

IN THE ELECTRONIC COMMUNICATIONS TRIBUNAL

ACCRA

AD 2018

APPEAL NO: ECT/APP/015/2018



GHANA TELECOMMUNICATIONS COMPANY LIMITED APPELLANT/APPLICANT

VERSUS

NATIONAL COMMUNICATIONS AUTHORITY

Accra

RESPONDENT/RESPONDENT

31st January 2019

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

RULING ON MOTION ON NOTICE FOR STAY OF EXECUTION PENDING APPEAL

PROFESSOR DATE-BAH, JSC (RETIRED): This is the unanimous Ruling of the Tribunal. The Applicant filed a Notice of Appeal on the 19th day of December 2018 complaining of the sanctions applied to it for non-compliance with Quality of Service Requirements contained in a decision of the Respondent dated 21st November 2018. The grounds of appeal set out in the Notice of Appeal are as follows:

1. The Respondent erred in law when it purported to sanction the Appellant for alleged breach of 3G Licence conditions when it failed to fulfil the preconditions needed to be met in the Appellant's 3G Licence before imposition of sanctions.
2. The Respondent erred in law when it purported to sanction the Appellant for alleged breach of 3G Licence conditions when it failed to abide by the prescribed methodology and procedure for determining a breach of Appellant's 3G Licence for determining breach of KPIs.
3. The Respondent erred in law when it failed to exercise its discretion judicially by neglecting to be fair and candid with the Appellant in imposing the purported sanctions.
4. The Respondent erred in law and in fact when it purported to sanction the Appellant on charges based on prior published notices in the Gazette and on its website stating the circumstances under which a pecuniary penalty may be imposed and the basis on which they may be calculated.

Subsequent to this, the Appellant filed a Motion on Notice, on 21st December 2018, for a stay of execution of this decision, pending the determination of the appeal. One Emmanuel Murray deposed to an affidavit in support of this application.

In the affidavit in support, the deponent avers that the Applicant's appeal to this Tribunal, which seeks that the sanction of eight million eight hundred and ninety thousand Ghana Cedis applied to it should be reversed, has a very high chance of success. He affirms that the Respondent erred gravely when it purported to sanction the Applicant for an alleged breach of its 3G licence conditions, in circumstances where the Respondent had failed to abide by the prescribed methodology and procedure for determining breach of Key Performance Indicators. He swears that a refusal of this application will render the appeal to this Tribunal nugatory and that the Applicant will suffer greater hardship in the event that the present application is refused. He contends that if the Applicant parts with nearly 9 million Ghana cedis that it had not budgeted for, it will suffer hardship.

The Respondent filed an affidavit in opposition to this application on 18th January 2019. The affidavit was sworn to by Robert Apaya, who asserts that the application is without legal basis



and has no merit. He avers that in line with its mandate and the licence granted to the Applicant, the Respondent carried out QOS monitoring exercises in 5 regions in the first quarter of 2018 to ascertain the Appellant/Applicant's compliance with its licence obligations. The results of the monitoring exercise revealed that Appellant/Applicant had failed to meet various QOS indicators, contrary to its licence obligations. Respondent carried out a second monitoring exercise in August 2018 which also revealed infractions by the Appellant/Applicant. Consequently, the Respondent, in accordance with its mandate to protect the consumer, applied to the Appellant the penalty of which it was complaining.

The Tribunal heard arguments from counsel on January 28th 2019 and adjourned the case for ruling on 31st January 2019, ordering counsel to file their oral submissions in writing within 24 hours. This was duly done.

The Appellant/Applicant has, in its oral submissions reduced into writing, argued this application on three main grounds. Its first ground is that there are exceptional circumstances surrounding this matter. Secondly, it argues that on a balance of hardship the Applicant would suffer a disadvantage if this application is not granted. Its third ground is that its appeal has a very high chance of success.

The Appellant contends that the parties to this suit are not ordinary parties in litigation, since the Respondent has the power to make decisions that have serious consequences for the Appellant and indeed has done so. Furthermore, the Respondent is the sole beneficiary of proceeds from its decision. The Respondent was both judge and opponent of the Appellant until the appeal was filed. The Appellant argues that these circumstances make the relationship between the parties exceptional. Appellant characterises it as "more of a Headmaster and a Student relationship." It concludes as follows:

"This circumstance is exceptional indeed. Our "normal parties" in an application for stay of execution would have gone through a first stage of proceedings before a neutral body. That neutral body would have heard both Parties and would have made a decision. It is normally the enforcement of such a decision that an aggrieved Party will apply for a stay. The Applicant submits that the situation where it is being compelled to abide by a decision made by a Party to the dispute who also stands to



gain from the enforcement of the decision in issue creates an exceptional circumstance that warrants the grant of the present application.”

On hardship, the Appellant contends that parting with nine million cedis of its working capital would make it suffer hardship, even though the Respondent is in a good position to return this capital, should the Respondent lose the appeal. In its oral submissions, the Appellant puts its case thus:

“The consequences that the Applicant will suffer having to pay this huge sum, a sum that has not been budgeted for will surely have a serious effect on its operations. On the other hand the Respondent has no hardship to endure whether the present application is granted or refused. The money that will be paid in enforcement of the Sanction is not the Respondent’s money in the strict sense of the word. The Respondent has no inherent right in that money such that when it is not paid before the determination of the Appeal will cause any serious hardship on the Respondent.”

Finally, the Appellant/Applicant talks up the prospects of its appeal succeeding.

In response to these submissions, the Respondent, in its oral arguments reduced into writing, contends that a successful party ought not to be prevented from enjoying the fruits of the judgment and that an appeal if successful must not be rendered nugatory. It also rests its submissions on the same three grounds relied on by the Appellant/Applicant, labelling them as:

- a) “Special cases/Exceptional circumstance
- b) Balance of convenience/Hardship
- c) Likelihood of Success of the Appeal/Serious Question for Trial.”

The Respondent does not consider that this case raises any special circumstance in respect of which the Tribunal should exercise its discretion in favour of the Appellant/Applicant and that, in any case, in its affidavit in opposition it has assured the Tribunal that it is in a strong position to refund the penalty to the Appellant/Applicant, in the unlikely event of its Appeal succeeding.

On the balance of hardship, the Respondent argues that it stands to suffer greater hardship if its decision is stayed pending appeal, since this will result in uncertainty regarding the

enforcement of regulatory decisions by the Respondent. The Respondent also contends that the Appellant's submissions ignore the point that the sanction imposed on the Appellant is aimed at compelling Appellant to provide quality service for the ultimate benefit of consumers. If the stay is granted, there will be no certainty as to the applicability of penalties on the Appellant for infractions committed in other parts of the country where quality of service measurements have been completed by the Respondent. If this happens, consumers will be left without redress until the appeal is determined. The Tribunal should therefore, in determining this application, take into account the impact of its decision on consumers.

Finally, on the prospects of success of the appeal, the Respondent concludes that the Appellant/Applicant has failed to show that its appeal is likely to succeed.

In the Tribunal's view, both parties have laid out correctly the main principles that this Tribunal should apply in determining this application. In this Tribunal's Ruling dated 25th January 2018 in *Ghana Independent Broadcasters Association v National Communication Authority* (Appeal No. ECT/APP/002/17), we articulated those principles as follows:

"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*,...”



In determining whether, on the facts of this case, the parties can be returned to the *status quo ante*, should the Appellant succeed in its appeal, this Tribunal needs to give serious consideration to the opportunity cost of the Appellant parting with a sizeable chunk of its working capital pending the determination of the appeal.

After a careful consideration of the evidence contained in the affidavits of the parties and all the relevant factors, as well as the oral submissions of counsel reduced into writing, the Tribunal has reached the conclusion that the right balance of the competing interests in this case is struck by granting the application for stay of execution. Accordingly, it is hereby granted.



PROFESSOR JUSTICE SAMUEL KOFI DATE-BAH (PRESIDING)



PROFESSOR NII NARKU QUAYNOR (MEMBER)



BIADELA MORTEY AKPADZI (MEMBER)

COUNSEL:

Martin Agyen-Sampong (with Bernard Gadzekpo and Emmanuel Murray) for the Appellant/Applicant

Robert Apaya for the Respondent

