. The party should be offered an opportunity to make representations in its defence before the decision is taken. The Respondent's letter of 28th September, 2017 (Exhibit R9 appended to the Respondent's Statement of Case) which imposed the fine on the Appellant did not invite the Appellant to make representations on its own behalf before the imposition of the fine. It merely announced the imposition of the fine and the mode of calculation of the fine. It ordered the fine to be paid within 30 days of the date of receipt of the letter.

As this Tribunal said in *Genesis Media Ltd v National Communications Authority* (ECT/APP/001/2017 decided on 18th June 2018):

> "The error made in this contention is to assume that once a letter was written to the Appellant that cured any breach of the principles of natural justice. There may still be a breach of those principles depending upon the content of the letter. What was needed in relation to the Appellant to avoid a breach of the principles of natural justice was a letter informing it of the intention of the Respondent to apply a particular sanction to it and inviting it to offer representations as to why that sanction should not be applied to it. Clearly, the letter relied on by the Respondent fell short of this requirement. The letter prayed in aid did not talk about failure to submit documents.

It spoke of something completely different, namely an intention to suspend the Appellant's operations.

Accordingly, the Tribunal finds that the Respondent breached the rules of natural justice."

This analysis applies to the facts of this case as well. The Tribunal therefore finds that in relation to the imposition of the penalty on the Appellant the *audi alteram partem* principle was breached.

The Appeal is thus allowed in part.

JUSTICE SAMUEL KOFI DATE-BAH (PRESIDING)

PROFESSOR NII NARKU QUAYNOR (MEMBER)

BIADELA MORTEY AKPADZI (MEMBER)

ELECTRONIC COMMUNICATIONS TRIBUNAL ORIGINAL

COUNSEL:

SEAN POKU FOR THE APPELLANT

ROBERT APAYA FOR THE RESPONDENT

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