



[2021] ECT 1
ECT/APP/001/2021
*On appeal from: Decision of the
National Communications Authority*

RULING

Alpha Lotto Limited (Applicant)

v

**National Communications
Authority (Respondent)**

before

**Mr Kissi Agyebeng, Chairman
Ms Naa Odofoley Nortey, Member
Dr Ezer Osei Yeboah-Boateng, Member**

4 May 2021

Appellant

Kofi Bekoe Esq.

Respondent

Robert Apaya Esq.

KISSI AGYEBENG: (giving the ruling of the Tribunal)

- 1 This is an application mounted on an appeal from a decision of the respondent, the institution which regulates the provision of communication services in the Republic. The applicant (a lotto operator) is praying the Tribunal for an interlocutory mandatory injunction to compel the respondent to renew the applicant's short code *896# pending the final determination of the appeal.

Setting

- 2 By a Licensing of Lotto Operator Agreement executed on 14 January 2020 in pursuance of the objects under the Veterans Administration, Ghana Act, 2012 (Act 844) between the National Lottery Authority (the institution which regulates, supervises, conducts and manages national lotto) and the applicant, the latter was licensed by the former to operate NLA VAG 5/90 Fixed Odd Games (a five out of ninety balls game set up to cater for the administration of veterans) for a period of five (5) years subject to a renewal for a further term of three (3) years unless suspended or terminated as provided in the Agreement.
- 3 By a Licensing of Lotto Operator Agreement executed on 14 January 2020 in pursuance of the objects under the National Lotto Act, 2006 (Act 722) between the National Lottery Authority and the applicant, the latter was licensed by the former to operate NLA 5/90 Fixed Odd Games under Act 722 for a period of five (5) years subject to a renewal for a further term of five (5) years unless suspended or terminated as provided in the Agreement.
- 4 The National Lottery Authority issued a licence dated 1 July 2020 to the applicant for the operation of lotto under Act 844.
- 5 Under the above arrangements, the applicant was required to sell lotto product/games through Point of Sale Terminals (POST) and on the Internet on the World Wide Web. This scheme of affairs was operable necessarily via Unstructured Supplementary Service Data (USSD) – which is a communications protocol used by Global System for Mobile Communications (GSM) cellular telephones to communicate with the mobile network operator's computers. In this context, its feature is short codes – that is, short numbers or short digit sequences that are much shorter than telephone numbers and used to address messages in the Multimedia Messaging System and short message service systems of mobile network operators. In

Ghana, the respondent assigns short codes by a Special Numbering Resources (SNR), which is part of the national electronic numbering resources which are either non-geographic or non-network dependent and comprising of short codes, premium rate numbers, toll free numbers, and shared cost numbers used for carrying voice and data.

- 6 The applicant applied for and was issued with the Short Code *896# by the respondent on 19 March 2020 based on the Lotto Operator Agreement in pursuance of the objects under the Veterans Administration, Ghana Act, 2012 (Act 844) and the subsequent licence.
- 7 The certificate of authority for the use of short code was issued by the respondent to the applicant on 19 March 2021 to expire on 18 March 2021 upon stated terms and conditions for operation and renewal upon expiry.
- 8 By a letter dated 15 February 2021 authored by the Director General of the National Lottery Authority and addressed to the Director General of the respondent, the former requested the latter to shut down the Short Code *896# on the ground that it was being operated illegally by the applicant. It was claimed in the letter that the National Lottery Authority had not issued a licence to the applicant for the operation of its 5/90 game and that the request for the cessation of the applicant's short code was to avoid a breach of contract by the National Lottery Authority in respect of contractual obligations owed to a third party, KGL Technology Limited, and to avoid incurring heavy financial penalties.
- 9 It appears that upon receipt of the 15 February 2021 letter, the respondent promptly suspended the applicant's short code, without notifying the applicant. By a letter dated 19 February 2021 authored by the Chief Executive of the applicant and addressed to the Director General of the respondent, the applicant decried the suspension of the short code without notification and it requested the respondent to rescind its decision and to observe due process.
10. The respondent demurred. By a letter dated 23 February 2021 authored by the Director General of the respondent and addressed to the Managing Director of the applicant, the respondent stated it was not responsible for the suspension of the assigned short code and that it was not responsible for interpreting the contours of any agreement between the applicant and the National Lottery Authority.

It then emphatically stated (after drawing the applicant's attention to the impending expiry of the applicant's certificate of authority) that upon the expiry of the applicant's certificate of authority on 18 March 2021 it would not process any re-application for the continuous use of the assigned special numbering resources unless the applicant can show proof from the National Lottery Authority that it has been duly licensed to operate the 5/90 game.

- 11 By another letter dated 16 March 2021 authored by the Acting Director General of the National Lottery Authority (upon the termination of the appointments of the Director General and Deputy Director General of the Authority) and addressed to the Director General of the respondent, the former requested the latter to ensure that the applicant was immediately denied the use of the Short Code *896#. This time, the ground for the request was that the applicant was a self-styled private lotto operator and retailer engaged in illegal sales of lottery products and its activities was causing enormous financial loss to the Republic through diversion of lotto sales and revenue.
- 12 In the interim, by a letter dated 11 February 2021, the applicant had applied for a renewal of its certificate of authority and had paid the relevant application and annual regulatory fee for a short code. By a letter dated 19 March 2021 authored by the Director General of the respondent and addressed to the Executive Chairman of the applicant, the respondent referred to its 23 February 2021 letter and stated that it would not process the re-application for the short code until the applicant produced evidence of licensure by the National Lottery Authority to operate the 5/90 game over USSD and the web. The respondent requested the applicant to provide the required evidence of licensure to enable the former process the latter's application.
- 13 Then by a letter dated 24 March 2021 authored by the Acting Director General of the National Lottery Authority and addressed to the Chief Executive of the applicant and copied to several persons including the Director General of the respondent, the National Lottery Authority stated that it had by a letter dated 17 March 2021 instructed the applicant to immediately cease and desist from illegal sale of lottery products. It appears that upon this instruction, the applicant produced the 14 January 2020 Licensing of Lotto Operator Agreement in pursuance of the objects under the Veterans Administration, Ghana Act, 2012 (Act 844) to the National Lottery Authority. This is because the Acting Director General of the

Authority referred to the produced agreement in the letter under reference and cited clause 16.1 of the agreement, which states that “[The] NLA may suspend this Agreement without prior notice, if it determines that immediate suspension is necessary in order to ensure the integrity, security, honesty or fairness of the operation of NLA.” He then proceeded to state that:

In view of the said clause, it has become necessary to immediately suspend the aforementioned Agreement for the integrity, security, honesty and or fairness of the operation of National Authority as well as safe-guarding the revenue of National Lottery Authority.

As a result, the Agreement between National Lottery Authority and Alpha Lotto Ltd dated January 14, 2020 is hereby suspended forthwith for further investigations into the activities of Alpha Lotto under the said Agreement.

- 14 The applicant filed a notice of appeal on 7 April 2021 against the decision of the respondent and on the same day filed the present application mounted on the appeal. The respondent filed its response to the application on 19 April 2021. The application was heard on 22 April 2021 as fixed by the Registrar and communicated to the parties.

Preliminary Legal Objection

- 15 The respondent raised a preliminary legal objection to the notice of appeal and the instant application on three grounds. First, the respondent contended that the notice of appeal and the application for interlocutory mandatory injunction were filed out of time in breach of Regulation 1(2) of the Electronic Communications (Rules of Procedure of the Electronic Communications Tribunal) Regulations, 2016 (L.I. 2235) – which requires an appellant to file a notice of appeal within twenty-eight (28) days after the occurrence of the issue giving rise to the appeal.
- 16 The respondent also contended that since the applicant bases its claim on the agreements between it and the National Lottery Authority, and the latter is not a party to the suit and the respondent is not privy to the contractual arrangement between the applicant and the National Lottery Authority, both the respondent and the Tribunal lack legal authority to determine the veracity or otherwise of the agreements.

- 17 The respondent further contended that a cause of action has not yet accrued to the applicant to warrant the filing of the notice of appeal. It was argued that since every appeal before the Tribunal has to be precipitated by a decision of the respondent, there must of necessity be a decision of the respondent, which an appellant impugns. However, in this case there is no decision to challenge since the respondent has made no decision at all and that all the respondent did was to request evidence from another regulatory body to verify the purpose for which the short code would be used. In effect, the applicant has appealed against a non-decision.
- 18 The applicant naturally countered the respondent's contentions. We are minded to side with the applicant and we overrule the preliminary legal objection for the following reasons.
- 19 The respondent fails to recognize that its first contention effectively cancels out its third contention and renders the latter contention empty. It seems to us that the respondent is speaking from both sides of its mouth when the first objection is placed by the side of the third. In practice the respondent says in one breath that the applicant is out of time by not filing the appeal within the stipulated period after the occurrence of the issue giving rise to the case. And in another breath the respondent is asserting that it has not made any decision at all to give rise to an appeal. The obvious question becomes – if no decision has been made by the respondent, how has the applicant come to the Tribunal too late in the day in respect of a decision which has not been made.
- 20 The rule is *quod approbo non reprobo* – that which a person approves of or confirms, he cannot repudiate. That is to say, a person cannot approbate and reprobate. The respondent cannot claim that it has not made a decision and then turn around to say in effect that the applicant has come to the party too late by not timeously appealing against the decision it has not made. The respondent is unhappily approbating and reprobating in this instance.
- 21 Then again, the events culminating in the respondent's letter of 19 March 2021 letter show clearly that the respondent was actively taking decisions. By the time the respondent dispatched its 23 February 2021 letter, it seemed it had already suspended the applicant's certificate of authority, which had yet to expire. The respondent's 19 March 2021 letter was most forceful in communicating to the applicant that its re-application for the short code will not be processed until it provided evidence of licensure by

the National Lottery Authority to operate the 5/90 game. A resolve not to process an application is in itself a decision – which is simply to make a choice from alternatives. It is not the correctness or otherwise of the action at this stage. It is simply whether the respondent had made a choice as to whether to process the re-application or not to process same. It is the refusal to process the re-application based on the stated reason that has brought the applicant to the Tribunal. Any claim of a non-decision is, with respect, sheer sophistry.

- 22 On the first contention itself, the question becomes – when was the decision not to process the applicant’s re-application taken. While the respondent claims it was taken by its 23 February 2021 letter, the applicant contends that it was taken in the respondent’s 19 March 2021 letter. If it was taken in the earlier letter then it would seem the applicant was out of time. Not so, if it was taken in the latter letter.
- 23 It would be recalled that the respondent indicated in its 23 February 2021 letter to the applicant that in view of the issues raised by the National Lottery Authority, it was giving the applicant notice that it will not process any re-application for the continuous use of the assigned Special Numbering Resources unless the applicant showed proof of due licensure to operate the 5/90 game. It seems to us that on its own showing and on its face, the 23 February 2021 letter was not the official decision on the status of the applicant’s re-application. It was a reaction to a letter dated 15 February 2021 from the applicant to the respondent in which the former was taking umbrage at the suspension of its assigned short code. The 23 February 2021 letter itself speaks to this. It was in this letter also that the respondent drew the applicant’s attention that the assigned short code was to elapse on 18 March 2021.
- 24 In any case, there’s no evidence before the Tribunal as to when the 23 February 2021 letter was actually served on or brought to the notice of the applicant. Thus, it would be unsafe for us to engage in an exercise of computing the number of days in reckoning the stipulated time period as we have no actual reference date – if we were minded to hold that the 23 February 2021 letter was the decision letter.
- 25 We hold that the respondent’s 19 March 2021 letter contained the official decision not to process the applicant’s re-application. Its title itself shuts down any doubt as to contents – “Re: Renewal of Certificate of Authority”. And in the main body, the applicant is

handed the knell of a reiteration referencing the 23 February 2021 communication that the re-application would not be processed until a specified condition was met. This was after the respondent had earlier in the first paragraph acknowledged the applicant's 11 February 2021 letter for renewal and its payment of the required fees (which was not so in the 23 February 2021 letter).

26 If we were even to berth at that very unsafe harbour of adopting the date of 19 March 2021 as the reference point of when the 19 March 2021 letter was actually communicated to the applicant, the applicant was well within the stipulated time of twenty-eight (28) days when it filed the notice of appeal and the instant application on 7 April 2021.

27 We agree with the respondent on its second contention that both the respondent and the Tribunal lack the legal authority to determine the veracity or otherwise of the agreements between the applicant and the National Lottery Authority. Indeed, the Tribunal has not been clothed with jurisdiction to adjudicate on decisions of the National Lottery Authority by its establishing Act. And as jurisdiction, especially the appellate form, is a creature of statute, the Tribunal would be remiss if it purports to determine the justice or otherwise of the actions of the National Lottery Authority.

28 We seek not to do so at all in this application or should the case travel beyond this application. Our task is to ascertain in this case whether the decision of the respondent not to process the applicant's re-application of the continuous use of the short code was lawfully founded and tenable. We will restrict ourselves to that. In that regard, we will not stultify ourselves by opening up the merits of the contracts between the applicant and the National Lottery Authority and the actions of that Authority. This recognition of the extent of the Tribunal's jurisdiction and its limitation effectively disposes of the respondent's second ground. Then again, in respect of the respondent, the Tribunal would restrict the appeal to the legal capacity and authority of the respondent as to what it was required to do in the circumstances of this case.

29 It is for the above reasons that we overrule the preliminary legal objection.

Should an Injunction Lie?

30 A historically equitable remedy whose primary function is the safeguarding of legal and equitable rights and interests – injunction –

whether it will be granted or not, depends on whether the principles lend themselves to be moulded to fit the particular case. An injunction may be prohibitory (requiring a person to refrain from doing an act) or mandatory (requiring a person to do an act).

- 31 It is a largely discretionary remedy. For this reason, 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 score, we recall our self-admonition in *Scancom PLC (MTN)*¹ 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.”
- 32 The authorities (which need not detain us here) speak in unison that an applicant must show that if the order sought is not granted, it will suffer irreparable injury; that the injury complained of is not *de minimis* – not pertaining to trivial things – that is to say, there is a serious question to be tried, that is to say, the case is not frivolous or vexatious; is persisting or likely to recur, and that damages would not be an adequate remedy. This sums up to that the applicant has legal or equitable right protectable at law in the justice of the particular case and the balance of convenience sways in his favour.
- 33 The authorities are also aligned that adjudicators are more reluctant to grant mandatory injunctions as compared to prohibitory injunctions. The former requires a higher threshold of success. It will be granted or refused depending on the special circumstances attending the case.
- 34 We immediately dismiss all talk of whether damages would adequately compensate the applicant should we refuse the application, as the respondent suggested in its statement of case, even if slightly. We are not minded to entertain any thought of awarding damages against the respondent should it lose the appeal. Indeed, none has been asked. And rightly so, in the circumstances of this case.
- 35 It is beyond doubt that the respondent’s decision to suspend the applicant’s assigned short code and subsequently not to process the applicant’s re-application for the continuous use of the short code was based on the letters written to the respondent by the National

¹ *Scancom PLC (MTN) v. National Communications Authority*, Consolidated No. 02/2020 delivered on 24 February 2020, par. 28 p. 9.

Lottery Authority claiming that the applicant was operating illegally. While the respondent was persistently directing the applicant to provide proof of licensure, it had been furnished with that information as far back as March 2020. The licensure had not been showed to have expired. It had not been showed to have been suspended until a communication unhappily after the fact contained in the National Lottery Authority letter of 24 March 2021. At the time the respondent was taking the decision to suspend the applicant's certificate of authority and not to process its renewal, the "battle of letters" clearly show that the applicant's licensure had not expired and it had not been suspended. The only reason why the respondent made a judgment call to suspend the applicant's certificate of authority and not to process the renewal application were the claims by the National Lottery Authority that the applicant was operating illegally.

- 36 We are minded in the substantive appeal to determine the issues as to whether the respondent's decision was lawfully founded and as to whether it should have afforded the applicant a hearing. In effect, if the claims of the National Lottery Authority afforded a tenable foundation for the decision of the respondent, the appeal would be lost. In the reverse, if those claims provided no lawful ground for the respondent's decision, then the appeal succeeds.
- 37 Upon this strife for mastery, it seems to us just and fair that the balance of convenience sways heavily in favour of the applicant. Though we will not open the substantive appeal at this stage, it seems to us that the uncertainty at this stage of the issues should be resolved in favour of the applicant, who stands to lose economically for its non-operation of the short code (which is without argument a business short code) as opposed to the respondent that loses nothing really. On this, we are not without authority that economic loss is one such consideration for granting this application.² Thus, the application succeeds.

Orders

- 38 Consequently, we order the respondent to immediately renew the applicant's Short Code *896# pending the final determination of the appeal.

² See *Attorney General v. Colchester Corporation* [1955] 2 QB 207.

- 39 The Registrar should draw up the order and promptly serve it on the respondent.
- 40 The respondent should file its response to the appeal by close of business on 11 May 2021.
- 41 The Registrar should fix the case for hearing immediately after the time stipulated for the parties to deliver their witness statements.
42. We make no order as to costs.

SGN: Mr Kissi Agyebeng (Chairman)

SGN: Ms Naa Odofoley Nortey (Member)

SGN: Dr Ezer Osei Yeboah-Boateng (Member)