

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

TRIBUNAL APPEAL NO. 5 OF 2016



AZAM MEDIA LTD.....APPELLANT

VERSUS

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

JUDGMENT

This is an appeal against the decision of the Tanzania Communications Regulatory Authority (TCRA) (hereinafter referred to as the respondent) which found Azam Media Limited (hereinafter referred to as the appellant) in breach of sections 13 and 116(b) of the Electronic and Postal Communications Act of 2010 (hereinafter referred to as EPOCA).

The facts that gave rise to the present appeal can be summarized as follows: On 6th December, 2013 the appellant was issued with a licence for support services for subscription content services by Satellite. Under clause 2.2 of the licence, the appellant is authorized to operate in Tanzania Mainland and provide support services for Satellite content by subscription. On 15th June, 2016 the respondent issued a compliance order and summoned the appellant to appear before the respondent on 17th June, 2016 at

10.00 am in order to show cause why legal action should not be taken for breach of sections 13(1) and 116(3)(b) of EPOCA. According to the respondent's decision, the compliance order was received by the appellant on 15th June, 2016. However, the counsel for the appellant during the hearing of the appeal submitted that the compliance order was received on 16th June, 2016 and were given six hours to make written submission of which it did.

The hearing before the respondent was done orally on 17th June, 2016 and written submissions were filed on 17th June, 2016. After hearing the appellant's defence, the respondent came to the following decision:-

"...it is confirmed that AZAM is part and parcel of the broadcasting value chain and indeed by providing content services through transmission of local content such as current affairs, news and coverage of live events to Azam Pay TV for aggregation, it does broadcasting. The transmissions are intended for direct transmission reception by members of the general public in Tanzania, which is contrary to sections 13(1) and 116(3)(b) of the Act".

Having found that, the appellant is in breach of sections 13(1) and 116(3)(b) of EPOCA, the respondent ordered the appellant to pay the respondent by 30th July, 2016 a fine of Tshs. 10 million for providing content services without a licence and to stop

immediately the provision of local content such as current affairs, news and coverage of live events.

Aggrieved with this finding, the appellant has approached the Tribunal with nine grounds of appeal.

Before dwelling with the grounds of appeal, it is pertinent to point out from the outset that pursuant to Rule 35(1)(c) of the Fair Competition Tribunal Rules, GN 219 of 2012 (hereinafter referred to as "the Rules") the Tribunal exercised its mandate of calling expert witness to assist the Tribunal on technical issues which are:

1. Meaning of Support Services for Satellite Content Services by Subscription.
2. Limitations in respect of licence for transportable satellite trans receivers and ground earth station.
3. What is content service licence?

The expert one Eng. Andrew Johnson Kisaka from TCRA appeared before the Tribunal on 20th day of June, 2018 to give his testimony in technical issues. It be noted that his testimony was taken after parties' counsels made their submissions on the grounds of appeal.

The expert explained to the Tribunal that technically broadcasting via satellite one must have a content. A content by subscription means that viewer has to subscribe to the content service provider so that can view that content.

Subscription mean viewer pay a certain amount of fee to the service provider determined by the service provider to allow the viewer to view the content.

On how the production is done, he said the best practice is that the service provider may use independent content producer or he may produce content himself/or buy content from any content sellers who thinks that the content may be appealing to viewers.

For producing content, the expert explained that one needs to have a studio called production studio which will help the producer to verify preview and ensure that the content he is buying is the right one for his viewers or it will impress his viewers such that they can subscribe or pay fee to access it. He further explained the means of airing content by subscription which may be by using the following facilities:-

1. Studio with production facilities
2. Transmission equipment such as transportable trans receiver
3. Uplink Satellite Stations.

Eng. Kisaka also explained the business model of provision of content by subscription through satellite platforms. He said broadcasting via satellite has advantages of bearing signals on earth and achieve global or continental coverage. He said once you broadcast signals using satellite then it may be received by many countries within the footprint of the satellite beam. For the content service providers to take advantage of this global or

continental coverage and to make business case, they normally have representatives to each country where the signal footprint of the signal is covering and the best practice is to have one point of content aggregation.

The one who aggregate content is called principal aggregator and these principal aggregators receive content from the countries or sellers or independent producer, package it, aggregate and distribute according to the need of each country.

In countries where the principal aggregator has representatives, the regulators have given these representatives different names eg. in Tanzania they are called support services while in Kenya they are called subscriber management licensee. In principal they are taking care of subscribers residing in that particular country by providing support services such as selling decoders, collect subscription fee, provide customer care such as billing and marketing.

Eng. Kisaka told the Tribunal that TCRA is not licensing content producer but it is dealing with the one who is broadcasting as they are required to obtain a licence. He said broadcasting licences are categorized in different categories which are:

1. Free to Air broadcasting services
2. Content by subscription:
 - Cable
 - Internet/IPTV
3. Support Services through Satellite

4. Online content services provider through radio or television streaming; online forms and blogs

He further explained that transportable satellite trans receiver and ground earth stations are transmission facilities which can take any kind of content and transmit it to principal aggregator, for the principal aggregator to distribute content to different countries according to the need of such country.

He also explained that in every broadcasting the end product is content so there is a Free to Air where viewer can be reached without payment and there is content by subscription where viewer pay amount of money to view the content.

Learned advocate Daibu Kambo who appeared to represent learned advocate Damas Ndumbaro for the appellant had no questions to the witness while learned advocate John Daffa who appeared for respondent had few questions. In responding to the questions fronted by the counsel for the respondent, the expert witness clarified that in Tanzania, TCRA does not licence principal aggregator but issues licence to support services and that a person who has a trans receiver and ground earth station licence is not allowed to provide free to air services likewise a person who has a support services licence is not allowed to provide free to air services.

Having prefaced this appeal with the testimony of the expert witness let us come back to the grounds of appeal. The appellant advanced nine grounds of appeal, namely:-

1. The respondent erred in law and facts by declaring the appellant as the broadcaster of local contents such as current affairs, news and coverage of live events.
2. The respondent erred in law in defining "technical and installation".
3. The respondent erred in facts by deciding on the use of the ground Earth station and Transportable Satellite Receivers.
4. The respondent erred for failure to adhere to the rules of natural justice.
5. The respondent erred in law and fact for failure to show the quorum, in its decision.
6. The respondent erred in law and facts by applying presumption of guilty against the appellant.
7. The respondent erred in law and facts by deciding that the appellant participates in real time broadcast in Tanzania.
8. The respondent erred in law by ordering the appellant to pay fine of Tanzanian Shillings Ten Million and stop provision of local content such as current affairs, news and coverage of live events.
9. The respondent decision is illegal and invalid for lack of jurisdiction.

In expounding the first ground of appeal, learned advocate Ndumbaro said the Tribunal need to look as to whether the appellant is a broadcaster or not. He said the meaning of "broadcaster" is provided for under section 3 of EPOCA but respondent added "broadcasting chain" and went further to explain it while the law does not define it and this is where the

respondent misdirected itself. He argued the issue of broadcasting chain resurfaced in the respondent's decision while it was not submitted by the appellant nor made an issue in the compliance order. He said the appellant holds licences issued by respondent and these licences entitle the appellant to do what is required to do. The appellant is not feeding information to the content producer.

On these submissions, it was replied that appellant is not a broadcaster but participated in broadcasting while it has no licence. He said section 13(1) of EPOCA requires any person to have a content licence and subsection (3) to section 13 of EPOCA categorises types of licences. He said the appellant holds support services for satellite content services by subscription licence which does not allow the appellant to do what he did, that is why he was summoned to show cause.

He argued support services definition is provided under regulation 3 of EPOCA as such the appellant is required to provide management services which includes subscription fee collection; call centre billing services etc. Counsel Daffa argued that the appellant involved itself in the chain of broadcasting by transmitting content Uhai in Mauritius from Tanzania and the said content are being viewed here in Tanzania without a licence. He said the appellant was only licenced to have equipment but has no licence to broadcast live programmes such as live news. He argued Mauritius based company cannot air these live programmes without the help of the appellant.

Counsel Ndumbaro rejoined by admitting that the appellant is part of broadcasting chain however the fact that appellant providing services of decoder does not make the appellant as broadcaster. He said the products are done by Uhai production and transmission cannot be equivalent with broadcasting.

From the contending submissions of the learned advocates, the Tribunal is requested to determine as to whether the appellant is involved in broadcasting.

Section 3 of EPOCA defines broadcasting Service as follows:

"a radio communication service in which the transmissions are intended for direct transmissory reception by members of the general public and "broadcast" used as a verb shall be construed accordingly"

It follows then that the word "broadcast" has the same meaning with the broadcasting services. We have been explained by Eng. Kisaka that broadcasting via satellite is when uplink satellite, antenna or transportable trans receiver are used to take content from the studio and uplinked it to the transporter and the broadcaster will beam down on Earth and that signal will be received by satellite decoder called DTH or DTT.

The appellant is a holder of one of the licences issued under section 13(1)(f) of EPOCA. Its licence is called certificate for provision of support services for subscription content services by satellite. According to Eng. Kisaka a holder of this licence is not authorised to provide free to air services. He is only allowed to provide support services to its customers such as billing,

collecting of subscription fees, taking care of decoders and customer management. Support service is defined under regulation 3 of the Electronic and Postal Communications (licensing) Regulations GN 430 of 2011 as follows:

"a service which consists of the provisions of management services to a subscription broadcasting service which may include, but is not limited to subscriber management support, subscription fee collection, call centres, sales and marketing and technical and installation".

It is the defence of the appellant that it is operating within the framework of its licence given and it does not broadcast programme. It is contended that the appellant is providing support services to the broadcaster as part and parcel of an integral part of support services to Azam Pay TV (a broadcaster). Therefore, the appellant is an agent of Azam Pay TV.

It is unfortunate that the appellant did not provide details on the kind of support services is providing to Azam Pay TV as the respondent's stand of view is that the appellant is using Ground Earth satellite and Transportable Satellite Trans receiver to provide real time broadcasting simply because the appellant also holds a Transportable Satellite Trans receiver licence and Ground Earth Station licence.

It is a finding of the respondent that facilitation of live programs requires Ground Earth Station and transportable satellite receiver of which the appellant is using them contrary to Regulation 10 of the Broadcasting Services (content) Regulation

of 2005 which deals with live programme. If this is the case, then obviously the appellant is operating outside its mandate.

We understand that the appellant is trying to shield itself under Regulation 3 of the Electronic and Postal Communications (licensing) Regulations GN 430 of 2011 that among other things permit the appellant to provide technical and installation services..

With due respect to the appellant's stand of view, the technical and installation services referred under this regulation does not extend to Azam Pay TV. It only covers subscription broadcasting services that is a broadcasting services available to general public through payment of a subscription fee as explained by Eng. Kisaka. The regulation does not extend to the broadcaster who in our context is Azam Pay TV. It does not extend to Azam Pay TV. In that respect, we find that the technical and installation services which are being provided by the appellant to Azam Pay TV through the use of Transportable Satellite Trans receiver licence is contrary not only to regulation 3 of the Electronic and Postal Communications (Licensing) Regulations GN 430 of 2011 but also to regulation 10 of the Broadcasting Services (content) Regulations of 2005 and Sections 13(1) and 116(3)(b) of EPOCA. We thus see no merit on this first ground of appeal.

For the second ground, counsel Ndumbaro argued that regulation 3 of EPOCA (licensing) Regulations defined support services which according to Ndumbaro's view the appellant is

supporting the broadcaster but the respondent found that the appellant is enabling Azam Pay TV whose satellite footprint is available in Tanzania to air live programs.

Counsel Daffa responded that the ground has no legal basis because respondent did not erred.

It was rejoined that if a licence allows to provide technical and installation then that is what the appellant is doing.

On this issue we need not to repeat ourselves. We have extensively stated under ground number one that regulation 3 of EPOCA (Licensing) Regulations does not extend to broadcasters. It applies only to subscription broadcasting services therefore what the appellant is/was doing is contrary to the law. Hence, we do not see merit on this ground of appeal.

For the third ground, it was submitted that the appellant applied for a licence to own two equipments, namely Ground Earth station and Transportable satellite receivers which he was issued with thus the respondent erred in attacking on the usage of equipments which the respondent licenced to use. It was replied by counsel Daffa that the licenses of these equipments do not allow the appellant to broadcast live events and news. The appellant is required to obtain a licence to do so. It was rejoined that the appellant is not a broadcaster.

As we have instigated in the first ground of appeal, the appellant is also the holder of Transportable Satellite Trans receiver Licence and Ground Earth station licence which cannot be used for providing technical and installation services to Azam Pay TV,

the broadcaster. These licences have their own use and they cannot be used to provide free to air services as explained by Eng. Kisaka. We thus see no merit on this ground of appeal.

Regarding fourth ground of appeal, it is the stand of counsel Ndumbaro that the respondent was a judge of his own case while contrary to the principal of natural justice and that the appellant was not given a fair hearing as he was provided with a limited time to defend itself and even the person who signed the decision did not take part in the proceedings so he did not hear the parties.

It was responded by counsel Daffa that section 45 of Tanzania Communications Regulatory Authority Act of 2003 (TCRA) empowers the respondent to make compliance orders as such there is no procedure provided by the law on how compliance order should be issued. He argued since the respondent was mindful that the appellant is entitled to be heard, then the respondent invited the appellant to be heard before issuance of compliance order.

Counsel further pointed out that section 114 of EPOCA empowers the respondent to take enforcement measures against any licenced person.

It was counsel Daffa's submission that the respondent is not required by law to hear any party and that the respondent was not sitting as a Tribunal rather it was exercising its administrative measures provided in the law like issuance of compliance order by the Director General, Eng. Kilaba was

proper and the proceeding only assisted the Director General issue such compliance.

Learned advocate Ndumbaro in his rejoinder insisted that the respondent should have adhered to the principles of natural justice thus section 45 of TCRA should not be used whimsically. Regarding section 114 of EPOCA, he said it is an afterthought as it is not cited in the decision.

The main issue on this ground of appeal is for the failure to adhere to the rules of natural justice especially on the right to be heard "*audi partem alteram*" and "*nemo judes in causa sua.*" Unfortunately, the proceedings and submissions made by the counsel for appellant defeat the argument that the appellant was not heard. Learned counsel Ndumbaro in his submissions he told this Tribunal that the appellant received a compliance order on 16th June, 2016 and required it to show cause why legal action should not be taken. He further told the Tribunal that the appellant appeared before the respondent, made its oral and written submissions. The record of appeal together with the respondent's decision also fortifies that the appellant was given a chance to be heard. In that respect we see no merit on this complaint.

Regarding the issue of respondent being a judge of its own case, we are persuaded and we strongly associate ourselves with the submissions made by learned advocate Daffa that the respondent was merely exercising its administrative powers by

virtue of section 45 of TCRA and it was not sitting as an arbitral tribunal. Therefore, we also see no merit on this complaint.

We now turn to the fifth ground of appeal where counsel Ndumbaro submitted that the decision of the respondent is deemed to have been made by one person so it has no quorum of members who made the decision.

Counsel Daffa replied that section 45 of TCRA does not provide for a mechanism of issuance of compliance order thus there is no requirement of quorum or committee.

Learned advocate Ndumbaro insisted that lack of quorum is fatal because quorum is needed to show accountability and fairness of the decision. He said section 20 of TCRA envisages for establishment of committees in order to assist the respondent and that sections 13(5) and (6) of TCRA prevents Director General from participating in committees. On this ground, we wish to associate ourselves with the submissions made by the learned advocate Daffa for two main reasons. First, Section 45 of TCRA does not provide a mechanism for issuance of compliance order. It only vests such power to the respondent and by virtue of section 13(6) of the TCRA, the Director General is responsible for the day to day operations; secondly the respondent by virtue of section 20(2) of TCRA may delegate its power to a committee as such it is upon the respondent to see to it as to which powers it may delegate to the committee. Therefore, the respondent is not mandatorily required to delegate its powers to the committee. Lastly, we failed to read

into section 13(5) and (6) of TCRA any prohibitive nature on part of the Director General to take part in the committee as suggested by counsel Ndumbaro. Section 13(5) of TCRA prohibits the Director General to take part in deliberations or decisions of the Board and not Committee on his terms and conditions of employment and not otherwise. With these reasons, we see no merit on this ground of appeal.

Regarding sixth ground of appeal, learned advocate Ndumbaro submitted that the wording of the compliance especially the words "...to show cause..." presumed the appellant guilty thus was called to exonerate itself while Article 13(6)(b) of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time (hereinafter referred to as "the Constitution of the URT") requires a party to be presumed innocent until proven guilty. He contended the offence was not a strict liability offence so it was wrong to shift the burden to the appellant.

Learned advocate Daffa replied that the act of calling the appellant to show cause does not mean that the appellant is presumed guilty.

The complaint here is the wording used in the compliance order which is argued that it presumed the appellant to be guilty which is contrary to the letters of the Constitution of the URT. It is thus prudent to reproduce the part of the compliance order, it reads:-

"NOW THEREFORE TAKE NOTICE THAT the Authority order you to appear before the Authority at Mawasiliano Towers, Sam Nujoma Road, Dar es Salaam the 17th day of June, 2016 at 10.00 am to show cause why legal action should not be taken against AZAM MEDIA LIMITED for being in breach of sections 13(1) and 116(3) of the Electronic and Postal Communications Act, Chapter 306 of the laws of Tanzania".

From the above wording of the compliance order, the appellant was required to appear before the respondent and explain why action should not be taken against it. As such it is a written notice to the appellant that legal actions are about to be taken against it thus the appellant is required to give satisfactory explanation as to why the intended cause of action should not be taken. Therefore, it cannot be equated as a presumption of guilty. We thus see no merit on this complaint.

On the seventh ground of appeal counsel Ndumbaro submitted that the respondent wrongly applied regulation 10 of the Broadcasting Services (content) Regulations of 2005 because the appellant is not a broadcaster. He said the issue should have been dealt with the content committee if there was any violation of it.

Learned advocate Daffa replied that regulation 10 of the Broadcasting service (content) Regulations of 2005 deals with

live events, live broadcasting which the appellant was found to be engaged thus the respondent rightly applied it.

In rejoinder it was insisted that the appellant is not a broadcaster.

We have extensively dealt with this issue through ground number one that though the appellant is not a broadcaster but uses its Transportable Satellite Trans receiver licence and Ground Earth Station licence to provide support service in disguise of regulation 3 of the Electronic and Postal Communications (Licensing) Regulations of 2011 which is contrary to the provisions of regulation 3 of the Electronic and Postal Communications (Licensing) Regulations of 2011; regulation 10 of the Broadcasting Services (content) Regulators of 2005; sections 13(1) and 116(5) of EPOCA. Therefore, the respondent rightly invoked regulation 10 of the Broadcasting Services (content) Regulators of 2005. We see no merit on this complaint.

The complaint on the eight grounds of appeal as submitted by the learned advocate Ndumbaro is that there is no justification of imposing fine to the appellant who is not a broadcaster. He said in any event the law provides for a fine of Tshs. 5 million not 10 million. It was replied that section 45 of TCRA provides that fine shall be assessed by the respondent thus it does not stipulate the amount of fine to be imposed. He said since the

appellant was/is involved in broadcasting then it was proper to fine it.

We have held herein that the appellant engages itself in providing real time events through its two equipments which is contrary to the laws. Section 45(3) of TCRA provides for imposition of the fine to any person who is in contravention of the TCRA or EPOCA. The fine to be imposed is to be assessed by the respondent. This section provides:

"A Compliance Order may require a person to refrain from the conduct which is in contravention of the provision of this Act or regulations made under this Act or sector legislations to take actions required to be taken in order to comply with this Act or to pay fine as assessed by the Authority".

It follows then that the law does not set a specific amount to be imposed as a fine as suggested by counsel Ndumbaro. We therefore see no merit on this complaint.

The last ground of appeal summarizes what has been submitted in the entire grounds of appeal. Counsel Ndumbaro said through his submissions he has shown the wrong application of section 3 of EPOCA; ignorance of section 13(1) of EPOCA; violation of the rules of natural justice; and invalidity of the decision as it does not show quorum. He therefore prays for the decision to be varied.

Daffa learned advocate replied that it is not disputed that the appellant holds more than one licences but each licence has its

own terms and conditions for use though they all fall under content licence. He contended that appellant misunderstood the licences issued to it that is why compliance order was issued.

It was insisted in the rejoinder that appellant is not a broadcaster.

We have held herein that section 3 of EPOCA was rightly applied by the respondent, there was no breach of natural justice, section 13(3)(f) of EPOCA does not allow the appellant to provide support services to AZAM Pay TV, and the compliance order was properly issued. Therefore, this ground of appeal has no merit.

All in all, the appeal preferred by the appellant has no merit. We therefore proceed to dismiss it with costs. It is so ordered.



Judge Barke M.A. Sehel – Chairperson



Mr. Yose J. Mlyambina – Member



Dr. Theodora Mwenegoha – Member

04/07/2018

Judgment delivered this 4th day of July, 2018 in the presence of Mr. Daibu Kambo, Advocate holding brief of Damas Ndumbaro, Advocate for the Appellant and Mr. Kant James, Advocate for the Respondent.



Judge Barke M.A. Sehel – Chairperson



Mr. Yose J. Mlyambina – Member



Dr. Theodora Mwenegoha – Member

04/07/2018