[2020] ECT 1

Consolidated No. 02/2020
ECT/APP/008/2019
ECT/APP/014/2018
On appeal from: Decisions of the National Communications Authority

RULING

Scancom PLC (MTN) (Applicant)
v
National Communications Authority (Respondent)

before

Kissi Agyebeng, Chairman
Nania Owusu-Ankomah Sackey, Member
Dr. Ezer Osei Yeboah-Boateng, Member

24 February 2020

Appellant	***Respondent***
Kwesi Coleman Esq. Susana Nyampong Esq. Dennis Armah Esq. (Holding Anthony Forson Jnr. Esq's brief)	Evelyn Bediakoh-Adu Esq.

KISSI AGYEBENG: (giving the ruling of the Tribunal)

1 This is an application mounted on consolidated appeals from certain decisions of the respondent, the institution which regulates the provision of communications services in the Republic. The applicant (a mobile network operator) is praying the Tribunal to stay the execution of one of such decisions pending the determination of the consolidated appeals. The application, filed on 16 November 2019, is brought under Reg. 9(2) of the Electronic Communications (Rules of Procedure of the Electronic Communications Tribunal) Regulations, 2016.[1]

2 By two letters dated 2 July 2019 and 6 August 2019, the respondent imposed sanctions in the sums of GHC50,000.00 and GHC120,000.00, respectively, on the applicant for breaches of license conditions in respect of telephone voice service quality in the Greater Accra, Eastern, Central, Northern, North East, Savannah and Ashanti Regions in the first instance, and in the Western, Western North, Bono, Bono East, Ahafo, Volta, Oti, Upper East and Upper West Regions in the second instance between 11 March 2019 to 6 April 2019 and 6 May 2019 to 4 June 2019.[2] Specifically, the sanctions were imposed on the applicant for its alleged failure by the applicant to meet speech quality and call setup time obligation under its Third Generation (3G) license in some district capitals of the stated regions.

3 Dissatisfied, the applicant lodged an appeal at the Tribunal against these decisions on 12 September 2019. On an application heard and granted on 14 January 2020, the appeal was consolidated with a similar pending appeal, involving the same parties, filed on 18 December 2018.[3] The determination of the present application has had to naturally abide the housekeeping matters attending the consolidation.

The Claim

4 In an affidavit in support of the application sworn to by the applicant's Senior Manager for Regulatory & Government Affairs, Enyonam Adinyira, the applicant contends that there exist exceptional circumstances that provide an appropriate basis for the Tribunal to exercise its discretion in its favour.

[1] L.I. 2235.
[2] The subject matter of the dispute in ECT/APP/008/2019.
[3] ECT/APP/014/2018.

5 In the applicant's reckoning, a larger percentage of the sanction complained of was based on an unsettled and unpredictable method of assessing voice quality parameters – known as Mean Opinion Score, and that the appeal has a real likelihood of success as the imposition of the sanction was in contravention of fundamental constitutional and administrative law principles, as being arbitrary and exposing the dangers of unregulated/unlawful exercise of the respondent's power.

6 The applicant also contends that a refusal of the stay and payment of the sanction would diminish its operating income and impair its ability to provide quality service to its customers thus exposing it to further fines by the respondent. And, in any case, a stay would not deprive any party of the fruits of litigation since the sanction is not a judgment debt but a regulatory imposition.

7 At the hearing, Dennis Armah, Esq., who argued the matter for the applicant, contended that the sanctions were imposed contrary to statute, especially sections 72(4) and 97 of the Electronic Communications Act, 2008 (Act 775); and that to be compelled to pay the sanction would be akin to the applicant being compelled to pay on a demand notice before the matter is heard. He also contended that the respondent is both judge and prosecutor in the matter and that a stay of execution would best uphold the principles of natural justice. He further contended that depriving the applicant of its working capital may trigger a situation where it may not be fully compensated for that deprivation should it be successful on appeal, and that enforcing the sanction now would amount to enforcing the decision appealed against. He ultimately prayed the Tribunal not to depart from its decision[4] granting a stay of execution in respect of its earlier appeal,[5] since in his estimation, both are on all fours.

The Response

8 Naturally, the respondent is opposed to the application – after all, its sanction has been called into question and its being attacked on all fronts by the applicant. In an affidavit in opposition filed on 4 December 2019, and sworn to by a legal officer in the respondent's offices, Shamira Karim, the respondent contends that the methodology applied in conducting the measurements is based on a settled technical model that is in consonance with the standards of the International Telecommunications Union (ITU).

[4] Rendered by the Tribunal (differently constituted) on 18 February 2019.
[5] ECT/APP/014/2018.

9 The respondent also contends that the appeal itself has no reasonable chance of success as the applicant is labouring under a misapprehension of the terms of its 3G license, and that there exist no exceptional circumstances upon which consideration a stay would be appropriately granted.

10 The respondent further contends that a stay of execution would tie its hands in the exercise of its statutory mandate and that, in any case, the applicant has financial obligations owed to the respondent by way of quarterly statutory payments – thus, the respondent can offset the payment against the sanction in the event of the applicant succeeding in the appeal.

11 At the hearing, the respondent's counsel, Evelyn Bediakoh-Adu, Esq. argued that the respondent ensured that the standard for the measurement was pre-determined and that the applicant is misreading and misapplying the provisions of Act 755, since the breach which precipitated the sanction complained of is in respect of the license agreement between the parties.

12 The issues are, thus, fiercely joined.

Should the application be granted?

13 Since its creation in 2008 under Act 775, this Tribunal has heard several applications to stay the imposition of sanctions imposed by the perpetual respondent pending the determination of the appeals upon which they were mounted. The story so far shows that the applications have had two main colours – namely, imposition of monetary sanctions and none-monetary administrative sanctions. The latter has been mainly in respect of media houses that faced imminent closure.

14 Two interests have fought for mastery in these applications. On the one hand is the clear and present danger of rendering appeals nugatory by refusal of stays should an appeal be successful, and on the other hand is the spectre of depriving the perpetual respondent of the benefit of its regulatory authority.

15 The jurisprudence in the Republic on stay of execution of pending appeal has been fashioned, in a long line of authorities, in the context of *lis inter partes* – legal suit between parties – in an adversarial litigation setting in which a victorious party emerges after a trial. This is begotten of the nature and setup of our legal system. In our context, as it stands,

this situation would never arise because our setting is by law an appeal against regulatory decisions of the respondent or decisions of the Dispute Resolution Committee of the respondent,[6] and not an after-litigation battle.

16 This Tribunal has always recognized this. So from the onset it would appear that the established authorities yonder are unsuited for our purposes. However, this Tribunal has held the view that the principles governing *lis inter partes* stay of execution pending appeal should hold in our circumstances[7] and it has always maintained that it seeks to maintain a delicate balance between the competing interests.

17 In the context of media houses and other entities facing imminent closure arising from a sanction of the respondent, this Tribunal has adopted a balance of hardship test and it has insisted that a refusal of an application for stay of execution would plunge an applicant in the obvious impossibility of reviving its business and restoring it to the status *quo ante*, upon a successful appeal where it had in the meantime been shut down.[8] A contra view would invariably portend the defeat of the ends of justice. On this score, there has been some workable benchmark principle guiding the exercise of our discretion.

18 However, in the setting of applications for stay of execution in respect of the imposition of monetary sanctions by the respondent (as in the present application), it seems to us that it has been an odyssey marked by no clearly discernible standards and characterized by a collection of vanishing acts. In this context, this Tribunal, except in our notable ruling in *Ghana Telecommunications Company Limited v. National Communications Authority*,[9] mainly relies on cases decided by our courts on *lis inter partes* stay of execution pending appeal, and then concludes with the observation that this or that case is an appropriate one for granting the application.[10] No concrete reason for granting or refusing the stay is provided.

19 In the excepted ruling,[11] this Tribunal sought to give serious consideration to the opportunity cost of the appellant parting with a

[6] Act 775, § 88. Hence the tag of "perpetual respondent" attending the respondent.
[7] See for instance, *Ghana Independent Broadcasters Association v. National Communications Authority* ECT/APP/002/2017. Ruling delivered on 25 January 2018.
[8] *Ibid.* This was applied in *Genesis Media v. National Communications Authority* ECT/APP/001/2017 and *Medeamaa Company Limited v. National Communications Authority* ECT/APP/002/2018.
[9] ECT/APP/015/2018. Ruling delivered on 31 January 2019.
[10] See for instance, *AirtelTigo Ghana Limited v. National Communications Authority* ECT/APP/013/2018. Ruling delivered on 31 January 2019.
[11] ECT/APP/015/2018.

sizeable chunk of its working capital pending the determination of the appeal. This is the standard as things stand.

20 Presently, it appears to us that the resort to basing the outcome of our rulings on applications for stay of execution on considerations of opportunity cost alone is not entirely satisfactory.

21 We understand opportunity cost to be the benefit that is missed or given up when one chooses an alternative over another. In other words, the loss of some prospect of a gain from other alternatives when one alternative is chosen. So for instance, where one chooses to spend an amount of money to purchase a Mercedes Benz, one cannot spend the amount already spent on the Mercedes on say, a BMW. If the next best alternative to spending that amount of money on the Mercedes is the BMW, then the opportunity cost of acquiring the Mercedes is the cost of the BMW, since one cannot have the two cars at the same time with that same amount of money. It is just stating the obvious of the limitations and constraints in the ordinary circumstances of mankind on this terrestrial planet.

22 So characterized, it unhappily portends that opportunity cost considerations alone would inevitably lead to a standing order automatic grant of stay of execution prayers. This is because, even if the imposed sanction is just a cedi (if we may be allowed to sound outlandish), the opportunity cost of our appellants paying up would be what use(s) they could have applied the cedi in their businesses. So where, as in this case, an applicant argues that the payment of the sanction pending the determination of the appeal would diminish its operating capital and impair its ability to satisfy its customers, we would invariably have to grant the prayer based on the opportunity cost of paying up. In the end, the formulation would be a template refrain by applicants, if we do not require more, and we would be sending handouts of automatic stays in a sort of soup kitchen.

23 Therefore, this Tribunal intends to set down a more predictable, practical and workable path for determining such applications. While we have not been established to rubber-stamp the sanctions of the respondent, ours is not a calling of granting automatic stays to our appellants either.

24 Our remit to hear applications for stay of execution is a construct of discretionary power borne of Reg. 9(2) of L.I. 2235, which provides that "…an appellant may apply to the Tribunal by motion on notice for a stay of execution of the decision." The regulation gives no

indication as to the grounds upon which our discretion should be exercised, except the omnibus direction that we should conduct our hearing in a fair and transparent manner.[12] Then again, we are directed to the wider jurisprudence of the Republic that "[W]here there is no provision in [our] rules of procedure regarding a particular issue, [we] should have recourse to the High Court (Civil Procedure) Rules, 2004 (C.I. 47)."[13] The relevant provision on stay of execution under C.I. 47[14] is also rendered in similar bare terms. And in any case, it is set in the circumstances of *lis inter partes*, though, as we recall, there is a rich line of cases which this Tribunal has hitherto adapted and applied to its purposes.

25 In the general scheme of affairs in respect of the exercise of discretionary power, we are not unmindful of the time-honoured admonition that:

> [W]hen a tribunal [such as ours] is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon which its discretion is to be exercised, it is a mistake to lay down any rules with a view to indicating the particular grooves in which the discretion should run.[15]

26 We have not the slightest intention of fettering and conscripting our discretion in any fixed-routine groove of self-imposed overbearance and forbearance. Rather, we are guided by the imperatives of article 296 of the Constitution, 1992 which enjoins us to exercise our discretion fairly and candidly, without arbitrariness, capriciousness, and bias; and also by notions of fairness in a democratic society. On this foundation, we have to build a predictable and clearly discernible framework within which to exercise our discretion to avoid a standardless sweep that has the potential of automatically skewing the outcome of such applications in favour of one party.

27 In this quest, we have considered the object and purpose of the establishment of this Tribunal and its functions,[16] the interplay in the telecommunications industry bringing into particular focus the National Telecommunications Policy[17] and the National Communications Authority Act.[18] We have also traversed the entire

[12] L.I. 2235, Reg. 10(1).
[13] *Ibid.* Reg. 10(9).
[14] Ord. 43 r. 11.
[15] *Gardner v. Jay* (1885) 29 Ch D 50 at 58, CA *per* Bowen LJ.
[16] Act 775, §§88-93; L.I. 2235, Regs. 9, 10, & 11.
[17] Ministry of Communications, Republic of Ghana, *National Telecommunications Policy* (2004).
[18] Act 769.

available jurisprudence in our jurisdiction[19] though, as we note, the judicial authorities have not been developed in our context.

28 The conglomeration of all these considerations points us to a workable guidance framework as to how we should proceed in such applications. This is that, our duty is a charge to do substantial justice borne of common sense – by which we mean, the administration of justice designed to achieve fairness not bogged or weighed down by undue technicality and pedantic minutia.

29 Thus conceptualized, it seems to us that the overriding consideration should be whether the appellant would be restored to the status *quo ante* the imposition of the sanction if the appeal were successful. Keeping the spectre of pyrrhic victorious appeals at bay by avoiding rendering same nugatory is what, it seems to us, will advance the course of justice. A necessary incident of this quest is the avoidance of the creation of a regime that engenders the automatic grant or refusal of stays. For if we erect unquestioned standing order constructs, such applications would serve no practical purpose and our discretion in these matters would be effectively extinguished.

30 On these considerations, we will grant the present application. We do so by accepting the applicant's invitation to stand by the decision of the Tribunal in the other half of this consolidated appeal.

31 It will be recalled that the Tribunal granted a stay of execution in an appeal filed earlier. It will also be recalled that that appeal has been conjoined with the one in which the present application emanated. We observe that the other half of the consolidated appeal is practically on all fours with its twin in terms of the parties, the nature of the imposed sanction, the alleged incidents precipitating the sanction, and the reliefs. Indeed, the formulated grounds of appeal and the various statements of case are even identical. It would be highly incongruous

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[19] Including – *Joseph v. Jebeille* [1963] 1 GLR 387, SC; *Rep. Court of Appeal, ex parte Sidi* [1987-88] 2 GLR 170, SC; *Agyemang VIII v. Dokyi XIII* [1982-83] GLR 453; *Saunders v. Awuku (No 2)* [1962] 1 GLR 545; *Eboe v. Eboe* [1961] GLR 432; *In re Yendi Skin Affairs, Yakubu II v. Abudulai* [1984-86] 2 GLR 231, SC; *Baiden v. Ansah* [1973] 1 GLR 33, CA; *Northern Regional Development Corporation v. Haruna* [1989-90] 1 GLR 340; *Rep. v. Court of Appeal, Accra, ex parte Ghana Cable Limited* [2005-2006] SCGLR 107; *Amoako v. Hansen* [1987-88] 2 GLR 26, SC; *Mensah v. Ghana Football Association* [1989-90] 1 GLR 1, SC; *Barnieh II v. Mensah* [1984-86] 2 GLR 20, CA; *Rep. v. High Court, Cape Coast, ex parte Ghana Cocoa Board* [2009] SCGLR 603; *Dzobo v. Agbeblewu* [1991] 1 GLR 294, CA; *Evanspenny Industries Company Limited v. Techno-chem Associates (Gh) Limited* [1992-93] GBR 803, CA; *Djokoto & Anor. v. BBC Industrials Company (Ghana) Limited & Anor.* [2011] 2 SCGLR 825; *Charles Osei Bonsu (trading under the name and style of "C.C.B Brothers") v. Dorothy Aboagye & Anor.* [2015] 81 GMJ 25; *Apaade Lodge Limited v. Attorney General* [2009] 5 GMJ 84, CA.

and bordering on the perverse for the Tribunal to stay execution of the sanction in one arm and refuse a stay in the other arm in such circumstances. It would lead to a very unhappy situation of the Tribunal being in an inordinate conflict with itself and unnecessarily stultifying its purpose. The ends of justice are better served by mirroring the conclusion in the twin ruling by letting the gains and losses (perceived or actual) lie where they fell therein.

32 That said, none of the other grounds canvassed for and against the application finds any particular favour with us.

33 In reference to the applicant's case, to ask us to consider that the imposition of the sanction complained of contravenes fundamental constitutional and administrative law principles, and that the appeal has a real likelihood of success are, in our context, a clear invitation to weigh the merits of the appeal – which would be a very unhealthy exercise at this stage. We should guard against determining the appeal itself in such applications. Consequently, we decline this invitation with this observation – to say that an appeal has a real likelihood of success is, in our opinion, merely a pointer to the Tribunal that the grounds of appeal contain questions to be determined. Our reading of the grounds in the consolidated appeals leads us to the conclusion that there are real questions to be answered, and we will meet the parties at the foot of that bridge when we get there, and we sure will cross it with them. And we so note – for whatever purpose the notation serves. We will proceed no further on this point. This holding also applies to the applicant's consternation in respect of the alleged breach by the respondent of the rules of natural justice in the imposition of the sanction, and the applicant's contention that a larger percentage of the sanction arose from an unsettled and unpredictable method of assessment.

34 However, this does not imply that we have tied ourselves down in a bunker and will not act in deserving cases of obviously hopeless appeals, as for instance where an appeal is mounted on a clearly irredeemable expired license.

35 We find unattractive the applicant's argument that a refusal of the stay would be akin to being compelled to pay on a demand notice before a hearing. It erroneously implies a *lis inter partes* relationship between the parties – in which one party to a potential litigation places a demand on the other for the payment of an alleged debt arising from private treaty. Then again, it inadvertently characterizes the sanction as the act of a private person arising from the unchallenged whims of that private

person, and by so doing totally misapprehends the statutory regulatory authority reposed in the respondent. Whether the sanction was wrongly imposed or otherwise, it must be recognized that, in the least, the respondent purported to exercise its regulatory statutory powers to so act. That is to say – the sanction is a product of the exercise of statutory authority. Thus, it is a world away from the incidents of a demand notice placed by one party on another in the civil setting. We find the comparison a bit too exotic for our legal taste buds. In any case, such a course would invariably lead to the automatic grant of stay of execution. It seems to us unpalatable.

36 Likewise, we find unfashionable the applicant's contention that a stay would not deprive any party the fruits of litigation since the sanction is not a judgment debt but a regulatory imposition. This is a contention borne of a comparative analysis as to which of the parties is likely to suffer hardship if a stay is granted or refused. While this construct may serve the ends of justice in the context of *lis inter partes* as developed by our courts, it would rather defeat the ends of justice in our circumstances. This is because in the world of statutory regulatory sanctions, the regulator, like the respondent, would hardly ever be in a position of hardship should a stay be granted. Therefore, the pendulum would never swing the other way and it will always hang over the appellant. This permanent bar on a comparative hardship analysis precludes us from applying authorities on that concept. Ours is clearly distinguishable. If we proceed on the applicant's route, we will constrain ourselves in a straightjacket of a standing order automatic grant of stays to appellants – for all they would have to do in such applications, as the applicant is doing here, is point to the peril of hardship attending to their lot and the total absence of any such considerations in respect of the respondent.

37 Then again, the contention is much too simplistic and it second-guesses without addressing the purpose of the imposition of sanctions and the effects of a delay in paying up fines in regulatory and monetary terms, though it seems that the perpetual respondent will never be in jeopardy of hardship of losing the benefit of the payment of a sanction pending the determination of the appeal. Yet it is conceivable that in certain cases postponing the payment of a sanction till the determination of the appeal would flatly defeat the purpose of the sanction. Viewed in this light, the argument would run in a circle unless properly conceived against the backdrop that the respondent, in exercising its regulatory function of the imposition of sanctions, does so not for its own sake or benefit, but for that of the public, and that

its fines are an expression of our collective opprobrium and our vindication, even if no monetary gain is on the menu.

38 Then we come to the applicant's lamentation that a refusal of the stay and payment of the sanction would diminish its operating income and impair its ability to provide quality service to its customers thus exposing it to further fines by the respondent. It sounded *à la mode* at first, and so we followed its seeming bright light. We realized not long after, that it was a smouldering fire we mistook for a blaze. It lay in ashes because it was just a bare claim without any demonstration as to how in fact payment of the sanction would impair the applicant's operations and we were left alone in the cold to guesswork. We were not inclined to embark on that journey and to assume knowledge of the state of the applicant's bank balances and its operating budget and limitations and its whole financial incidents and situation. And we saw this also as a ploy to conscript us to grant stays automatically.

39 In respect of the respondent's case, much of it is a response to the claim. Our conclusions on the applicant's contentions resolve them. That leaves us with two grounds that are not a direct reaction to the applicant's. We are not convinced by either because it appears to us that upholding them would effectively lead to automatically refusing applications for stay of execution.

40 We recall the respondent's seeming frustration that a stay will tie its hands in exercising its statutory mandate. The respondent fails to recognize that it has in fact exercised its mandate by imposing the fines – which fines would be paid if the appellant loses the appeal. In that sense, its hands are merely waiting to receive the cash with an understandable itch of delay. However, if the wait pending the determination of the appeal is what the respondent finds unbearable, then it sounds a tad dystopian to us and too cold for comfort. It suggests that the respondent wants to be left alone, without the Tribunal's intervention, to impose and realize monetary sanctions without question. Certainly, that cannot be the lawmaker's purpose in creating this Tribunal with its appellate powers and intervention discretion derived from its jurisdiction. If it were so, the Tribunal would be rendered otiose and merely decorative on the statue books.

41 We also recall the respondent's set-off approach of hedging the instant payment of the sanction by the applicant against the latter's quarterly financial obligations owed to the former. On some level, the economics of this argument sounds attractive as it would seem to aid in balancing the books of both parties and shutting the door to the

specter of pyrrhic appeals. That is to say – if the appeal is successful, the applicant (who in the interim has paid the sanction) would be saved the trouble of financial hiccups by not being saddled with honouring a due mandatory quarterly payment, and thus balancing off the equities. However, the proposed formula, as it stands, leaves a very pressing question unanswered – the real value of money in inflationary terms that may place the appellant in an invidious position come the reckoning. To this extent, we find the formula to be in its incipient stages and not fully developed. Thus, it appears unsafe for us to rely on it and it has the effect of shutting down our discretion as it stands in its present mode.

Conclusion

42 The application for stay of execution is granted. The sanctions imposed by the respondent on the applicant contained in two letters dated 2 July 2019 and 6 August 2019 are frozen in their effect pending the determination of the appeal.

SGN: Kissi Agyebeng (Chairman)

SGN: Nania Owusu-Ankomah Sackey (Member)

SGN: Dr. Ezer Osei Yeboah-Boateng (Member)