IN THE ELECTRONIC COMMUNICATIONS TRIBUNAL

ACCRA

AD 2018

APPEAL NO: ECT/APP/002/2017

GHANA INDEPENDENT BROADCASTERS ASSOCIATION

(suing for and on behalf of Mascott Multimedia Ltd & 8 others)

Accra APPELLANTS/APPLICANTS

VERSUS

NATIONAL COMMUNICATIONS AUTHORITY

Accra RESPONDENT/RESPONDENT

25th January 2018

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

RULING ON MOTION ON NOTICE FOR STAY OF EXECUTION PENDING APPEAL

DATE-BAH, JSC (RETIRED): This is the unanimous Ruling of the Tribunal. The Applicants filed a Notice of Appeal with the Electronic Communication Tribunal established under the

Electronic Communications Act, 2008 (Act 775) on the 3rd day of November 2017, complaining of that part of a decision by the Respondent, dated the 28th day of September, 2017 and reviewed on the 20th day of October 2017, which imposes pecuniary penalties on the Appellants, pursuant to section 73(1) of the Electronic Communications Act, 2008 (Act 775) and Regulation 137 of LI 1991. The penalties are stated in the National Communications Authority Schedule of Penalties published in the Ghana Gazette on 20th April 2015. In the appeal, the Appellants/Applicants seek the following reliefs:

a. "A declaration that upon a true and proper interpretation of Section 72(1) of Act 755 and Regulation 137 of LI 1991, the National Communications Authority only has the power to apply pecuniary penalties to offences already created in Act 755 or Regulation LI 1991 where no punishment is provided for under those laws.
b. A declaration that upon a true and proper interpretation of the Section 73 of the Act 755 the facts grounding the infractions which the Appellants are alleged to have committed are cognizable under Section 73 of Act 755 and therefore not punishable under the Schedule of Penalties Gazetted on the 20th day of April 2015 via Section 72 of Act 755 and Regulation 137 of LI 1991.
c. A declaration that the retrospective application of the Schedule of Penalties to offences alleged to have been committed before the said Schedule of Penalties was Gazetted is contrary to law, void and of no effect.
d. A declaration that the imposition of penalties on the Appellants without granting them the opportunity to remedy any alleged infraction is contrary to law and of no legal effect.
e. A reversal of the decision by the Respondent to apply pecuniary penalties on any of the Appellants herein.
f. Any further orders as this Honourable Tribunal may deem fit."

On the 24th day of November 2017, the Appellants filed a motion on notice with this Tribunal, seeking a stay of execution of the decision of the Respondent dated the 20th day of October 2017 against which it has lodged the appeal referred to above. In a supporting affidavit deposed to by one Pat Kyei, she avers that the decision of the Respondent in respect of each of the Appellants is that the Respondent is to close down their respective radio stations, should they fail to pay the fines and penalties levied on them. She contends

that the fines imposed are both unconstitutional and ultra vires the Electronic Communications Act, 2008. She further deposes that it is fair and just that the execution of the decision of the Respondent is stayed pending the final determination of the appeal before this Tribunal. She further contends that the Applicants stand a risk of having their radio stations closed down by the Respondent because of the decision they are challenging on appeal. Should that happen, the Applicants would have suffered damage which may later turn out to have been unnecessary, if the Applicants' appeal were to succeed.

The Respondent has vigorously opposed the motion by the Applicants. Ruth Essilfie Ntenah of Bentsi-Enchill, Letsa and Ankomah has deposed to an affidavit in opposition to the motion. She affirms that the Respondent's Schedule of Penalties is not ultra vires the Electronic Communications Act, 2008, which empowers the Respondent to impose pecuniary penalties. She further avers that the Respondent has not breached any law or the Constitution and has not been unfair to the Appellants. It is her belief that the Applicant's appeal is without any legal basis and is frivolous and has no chance of success. She deposes to the view that if the appeal succeeds, the Appellants will not suffer any adverse consequences because their authorisation having already expired, they cannot operate unless the authorisation is renewed. She also asserts that the Applicants have failed to show any exceptional circumstances in their application to warrant the exercise of this Tribunal's discretion in their favour.

The interests of the Applicants and the Respondent are thus in conflict and in competition. The tension that often emerges between the interests of an Appellant and a Respondent in stay of execution proceedings is expressed thus by Francois JSC in *Republic v Court of Appeal, ex parte Sidi* [1987-88] 2 GLR 170 at 181:

> "...one must recognize that there are two competing interests. First that of the victorious party of whom it was said in The Annot Lyle (1886) 11PD 114 at 116 per Bowen L.J., that the court does not "make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds, to which prima facie he is entitled...." pending an appeal. The other side of the coin derives its validity from Wilson v Church (No. 2) (1879) 12 Ch. D 454 to which our Joseph v Jebeile [1963] 1 GLR 387, SC owes its origin. That postulates that a person exercising its undoubted

right of appeal is entitled to obtain an assurance from the court that the appeal if successful would not be rendered nugatory."

This dictum has to be adapted to the context of the present application where the Respondent is not a successful litigant, but rather the maker of a decision which is being challenged on appeal. The principle is, however, the same in that while it may be said that the Tribunal should not deprive the decision-maker of the benefits of its decision, the appellants' appeal, on the other hand, should not be rendered nugatory either. There has to be a delicate balancing of interests. Nevertheless, not rendering the appeal nugatory is a very important consideration. The *locus classicus* that supports this proposition is the well-known dictum of Akufo-Addo JSC in *Joseph v Jebeille* [1963] 1 GLR 387 at 390. He there said:

> "While we do not wish to say anything that may be interpreted as a fetter on the exercise of discretion of a trial judge when he considers an application for stay of execution pending appeal we think it necessary in the interest of justice to say generally that when such a case is considered in a case involving, *inter alia*, the payment of money, the main consideration should be not so much that the victorious party is being deprived of the fruits of his victory, as what the position of a defeated party would be who had to pay up or surrender some legal right only to find himself successful on appeal. In this respect, it is wholly immaterial what view a trial judge takes of the correctness of his own judgment or of the would-be appellant's chances on appeal, if the position ...is that the victorious party is unlikely to be able refund the amount paid to him, or the defeated party to be restored to the *status quo ante*, in the event of a successful appeal (and it should not be difficult to determine the likelihood of such an event), then it would be palpably unjust to refuse stay of execution..."

In addition to the factor just discussed, the Tribunal also took into account another criterion that Ghanaian courts advert to when exercising their discretion in applications such as this, namely, the balance of hardship. (See, for instance, *Saunders v Awuku (No. 2)* [1962] 1 GLR 545 and *NDK Financial Services Ltd. V Yiadom Construction & Electrical Works* [2007-2008] 1 SCGLR 93.) The critical factor influencing our decision is the difficulty of restoring the Applicants to the *status quo ante*, if they were to succeed in their appeal and they had in the meantime been closed down by the Respondent. The Tribunal is reluctant to comment on

the chances of success of the Applicants' appeal, lest we are considered to have prejudged the appeal. Suffice it to state that we do not consider the Notice of Appeal to be so obviously incompetent or flawed as to influence us to reject this application.

Accordingly, after hearing the oral arguments of counsel for both Applicants and the Respondent on 16th January 2018, highlighting and justifying the contentions set out in their respective supporting affidavits, and a careful consideration of the competing interests in this case, the Tribunal has come to the conclusion that it would be unjust not to grant a stay of execution in this case. The Tribunal, therefore, hereby orders a stay of execution of the decision of the Respondent dated the 20th day of October 2017, which is the subject-matter of an appeal to this Tribunal.

JUSTICE SAMUEL KOFI DATE-BAH (PRESIDING)

PROFESSOR NII NARKU QUAYNOR (MEMBER)

BIADELA MORTEY AKPADZI (MEMBER)

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