

**IN THE FAIR COMPETITION TRIBUNAL  
AT DAR ES SALAAM**



**TRIBUNAL APPEAL NO. 2 OF 2016**

**MYCEL CO. LTD.....APPELLANT**

**VERSUS**

**TANZANIA COMMUNICATIONS REGULATORY  
AUTHORITY (TCRA).....RESPONENT**

**JUDGMENT**

This is a judgment on appeal against the decision of the Tanzania Communications Regulatory Authority (hereinafter referred to as "the Respondent") whereby acting under section 22(a) of the Electronic and Postal Communications Act, Cap. 306 (hereinafter referred to as "EPOCA"), the Respondent cancelled four licences, namely National Network Facilities; Network Services; Application Services and Frequency User Licences issued to Mycell (T) Limited (hereinafter referred to as "the Respondent").

The facts of the case as far as they relate to this appeal can be conversed as follows:-

On 27<sup>th</sup> January, 2016 the Respondent issued a Compliance Order requiring the Appellant to appear before the Respondent

to show cause why legal actions should not be taken for failure to construct the network and commence the provision of license services contrary to section 21(a) and (b) of EPOCA. The Appellant appeared before the respondent and in its defence admitted that it failed to roll out the network and provide services due to various reasons. Amongst the reasons stated are that there was a shareholder's dispute on ownership/shareholding structure which was resolved on 28<sup>th</sup> August, 2013 and Appellant requested to the Authority to consent the change in shareholding structure through its letter dated 20<sup>th</sup> August, 2013 and the Respondent promised to approve upon payment of USD 35,383.53 as penalty of which the Appellant paid on 21<sup>st</sup> November, 2013. The Appellant also said it lost two years since its soft launch of CDMA in 2012 and by that time CDMA technology was set out of the market and new technologies such as LTE emerged thus Appellant was looking for ideal options to utilise the spectrum allocated. It also said on 5<sup>th</sup> November, 2014 the appellant entered into purchase agreement for transfer of Dovetel's licences to Appellant subject to the Respondent's statutory obligations being settled by the Appellant. It said on 5<sup>th</sup> November, 2014 the Appellant wrote a letter with Ref. No. Ripe/TCRA/01/14 to the Respondent seeking for written confirmation if it will irrevocably transfer Dovetel licences.

After hearing the Appellant's defence, the Respondent found the Appellate in material breach for failure to roll out the network and provide services as provided under section 21(a) and (b) of

EPOCA. The respondent by using its discretionary powers under section 22 of EPOCA did not see any reasonable ground to grant the Appellant another chance to roll out its network and services thus decided to cancel all the licences. The Respondent also found that the behaviour/act of the Appellant to pay for frequency user fees while keeping the frequency un-utilise amount to hoading frequencies which is a contravention of section 72(3)(b) and (c) of EPOCA. Aggrieved by this decision the Appellant has come to this Tribunal with five grounds of appeal; namely:

1. That the decision of the Respondent was not based on evidence adduced by the Appellant.
2. That the Respondent erred for failure to consider the reasons adduced by the Appellant which cause the delay to roll out the network.
3. That the decision by the Respondent failed miserably to disclose any reasonable ground for cancellation of the appellant licences despite adequate material which were before the Respondent for consideration for the delay.
4. That the Respondent unreasonably failed to appreciate the need of the Appellant additional frequency spectrum as the technology used for spectrum allocated to the Appellant became outdated which was CDMA based technology and not commercially viable, as the Appellant cannot launch 4G based technology which is now required, unless Appellant get the additional required spectrum as applied for from the Respondent.

5. That the decision of the Respondent is not justified in law and fact as the Appellant have been complied with all necessary requirements and any problem encored were promptly addressed to the Respondent, and the Respondent never pointed out in their decision any requirements which the Appellant breached, but the respondent without unjustifiable cause refused to entertain the Appellant need of right frequency and right channel according to the market demand for establishing the competitive telecommunication services at a level playing field for the Tanzanian Based Local Company. With these five grounds of appeal, the Appellant asked the Tribunal: -

1. To revise the Respondent's decision and substitutes with its own decision.
2. To order the Respondent to allow the Appellant to acquire the additional mobile network from Dovetel Tanzania Limited as per their agreement.
3. The Respondent be ordered to approve the transfer of licences' rights of M/S Dovetel Tanzania Limited to the Appellant.
4. To allow the Appellant to continue and finish to roll out the installation of the mobile network with the additional frequency spectrum acquired from the Dovetel Tanzania Limited.
5. Costs of the appeal.
6. Any other remedies the Tribunal shall consider fit to grant.

Both parties complied with Rule 28(1) of the Fair Competition Tribunal Rules GN. No. 219 of 2012 (hereinafter referred to as "FCT Rules") by filing their skeleton arguments of which they adopted during the oral hearing of the appeal. At the oral hearing the Appellant was represented by the learned advocate Living Raphael while the respondent had the services of the learned advocate Casmir Nkuba.

In expounding grounds number one; two and three of the appeal as outlined in the skeleton arguments, the counsel for the appellant argued that the Respondent in its ruling did not consider the reasons given by the Appellant as itemized under items 3.2.2 to 3.2.11 of the Ruling and instead the Respondent made a general observation that the Appellant admitted to fail to roll out the network and provide services as explained under item 4.1. He contended that the Respondent being a public body has a duty to analyse and give reasons in reaching to its decision. He pointed out that the Appellant showed that there was a dispute between shareholders that stall the operation of the appellant and respondent was aware. He said after the soft launch, the Appellant was in dispute for two (2) years and after the dispute was resolved the Respondent promised to approve the change in shareholding structure. The counsel further argued that during the two years period, the technology changed drastically thus CDMA was no more competitive and viable and there was new technology 4G lite. He said given this change, that Appellant was analysing the options on how to use the allocated spectrum with the new emerged technology. The

Appellant decided to merge licenses issued to Dovetel (T) Ltd and the appellant and sought permission from the respondent through a letter dated 20<sup>th</sup> November, 2014 but the Respondent did not respond to it until cancellation of the license.

It was the view of the counsel that failure to respond occasioned the delay for roll out and the appellant was not in a position to know whether the request was approved or not until the notice to show cause.

For the fourth ground, it was argued that communication industry is competitive and must be in the latest technological need as there was new technology which the appellant sought to pursue but the Respondent refused hence it was unreasonable. The counsel further argues that the Respondent did not give any reason for failure to allow the Appellant to use additional networks after all the details were submitted. He said it would be uneconomical for the appellant to proceed with the outdated technology.

For the fifth ground, the counsel for the Appellant contended that the Appellant was committed to roll out the network. There was no breach as the delay was caused by unexplainable circumstances. Appellant paid all statutory fees of about USD 3m even for 2015/2016 the fees were paid. With these submissions, the counsel for the Appellant prayed for the appeal to be allowed with costs.

In reply, learned advocate Nkuba submitted that powers and functions of the respondent are provided for under sections 5

and 6 of the Tanzania communication Regulatory Authority Act No. 12 of 2003 whereby the Respondent is required to promote the availability of regulated services to all customers in rural and urban areas. He said the Appellant was issued with four licenses that had seven conditions which appellant was duty bound to comply. He pointed out that Network Facilities License required the Appellant to provide facilities within a maximum period of six (6) months; Network services licence provides also for six (6) months period; Application services licence was issued to last for a period of five (5) years unless renewed; and the life of the frequency spectrum licence is dependent upon all other three licences life period. The counsel further pointed out that the licenses were issued in November, 2008 and they were cancelled in February, 2016 he said there is a period of over seven (7) years without compliance of the conditions.

The counsel for the Respondent also adverted that the reasons stated are devoid of merit because the dispute amongst the shareholders was caused by false information and the dispute was resolved after two years.

For technological problem, he said there is no application for consent by Dovetel, the license holder, there is only a letter by Ripe (T) Limited who is not a licensee. He said section 24 of EPOCA and rule 12 of EPOCA GN 430 of 2011 requires the applicant to attach certain documents. i.e to make a formal application and not by writing a mere letter. He said the agreement was entered prior to obtain the consent which was a violation of the law.

He further contended that the Respondent never received any application from the Appellant for additional spectrum. The Appellant complained to the Minister instead of placing the request to the Respondent.

On giving reasons in its ruling dated 25<sup>th</sup> February, 2016, the counsel replied that none of the grounds had merits and, in the order, it was admitted the appellant had not done the roll out even after the extension of time was granted in 2011. The Appellant was holding the licenses but the services were not given to the intended customers. He said the payment of statutory fees does not justify the holding of the licences without compliance with the law. The counsel concluded his reply by submitting that the Respondent exercised its powers provided by the law thus the appeal has no merit. He prayed for the dismissal of the appeal with costs.

It was rejoined that there was a shareholder's dispute from February, 2012 to August 2013 and that according to Section 24 of EPOCA a party cannot transfer a licence without a consent from the Respondent. He said Ripe was authorized by the order of the court to act on behalf of Dovetel to find a potential buyer in other words Dovetel was under the supervision of the High Court order. He said the letters dated 20<sup>th</sup> November, 2014 and 5<sup>th</sup> November, 2014 are clear that Ripe sought transfer of the licences which were never responded by the Respondent. The counsel insisted that the Appellant could not lodge an application without the approval of the Respondent but



Respondent kept silent. He thus insisted that the appeal has merit and should be allowed with costs.

Having heard the submissions made by the counsels we are satisfied that the gist of the Appellant's appeal in respect of all five grounds of appeal is whether the Respondent considered the reasons for the delay submitted by the Appellant in showing cause why the licences should not be cancelled.

For this Tribunal to be fully satisfied as to whether the Respondent considered the reasons in its decision, we have to reproduce part of its findings. It reads:

"4.1 Having heard the licensee's defence, and considering the licensee's admission to the failure to roll out the network and provide services, it is clear that the said licensee is in material breach for failure to roll out the network and provide services as provided under section 21(a) and (b) of the Electronic and Postal Communications Act. Chapter 306 of the laws of Tanzania, which states that failure of a licensee to construct the network and commence the provisions of the licenced services is a material breach of licence conditions.

4.2 By virtue of section 22(a) of EPOCA, the Authority may SUSPEND or CANCEL a licence if the Licensee is in material breach of the licence conditions provided for under section 21 of EPOCA.

The Authority has decided to use its discretion to exercise its powers under section 22 of the EPOCA and does not see

any reasonable ground to grant Mycel another chance to roll out its network and services as it was previously granted extensions as follows and it failed to meet its obligation:-

- 10<sup>th</sup> June, 2009
- 31<sup>st</sup> December, 2009
- 2<sup>nd</sup> August, 2010
- 10<sup>th</sup> January, 2012.

4.3 It is the obligation of the licensee to abide by the law, and construction of the network is an obligation for every licensee. Failure to roll out the network and provide licensed services is material breach of the licence conditions and entitles the Authority to cancel the licences issued to Mycel.

4.4 Furthermore, despite the fact that Mycel has been paying for the frequency user fees, the behaviour/act of the licensee to pay for the same while keeping the frequency unutilised amount to hoarding frequencies which is a contravention of section 72(3)(b) and (c) of EPOCA".

From the above observations and statements, the Respondent decided as follows:-

"NOW THEREFORE, the Authority orders that the licences issued to Mycel namely National Network Facilities, Network Services, Application Services and Frequency User Licences to be cancelled".

In **Hamisi Rajabu Dibagula Vs. Republic [2004] TLR 196** the Court of Appeal at page 196 cited in approval the case of **Lutter Symphorian Nelson Vs. The Hon. Attorney General and Ibrahim Said Nsabah, Civil Application No. 24 of 1999** (unreported) where it was held:-

"...A judgment must convey some indication that the judge or magistrate has applied his mind to the evidence on the record. Though it may be reduced to a minimum, it must show that no material portion of the evidence laid before the court has been ignored. In **Amirali Ismail Vs. Regina** (6) Abernethy, J. made some observations on the requirements of judgment. He said:

A good judgment is clear, systematic and straight forward. Every judgment should state the facts of the case, establishing each fact by reference to the particular evidence by what it is supported; and it should give sufficiently and plainly the reasons which justify the finding. It should state sufficient particulars to enable a Court of Appeal to show what facts are found and how"

Applying the above to the matter at hand, we find that the respondent in its decision gave sufficient reasons to justify its findings. The Respondent by stating that it heard the licensee's defence and considered the licensee's admission then it obviously applied its mind to the evidence on the record though not in very many words. In the end we are satisfied that the Respondent did consider the defence fronted by the Appellant

but ruled them out. Therefore, we find that the appeal lacks merit and we proceed to dismiss it with costs. It is so ordered.



**Judge Barke M.A. Sehel – Chairperson**



**Hon. Yose J. Mlyambina – Member**

**Dr. Theodora Mwengoha – Member**

**08/10/2018**

Judgment delivered this 8<sup>th</sup> day of October, 2018 in the presence of Byamungu, Advocate for the Respondent and in absence of the Appellant.



**Judge Barke M.A. Sehel – Chairperson**



**Hon. Yose J. Mlyambina – Member**



**Dr. Theodora Mwengoha – Member**

**08/10/2018**