



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

TRIBUNAL APPEAL NO. 2 OF 2007

VODACOM TANZANIA LIMITED..... APPELLANT

VERSUS

TANZANIA COMMUNICATIONS

REGULATORY AUTHORITY (TCRA)..... RESPONDENT

SIX TELECOMMUNICATIONS CO.LIMITED..... INTERVENER

REASONS FOR A DECISION

Earlier today, the 3rd day of October 2008 we overruled the preliminary objections raised by the Intervener, but reserved our reasons, which we now give.

This is an appeal from the decision of the Tanzania Communications Regulatory Authority (TCRA) in Interconnection Determination No. 2 of 2007 of 27th December 2007.

The respondent TCRA has resisted the appeal by filing a Reply to the Memorandum of Appeal filed by the appellant Vodacom Tanzania Limited. Six Telecommunications Co. Limited, the intervener has also opposed the appeal by filing a Statement of Intervention. By Notice of preliminary objection, the Intervener has also taken objection to the appeal on the following grounds:

- (i) The appeal has been overtaken by events; and
- (ii) The Tribunal does not have jurisdiction to grant the reliefs sought.

The brief undisputed background to this matter is that by G.N. No. 247 of 14th December 2007 the respondent gave notice to the general public of its intention to hold an inquiry for the purpose of reviewing the cost based interconnection rates applied among the telecommunication operators. The inquiry was duly held. On 27th December 2007 the respondent issued Interconnection Determination No. 2 of 2007 and by letter the respondent informed the telecommunication operators of the decision reached on the interconnection rates. The Determination aforesaid was communicated to the appellant on 28th December 2007. On the same date, the 28th of December 2007 G.N. No. 258 was published, setting out the rates which were determined by the respondent in its decision of 27th December 2007. The G.N. provides that it would be effective as from the 1st January 2008. The appellant was aggrieved with the decision of the respondent in the Determination. On 31st December 2007 the appellant filed in this Tribunal Notice to appeal from Interconnection Determination No. 2 of 27th December 2007. Both the Determination and G.N. No. 258 were made available to the appellant on 28th December 2007.

This appeal was lodged in this Tribunal on 31st December 2007 on the ground *inter alia* that the respondent had acted without jurisdiction when it made the Determination on the interconnection charges.

As regards the first ground of preliminary objections, Mr Mahebe, learned counsel for the intervener, submitted that the appeal had been overtaken by events, that while the appellant was entitled to appeal against the decision before the issue of G.N. No. 258 of 28th December 2007, after the publication of G.N. No. 258, Determination No. 2 of 2007 had ceased to exist and the appellant had lost the right to appeal to this Tribunal from the decision.

On the second ground of objection, Mr Mahebe contended that with the publication of G.N. No. 258 the Determination of the respondent had become law, that the Tribunal lacks the jurisdiction to review laws or grant the reliefs sought in the appeal, that the power to review laws is vested in the High Court of Tanzania, and that this Tribunal has no jurisdiction to set aside or nullify any written law. It was asserted that this Tribunal has no jurisdiction to entertain this appeal which effectively seeks to set aside the entire Determination No. 2 of 2007. It was further asserted on behalf of the intervener that after the issuance of G.N. No. 258 of 2007 the only remedy available to the appellant was by way of an application for *certiorari* and *mandamus*.

Countering these submissions, Mr Galeba, learned counsel for the appellant, maintained that the appeal is properly before this

Tribunal, that the Tribunal is vested with the jurisdiction to hear the appeal and that Determination No. 2 of 2007 appealed from had not ceased to exist, nor had it been superseded by G.N. No. 258 of 2007. Mr Galeba asserted that what was appealed from was the Determination and that both the Determination and the G.N. were communicated to the appellant on 28th December 2007. Learned counsel argued that as the appeal was filed on 31st December 2007, a day before the G.N. was to become operational, the appeal was properly before the Tribunal, which derived its jurisdiction from the provisions of s. 85(1)(c) and s. 89(d) of the Fair Competition Act, 2003, Rule 32 of the Fair Competition Tribunal Rules, 2006 and s. 36 of the Tanzania Communications Regulatory Authority Act No. 12 of 2003. Mr Galeba was emphatic that if regulatory bodies were permitted to preempt appeals from their decisions by issuing letters of determination and a G.N. on the same day, this would make it difficult to challenge the decisions of a regulatory body by appealing to this Tribunal, which would thereby undermine the Tribunal and effectively make it impossible for this Tribunal to discharge its functions.

Mr Nyika, learned counsel who appeared with Mr Galeba at the hearing on behalf of the intervener, added that G.N. No. 258 of 2007 was not a decision but a publication of the rates and charges set out in the Determination and in the event the Determination was found to be improperly made then the G.N. would have no leg to stand on, and the Tribunal may proceed under Rule 32 of the Fair Competition

Tribunal Rules to make such consequential orders as may be appropriate with regard to the legality or otherwise of the G.N.

We have carefully considered the respective arguments by the contending learned counsel.

It is not disputed that Interconnection Determination No.2 of 27th December 2007 was communicated to the appellant on 28th December 2007 and G.N.No.258 was published on the same date. The appellant is aggrieved with the decision made by the respondent, that is Interconnection Determination No.2 dated 27th December 2007, and is in this appeal clearly challenging Interconnection Determination No.2 of 27th December 2007 and seeking *inter alia* the setting aside of the whole Determination. The question to be addressed is whether with the publication of G.N.No.258 the appellant's right to appeal has been overtaken by events. Secondly, following publication of G.N.No.258 of 2007, does this Tribunal lack jurisdiction to entertain the appeal and grant the reliefs sought?

Admittedly, as pointed out on behalf of the intervener/objector, it is the High Court which is by law the court vested with the jurisdiction to review and quash/nullify legislation, including a G.N. which is nothing but subsidiary legislation. As in part pointed out on behalf of the intervener/objector, this Tribunal derives its power to hear and determine appeals from decisions of the TCRA from s.85(1)(c) and s.89(d) of the Fair Competition Act, 2003, Rules 7, 9 and 32 of the Fair

Competition Tribunal Rules, s. 36 of the TCRA Act No. 12 of 2003 and Rule 11 of G.N. No. 258 of 2007.

Rule 9(1) of the Fair Competition Tribunal Rules provides as follows:

“9(1) – An appeal or cross-appeal shall be instituted by lodging not later than thirty days of the date when the notice of appeal or cross appeal was lodged”

Under Rule 32, this Tribunal has the power to confirm, reverse or vary any decision of the TCRA or any relevant regulatory body *inter alia*. It can also make any necessary incidental or consequential order.

Interconnection Determination No. 2 of 2007, which is the decision the appellant is appealing from, was communicated to the appellant on 28th December 2007. The appellant was surely entitled to appeal against the said decision under the provisions of Rule 9(1) of the Fair Competition Tribunal Rules within 30 days of the date of the lodging of the notice of appeal, which in this case was 31st December 2007. The appeal itself was filed on the same day.

Now the question is, does G.N. No. 258, which clearly is a publication of the rates set out in the decision, preclude this Tribunal from entertaining this appeal and granting the reliefs sought in the

appeal? Does the publication of the G.N. disentitle the appellant from exercising its statutory right to appeal to this Tribunal?

This Tribunal's answer to both questions is in the negative. In the first place, the appeal seeks to challenge the decision in the Determination. It is not an appeal against the G.N. The appellant is not seeking the nullification of G.N. No. 258 of 2007. The appeal was filed within time and this Tribunal is empowered to determine it under the provisions stated hereinbefore. The appeal was undisputably filed on 31st December 2007, a day **before** the G.N. was to become operational. Indeed, the filing of the appeal had, in our opinion, the effect of staying the coming into operation of the G.N. We cannot, therefore, agree to the contention that the Determination does not exist or that it has been superseded by the G.N. No. 258 of 2007. G.N. No. 307 of 2004 provides the rules for conducting an inquiry. The Determination which the appellant is appealing from was made following such an inquiry. Rule 10 thereof provides that the authority/respondent shall notify in writing its determination or decision on the inquiry and the reasons for the decision to all persons entitled to appear at the inquiry. Rule 11 of G.N. No. 307 of 2004 reads as follows:-

“Any person aggrieved by the decision of the Authority made pursuant to the Act and these Rules may appeal to the Fair Competition Tribunal established under section 83 of the Fair Competition Act, 2003.”

Clearly, Determination No. 2 dated 27th October 2007 is the decision that the appellant is appealing from. G.N. No. 258 of 2007 is not the determination/decision of the respondent on the inquiry referred to in Rules No. 10 and 11 of G.N. No. 307 of 2004. G.N. No. 258 is the publication of the Cost Based Interconnection Rates for Telecommunication Network Operations as determined by the respondent in its Determination No. 2 issued on 27th December 2007. The Tribunal cannot be said to lack the jurisdiction to entertain this appeal.

In the event that after hearing the appeal on merit this Tribunal finds the Determination to be improperly made and the rates unlawful, the Tribunal may, in our view, under Rule 32 of the rules reverse or vary the decision of the respondent and make any necessary appropriate consequential orders with regard to the legality or otherwise of G.N. No. 258 of 2007, and/or order the respondent to amend the G.N. notwithstanding that it has no power to nullify the G.N. which is subsidiary legislation. We cannot therefore agree with the contention that the appeal has been overtaken by events or that this Tribunal has no jurisdiction to grant the reliefs sought.

Mr Mahebe has clearly conceded in the course of his submissions that the issuance of a determination and a G.N. on the same day would make it difficult for an aggrieved person to challenge the decision concerned in this Tribunal. Indeed, we cannot but agree with Mr Galeba that the practice of issuing both a determination and

publication of a G.N. on the same date would not only deny a party aggrieved with a decision of a regulatory body the statutory right to appeal to this Tribunal but also oust the Tribunal of its powers to hear appeals from decisions of Regulatory Bodies vested upon it by ss. 85 and 89 of the Fair Competition Act and the Fair Competition Tribunal Rules and s. 36 of the TCRA Act, and thereby make it impossible for this Tribunal to discharge its duties. The very existence of this Tribunal, which is the Tribunal vested with the powers to hear appeals from decisions of the Fair Competition Commission and the Regulatory Bodies on competition matters would become irrelevant.

As stated earlier, it is this Tribunal which is vested with the jurisdiction to determine competition matters. If the appellant's complaints were to be lodged in the High Court, it would surely defeat the purpose of establishing this specialised tribunal consisting of members who are persons with diverse expertise in industry, commerce, economics, law(s), etc. Indeed, we do not think the legislators intended decisions of the relevant Regulatory Bodies to be immediately translated into law by publication of G.N.s, etc., when they passed this specific law with the objective of promoting fair competition. Not surprisingly, the respondent did not raise any objection on jurisdiction, or any other preliminary points of law, for that matter.

For the above reasons, as stated in our order earlier today, both grounds of objection are overruled and dismissed with costs.

R. Sheikh, J - 

Chairman

Dr R. Shah - 

Member

F. Kibodya - 

Member

Date: 03 October 2008