



[2021] ECT [13]
ECT/APP/001/2021
*On appeal from: Decision of the
National Communications Authority*

FINAL RULING

Alpha Lotto Limited (Appellant)

v

**National Communications
Authority (Respondent)**

before

**Kissi Agyebeng, Chairman
Naa Odofoley Northey, Member
Dr. Ezer Osei Yeboah-Boateng, Member**

1 September 2021

PARTIES:

Appellant

Kenneth Kwame Asare

Respondent

Golde Assan
Elizabeth Essel

LEGAL REPRESENTATION:

Appellant

Kofi Bekoe, Esq.
(Gratia Law Consult, Accra)

Respondent

Dr. Poku Adusei, Esq.
(Director, Legal)
Mashood Abdul-Mumuni
(In-House Counsel)

KISSI AGYEBENG: (giving the unanimous ruling of the Tribunal)

I BACKGROUND

- 1 This appeal stems from a decision by the National Communications Authority ¹ (the institution which regulates the provision of communications services in the Republic) not to process the re-application for the assignment of a Short Code to Alpha Lotto Limited² (a lotto operator carrying on business from C175/5 Torgbor Link, Kanda, Accra) until the latter provides evidence of licensure to operate lotto by National Lottery Authority, the institution which regulates, supervises, conducts and manages national lotto.
- 2 Although the respondent's witness sought tenuously and unconvincingly to deny it, the respondent's decision which precipitated this appeal was informed by certain correspondence transmitted to it by National Lottery Authority which carried allegations that the appellant was illegally operating lotto; and the responses from the appellant to both the respondent and National Lottery Authority. The pieces of correspondence – which we term “the battle of letters” – would be set out for their full effect.
- 3 We ruefully and disquietly bemoan the conduct of the relevant Chief Executives of National Lottery Authority in respect of the appellant – which, at best, can only be described as skullduggery. However, since this Tribunal does not have lotto jurisdiction, we have had to regrettably not call out the National Lottery Authority over this matter.
- 4 By a Licensing of Lotto Operator Agreement³ executed on 14 January 2020 in pursuance of the objects under the Veterans Administration, Ghana Act, 2012 (Act 844) between National Lottery Authority and the appellant, 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.
- 5 By another Licensing of Lotto Operator Agreement⁴ executed on 14 January 2020 in pursuance of the objects under the National Lotto Act,

¹ Hereafter, the respondent.

² Hereafter, the appellant.

³ Exhibit A1.

⁴ Exhibit A2.

2006 (Act 722) between National Lottery Authority and the appellant, 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.

- 6 On the back of Exhibits A1 and A2, National Lottery Authority issued a license dated 1 July 2020 to the appellant for the operation of lotto under Act 844.⁵ There is a notation at the bottom right corner of Exhibit A3 of an expiration date of 30 June 2021.
- 7 Under the above arrangements, the appellant 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 (MMS) and Short Message Service (SMS) systems of mobile network operators. In Ghana, the respondent assigns short codes by 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.
- 8 Armed with the above agreements and the licence to operate lotto under Act 844,⁶ the appellant applied for and was issued with a short code *896# by the respondent evidenced by a National Communications Authority Certificate of Authority⁷ with an effective date of 19 March 2020 and an expiration date of 18 March 2021. The respondent’s decision to issue the short code to the appellant was informed by Exhibits A1, A2 and A3, the incorporation documents of the appellant, and the driver’s licence of the named human agent of the appellant. In effect, the appellant had fulfilled all the requirements of the requisite regime – that is, the Electronic Communications Act, 2008 (Act 775) and the Special Numbering Resources and Administrative Framework, 2014.

⁵ Exhibit A3.

⁶ Exhibits, A1, A2 and A3.

⁷ Exhibit NCA1.

short code *896#. It was rather a private entity, described as KGL Technology Limited, which made the allegation (almost eleven (11) months after whatever allegation of illegality there may have been) to the respondent and requested the shut down of the short code. This was the entity referred to in Exhibit A5 by Hon. Kofi Osei-Ameyaw to the effect that National Lottery Authority was in the unhappy position of incurring heavy financial penalties to if the respondent did not immediately shut down the appellant's short code.

- 12 By a letter⁹ dated 11 February 2021 and authored by Alex Dadey, the Executive Chairman of KGL Technology Limited and addressed to the Director General of the respondent, and copied to the Director General of National Lottery Authority, the Chairman of the Board of National Lottery Authority, Executive Secretary to the President, the appellant, and the VAS Directors of MTN, Airtel and Vodafone,¹⁰ KGL Technology Limited alleged:

Dear Sir,

UNAUTHORISED ONLINE OPERATION OF NLA 5/90 GAME

Our attention has been drawn to the unauthorized online operation of the NLA 5/90 game via mobile and USSD by a company known as Alpha Lotto using short code 896. We have attached a copy of the advertisement of the 5/90 game, published by Alpha Lotto in the media, as evidence, for your information.

We would like inform your good offices that KGL Technology Limited is the only company duly authorized by the NLA to operate the 5/90 online game on USSD and mobile. Find attached our agreement with the NLA for your information.

This matter has been brought to the attention of the Director-General of the NLA, who has categorically denied any knowledge of the use of the 896 short code by Alpha Lotto. We also do not believe that the said short code was validly issued to Alpha Lotto by the NCA for the purpose of operating this specific NLA product. As the sole authorized operators of the 5/90 online license under short code 959, we are requesting that you take immediate steps to suspend the 896 short code, pending further investigation into this illegal operation.

We have committed a significant amount of investment to develop and operate the 5/90 game and the continued unlawful operation of the game by Alpha Lotto will adversely impact our business. We are by this letter,

⁹ Exhibit A4.

¹⁰ Incidentally, Hon. Kofi Osei-Ameyaw also copied his 15 February 2021 letter to the same persons in the same order.

authored by Kenneth Kwame Asare, who signed this time as the Chief Executive Officer of the appellant and addressed to the Director General of the respondent, Mr. Joe Anokye, the appellant decried the suspension of the short code without notification and it requested the respondent to rescind its decision and to observe due process. The letter reads:

Dear Sir,

SUSPENSION OF ALPHA LOTTO LIMITED USSD SHORT CODE #896

We respectfully, draw your attention to NCA's suspension of our USSD #896 without reference to the provisions of the Regulation 12 of the *Conditions for Certificate of the Authority*

Regulation 12, expressly mandates NCA to give a "*notice in writing to the Certificate Holder*" – Alpha Lotto Limited, before any action is taken. We are aware of the misinformation from the National Lottery Authority (NLA) to NCA to suspend our USSD #896 without just cause. It was our expectation that as a regulator, NCA would have given us fair notice and opportunity, to offer reasons before its action.

We further draw your attention to the fact that, as a public sector regulator, NCA has a duty of care to its Certificate Holders and their businesses, when contemplating any enforcement action, in order not to make your actions seem capricious, high-handed and intended to destroy a business.

With reference to the Scope of the Agreement made with NLA, under *Section 2.3*, Alpha Lotto's License Agreement: "covers operation of NLA/VAG 5/90 Fixed Odds Game" under VAG Act, Act 844 (2012). The use of USSD short code is provided for under *Section 13.2* and defined in *Section 2.3* of the Scope of Agreement as follows: "End-to-End lotto/lottery infrastructure means the complete information technology system needed to optimize the performance and efficiency of lotto sales involving the use of hardware, software, application program, written materials and procedures".

Alpha Lotto per its Agreement with NLA is a licensed operator of VAG 5/90 Fixed Odds Game and is therefore not in breach of using "End-to-End Technology and Application" which include USSD short code in its operation. NLA's incitement of NCA to suspend our short code is a breach of NLA's Agreement with Alpha Lotto.

We regret that NCA did not observe the regulatory practice of giving notice, seeking explanations and observing the time-honoured legal principle of "*audi alteram partem*" (hearing the other side) before commencing action against the business interest of our company, which is legally incorporated in Ghana and licensed for its lottery operations.

We are by this letter, humbly enjoining NCA to rescind its suspension of Alpha Lotto's USSD #896, and observe due process. Such patent regulatory abuse undermines the fundamental interests of businesses, and defeats our government's quest for private sector participation in lottery.

We hope NCA will receive this favourably and rectify the anomaly, to save our business.

Thank you.

Yours faithfully,
[]
(*sic*)

18 The respondent demurred. By a letter¹⁶ dated 23 February 2021 authored by the Director General of the respondent and addressed to the Managing Director of the appellant, the respondent replied as follows:

Dear Sir,

RE: ILLEGAL OPERATION OF NCA 5/90: ALPHA LOTTO
RE: SUSPENSION OF ALPHA LOTTO LIMITED USSD SHORT
CODE #896

We refer to the attached letter dated 15th February, 2021 on the above subject received from the National Lottery Authority (NLA).

We also acknowledge your letter dated 19th February 2021 on the above subject and wish to respond as follows:

- The NCA is not responsible for the suspension of the assigned short code #896 as claimed in your letter.
- The NCA is not responsible for interpreting contours of any agreement that Alpha Lotto Limited may have with the NLA.

That notwithstanding, the NCA wishes to draw the attention of Alpha Lotto Limited to the fact that the assigned short code #896, which was assigned 19th March 2020, shall elapse on 18th March 2021.

In view of the issues of the illegal operation of 5/90 raised against the use of the short code by the NLA in its letter referred to above, please take note and notice is hereby given that upon expiration of your Certificate of Authority on 18th March 2021, the Authority will not process any re-application for the continuous use of the assigned Special Numbering Resources, unless you can show proof from the NLA that you have been duly licensed to operate the 5/90 game on USSD and web.

¹⁶ Exhibit NCA5.

Please take note and be guided accordingly.

Yours faithfully,

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- 19 There was a pause in the “battle of letters” till the middle of March 2021. By this time, Hon. Kofi Osei-Ameyaw had been exited as the boss of National Lottery Authority. Enter Ernest Mote – who had been appointed as the Acting Director General of the Authority from 10 March 2021. He authored two letters dated 16 and 17 March 2021 to the respondent and the appellant, respectively, revisiting the matter of the alleged illegal operation of lotto by the appellant via its short code.
- 20 In his 16 March 2021 letter¹⁷ addressed to the Director General of the respondent and copied to the Office of the President, Minister for Communications & Digitization, MTN Ghana Ltd., Vodafone Ghana Ltd., and Airteltigo Ghana Ltd., Ernest Mote was even more brazen. He wrote:

Dear Sir

NOTICE OF REQUEST TO CEASE ALPHA LOTTO LTD FROM USING SHORT CODE NUMBER *896# FOR UNAUTHORISED AND ILLEGAL DELIVERY OF LOTTERY PRODUCTS AND SERVICES

We refer to the above subject matter and request your urgent attention to ensure protection and preservation of state revenue through your immediate action to cease the illegal use of Short Code *896# by **Alpha Lotto Ltd** (Alpha).

Following the President’s retirement and termination of service appointments of the Director-General and the Deputy Director-General of the National Lottery Authority (NLA) respectively, I was appointed under the Authority of the President of the Republic of Ghana as the Ag. Director-General of the NLA on March 10, 2021 to ensure the successful implementation of the reorganization of the NLA as envisioned by the Office of the President, His Excellency President Nana Akuffo Addo. (*sic*)

Alpha Lotto Ltd, a self-styled Private Lotto operator and retailer, is presently engaged in the illegal sales of NLA lottery products using Short Code *896# as the pass through medium for receiving electronic money payments particularly mobile money as payments for its illegal sales of lottery products to the general public. Beyond the illegality of its Short

¹⁷ Exhibit 6/Exhibit A6.

Code operations the activities of Alpha is causing enormous financial loss to the state through diversion of lotto sales and Revenue.

The referred illegal operation of Alpha constitutes serious violations of the National Lotto Act, 2006 (Act 722) which gives NLA a statutory monopoly over the conduct, operation and management of lottery in Ghana.

Consequently, we write to request your good offices to exercise its authority under the enabling and regulatory laws of the NCA to ensure that Alpha is immediately denied the use of Short Code *896# for its illegal lottery operations.

In addition, we remain available for any needful meetings with your offices to discuss any issues arising out of our request which requires further clarification.

Thank you.

Yours faithfully

[]

[Original emphasis]

- 21 After this self-aggrandizing and fawning letter laced with huge pretenses of lack of knowledge of the subsisting agreements between National Lottery Authority and the appellant, Ernest Mote shot across the bow of the latter with his letter dated 17 March 2021 notifying it to cease and desist from illegal sales of national lotto coupons and other forms of lottery. This letter was not exhibited. It was referred to in the appellant's response dated 29 March 2021,¹⁸ in which the appellant denied the allegations of illegal sales of lotto coupons and recalled and recited its contractual arrangements with National Lottery Authority. The letter was copied to several persons, including the Director General of the respondent.
- 22 In the interim, by a letter dated 11 February 2021, the appellant had applied for a renewal of its certificate of authority and had paid the relevant application and annual regulatory fee for a short code.¹⁹
- 23 By a letter dated 19 March 2021 authored by the Director General of the respondent and addressed to the Executive Chairman of the

¹⁸ Exhibit 7.

¹⁹ Exhibit NCA2.

appellant, the respondent referred to its 23 February 2021 letter and communicated its decision on the application for renewal as follows:

Dear Sir,

RE: RENEWAL OF CERTIFICATE OF AUTHORITY

The National Communications Authority (NCA) acknowledges your letter dated 11th February, 2021 together with the payment of Two Thousand, One Hundred Ghana Cedis (GHC2,100.00) being the application and annual regulatory fees for a Short Code.

We also refer to the NCA's letter numbered NCA/MISC/VOL.22/06 and dated 23rd February, 2021.

We would like to reiterate that your re-application for the Short Code 896 will not be processed until you provide evidence of licensure by the National Lottery Authority to provide the 5/90 game over USSD and the web.

Alpha Lotto Limited is hereby requested to provide the required evidence of licensure at its earliest convenience to enable the NCA further process the application for certificate renewal.

We count on your cooperation.

Yours faithfully,
[]

- 24 Then came the anchor of the battle of letters – a letter dated 24 March 2021²⁰ authored by the Acting Director General of National Lottery Authority to and addressed to the Chief Executive Officer of the appellant. It stated:

Dear Sir

SUSPENSION OF AGREEMENT BETWEEN NATIONAL LOTTERY AUTHORITY AND ALPHA LOTTO LTD.

Further to a letter from the office of the Acting Director-General of National Lottery Authority to you dated March 17, 2021 that the operations and activities of **Alpha Lotto Ltd** constitutes serious violations of the National Lotto Act, 2006 (Act 722) and its consequent instructions that you immediately cease and desist from illegal sale of Lottery Products which is resulting in the loss of substantial revenue to the State.

²⁰ Exhibit R5.

Your office provided a copy of an Agreement titled “**Licensing of Lotto Operator Agreement**” under Act 844 between National Lottery Authority (NLA) and **Alpha Lotto Ltd** dated January 14, 2020.

Clause 6.1 of the aforementioned Agreement gives National Lottery Authority the option to suspend it in order to ensure the integrity, security, honesty or fairness of the operation of National Lottery Authority.

In view of the said clause, it has become necessary to immediately suspend the aforementioned Agreement for the integrity, security, honesty and fairness of the operation 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 and operations of **Alpha Lotto** under the said Agreement.

Thank You.

Yours faithfully

[]

(*sic*)

[Original emphasis]

- 25 The 24 March 2021 letter, which was copied to several persons including the Director General of the respondent, totally exposes the pretensions of the successive heads of National Lottery Authority, Hon. Kofi Osei-Ameyaw and Ernest Mote as to the legal status of the lotto operations of the appellant. It would be recalled that up to this point, National Lottery Authority had openly accused the appellant of engaging in illegal lotto operations and made it seem as if there was no contractual relationship between National Lottery Authority and the appellant. However, there is a tacit admission by Ernest Mote that there was, all this while, indeed a contractual arrangement between the two entities. The perplexing posturing and total lack of candour of the two heads of National Lottery Authority thus laid bare, Ernest Mote then quickly invoked the termination clause in the agreement to suspend its operations to promptly cover up the contrived skullduggery.

II PROCEEDINGS BEFORE THE TRIBUNAL

- 26 On the back of the recounted events, the appellant filed a notice of appeal on 7 April 2021 against the decision of the respondent and on the same day filed a motion on notice for interlocutory mandatory injunction compelling the respondent to renew the appellant's short code.
- 27 The respondent filed its response to the application on 19 April 2021.
- 28 The application was heard on 22 April 2021 and decided in favour of the appellant on 4 May 2021.
- 29 The appellant delivered its statement of case accompanying the notice of appeal on 28 April 2021.
- 30 The respondent filed a notice of interlocutory appeal at the Court of Appeal on 7 May 2021 against the 4 May 2021 ruling. It then filed a motion of notice for stay of execution of the 4 May 2021 order on 11 May 2021 before this Tribunal.
- 31 The appellant delivered its response to the application for stay of execution on 20 May 2021.
- 32 The respondent filed its statement of case in respect of the substantive appeal on 21 May 2021.
- 33 The application for stay of execution was heard on 25 May 2021. On 8 June 2021 the Tribunal deferred its ruling on the application on the wisdom of the consideration that the appeal on which the application was mounted had been overtaken by events since the substantive matter would be heard and decided before that interlocutory appeal is heard, thus rendering it otiose.
- 34 The hearing was conducted on 15 and 16 June 2021. The parties called a witness each. The appellant called Raymond Kwei Mensah, its IT Manager, whose witness statement was filed on 11 June 2021. The respondent called Yaw Boamah Baafi, a Chief Manager in charge of the respondent's Greater Accra Regional Office, whose witness statement was filed on 10 June 2021.
- 35 The respondent filed its closing address on 13 July 2021 and the appellant filed theirs on 26 July 2021.

III SUBMISSIONS OF THE PARTIES

- 36 The appellant canvassed two grounds of appeal, *viz*:
- i. That the refusal of the National Communications Authority to renew Alpha Lotto Limited's Short Code *896# without giving Alpha Lotto Limited a hearing is in breach of the *audi alteram partem* rule thus a breach of the rules of natural justice.
 - ii. That the decision is against the weight of the evidence.
- 37 In the appellant's simple reckoning, the respondent refused to give it a hearing prior to reaching its decision not to renew its short code certification. In its statement of case, the appellant posited that the respondent breached the rules of natural justice by creating the impression that the appellant had not fully complied with the requirements for reapplication of the short code at the time the certificate of authority had not expired to simply deny the appellant the renewal based on the unsubstantiated claims of National Lottery Authority.
- 38 The appellant submitted that the respondent, as a way of denying the appellant the right to be heard, rather proceeded to request a license from the appellant which said license was already in the respondent's possession – by so doing, indirectly shutting the door of renewal to the appellant by creating the impression that it had only requested for a document, *viz*: the license.
- 39 The appellant opined that the respondent, an administrative body, had breached its statutory and constitutional duty of a requirement to act fairly and to give the appellant a fair hearing in view of the allegations of illegal conduct leveled by National Lottery Authority. And had it not merely swallowed the words of the lotto regulator, the respondent would have seen its way clearer.
- 40 Curiously, the appellant did not appear to proffer any argument in support of the second ground of appeal.
- 41 In its statement of case, the respondent contended that it did not breach the rules of natural justice by requiring the appellant to submit additional information required for the processing of the latter's renewal application.

- 42 In the respondent's estimation, given the objections raised by National Lottery Authority regarding the legality of the appellant's operations, it was only prudent for the respondent to ensure compliance with not only its regulatory requirements but also the requirements of the law of other established regulatory bodies. And that merely requesting evidence from another regulatory body to verify the purpose for which the short code would be used is not a breach of the rules of natural justice.
- 43 The respondent argued that it acted in accordance with the Special Numbering Resources Administrative Framework & Guidelines,²¹ the regime that governs the issuance of short codes instituted by the respondent. It contested the appellant's stance of the requested license being already in possession of the respondent as misplaced – since the body that issued the license was disputing its content.
- 44 In the respondent's estimation, contrary to the appellant's claim of the former's breach of the rules of natural justice, the evidence rather points to the honouring of the rules by the respondent since it afforded the appellant an opportunity to present the required documentation in aid of re-application.
- 45 Throughout the conduct of the case, the respondent also persistently claimed that it has not taken a decision on the status of the appellant's certification renewal application.
- 46 The respondent then proceeded on an analysis of demonstrating, in response to the phantom second ground of appeal, that its decision was not against the weight of the evidence.
- 47 Further, the respondent submitted that the appeal was filed out of time and 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 a person desirous of contesting a decision of the respondent to file her notice of appeal within twenty-eight (28) days after the communication of the decision.
- 48 This submission was said to be founded on a sequence of events tabled by the respondent. The respondent contended that its decision not to process the appellant's re-application was taken in its 23 February 2021 letter, which was served on the appellant on 25 February 2021. And that having received that correspondence on the indicated date, the

²¹ Exhibit NCA6.

appellant had up to 25 March 2021 to file its appeal. However, the appellant filed its notice of appeal out of time on 7 April 2021. Thus, the appeal is incompetent and has to be dismissed.

IV MERITS

Preliminary Objection

- 49 In its opposition to the application for interlocutory mandatory injunction, the respondent set up the time bar argument and two other main grounds as a preliminary legal objection to that application and to the entire appeal.
- 50 The second ground was that since the appellant based its claim on the agreements between it and National Lottery Authority, and the latter is not a party to the appeal and the respondent is not privy to the contractual arrangement between the appellant and National Lottery Authority, both the respondent and the Tribunal lack legal authority to determine the veracity or otherwise of the agreements.
- 51 The third point was that a cause of action had not yet accrued to the appellant to warrant the filing of the notice of appeal. It was argued that since every appeal before the Tribunal had 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 was no decision to challenge since the respondent had 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 appellant had appealed against a non-decision.
- 52 The preliminary legal objection did not find favour with us and we dismissed it in its entirety on 4 May 2021. We reproduce the relevant part of our ruling to set the matter in its right perspective owing to the rather acerbic reaction to the dismissal of the ruling by lead counsel for the respondent and his unhappy and total misapprehension of the issue and the effect of our ruling. We held that:

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.

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.

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.

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.

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.

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.

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).

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.

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.

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.

It is for the above reasons that we overrule the preliminary legal objection.²²

- 53 The respondent appeared to have accepted the ruling on its second and third ground of the preliminary legal objection. Not so with the first ground – the time bar objection.
- 54 Our elementary understanding of the law and the rules of procedure informs us that a party aggrieved by such a ruling of the Tribunal, goes further on appeal to the Court of Appeal in a quest to have it overturned. Lead counsel for the respondent sought to take this obvious course, which was fair enough. Had he taken up the matter there and bothered us no further, we would have had no cause to expend pages on this matter in this final ruling. However, clearly thinking that it is his undisputed birthright to have the appeal thrown out as time barred, he launched a perplexing scathing siege campaign on the Tribunal to get us to overrule ourselves.
- 55 First was his application for stay of execution of the order for interlocutory mandatory injunction. The language he employed in his drafted arguments was so acidic and scalding of the Tribunal it was as if he had declared total war in which no prisoners are taken. His oral argument before the Tribunal on the application for stay of execution followed the same pattern. Nothing seemed to calm him down.
- 56 Matters came to a crash during the hearing on 15 June 2021 while he was cross-examining the appellant's witness. He repeatedly sought to show through questioning the witness that the appeal was filed out of time. We constantly had to remind him that the Tribunal had already decided the issue and that the question of a time-barred appeal before this Tribunal is simply a reckoning of time between when the respondent's impugned decision was communicated to an appellant and when the appellant filed her notice of appeal. So where the Tribunal has held that it was satisfied that an appeal had been filed within time, it was totally out of the question and outlandishly moribund for counsel to seek to elicit answers from the witness in aid of showing that the appeal was filed out of time. Counsel just could not appreciate the simple legal realism that in the circumstances of this case, the witness' answers to his questions could not by any stretch of the imagination overturn our ruling and in the same un-stretch could not change the legal position of time reckoning. He persisted in the

²² *Alpha Lotto Limited v. National Communications Authority* [2021] ECT 1 at pp. 7-9, par. 19-29.

doomed line of questioning and we obliged him by summarily overruling his line of questioning on the issue after we had made our position clear to him.

- 57 Counsel for the respondent resumed his attack on the Tribunal in his closing address on the same line of reasoning *ad nauseum*.
- 58 The unjustified consternation of lead counsel for the respondent on the issue of time bar appears to stem from his misreading of our ruling or his misunderstanding of it. He conceptualizes our ruling to mean that had we been shown evidence of the actual date on which the 23 February 2021 letter was served on the appellant, our decision would have been different. So the respondent's witness, subsequent to our ruling, attached the proof of service on 25 February 2021 to his witness statement as Exhibit NCA6.
- 59 On the contrary, we emphatically ruled, as reproduced above, that the respondent's official decision not to process the appellant's re-application was contained in the 19 March 2021 letter and not the 23 February 2021 letter. We were by no means suggesting otherwise. Our reference to the non-exhibition of the proof of service was only by a side-wind to show how we were unimpressed by that regime. Our emphatic election of the 19 March 2021 letter should have put this matter to sleep before this Tribunal.
- 60 If the non-showing of proof of service at the application stage was the keystone of our non-election of the 23 February 2021 letter, then the 19 March 2021 letter should conceptually suffer the same fate of non-election since there was no indication of proof of service in its regard either. And perhaps that would have afforded some dubious credence to the respondent's claim that it had taken no decision – which stance begot the question we posed in the ruling: If no decision has been made by the respondent, how can the appellant be said to have come to the Tribunal too late in the day in respect of a decision which has not been made.
- 61 We re-affirm our ruling that the respondent's official decision not to process the appellant's re-application of the certificate of authority to operate short code *896# was contained in the 19 March 2021 letter to the appellant. And that even if we are to assume that that letter was served on the appellant on 19 March 2021, it was within the twenty-eight day rule for the filing of appeals when it filed its appeal on 7 April 2021. Consequently, we dismiss the respondent's preliminary objection to the appeal as unfounded.

Ground 1

- 62 The appellant contended in its first ground of appeal that the refusal of the respondent to renew the appellant's short code *896# without giving the latter a hearing is in breach of the *audi alteram partem* rule thus a breach of the rules of natural justice.
- 63 One of the cardinal principles of our legal system is that a party must be given adequate notice and opportunity to be heard. This is captured in the Latin maxim – *audi alteram partem* – listen to the other side or let the other side be heard as well. Perhaps this rule is humanity itself.
- 64 The rule developed variously in respect of the criminal law, deprivation of offices and other dignities, and decisions of the clergy.²³ In the nineteenth century, the rule was established in respect of “every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.”²⁴
- 65 Article 23 of the Constitution 1992 states that “[A]dministrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal.”
- 66 In explaining the duty imposed on administrative bodies as referred to in article 23 of the Constitution in *Awuni v WAEC*, Sophia Akuffo JSC (as she then was) remarked that:

In my view, the scope of Article 23 is such that there is no distinction made between acts done in exercise of ordinary administrative functions and quasi-judicial administrative functions. Where a body or officer has an administrative function to perform, the activity must be conducted with, and reflect the qualities of fairness reasonableness and legal compliance. I will not venture to give a comprehensive definition of what is fair and reasonable, since these qualities are dictated by the circumstances in which the administrative function is performed. At the very least however, it includes probity, transparency, objectivity, opportunity to be heard, legal competence and absence of bias caprice or ill-will. Where, as in this case, the likely outcome of an administrative activity is of a penal nature no matter how strong the suspicion of the commission of the offence, it is imperative that all affected persons be

²³ See S.A. de Smith, *Judicial Review of Administrative Action* (Stevens & Sons Ltd., London; Oceana Publications Inc., New York, 1959) 103-15.

²⁴ *Wood v. Woad* (1874) L.R. 9 Ex. 190 at 196.

given reasonable notice of the allegations against them and reasonable opportunity to be heard, if the objective of Article 23 is to be achieved.

67 This dictum points to the requirement of the observance of the rules of natural justice, at least at the barest minimum. And even where it is not specifically enacted, the authorities imply adherence to the rules of natural justice. Thus, the rules are to be adhered to at all times without fail, and a hearing process devoid of fair notice and opportunity to be heard is void.²⁵

68 However, the requirement to hear the other side does not imply processes akin to court proceedings or oral presentation or the affected person appearing to be examined.²⁶ A reasonable opportunity for reply suffices.²⁷ Thus, it was explained in *Aryee v. State Construction Company*²⁸ that:

A hearing did not necessarily, at all times, involve the physical presence of the employee before a board of directors to be examined *viva voce*. Where a Board wrote to an employee drawing his attention to alleged acts of misconduct or impropriety, and invited a written explanation, it would be thought that the employee would have been given an opportunity to be heard. If the employee wrote back answering the queries, and offered explanations and justifications for his conduct, or otherwise upon “sober reflection ‘withdrew the allegations and insinuations and apologized for his conduct, then surely, he would have taken advantage of the opportunity offered him and would have been heard. The board will then be entitled to take a decision based on the answers, explanations and justifications or apologies given by the employee. The *audi alteram partem* rule would have been complied with.

69 Consequently, the *audi alteram partem* rule would be held to have been breached by the respondent if it offered no opportunity to the appellant to rectify any detected defect in the latter’s re-application for a certification to operate a short code.

70 Upon the successful application by the appellant to operate a short code, the respondent initially issued it with a certificate of authority, which was to expire on 18 March 2021. The certification was attended by conditions. It was stated on the certificate that it was being issued as a result of the appellant having “fulfilled the requirements under The

²⁵ See *Aboagye v. Ghana Commercial Bank* [2001-2002] SCGLR 797 at 803-804, *per* Bamford-Addo JSC.

²⁶ *Ibid.* at 804.

²⁷ See *Stafford v. Minister of Health* [1946] K.B. 621.

²⁸ [1984-86] 1 GLR 4, holding 2.

Electronic Communications Act, 2008, Act 777 and the special numbering Resources and Administrative Framework, 2014”. Then came a proviso that: “This certificate shall be rendered null and void if any of the terms in the regulatory framework is violated and same shall be returned to the Authority upon request.”

- 71 The Special Numbering Resources Administrative Framework & Guidelines,²⁹ which governed the arrangement between the parties requires in its Regulation 15 that “[T]he [respondent] may require where applicable a copy of an authorization where services to be provided by a service provider require authorization from other government agencies. Such authorization shall first be obtained before any resource allocation”. Regulation 17 also provides:

The Certificate holder shall furnish the NCA such Information as the Authority may request regarding the Certificates Holders network plan, financial Information, billing and tariff Information, costs and accounts or any such other Information as the NCA may from time to time require in connection with Its responsibilities.

- 72 Thus was the framework within which the parties operated. And it must have been clear to the appellant or it ought reasonably to have known that within the sphere of the regulated lotto industry it operated, and within the province of Exhibit NCA8, the respondent could insist on the production of industry regulator authorization before issuing a certification of authority or renewing same.
- 73 It seems to us that the respondent’s 23 February 2021 letter was fair notice to the appellant that the former would be requiring the production of industry regulator authorization come the reckoning upon the expiry of the initial certificate of authority – which expiry was imminent. The respondent’s 19 March 2021 letter was an emphatic requisition of the indicated authorization.
- 74 The appellant’s Joan of Arc was that the demanded authorization was already in the possession of the respondent. True it is that it was. And it appears to us that the respondent’s demand for the industry regulator authorization in its 23 February 2021 letter was premature since the certificate of authority had not expired.
- 75 However, it also seems to us that the respondent acted responsibly in the circumstances and it would have been remiss had it not put the appellant on early notice on the insistence of the industry regulator

²⁹ Exhibit NCA8.

authorization. The respondent was unfairly caught in the contrived bludgeoning of the appellant by National Lottery Authority. The appellant clearly expected the respondent to carry out investigations into the claims by National Lottery Authority that the appellant was engaged in illegal operation of lottery by the institution of a hearing.³⁰ Yet, it is obvious that the respondent does not have the authority or mandate to conduct a hearing in respect of the claims of National Lottery Authority that the appellant was illegally engaged in lotto operations. This is the province of an adjudicator with competent jurisdiction to determine claims of illegal conduct. Thus, it cannot be said that the respondent's failure or refusal to carry out an investigation and to institute a hearing is an index of a breach of the *audi alteram partem* rule.

76 Then again, the persistent claims of National Lottery Authority of illegal conduct by the appellant must have sounded disconcerting to the respondent, which reasonably prompted its reaction. And had the respondent owned up to the obvious that its action stemmed from the claims of National Lottery Authority, perhaps this appeal would have been needless. Instead, the respondent kept on posturing and kept on denying that its action was begotten of the claims of illegality by National Lottery Authority, which only served to heighten the fair suspicion of the appellant that perhaps the respondent was in cahoots with National Lottery Authority to unfairly put the appellant out of business. On this score, the respondent's witness, Yaw Boamah Baafi showed a total lack of forthrightness as he sought to deny the link between the respondent's action and the claims by National Lottery Authority.³¹

77 In totality, the respondent's insistence on the production by the appellant of an industry regulator certification as a condition precedent for renewal of the operation of the short code was not in breach of the *audi alteram partem* rule as the requirement was reasonable and it afforded the appellant decent notice and an opportunity to produce the authorization for certification. Indeed, had National Lottery Authority not dishonestly muzzled out the appellant, it would have easily produced the authorization. Thus, the appellant's meltdown was the result of the actions of National Lottery Authority and not the respondent.

³⁰ See proceedings on 15 June 2021, pp. 4, 5, 6, & 16.

³¹ See proceedings on 16 June 2021, pp. 6, 20, 21, 22, & 23.

Ground Two

- 78 The respondent's second ground of appeal was that the respondent's decision was against the weight of the evidence.
- 79 As we noted earlier, the appellant did not advance any arguments in support of the second ground of appeal. An appellant cannot expect an appellate Tribunal to decode its mind and construct or reconstruct a ground of appeal to decipher the foundation or otherwise of an unargued ground of appeal.
- 80 We hold that the appellant has abandoned the second ground of appeal.

ON THESE GROUNDS

The Electronic Communications Tribunal rules that:

1. The respondent did not breach the *audi alteram partem* rule of natural justice by refusing to renew the appellant's short code *896#.
2. The appellant has abandoned its second ground of appeal.
3. The appeal is dismissed.
4. There will be no order as to costs.

Seat of the Tribunal: Accra

THE ELECTRONIC COMMUNICATIONS TRIBUNAL

Kissi Agyebeng
Chairman

Naa Odofoley Nortey
Member

Dr. Ezer Osei Yeboah-Boateng
Member