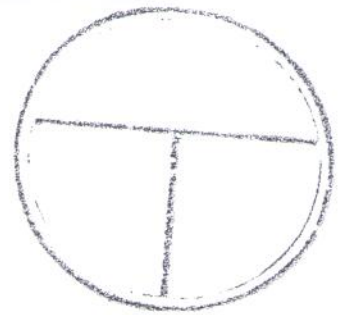


IN THE ELECTRONIC COMMUNICATIONS TRIBUNAL

ACCRA

AD 2018

APPEAL NO: ECT/APP/007/2018



GEORICHCAT COMPANY LTD

APPELLANT

VERSUS



NATIONAL COMMUNICATIONS AUTHORITY

Accra

RESPONDENT

24th July 2018

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

DECISION

PROF. DATE-BAH JSC (RETIRED): The Respondent granted the Appellant an FM broadcasting authorisation on 27th March 2012. The duration of the authorisation was five years. There was a provision in the authorisation that it was to be renewed at least three months before its expiry, if the holder so desired. The Respondent, by a letter dated 22nd February 2017 (Exhibit 2 attached to the Respondent's Statement of Case and a copy also attached to the Appellant's Statement of Case), reminded the Appellant that its authorisation was due to expire on 26th March 2017. The Appellant neglected to renew its authorisation and it duly expired on 26th March 2017. Subsequently, the Respondent wrote to the Appellant on 23rd June 2017 (Exhibit 3 attached to the Respondent's Statement of Case) pointing out that it had failed to renew its authorisation and was thus in breach of section 2(4) of the Electronic Communication Act, 2008 (Act 775). The letter gave notice to the Appellant that the

Respondent would close down its station and re-assign its frequency after 30 days from the date of the letter. The Appellant did not apply for a renewal of its authorisation and therefore the Respondent wrote to it on 28th September 2017 revoking its authorisation. By a letter of 22nd December 2017 from the Respondent, the Appellant was informed that its authorisation would be reinstated subject to the payment of a fine, being the penalty for not submitting the complete set of required documents for the renewal of its expired authorisation.

The Appellant was dissatisfied with the Respondent's decision contained in the letter of 22nd December 2017 and therefore filed a Notice of Appeal on 26th January 2018, pursuant to Section 88 of the Electronic Communications Act, 2008 (Act 775) and Regulation 1 of the Electronic Communications (Rules of Procedure of the Electronic Communications Tribunal) Regulations, 2016 (LI 2235). The Notice of Appeal complains of that part of the decision that imposed pecuniary penalties on the Appellant pursuant to section 72(1) of Act 775 and Regulation 137 of LI 1991 and according to penalties stated in the National Communications Authority Schedule of Penalties (Ghana Gazette, 20th April, 2015).

The Grounds of Appeal raised in the Notice of Appeal are the following:

- a. The Respondent erred when it penalized the Appellant according to the Respondent's Schedule of Penalties when those penalties were not applicable to the offence/breaches the Appellant is alleged to have committed.
- b. That the Respondent erred when it applied the Schedule of Penalties to punish the Appellant for its alleged offences/breaches when the applied portions of the said Schedule of Penalties are ultra vires the Electronic Communications Act, Act 775, and therefore void and of no effect.
- c. That the Respondent erred when it sought to apply the penalties against the Appellant for alleged breaches that were never communicated to it and given the opportunity to remedy same.
- d. That the Respondent erred when it imposed penalties on the Appellant without offering it the opportunity to remedy the alleged infractions as provided for under Act 755."

The Respondent's Statement of Case contains the following passage (at pp. 6-7):



“Thus the Respondent is only required to publish a notice in the Gazette and on its website of its pecuniary penalties and when they would be imposed. In accordance with this, the Respondent published a Schedule of Penalties in the Gazette on 20th April 2015 and on its website. The Schedule provides in section N7 as follows:

Failing to submit to the Authority 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 and in general give the Authority’s inspectors the necessary facilities to carry out inspections of the communications system.

Penalty-A fine of GHC 10,000 for each day the infraction persists

The Appellant was operating on an authorisation which expired on 26th March 2017. Even before the authorisation expired the Respondent notified the Appellant of it and reminded it to apply for a renewal. However, the Appellant failed to do so and its authorisation expired. Consequently the Respondent by a letter dated 28th September 2017 revoked the Appellant’s authorisation. Subsequently by its letter dated 22nd December 2017, the Respondent granted the Appellant a reprieve that its authorisation would be reinstated upon paying a fine imposed for its failure to submit documents for the renewal of its authorisation.

Respectfully the Respondent thus provided the Appellant the opportunity, as it did with other affected radio stations, to remedy the breach of its authorisation subject to paying a fin (*sic*). We however concede that the sanctions could have been applied against the Appellant if or when it applied for a renewal of its authorisation and not before.”

This passage is reproduced to demonstrate that, on the Respondent’s own showing, the authorisation of the Appellant had expired at the time that it was found guilty of section N7 and a penalty exacted from it. This fact brings it within the *ratio decidendi* of *Ghana Independent Broadcasters Association v National Communication Authority* Case No ECT/APP/002/2017 (decided on 18th June 2018).

In this case, the 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



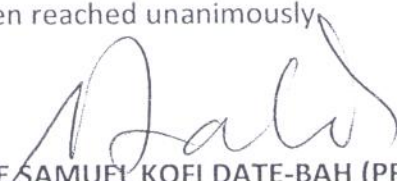
provision under consideration, the Tribunal is of the view that, given its context, it does not apply to persons who do not have a current frequency authorisation.”

Applying *Ghana Independent Broadcasters Association v National Communication Authority*, this Tribunal is bound by precedent to quash the penalty imposed on the Appellant in this case and it hereby does so.

The Tribunal also finds that the process by which the penalty in this case was imposed on the Appellant did not comply with the due standards of procedural fairness and propriety. Assessing a similar process in *Ghana Independent Broadcasters Association v National Communication Authority*, this Tribunal said:

“The issue to be determined is whether Network Broadcasting Company Ltd., on the facts as narrated under ground (a) above, was given an adequate opportunity to respond to the decision of the Respondent to “charge” it with the offence of failure to apply for a renewal of its authorisation before its expiry. The evidence on this is rather scanty. However, the Tribunal is not satisfied that the Company was given an adequate opportunity. Best practice would be for the Respondent to invite a prospective subject of a penalty to show cause why it should not be penalised for a particular offence. For the Tribunal to uphold the penalty imposed on the Company in this case, there has to be evidence on record showing that the Company was given an opportunity to respond to the offence charged before the levying of the penalty. There is inadequate evidence on this. Accordingly, the penalty imposed on Network Broadcasting Company Ltd is also quashed.”

In conclusion, the Tribunal declares that the imposition of a penalty on the Appellant without granting it the opportunity to make representations on its behalf on the proposed penalty is contrary to law and therefore the penalty is quashed. Having reached this conclusion, it is not necessary to decide on the other reliefs sought by the Appellant. The Tribunal’s decision has been reached unanimously


JUSTICE SAMUEL KOFI DATE-BAH (PRESIDING)



Nii Narku Quaynor
PROFESSOR NII NARKU QUAYNOR (MEMBER)

Biadela Morley Akpadzi

BIADELA MORTEY AKPADZI (MEMBER)

COUNSEL:

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GOLDA DENYO FOR THE RESPONDENT

