



[2020] ECT 17
ECT/APP/015/2018
*On appeal from: Decisions of the
National Communications Authority*

RULING

**Ghana Telecommunications Company
Limited
(Applicant)**

v

**National Communications Authority
(Respondent)**

before

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

27 May 2020

Applicant

Martin Agyin Sampong, Esq.
Emmanuel Murray, Esq.

Respondent

Robert Apaya, Esq.

NANIA OWUSU-ANKOMAH SACKEY: (giving the ruling of the Tribunal)

1. This is an application by the appellant seeking an order for the consolidation of two separate appeals: Suit Number ECT/APP/015/2018 and Suit Number ECT/APP/006/2019. The application, filed on 31 January 2010, is mounted on Regulation 10 rule 9 of the Electronic Communications (Rules of Procedure of the Electronic Communications Tribunal) Regulations, 2016 (L.I. 2235) and Order 31 rule 2 of the High Court (Civil Procedure) Rules, 2004 (C.I. 47).
2. The two suits sought to be consolidated are both appeals by Ghana Telecommunications Company Limited (the “Applicant”) against sanctions imposed by the National Communications Authority (the “Respondent”) for alleged breaches of its Third Generation (3G) Licence conditions.
3. The first appeal, ECT/APP/015/2018, was initiated by a Notice of Appeal filed on 19 December 2018 seeking to set aside the decision of the Respondent to impose a sanction in the amount of GHS8,990,000.00 contained in a letter dated 21 November 2018. The sanction was for failing Quality of Service drive tests, particularly on speech quality measured as Mean Opinion Scores (MOS).
4. The second appeal, ECT/APP/006/2019, was commenced by a Notice of Appeal filed on 4 September 2019 seeking to set aside the Respondent’s decisions contained in letters dated 2 July 2019 and 6 August 2019 which sought to sanction the Applicant for failing a Quality of Service drive tests, particularly MOS and Call Setup Time (CST). The sanctions imposed were in the amounts of GHS 530,000.00 and GHS 550,000.00 for the first and second quarters of 2019.

Applicant’s Case

5. By its application, the Applicant is urging the Tribunal to consolidate the two appeals so that the two cases are heard together in one hearing. The Applicant’s case is that the parties, the main issues and the reliefs in both appeals are the same. The Applicant also submits that there are common questions of law and fact arising in both appeals, making the two appeals amenable for consolidation. The Applicant submits that both appeals emanate from tests conducted by the Respondent and relate to the methodology and processes adopted by the Respondent for the said tests.

6. The Applicant further submits that in both appeals, it intends to rely on the evidence of a foreign expert witness who resides in Germany. The Applicant indicates that if the two appeals are heard separately, it would have to bring the same expert witness to Ghana twice to testify in each appeal. It is therefore praying that the two appeals are consolidated into one hearing to avoid unnecessary expense and avoid undue delay.
7. The Applicant admits that at the time it filed the application for consolidation, it had not yet filed its Statement of Case in ECT/APP/006/2019 and that indeed, the time period for filing the process under the Rules of Procedure of the Tribunal had lapsed. At the hearing of the application, the Applicant indicated that it had filed the Statement of Case that morning, albeit out of time. It prayed the Tribunal to admit the belatedly filed Statement of Case, invoking Order 81 rule 1 of C.I. 47 in support.

Respondent's Case

8. The Respondent is opposed to the application for a number of reasons. Firstly, it contends that the two appeals are at different stages and a consolidation would cause unnecessary delay. The Respondent's case is that while the first appeal is set for hearing and dates have already been agreed upon for the hearing, the second appeal is not yet ripe for hearing. The Respondent argues that as at the time the application for consolidation was filed, the Applicant had not even filed its Statement of Case in the second appeal. The Respondent contends that since the parties' Statement of Case and Witness Statements in the second appeal are yet to be filed, it would be undesirable to consolidate the two appeals for them to be heard together.
9. Secondly, the Respondent contends that the issues in the two appeals are not the same, because the Applicant has introduced a new issue in the second appeal, which was not raised in the first appeal. The Respondent submits that the second appeal touches on the review of the Threshold of Call Set Up Time and MOS, an issue which has not been raised by the Applicant in the first appeal. On this basis, the Respondent argues that the issues in the second appeal are substantially different from the issues in the first appeal.
10. Thirdly, the Respondent further contends that the issue of delay and unnecessary expense canvassed by the Applicant in support of its application becomes even more concerning if the two appeals are consolidated. Contrary to the Applicant's position, the Respondent submits that granting the application has the potential of causing delay and increasing expense, and would lead to a multiplicity of suits.

11. Fourthly, the Respondent argues that a consolidation may potentially prejudice the regulatory mandate of the Respondent or otherwise prejudice the Respondent's case in the respective appeals.

The Law

12. Consolidation strictly means trying two or more cases together if convenient and the Tribunal has a large discretion in the grant of consolidation.
13. The Tribunal's rules of procedure, LI 2235, makes no specific provision for the consolidation of appeals. It however mandates the Tribunal to rely on the civil procedure rules of the High Court in such instances. Specifically, Regulation 10 rule 9 of L.I. 2235 states as follows:

Where there is no provision in these rules of procedure regarding a particular issue, the tribunal shall have recourse to the High Court (Civil Procedure) Rules, 2004 (C.I. 47).

14. The relevant provision on consolidation of suits under the civil procedure rules of the High Court is Order 31 Rule 2 of C.I. 47, which provides the circumstances under which two suits may be consolidated into one. It states as follows:

Where two or more causes or matters are pending in the same court and it appears to the Court

- (a) that some common question of law or fact arises in both or all of them; or
- (b) that the rights to relief claimed are in respect of or arise out of the same transaction or series of transactions; or
- (c) that for some other reason it is desirable to make an order under this rule,

the Court may order those causes or matters to be consolidated on such terms as it considers just, or may order them to be tried at the same time or one immediately after another, or may order any of them to be stayed until the determination of any other of them.

15. The scope of a tribunal's power to consolidate two suits into one has been considered by the courts in a number of cases.¹ From this long line of cases, it

¹ See for instance, *Real Estate Developers Limited v. Fosua* [1984-86] 2 GLR 334 CA; *Eva Cofie v. Noah Borketey & 6 Ors* [22/05/2014] Civil Appeal H1/100/12; *Samuel Atta-Mensab v. Attorney-General & Anor*, and *Stephen Kwaku Asare v. Attorney-General* (J1/4/2015) delivered on 3 December 2015, SC; *Daws v. Daily Sketch & Sunday Graphic Ltd* [1960] 1 All ER 397; *Beardsall v. Cheetham* (1858) EB & E 243.

appears to this Tribunal that five main considerations must weigh on our minds when determining applications for consolidation of appeals. Simply put, for the Tribunal to order a consolidation of two appeals, it must ensure that the following conditions exist:

- i. The two appeals sought to be consolidated must be pending between the same appellant and respondent;
- ii. Some common question of law or fact arise in the two appeals, even if the issues to be tried are not precisely the same;
- iii. The right to the relief claimed in each appeal arises out of, or is in respect of the same transaction or series of transactions in each appeal;
- iv. Or for some other reason it is desirable to consolidate; and
- v. There is little or no possibility of prejudice to one of the parties or confusion of interest if the two appeals are consolidated.

16. It is these five considerations enumerated above that the Tribunal must apply to decide whether or not ECT/APP/015/2018 and ECT/APP/006/2019 ought to be consolidated and heard together.

The Decision

17. The two appeals sought to be consolidated are both pending before this Tribunal and are between the same parties. Both appeals arise out of the same transaction or series of transactions, both relating to sanctions imposed by the Respondent on the Applicant for breach of the Respondent's 3G licence, that is, failing Quality of Service drive tests and MOS.

18. The Notices of Appeal filed in both suits are telling. The grounds of appeal in both cases mirror each other and the reliefs and issues are virtually identical. However, while in the first appeal the Tribunal is mainly required to determine whether the methodology used by the Respondent for the Quality of Service Drive Test, particularly for the MOS, is appropriate, the second appeal invites the Tribunal to additionally make a determination on the review of the threshold of Call Set-Up and MOS. It appears to the Tribunal that both parties recognise that the scope of the appeal in the second appeal is somewhat wider than that in

the first. What the parties do not agree on is whether the slightly widened scope of the second appeal prevents the two appeals from being consolidated and heard together.

19. While we agree with the Respondent's view that the second appeal raises the review of the threshold of the Call Set-Up and MOS (an issue that was not raised in the first appeal), we think that the issues raised in the two appeals are not poles apart such as to disqualify them from being heard together. Indeed, the legal position from case law indicates that a matter may be consolidated and heard together even where there are issues which are common to both cases but also issues which are uncommon, that is – issues that relate to only one of the appeals but not the other.² In the instant case, the issues raised in the two appeals are virtually the same and closely related. We are therefore not persuaded by the Respondent's position on this point. This Tribunal can conveniently deal with all the issues raised in both appeals in the same hearing.
20. In relation to the argument that a consolidation may possibly prejudice the Respondent's regulatory mandate, or may prejudice the Respondent's position in either or both of the appeals, the Tribunal's view is that this concern is easily resolved. The regulatory mandate of the Respondent has already been exercised and continues to be exercised by the Respondent and the Tribunal does not see any real possibility that a consolidation of the two appeals pending before it would impact negatively on the exercise of this regulatory mandate.
21. The Tribunal is also acutely aware that each of the appeals must be determined on their merit using the relevant criteria applicable in each of the appeals. Therefore, the Respondent's concern that hearing the two cases together may prejudice or affect their position in either appeal, though perhaps warranted, is not entirely valid. The Tribunal is aware of the considerations that it must take into account in each of the appeals and the standards that must be applied against the factual background of each of the two appeals. This Tribunal is well able to delineate the different criteria applicable in each of the appeals and is unlikely to be influenced or seduced into allowing the facts in one of the appeals to negatively influence the outcome of the other appeal. Particularly, where the Respondent has raised this concern, the Tribunal will be even more diligent in its evaluation of the issues in each of the appeals to ensure that there is no prejudice to either of the parties if the two appeals are heard together.

² *Samuel Atta-Mensah v. Attorney-General & Anor*, and *Stephen Kwaku Asare v. Attorney-General* (J1/4/2015) delivered on 3 December 2015, SC.

22. The Respondent's argument that the two appeals are at different stages of proceedings and therefore consolidating them would occasion some delay is well-founded, and its logic seemingly unassailable. There will inevitably be some delay where two matters which are at different procedural stages are consolidated into one suit for hearing. However, the Tribunal is of the view that any delay that would arise if the two appeals were consolidated would outweigh any benefits that would be derived from hearing each appeal separately. The essence of consolidation is to save time and avoid a multiplicity of actions³, and in instances where in fact all the issues between the parties can be efficiently and effectively heard and determined by the Tribunal in one hearing, consolidation is desirable.
23. The Tribunal takes the view that on the facts, the conditions for consolidation have been satisfied and that the two appeals are amenable for consolidation. The Tribunal is disposed to consolidating the two appeals to be heard together in one hearing so that the common questions of law or rights to relief claimed in both appeals are determined at the same time. This will expedite resolution of the two appeals in an effective and efficient manner.

Conclusion

24. We will grant the order of consolidation in respect of Suit Number ECT/APP/015/2018 and Suit Number ECT/APP/006/2019, which are both pending before this Tribunal. The two suits are hereby consolidated into one and will be tried together in one hearing.
25. The Tribunal directs the Registrar to prepare one docket for the now consolidated suit and allocate a consolidated suit number to the now consolidated appeals.
26. To enable the consolidated suit to proceed efficiently, the Tribunal adopts the Statement of Case filed by the Applicant in ECT/APP/006/2019 on 10 February 2020 as regularly filed. The Respondent is to file its Statement of Case in respect of Suit Number ECT/APP/006/2019 within fourteen (14) days. The parties are to simultaneously file any Witness Statements or Supplementary Witness Statements within a month of this ruling.
27. There will be no order as to costs.

³ *Eva Cofie v. Noah Borketey & 6 Ors* [22/05/2014] Civil Appeal H1/100/12.

SGN: Kissi Agyebeng (Chairman)

SGN: Nania Owusu-Ankomah Sackey (Member)

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