

IN THE ELECTRONIC COMMUNICATIONS TRIBUNAL

ACCRA

AD 2018

APPEAL NO: ECT/APP/002/2018

MEDEAMAA COMPANY LTD

APPELLANT

VERSUS

NATIONAL COMMUNICATIONS AUTHORITY

Accra

RESPONDENT

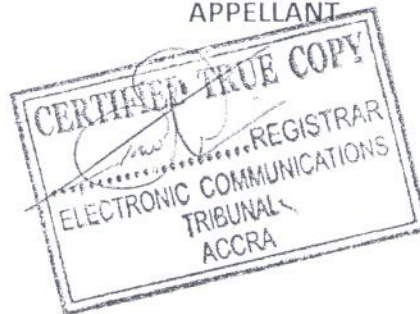
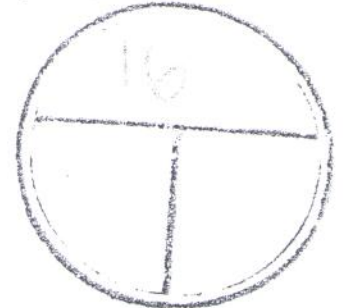
24<sup>th</sup> July 2018

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

DECISION

PROF. DATE-BAH JSC (RETIRED): This is the unanimous decision of this Tribunal. The facts of this case are that the Appellant filed a Notice of Appeal, 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), on 16<sup>th</sup> January 2018 against a decision of the Respondent dated 21<sup>st</sup> December 2017 which imposed a fine of four hundred and five thousand (405,000) Ghana Cedis on the Appellant.

The Grounds of Appeal set out in the Notice of Appeal are as follows:



“(a) The decision of the Respondent dated 21<sup>st</sup> December 2017 imposing a punitive fine of Four Hundred and Five Thousand Ghana Cedis (Ghc 405,000.00) on the Appellant is wrongful, arbitral (*sic*), discriminatory and without any legal justification.

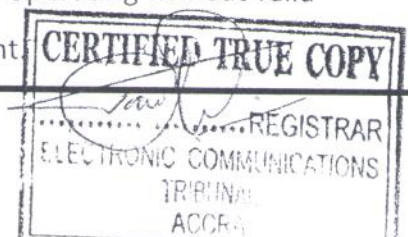
(b) That the Respondent never made any request on Applicant to submit any document prior to its letter dated 26<sup>th</sup> September, 2017. Therefore the imposition of a penalty for “failing to submit documents reasonably requested for” is without lawful justification and the decision of the Appellant dated 21<sup>st</sup> December 2017 granting amnesty thereon is void ab initio.

(c) The Respondent’s SCHEDULE OF PENALTIES which formed the basis of the Appellant’s (*sic*) decision to impose a fine on Appellant was not laid before parliament and if it was laid at all, same was not published in the gazette the day it was laid as required by Article 11(7) of the Constitution of Ghana consequently same is wrongful and or void in law.

(d) That even if the Respondent’s gazetted schedule of Penalties is lawful same cannot prescribe and impose any amount that exceeds the highest penalty/fine prescribed by the parliament of Ghana for infractions of the law and rules governing Telecommunications in Ghana.

(e) That if at all the schedule of penalty is lawful which with respect is doubtful, the Respondent has by its decision dated 21<sup>st</sup> December 2017 arrogated to itself legislative authority of amending the schedule contrary to law.

(f) That by serving invoices/bills of the requisite statutory charges including annual regulatory and spectrum charges on the Appellant and accepting payments of same from the appellant from 2012 to 2017 as well as accepting the renewal application fee and the provisional Authorization fee of one Thousand Nine Hundred and Twenty Five Ghana Cedis (Ghc 1,925.00) and Eight Thousand and Fifty Five Ghana Cedis (Ghc 8,855.00) respectively without any objection, the Respondent has, by its act or omission, intentionally and deliberately by conduct caused or permitted the Appellant to believe that it was in good standing and it is estopped thereby from revoking Appellant’s Authorization/closing down it station for operating without valid authorization and/or imposing a punitive fine on the Appellant.



(g) That the Respondent having failed/refused to request for any outstanding document before imposing the penalty on the Appellant by its letter dated 26<sup>th</sup> September 2017, the said penalty was unlawful and contravenes section 13 of Act Act (sic) 775 and N7 of the Respondent's Schedule of Penalties.

(h) That the Respondent's conduct in imposing the punitive fine on the Appellant is unreasonable as same failed to comply with the mandatory requirements of law reasonable standards of procedural fairness and observance of the rules of Natural Justice contrary to Article 23 of the Constitution of Ghana and section 25 of the National Communication Authority Act 2008 (Act 769).

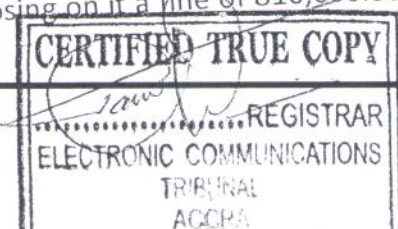
(i) That the Respondent exercised its discretion arbitrary (sic) and contrary to law when it accepted the renewal application fee and the provisional Authorization fee of one Thousand Nine Hundred and Twenty Five Ghana Cedis and Eight Thousand Eight hundred and Fifty Five Ghana Cedis respectively but rejected the only outstanding document duly submitted by the Appellant within the Statutory period.

(j) That if at the entire (sic) Appellant submitted its Tax Clearance Certificate to the Respondent late, it was because the Ghana Revenue Authority issued the said certificate late and the Appellant had no control over the said Authority and should not in law and in equity be punished for their act or conduct."

Some of the issues raised in these Grounds of Appeal have already been settled in previous decisions of this Tribunal which the Tribunal will follow. Accordingly, those issues will be dealt with first.

### GROUND A & B

In arguing Grounds A and B, the Appellant in its Statement of Case indicated that it was given authorisation by the Respondent on 2<sup>nd</sup> April 2012 to establish and operate a commercial broadcasting radio station at Tarkwa. The authorisation expired on 1<sup>st</sup> April 2017. After the expiry of its authorisation, the Appellant submitted its renewal application and documents on 19<sup>th</sup> June 2017, paying the requisite fees. In October 2017, the Appellant received a letter (attached as Exhibit 4 to the Respondent's Response to the Appellant's Statement of Case) from the Respondent dated 26<sup>th</sup> September 2017 imposing on it a fine of 810,000:00 Ghana



Cedis for failing to submit to the Respondent in a manner as may be reasonably requested documents, accounts, estimates, returns and other information that may be requested under the authorisation.

These facts bring this case within the *ratio decidendi* of *Ghana Independent Broadcasters Association v National Communication Authority Case No ECT/APP/002/2017* in which this Tribunal delivered its decision on 18<sup>th</sup> June 2018.

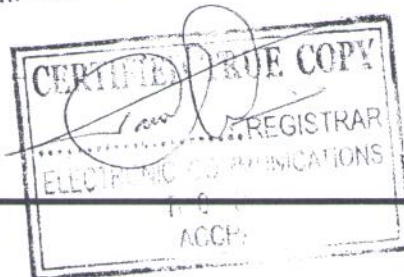
In this case, the Tribunal said:

“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.”

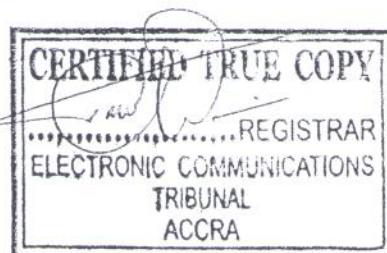
The same considerations apply to an applicant for renewal of an authorisation. When the authorisation expires, the former holder of it reverts to the same position as a fresh applicant for it. Applying a purposive approach to the interpretation of the provision under consideration, the Tribunal is of the view that, given its context, it does not apply to persons who do not have a current frequency authorisation.”

This case thus holds that a person who is not the holder of a frequency authorisation cannot lawfully be charged with the offence provided for in section N7 of the Schedule of Penalties published by the Respondent on its website and in the Gazette. Nothing contained in the Response filed by the Respondent diminishes the authority of this previous decision of the Tribunal. Accordingly, the Tribunal holds that it was wrong for the Appellant to be charged under section N7 of the Schedule of Penalties. The penalty imposed on the Appellant is therefore hereby quashed. This holding disposes of this Appeal in so far as it relates to the imposition of the fine or penalty. However, the Tribunal will consider a few more points of law raised by the Appellant in its Appeal.

#### GROUND C

In *Genesis Media Ltd v National Communications Authority* (ECT/APP/001/2017 decided on 18<sup>th</sup> June 2018), this Tribunal held that matters relating to the enforcement or interpretation of the Constitution are excluded from the jurisdiction of this Tribunal by Article 130 of the 1992 Constitution. Accordingly, the Tribunal declines jurisdiction over Ground (c) of the Grounds of Appeal which relies on Article 11(7) of the Constitution to attack the validity of the Schedule of Penalties.

#### GROUND D



The issue raised in Ground D has already been settled in a previous decision of this Tribunal. In *Ghana Independent Broadcasters Association v National Communications Authority* (ECT/APP/002/2017 decided on 18<sup>th</sup> June 2018) the Tribunal stated as follows:

“Finally, the Respondent points out that section 97(3) of Act 775 on which the Appellants rely to maintain that a penalty for contravention of the Regulations shall be a fine not exceeding two thousand penalty units was repealed by the Electronic Communications (Amendment) Act, 2016 (Act 910). Section 4 of 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 under Act 775. The quantum of a fine cannot therefore be the only ground on which an argument of ultra vires under Act 775 is based.

After considering the arguments from both sides, the Tribunal finds that N(7) of the Schedule of Penalties is not ultra vires the Respondent.”

The Tribunal, therefore, dismisses Ground D.

#### GROUND F

In Ground F, the Appellant pleads estoppel against the Respondent to prevent it from revoking the Appellant’s Authorisation and closing down its station. In assessing the conduct of the Respondent alleged by the Appellant to constitute estoppel, it should be borne in mind that the Respondent was established by Parliament to safeguard the public interest by regulating communications in Ghana. Conduct by its officials cannot, therefore, lightly be construed as amounting to surrendering or giving up its statutory regulatory rights. While estoppel may not be entirely ruled out, it should not be easily found by this Tribunal. That would be against public policy. Certainly, in relation to provisions in the Constitution, in *Tuffuor v Attorney-General* [1980] GLR 637, the Court of Appeal, sitting as the Supreme Court, held that any act or conduct which was contrary to the express or implied provisions of the Constitution could not be made valid by the equitable doctrine of estoppel. While statutory provisions are lower than constitutional provisions in the hierarchy of norms, nevertheless Parliament’s will expressed in statute should not easily be allowed to be blunted by estoppel being applied to prevent the exercise of regulatory rights and duties.



In the light of this context, this Tribunal will assess the case put forward by the Appellant for estoppel. The Appellant submits that the Respondent, by serving invoices/bills of the requisite statutory charges on the Appellant and accepting payments in respect of them from 2012 to 2017 as well as accepting the renewal application fee and the provisional authorisation fee, is estopped from revoking the Appellant's authorisation and closing down its station for operating without a valid authorisation or imposing a punitive fine on the Appellant. In support of this argument, it cites section 26 of the Evidence Decree, 1975 (NRCD 323). That section 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 successor in interest of that party in proceedings between

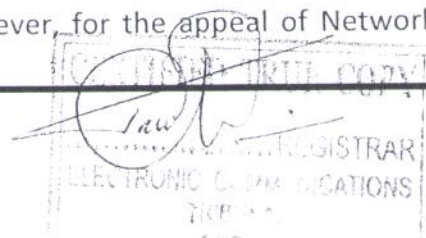
- a) that party or the successors in interest of that party; and
- b) the relying person or successors in interest of that person.”

The Tribunal is not satisfied that the conduct relied on by the Appellant is sufficient to estop the Respondent from exercising its statutory rights.

## GROUND H

Ground H raises cogent concerns regarding the procedural fairness or propriety of the process through which the penalty/fine was imposed on the Appellant. This Tribunal has already held that the process fell foul of the principle of *audi alteram partem*. In the *Ghana Independent Broadcasters Association v National Communications Authority* case, this Tribunal stated that:

“Although ground (d) has been dismissed, it does raise an important issue which has to be addressed in this Decision, namely, procedural impropriety. This is one of the grounds articulated by Lord Diplock in his classic statement in the *GCHQ Case* earlier referred to. (See *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C.374 at 410). For the Appellants whose penalty has been quashed under ground (a), this ground is not crucial. However, for the appeal of Network Broadcasting



Company Ltd this ground is crucial. The point is that no penalty should be imposed without affording the subject of the penalty an opportunity to make representations on its own behalf with regard to the penalty. This means that prior to the levying of a penalty on Network Broadcasting Company Ltd. it should have been afforded an opportunity of defending itself against its imposition.

Earlier in this Decision reference was made to the passage in Date-Bah JSC's judgment in *Awuni v WAEC*, [2003-2004] SCGLR 471 which explained the role of the principles natural justice, epitomised in the twin latin maxims of *nemo iudex causae suae* and *audi alteram partem*. These two maxims play an important role in ensuring that administrative bodies act fairly.

In the *Awuni case* Date-Bah JSC explained the implications of *audi alteram partem* as follows (at p. 563):

“My interpretation of fairness within the context of Article 23 would be that, in general, unless the circumstances make it inappropriate, for instance for reasons of practicality or of public interest or for any other cogently valid reason, it includes a principle that individuals affected by administrative decisions should be afforded an opportunity to “participate” in the decision in the sense of being given a chance to make representations on their own behalf of some kind, oral or written, to the decision-maker.

Individuals affected or to be affected by administrative decisions obviously have an interest in influencing the outcome of the decision-making process. In general, it is fair that they should be afforded an opportunity to influence the decision. Given the variety, and the width of the continuum, of contexts in which administrative decisions are taken, however, there is need for flexibility in the ways that are to be worked out to enable individuals to influence decisions about themselves.



Thus, in relation to a particular decision, the circumstances may indicate that there is no need for a formal hearing, in the sense of an adjudication. A consultation, for instance, may be adequate. This flexibility, regarding how the presentation of the views of those affected by administrative decisions may be made, is expressed thus by Lord Bridge in *Lloyd v McMahon* [1987] AC 625 at p. 702:

“...the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates.”

Accordingly, a fair “hearing” does not necessarily connote an opportunity for the person affected to be heard orally. Written representations on his or her behalf may be sufficient, given the context. Also, the nature of the opportunity to be offered to an affected person to be heard may be influenced by public interest considerations and the requirements of efficient administration.”

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.”

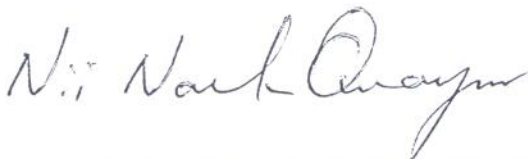
Accordingly, this Tribunal finds that, on the facts of this case as well, the penalty or fine should be quashed on the ground of breach of the principle of procedural fairness.

The Tribunal finds the other grounds of appeal unmeritorious.

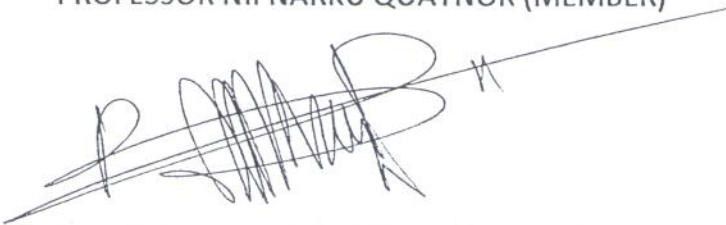
In conclusion, the Tribunal hereby quashes the fine imposed on the Appellant by the Respondent. However, the Tribunal is unable to hold that the Respondent be restrained from revoking or suspending the Appellant’s authorisation or closing it down, as claimed in the Notice of Appeal, since no legal basis has been established for such relief. Since the Appellant’s authorisation has expired, revoking or suspending it is in any case irrelevant.



JUSTICE SAMUEL KOFI DATE-BAH (PRESIDING)



PROFESSOR NII NARKU QUAYNOR (MEMBER)



BIADELA MORTEY AKPADZI (MEMBER)



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