

IN THE ELECTRONIC COMMUNICATIONS TRIBUNAL

ACCRA

AD 2018

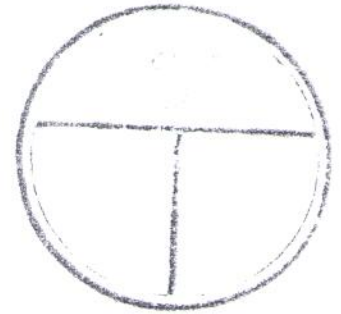


APPEAL NO: ECT/APP/005/2018

MIGHTY FM 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): On 19th January 2018, 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), expressing dissatisfaction with the Respondent's decision refusing to vacate totally the penalty imposed on it, but rather imposing a reduced fine by a letter dated 21st December 2017. The Appellant also complained of the Respondent's refusal to undertake an inspection of the Appellant's newly acquired premises at Amakom, Kumasi, in spite of repeated requests to do so.

The reliefs sought by the Appellant were, first, the vacation of the Respondent's decision imposing a fine on the Appellant and the restraining of the Respondent from revoking/suspending the Appellant's authorisation or closing down its station. The second

relief sought was an order enjoining the Respondent to undertake an inspection of its newly acquired premises in Kumasi.

This second claimed relief induced a preliminary objection by the Respondent. On 21st February 2018, the Appellant applied for an Order of Interim Injunction pursuant to Order 25 r1 of the High Court (Civil Procedure) Rules, 2004 (CI 47) and Regulation 10(9) of Electronic Communications (Rules of Procedure of the Electronic Communications Tribunal) Regulations 2016 (LI 2235) to compel the Respondent to undertake an inspection of the Appellant's new premises in Kumasi. The Respondent not only filed an affidavit in opposition to this motion for interim injunction, but also filed a Statement of Case in Opposition to it. The Respondent followed up with a Notice of Preliminary Objection, filed on 5th March 2018. The ground of the objection was stated in the Notice as: "The Electronic Communication Tribunal's jurisdiction under section 91 of the Electronic Communications Act, 2008 (Act 775) has been wrongly invoked by the Appellant in respect of the aspect of its appeal which contends to be appealing against a decision of the Respondent refusing to inspect the Appellant's newly acquired premises."

By a Ruling dated 15th May 2018, this Tribunal upheld this preliminary objection on the ground that the Respondent had not made any decision not to inspect the Appellant's premises. Without such a decision, the Appellant had not properly invoked the jurisdiction of this Tribunal in relation to the inspection of the Appellant's premises in Kumasi.

Following this Ruling therefore, the only relief in contention before the Tribunal is the request for a vacation of the Respondent's decision imposing a fine on the Appellant and the restraining of the Respondent from revoking/suspending the Appellant's authorisation or closing down its station.

The facts of this case, as deposed to by the General Manager of the Appellant and as can be gleaned from the correspondence appended to the Respondent's Statement of Case, are as follows: on 13th February 2002, the Appellant was authorised by the Respondent to establish and operate a commercial broadcasting radio station in Mampong on the assigned frequency of 91.1 MHz. The duration of the authorisation was five years. Pursuant to this authorisation, the Appellant imported the requisite equipment and developed a property for purposes of its operations at Mampong at a cost running into millions of cedis. The Appellant has since



February 2002 operated this radio station in Mampong in the Ashanti Region, paying the requisite annual, regulatory and spectrum charges to the Respondent.

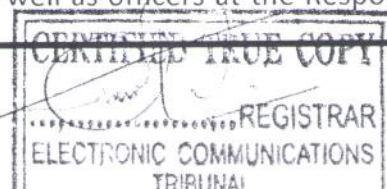
By a letter dated 28th September 2017 written by the Respondent, it imposed a fine on the Appellant for infringing offence Number N(7) of the Schedule of Penalties gazette by the Respondent. The offence is set out in the letter as follows:

“Failing to submit to the Authority in a manner and at times as may be reasonably requested documents, accounts, estimates, returns and other information that may be required under the Authorisation, attracts a fine of Ten Thousand Ghana Cedis (GHS 10,000.00) for each day the infraction persists.”

The Appellant, in the meantime, applied for a relocation of its radio station from Mampong to Kumasi, which the Respondent granted. As a condition precedent to the grant of relocation to Kumasi, the Appellant paid 2017 annual regulatory and spectrum charges in the amount of 12,705 Ghana Cedis. The Appellant was also required to invite the Respondent for inspection of its broadcasting facilities after it had relocated to its new premises in Kumasi. On the basis of these facts, the Appellant invested millions of cedis in its newly acquired premises at Amakom in Kumasi and acquired more machines and equipment to enhance its operations.

In August 2017, the Appellant relocated to its newly acquired premises. By a letter of 17th October, 2017, it invited the Respondent to inspect the premises to enable it to commence operations there. However, despite several reminders, the Respondent has failed or refused to inspect the premises. It is the Appellant’s contention that the Respondent’s failure or refusal to carry out this inspection to enable it to continue its commercial operations is causing it huge financial losses and irreparable damage. The Appellant caused its solicitor to write to the Respondent by a letter of 18th September 2017 requesting that the inspection be carried out. The said letter gave notice to the Respondent that the Appellant intended to resort to legal action 14 days after service of the letter.

In spite of the service on the Respondent of the said letter, the Respondent has refused or failed to respond to the letter. The Appellant has followed up in the Respondent’s offices both in Kumasi and Accra, but to no avail. The Respondent’s Kumasi Branch Manager and the officer in charge of inspections as well as officers at the Respondent’s Head Office in Accra

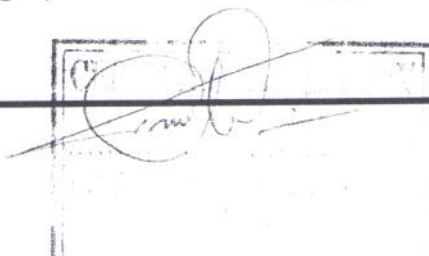


have informed the Appellant that the inspection cannot be undertaken if the penalty imposed is not paid.

The Appellant has challenged the basis for the imposition of the fine in numerous appeals to the Respondent and has lodged this appeal before this Tribunal in relation to it.

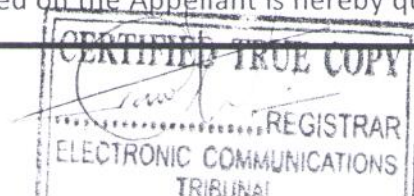
The grounds of appeal on which this relief is founded are set out in the Notice of Appeal as follows:

- a) "The decision of the Respondent dated 21st December 2017 imposing a punitive fine of Two Million Five Hundred and Fifty Five Thousand Ghana Cedis (Ghc 2,555,000.00) on the Appellant is wrongful, arbitral (*sic*) and without any legal justification.
- b) The Respondent's SCHEDULE OF PENALTIES which formed the basis of the fine 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.
- c) N(7) of the Schedule of Penalties of the Respondent having been gazetted on 20th April 2015, it at all same is valid, it cannot in law and equity be made to apply to the Appellant retrospectively.
- 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 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 without any objection from the year 2007 to 2017 and further inter alia granting the Appellant's request for relocation from Mampong to Kumasi, 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 is estopped thereby from revoking Appellant's license (*sic*) for operating without valid authorisation and/or imposing a punitive fine on the Appellant.



- f) The Appellant having promptly remedied the alleged breach which has occasioned the Respondent's decision to suspend or revoke the Appellant's authorisation by submitting the only outstanding document for renewal of its authorisation within the 30 days notice period granted by the Respondent, the Respondent's subsequent imposition of a punitive fine on the Appellant, after it had remedied the alleged breach, is without any legal justification and contravenes section 13 of Act 775 and N7 of the Respondent's Schedule of Penalties.
- g) 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, acting timeously and observance of the rules Natural Justice contrary to Article 23 of the Constitution of Ghana and section 25 of the National Communications Authority Act 2008 (Act 769).
- h) That the Respondent exercised its discretion arbitrary (*sic*) and contrary to law when it accepted the only outstanding document submitted by the Appellant upon the Respondent's demand/request for it to remedy the breach but failed or refused to accept the Appellant's Bankers draft of Three Thousand Eight Hundred and Fifty Ghana Cedis (Ghc 3,850.00) covering the Appellant's renewal application fee without any assigned reason same having been submitted within the 30 days Notice period.
- i) That the Respondent's conduct in refusing or failing to inspect the Appellant's newly acquired premises at Amakom, Kumasi into which the Appellant has relocated with the Respondent's explicit approval to enable Appellant commence commercial operations despite repeated request for the Respondent to do so thereby leading to a severe economic losses (*sic*) to the Appellant, its employees and dependants is unfair, unjust, arbitral (*sic*) and unconscionable."

It is clear from the facts narrated above that at the time the penalty was imposed on the Appellant, its frequency authorisation had expired. This Tribunal has held in several of its decisions that a person who is not the holder of an authorisation cannot lawfully be held culpable of the offence provided for in Number N(7) of the Schedule of Penalties. (See for instance, *Ghana Independent Broadcasters Association v National Communication Authority*). Accordingly, the penalty imposed on the Appellant is hereby quashed. Although the penalty



is quashed, this Tribunal will not issue an order restraining the Respondent from revoking/suspending its authorisation or closing down the Appellant's station. This is because the Appellant's authorisation has expired and therefore there is no need for the Respondent to suspend it or revoke it. Given the expiry of the Appellant's authorisation, there is no legal basis for ordering the Respondent not to close down its station.

This is the holding of the Tribunal, notwithstanding the Appellant's arguments on estoppel, based on Ground (e) of its Grounds of Appeal. It submits that by serving invoices/bills of the requisite statutory charges on the Appellant and accepting payments from the Appellant without objection, the Respondent should be regarded as estopped from revoking the Appellant's licence/authorisation or imposing a punitive fine on it. It makes a similar argument in relation to the Respondent's conduct in granting the Appellant's request for relocation from Mampong to Kumasi. The Tribunal is not impressed by the weight of this argument.

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.

This Tribunal has also held in previous decisions that it is precluded by Article 130 of the Constitution from deciding matters relating to the enforcement or interpretation of the 1992 Constitution. Accordingly, it declines jurisdiction to consider Ground (b) of the Appellant's Grounds of Appeal.

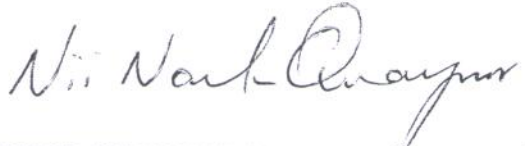


The Tribunal's holding above disposes of this Appeal and there is no need to consider the other Grounds of Appeal.

In conclusion, the Appeal is allowed in part. The second relief sought by the Appellant, namely, an order enjoining the Respondent to undertake an inspection of its newly acquired premises in Kumasi, is denied.



JUSTICE SAMUEL KOFI DATE-BAH (PRESIDING)



PROFESSOR NII NARKU QUAYNOR (MEMBER)



BIADELA MORTEY AKPADZI (MEMBER)



COUNSEL:

Robert Sumaa for the Appellant

Golda Denyo for the Respondent

