THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
[CIVIL DIVISION]

MISCELLANEOUS CAUSE NO. 240 of 2020

MTN UGANDA LIMITED========== APPLICANT

VERSUS

UGANDA COMMUNICATIONS COMMISION=======RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application under Article 42 of the Constitution, Section 33,36 and 37 of the Judicature Act and Section 98 of the Civil Procedure Act and Rules 3(1)(a), 6(1) & (2) of the Judicature (Judicature Review) Rules and Judicature Act for declarations and orders that;

(i) *Certiorari* calling for and quashing the decision of the Respondent requiring the Applicant to pay **US$ 14,140,030** (United States Dollars Fourteen Million, One Hundred Forty Thousand, Thirty only) as licence fees for the transition period without any legal justification.

(ii) An Injunction restraining the Respondent from implementing its impugned decision and in any way interfering with or interrupting the Applicant's operations by reason of its impugned decision.

(iii) Prohibition to prohibit the Respondent from unilaterally determining and levying the licence fees for the transition period which are not prescribed by law.

(iv) A declaration that any licence fee for the transition period should be determined with reference to the Applicant's Second National Operator (SNO) licence.

(v) An Order that the costs of this application be paid by the Respondent.

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavit in support of the applicant by ***WIM VANHELLEPUTTE*** but generally and briefly state that;

1) The decision and directive of the respondent contained in the letter dated 22nd July 2020 requiring payment by the applicant of a licence fee for the transitional period 21st October 2018 to 30th June 2020 of US $14,140,030 is tainted with illegality, irrationality, procedural impropriety and is unreasonable.

2) The applicant provided telecommunications services under a Second National Operator Licence for the operation of a telecommunications system issued and dated 15th April 1998 for a period of 20 years from 21st October 1998.

3) The Second National Operator Licence provided for extension of the licence under Article 3.2 and 3.3, respectively, whereby the licensee might apply to the respondent for renewal of its licence no later than 12 calendar months prior to the expiry of the Licence term.

4) On 2nd October 2017, the applicant applied to the Respondent for the renewal of its SNO Licence and the Respondent determined that the renewal fees for the applicant licence would be $58,000,000 and authorised the applicant to continue operating under the SNO license terms and conditions.

5) The Respondent later on 21st November deferred the issuance of the renewed licence to allow for the alignment with internal government processes, the respondent extended the operations of the applicant licence for a maximum period of 60 days from 21st November 2018. The period was further extended on 21st March 2019 to ensure continuity while negotiations over the new licence progressed and further extensions were made until 30th June 2020 under SNO License framework.

6) On 18th March 2020, the respondent communicated its decision to renew the licence for a term of 12 years from 1st July 2020. In the same letter, the respondent indicated for the first time that the applicant would be required to licence fees for the transition period between 2018 and 30th June 2020 prorated on the new NTO licence fee of US$100M.

7) On 22nd July, 2020, the respondent issued a demand requiring the applicant to pay a licence fee for the transition period of US$ 14, 140,030 for operating its telecommunications business during the period between the expiry of the SNO Licence and the effectiveness of the NTO Licence that is between 21st October 2018 and 30th June 2020.

8) On 10th August 2020, the applicant responded to the respondent's demand and highlighted the fact that although the applicant

recognises its obligation to pay fees in connection with its operations during the transition period, it did not agree with the premise on which the Respondent had assessed the fees payable.

The respondent opposed this application and filed an affidavit in reply deposed by ***Susan Wegoye*** the Commission Secretary/Director legal Affairs and briefly stated that;

1. The respondent presented to the applicant with a clear methodology for the fee that had been assessed of US$100,000,000 based amongst other things on the economic opportunity availed by a 10-year licence term.

2. That the letter dated 16th November 2018 which communicated a revised renewal fee of US$ 58,000,000 did not represent a final position on this matter. It only communicated a revised amount which the respondent had considered as an option at the time, subject to further consultations and discussions.

3. That the respondent was cognisant of the lengthy discussions and arrangements that were required to conclude the renewal/extension process and on 20th October 2018 communicated that it had extended the operation of the licence for a period of 30 days from 21st October. One of the terms for the extension was that upon renewal formalities being concluded, the period for which the operation licence was extended would form part of the extension period under the new licence.

4. That from the onset there was never a position that the fee payable following expiry would be on the basis of the expired SNO licence and said SNO licence did not have a provision stating the amount of

fees payable for the period after expiry. The SNO license provided for fees for the 20 year term, not beyond.

5. That in a letter dated 16th November 2018, the respondent reminded the Applicant that in the various negotiation meetings held between the parties it had been agreed by both parties that as per the SNO licence and Uganda Communications Act 2013, the Respondent was empowered to grant a licence for the extension term on such terms and conditions as reasonably reflect the changed circumstances in the telecommunications sector.

6. The extensions were granted to the respondent upon similar terms and parties eventually signed an extension licence referred to as a 'National Telecommunications Operator' licence and it was signed by the applicant on 22nd June 2020 with an effective date of 1st July 2020. The said licence granted the applicant an extension term of 12 years from 1st July 2020 for a renewal fee of US$ 100,000,000.

7. That following various consultations within Government it was determined and assessed that the fee of US$100,000,000 was payable for a 12-year period and that an equivalent of the prorated value of US$100,000,000 would be payable for the transition period. This formula had been arrived at after consideration of the most relevant methodology and a directive was issued to that end by the President of the Republic of Uganda by letter dated 11th March 2020.

8. That by letter dated 23rd March 2020, the applicant wrote to the respondent in response to the letter of 18th March 2020, proposing that the 'extension term' should run from 21st October 2018 to 30th June 2032, a period of 14 years. In the said letter, the applicant did not

oppose the pro-rated fee calculation method for the transition period that had been communicated in the letter dated 18th March 2020.

9. That the respondent did not agree to the proposal of 14 year term and accordingly the parties went ahead to sign the licence upon the terms as had been communicated to the respondent, with the transition period 21st October 2018 to 30th June 2020 not being being defined as part of the new licence term on the understanding that a separate fee of US$ 14,140,030 was to be paid on a prorate basis for the transition period as communicated in the letter of 18th March 2020.

10. That by letter dated 22nd July 2020, the respondent reminded the applicant about its obligations to pay the transition period license fee of US$14,140,030 and requested the applicant to make necessary arrangements to honour the payment. The said letter alluded to the position earlier communicated in the letter of 18th March 2020 relating to the requirement to pay a separate fee for the transition period.

11. That the applicant at the time of signing the new licence had full knowledge that it had to pay additional fee of US$ 14,140,030 for the transition period that had not been included in the new 12 year term period, although in August 2020 the communicated that they did not agree with the fees for the transition period.

At the hearing of this application the parties were directed to file written submissions which I have had the occasion of reading and consider in the determination of this application.

The following issues were formulated by court for determination;

(a) Whether the application is time barred.

(b) Whether there are legal grounds for judicial review.

(c) What remedies are available to the parties?

The applicant was represented by *Mr. Tumusingize Barnabas, Mr. Micheal Mafabi and Mr. Andrew Mauso* while the respondent was represented by *Mr. Karugire Edwin* and *Mr. Peter Kawuma.*

Whether the application is time barred?

The applicant's counsel submitted that that the grounds for judicial review first arose on the latter date as per *the letters of 18 March 2020 and 22 July 2020.* Therefore *t*he basis for this application is the letter of 22 July 2020, not the earlier letter of 18 March 2020.

It is further contended for the Applicant that the Respondent's letter of 18 March 2018, when juxtaposed with the circumstances at the time reveals that the licence renewal processes were still inchoate.

Further, we submit that the said letter lacked legal certainty and legal finality to be deemed a final decision of the Respondent. The inchoateness of the letter of 18 March 2020 can be deduced from its language and the circumstances at the time.

The communication of the 18 March 2020 did not constitute a decision of the Respondent. Little can be made from the statement, **"MTN is expected to pay this fee."** On the other hand, the letter of 22 July 2020 not only particularized the amount payable, it also gave a time limit within which the said amount was to be paid.

The respondent's counsel submitted that the grounds for the Application first arose on the 18th March 2020 which is the date on which the decision was communicated by letter to the Applicant and a demand for payment was made. This application was however filed on 1st September 2020, about 6 (six) months from the date of the decision. It follows that the Application is out of time and is therefore barred by law.

The said letter of July 2020 communicated to the Applicant that the licence extension/renewal fee was US$100,000,000/for a 12-year period commencing 1st July 2020.

This letter made it clear that over and above the USD. 100,000,000 being paid for the 12-year renewal, a prorated amount based on the USD. 100,000,000 value would have to be paid for the 'transitional period'. The letter clearly conveyed the Respondent's decision and demanded for payment of the prorated amount for the transitional period.

It was the respondent's submission that, both a decision and demand were communicated to the Applicant in the letter dated 18th March 2020. Following this letter, it was clear that the Applicant had the obligation to pay the fee as communicated. By way of a distinction, the letter dated 22nd July 2020 was a reminder to the Applicant of its obligation to pay the fees for the transitional period and is not the letter that created the obligation to pay. It also cannot be said to be the letter where the grounds 'FIRST AROSE' as the law requires.

The letter of 22nd July 2020 was simply a re-echoing of the position communicated in the letter of 18th March 2020 and cannot be said to have created different legal obligations from the earlier letter.

Analysis

It is not in contention that the statutory time-limit for instituting a judicial review application is three months from the date when the grounds of the

application first arose. What is in contention is whether the grounds for judicial review first arose on 18 March 2020 or on 22 July 2020.

According to the facts of the matter, there were several communications by way of letters between the parties since 2018 when the licence expired and this finally culminated in the setting the renewal date as 1st July 2020. It is true that the decision was made in the said letter but the same was and could still be subject of discussion between the parties as no exact amount was stated therein. It is indeed true that on 23rd March, 2020 the applicant wrote another letter which sought an extension of the term to cover the period 21st October 2018 to 30th June 2032.

The final decision on the matter was indeed made in the letter dated 22nd July 2020 which set out the amount payable for the transition period 21st October 2018 to 30th June 2020 as US$ 14,140,030.

A right of entitlement to the demanded sum was created for the Respondent and a corresponding obligation for the Applicant to pay the demanded sums within thirty days was created. Any earlier challenge to the decision before concluding on the negotiations on the exact amount payable would have been premature. In the case of **R (Burkett) –v- Hammersmith & Fulham London Borough Council & Another [2002] 1 WLR,** the House of Lords was invited to decide which of the two (between an earlier resolution to grant a planning permission, and the actual grant of the planning permission), was the operative decision from which an action for judicial review arose. While deciding that the earlier resolution was not the trigger for the judicial review application Lord Steyn stated at page 1607;

> *"If a decision-maker indicates that, subject to hearing further representations, he is provisionally minded to make a decision adverse to a citizen, is it to be said that time runs against the citizen from the moment of the provisional expression of view? That would plainly not be sensible and would involve waste of time and money. Let me give a more concrete example. A licensing authority expresses a provisional view that a licence*

should be cancelled but indicates a willingness to hear further argument. The citizen contends that the proposed decision would be unlawful. Surely, a court might as a matter of discretion take the view that it would be premature to apply for judicial review as soon as the provisional decision is announced. And it would be certainly contrary to principle to require the citizen to take such premature legal action. In my view the time under the rules of court would not run from the date of such preliminary decisions in respect of a challenge of the actual decision."

The earlier communication or letter dated 18th March 2020 was inconclusive and the Respondent's willingness to hear further argument can be deduced from the several subsequent correspondences with the Applicant.

I entirely agree with the applicant's counsel that the final decision in the matter was contained in the letter dated 22nd July 2020 and this was the date to be considered, as, when the cause of action arose. This application is not time barred as contended by the respondent.

General Issue

Whether there are legal grounds for judicial review.

Specific Issue

Whether the decision of the respondent in levying transition fees was tainted with illegality?

The applicant's counsel submitted the decision of the Respondent and the process leading up to it are tainted with illegality insofar as the decision of the Respondent to unilaterally levy transition license fees and the process by which it was made are not founded on any law or legal justification.

It was counsel's contention that at the time of the Applicant's application for renewal of its licence ("the SNO Licence") and at the time of the demand for transition license fees, no legal or regulatory framework for determination of fees for the transition period existed. The Uganda Communications Act 2013 vests the power to determine license fees and renewal fees in the Minister who must make regulations for that purpose.

It is further submitted for the Applicant that both the SNO Licence which was the basis of the Applicant's application for renewal of its licence, and the current applicable law do not provide a framework for the determination of fees to be paid for the transition period as both did not envisage that there would be a transition period. What is clear is that the process of renewal of the Applicant's license was governed by the Applicant's SNO Licence which was the subject of renewal.

As a result, it was submitted that the reasonable expectation and conclusion of the Applicant is that the fees for the transition period were to be approximately reckoned and prorated with reference to the fee paid under the SNO License.

It is abundantly clear from the above that there was no legal framework for license fees for an NTO license. The Uganda Communications (Fees and Fines) Regulations, SI. 94 of 2019 referred to in the letter did not provide for NTO license fees or transition fees. The license renewal fees of $100Million paid by the Applicant were unilaterally determined by Government.

IN THE ALTERNATIVE, it was submitted that the principles of implied terms of contract, which are analogous to the doctrine of ***tenancy by holding over***, would be instructive in the circumstances.

The SNO licence in article 5.6 provides that the fees payable for any renewal period shall be agreed upon between the Applicant and the Respondent. To that extent, as a matter of law, that article created a contractual contract between the Applicant and the Respondent. It is a principle of contract law that an implied contract is created where the parties make an express contract to last for a fixed term and continue to act as though the contract still bound them after the term has expired.

The impugned decision of the Respondent as contained in its letter of 22 July 2020 refers to levying of transitional license fees on a *pro rata* basis

derived from the license fee of US$ 100,000,000 which the Applicant has already paid to the Respondent for its NTO License which became effective in 1 July 2020.

Firstly, the NTO license fee on the basis of which the transitional license fees were pro-rated are not based on any law. Secondly, it is common ground that the transition period between 20th October 2018 to 30 June 2020 and the short-term authorisations/temporary extensions were governed by the SNO Licence.

The applicant submitted that the levying of transition fees on the basis of the licence renewal fees is contrary to retrospectivity since the NTO Licence terms and conditions only became effective on 1 July 2020.Accordingly, the pro-rated fees are illegal.

It was further contended for the Applicant that by conduct and written correspondence, and to the extent that the short-term authorisations granted to the Applicant for the transition period were expressly governed by the SNO Licence, the Respondent is barred by estoppel from unilaterally levying and demanding transition licence fees for the transition period not premised on the SNO License. To this extent therefore, the Respondent's decision amounts to an error of law and principle within the meaning of illegality.

In the final result and for the reasons advanced above, the applicant contended that application has shown the illegalities in the Respondent's decision-making process. Counsel invited the Court to find that the Respondent's decision is tainted with illegality.

The respondent's counsel submitted that for the Court to find that the decision or determination of Respondent was illegal, the court has to find or identify a statute, regulation or ordinance that was violated. The Applicant has not stated any provision that was violated. The Respondent

has the duty to show the statute, regulation, or ordinance that prohibits the Respondent from making the determination under consideration.

Paragraph 7 of the Respondent's affidavit in reply describes the powers and the mandate of the Respondent. It states that Respondent is established by law under the Uganda Communications Act to carry out various functions including the monitoring, inspection, licencing, supervision, control and regulation of communications and other related functions and to that end is *inter alia* empowered to charge fees, institute levies, collect revenue, impose fines and classify and license communications services.

The Respondent indeed has these powers under Section 6(1)(a) of the Uganda Communications Act and adds that the Minister is to make regulations regarding licence fees. The Applicant in paragraph 5.43 further alludes to the fact that the Respondent has the power and discretion to charge fees as granted by statute. Counsel submitted that the determination and charging of license fees is one of the operational administrative powers exercisable by the Respondent under sections 5 (1)(a)(b) and (z) and 6 of the Uganda Communications Act 2013. This section spells out some of the powers of the Respondent in the exercise of its functions. These powers are exercisable by the Respondent and not by Minister through Regulations as the Applicant suggests.

The powers of the Minister of ICT to make Regulations under the Uganda Communications Act 2013 is not a mandatory pre-requisite to the exercise of Regulatory functions and powers by the Respondent. Section 93(1) of the Uganda Communications Act 2013 as amended clearly provides that:

> *'The Minister **may**, after consultation with the Commission, by Statutory Instrument, make regulations for the better carrying into effect the provisions of this Act.'*

The Regulations to be made by the Minister are not mandatory and are only required for the better carrying out of the existing power of the Respondent

to license operators in section 5 (1)(a),(b) and (z) of the Uganda Communications Act. Counsel submitted that making of Regulations by the Minister is NOT a pre-requisite to the Respondent exercising its functions and powers under the Act and the Respondent was well within its statutory powers to have determined the fees payable for the transitional period.

Indeed, in exercise of her powers under the Uganda Communications Act, the Minister duly issued Regulations, including the Uganda Communications (Fees and Fines) Regulations, S.I. No. 94 of 2019, which in Regulation 5 (1)(a)(b) and (e) restates the Respondent's statutory function and power to assess and collect fees and to this end the Commission may classify communication services, assess and collect fees for application, grant, modification, transfer and renewal of licenses to operate services in Uganda and may impose specific financial conditions to maintain licences and determine, assess and collect fees for permits and services rendered by the Commission in exercise of its functions under the Act.

Additionally, under Regulation 3(n) of the Uganda Communications (Licensing) Regulations, S.I. No. 95 of 2019, the Respondent has the powers to grant temporary authorisations where delay in the grant of a licence would seriously prejudice the public interest or where there are extraordinary circumstances requiring temporary authorisation in the public interest before the completion of the licensing process.

It should be noted that the above provisions were in effect before the decisions on the amount of fees payable by the Applicant were made. It is accordingly untenable for the Applicant to argue that there is no legal framework and no law under which the fees were levied. There is no requirement in the law that provides that the actual amount payable shall be determined by way of a statutory instrument.

In addition, the old SNO license contemplated that upon expiry of the 20-year licence, fees would be payable. To this end, the SNO licence (attached as annexure 'UCC1' to the affidavit in reply) under clause 3.3(d) gave the

Uganda Communications Commission the mandate to assess a fee for any renewal of a licence.

It is the Respondent's contention that in light of the above the Applicant cannot maintain the argument that there is no legal framework and the fees are not based on any law. It cannot be said that there is an illegality in light of the statutory and contractual provisions that have been cited above.

It should be noted that at all material times during the transitional period when the Applicant's operations were being temporarily extended the Applicant was fully aware that the appropriate licence fee for the extensions would have to be paid at a later date because this was an express provision in the authorisations which the Applicant accepted. It is disingenuous to now turn around and argue that the fee is illegal because it is retrospectively being applied. There is no law that prevents payment or ascertainment of payment in arrears for a license one has used for private gain. If the Applicant did not want to pay fees after consuming a service it should have declined the extensions.

The Applicant further argues that the communication from the President of Uganda dated 11th March 2020 amounts to a fetter of the Respondent's powers and renders the decision to be *ultra vires.* The Applicant argues that this is an instance of illegality that would warrant judicial review. The respondent counsel contends that this argument is not tenable. It is not true that the fees levied were not arrived at pursuant to the Respondent's decision-making powers. The above fees were arrived at after a process of internal government consultations. These internal government consultations are not coming as a surprise to the Applicant and were communicated to the Applicant on various occasions for example as per letter dated 21st March 2019 (annexure UCC6). The final decisions were made following the participation and internal consultations with the Government, including, at the highest level, the President of Uganda. The fact that there were internal government consultations cannot be said to render the decision *ultra vires*.

The Minister is given powers under **S. 7** of the **Uganda Communications Act 2013** to give policy guidance to the Respondent which guidance must be followed. Guidance on the licensing of the expired SNO is not excluded. Under **S. 31** of the **Interpretation Act Cap 3**, where any power is conferred by any Act on a Minister, it may be signified under the hand of the President or any Minister. The President can therefore legally give binding guidance to the Respondent on their functions. The President's view on the licensing of the largest telecom operator in Uganda cannot, by any stretch of the imagination be irrelevant, as the Applicant surprisingly argues.

In addition, the Applicant was at all material times a part of this consultative process and cannot now seek to use it as the reason not to pay the assessed amounts. Indeed the Applicant repeatedly escalated the licensing process to H.E. the President during the two year licensing process. The Applicant in its letter dated 12th March 2020 (annexure 'UCC8') addressed to the President stated that "*Your Excellency, we thank you for your continued instructive guidance in this matter and commit to conclude discussions with UCC and the Ministry of ICT based on your directives and principles espoused in the shortest possible time*". For the Applicant to now turn around and try to argue that the President's involvement in the process amounted to an *ultra vires* decision is dishonest, in bad faith and cannot be condoned by the court.

The Applicant further argues estoppel under section 114 of the Evidence Act and contends that the Respondent is barred from levying fees for the transition period that is not based on the SNO licence. The Applicant argues that this 'amounts to an error of law within the meaning of illegality'. It is the Respondent's case that it has never represented to the Applicant that the fees payable for the transition period shall be based on the SNO licence. The SNO license does not provide any transitional fees. At all times it was clear that any fees payable were to be assessed by the Respondent. Where the Respondent communicated that the transition period would form part of the renewal term, the only inference that can be

drawn is that the fees payable would be commensurate to the fees for the new term. It cannot be inferred that what was meant is that the fees payable would be at the same rate as for the old term which were set in 1998. This was not stated by the Respondent in any of its communications and cannot form the basis of estoppel. In fact all evidence on record shows that the Applicant would have to pay the appropriate regulatory and licence fees that would have accrued during the temporary extension period.

In the said letters it was always expressly stated by the Respondent that the Applicant would have to pay the appropriate regulatory and licence fees for the said periods of extension. Besides, the Parole Evidence rule under the Evidence Act does not allow court to imply terms into a written document. Considering all the above, the respondent's counsel contends that the Applicant has not been able to show any illegality that would warrant the grant of the application for judicial review.

Analysis

The purpose of judicial review/administrative law is to identify the excesses of power and endeavours to combat them. Power may be exercised for purposes other than those for which it has been conferred by the Constitution or the law.

The will of the power-holder becomes the sole justification for the exercise of power. This is the essence of arbitrariness. It is clear that if powers are used outside the ambit of statutory purposes, it is not only ultra vires but also one of arbitrariness.

Where a public authority or decision maker has directed itself correctly in law, the court on judicial review will not interfere, unless it considers the decision was irrational. The court will however only quash a decision if the error of law was relevant to the decision making process. This could be ascertained where there is ulterior purpose or motive.

Powers given to a public body for one purpose cannot be used for ulterior purposes which are not contemplated at the time the powers are conferred. If a court finds that powers have been used for unauthorised purposes, or purposes 'not contemplated at the time when the powers were conferred', it will hold that the decision or action is unlawful.

Power or discretion conferred upon a public authority must be exercised reasonably and in accordance with law. An abuse of discretion is wrongful exercise of discretion conferred because it is the exercise of discretion for a power not intended. Accordingly, the courts may control it by use of the *ultra vires doctrine.* The courts task is merely to determine whether the decision made is one which achieves a reasonable equilibrium in the circumstances. See *Minister of Environment Affairs and Tourism v Bato Star Fishing (Pty) Limited 2004 (7) BCLR 687 (CC); 2004 (4) SA 490 (CC) para 49.*

The applicant is challenging the decision to levy transitional fees for illegality or simply exercise of power not derived from any law since at the time of the demand for transition license fees, no legal or regulatory framework for determination of fees for the transition period existed.

The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument (law) conferring a duty or power upon a decision maker. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the 'four corners' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. There are two major considerations to determine lawfulness of the decision: was the decision taken within the powers granted and if it was, was the manner in which it was reached lawful?

The respondent exercised powers conferred upon it to charge and levy transitional fees for the period the parties where negotiating the renewal of the applicant's licence. The exercise of power is premised on interpretation

of the law that established the respondent i.e Uganda Communications Commission Act.

The applicant has not cited any specific provision of the law that was violated or breached apart from making a general statement that there is no legal and regulatory framework for determination of fees for the transition period. Does this mean that no fees can be charged or that it is illegal to charge the fees levied? Section 6 of the Communications Act provides that; The Commission may in exercise of its functions; ***(a) charge fees for services provided by the Commission*** (b) Institute a levy on the gross annual revenue from operators in accordance with section 68.

An analysis of lawfulness in administrative law always involves comparing the administrative action to the authorisation for that action in the relevant empowering provision. For every action a decision maker takes there must be valid authorisation in the law empowering it. The law allows the respondent to charge fees, therefore the submission or contention of the applicant that there was no legal framework is devoid of merit.

Secondly, under Article 5.6 of the SNO licence agreement of 1998: it was provided that fees payable for the renewal would be agreed upon. So the general framework supported by the Uganda Communications Commission Act for charging the applicable licence renewal fees was supposed to be through negotiations between the parties. After the parties negotiating and agreeing to the US$100,000,000 for the 12 year license period, the applicant requested agreed that the 12 year period should start on 1st July 2020 and not 20th October 2018 when it should have ordinarily started. It is clear from all the evidence on record that the parties agreed to the amount payable through a consultative process and it matters not whether it involved the President of the Republic of Uganda.

The applicant seems to argue that the fees were unilaterally imposed without their involvement. There are several communications which indicate that the two parties engaged several times from the time of expiry of the original licence October 2018 until March 2020 and this culminated into the NTO license of US$ 100,000,000 commencing 1st July 2020. It is

surprising that the applicant is now contending that the fees were unilaterally levied or imposed. The applicant is approbating and reprobating after taking full benefit of the renewal and duly executing the same by effecting payment.

The applicant's challenge the transition fees for being pro-rated as being illegal and contrary to the principle of retrospectivity since the law was not in place during the period. This court finds no merit in this argument, the pro-rated fees was used as being fair to the applicant otherwise the transition fees could actually have been even higher than what had been agreed under the NTO licence. The pro-rated formula was used for convenience and fairness and above all the parties had earlier agreed specifically that;

"MTN Uganda Limited is reminded to note that the period MTN is operating under the temporary extensions (from 20th October 2018 until when the renewed license shall be granted), will form part of the renewal term and MTN Uganda shall be required to pay the appropriate regulatory and license fees that will have accrued during the temporary extension period."

It is disingenuous to now turn around and argue that the fee is illegal because it is retrospectively being applied. The applicant cannot argue retrospectivity on the imposition of transition fees simply because they feel they should or want to pay a sum provided under the SNO License in 1998.

The Applicant further argues that the communication from the President of Uganda dated 11th March 2020 amounts to a fetter of the Respondent's powers and renders the decision to be *ultra vires.* The Applicant argues that this is an instance of illegality that would warrant judicial review. Like the stated earlier, the applicant duly participated in the negotiations with the respondent and this ended up sucking in the President to facilitate the negotiations which took almost two years.

The applicant is further approbating and reprobating by challenging the letter that empowered and assisted in the grant of 12 years licence. Surprisingly, they are not challenging the said license but rather the fees for

the transition period which they agreed to pay for but seem not to be in agreement with the fees set on a pro-rated basis or don't want to pay at all.

The applicant in their letter dated 12th March 2020, thanked the President for giving them an opportunity to engage with them on matters related to MTN Telecommunications license renewal. The letter specifically states that;

"Your Excellency, MTN appreciates your considered review of the Licence renewal duration to 12 years commencing 1st July 2020 and ending 30th June 2032 for a financial consideration of US$100m.

Your Excellency, lastly on the payment of the Licence renewal fee, we confirm our commitment to pay US$100 in two instalments as follows;

i) US$ 50m, as soon as we receive a letter of confirmation from UCC indicating our regulatory good standing. This letter is required by the banks to release the funding; and balance of

ii) US$50m, a few weeks thereafter.

Your Excellency, we thank you for your continued instructive guidance in this matter and commit to conclude discussions with UCC and Ministry of ICT based on your directives and principles espoused in the shortest possible time"

It can equally be said that fettering of one's discretion is to abuse that discretion. The law expects that public functionaries would approach the decision making process with an open mind. Reason and justice and not arbitrariness must inform every exercise of discretion and power conferred by statute. See ***Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988 (3) SA 132***

Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely-that is to say, it can validly be used only in the right and proper way which Parliament conferring it is presumed to have intended.

The powers conferred under The Uganda Communications Act where never intended to be exercised in such a way that would defeat the entire spirit of the Act of regulating operations of the telecommunications sector. The act of the President giving guidance in a letter dated 11th March 2020 cannot be seen as a fetter to the discretion of the respondent. Rather, it was to facilitate the exercise power and avoid a deadlock between the parties for over two years.

The applicant benefitted from the intervention of the President since they got 12 years from 2020 until 2032 and yet the earlier position of the negotiations for the respondent was for a 10 year period which would have ended in 2030. This is clear that the said letter from the President was not a fetter on the discretion rather favoured the applicant and allowed a review of the exercise of discretion by the respondent in a rigid manner probably.

Whether the decision was irrational and in breach of Legitimate expectation of the applicant.

The respondent counsel argues that, the decision of the Respondent defies logic and sharply contradicts the Respondent's earlier position (on which the Applicant relied) that the transition period would be reckoned with in the renewal term of the Applicant's SNO License.

The applicant argues further that the Respondent created a legitimate expectation which, as a matter of public law, should not be frustrated by the Respondent unilaterally levying transition fees without any legal justification.

Moreover, it is abundantly clear that from commencement of the licence renewal process, the Respondent had carried out all processes based on the terms and conditions of the Applicant's SNO Licence. The Respondent carried on with the same approach by unilaterally levying transition fees on a *pro rata* basis of the $100,000,000. Moreover, such fees could only have been arrived at by reference to the terms of the SNO Licence.

The respondent's counsel in his submissions stated that the second consideration in applications for judicial review relates to 'irrationality. The Applicant wants this court to believe that the decision made by the Respondent was so outrageous in its defiance of logic or of accepted moral standards. The facts and the law however clearly do not support the Applicant's arguments since the decision made was a rational and logical decision. In fact, the Applicant has not shown anywhere that the decision being challenged is irrational or at all.

To the contrary, what the Applicant seeks from this court would, we submit, be so irrational and would defy all logic. It can be discerned from Article 5 of the SNO licence (annexure 'UCC1) that **the licence fee that was paid in 1998 was USD. 200,000**. **If this amount were to be prorated and applied as the fee payable for the transitional period, the Applicant would pay a licence fee of approximately USD. 18,890 for the period from 2018-2020**. **Clearly this would be an irrational position that would defy all logic.** This is the position that the Applicant wants this court to apply. We contend that this would be so grossly unreasonable and would amount to a miscarriage of justice. It would amount to applying the very thing that judicial review applications seek to stop. If the Respondent had made such a decision, it would have been both illegal and a breach of its statutory duty and the public trust.

The respondent's counsel contends that the Applicant in effect is arguing that the period for the new NTO licence should have been indicated to commence from 21st October 2018 to 30th June 2020, a period of 14 years rather than the period of 12 years as agreed upon by the parties.

Firstly, this argument is not maintainable since the decision that is being challenged is that which relates to the payment of the fee of USD. 14,140,030. The argument being raised here would have been validly raised if the Applicant were challenging the decision to have the new NTO licence run from 1st July 2020 to June 2032. This is not the decision that is being challenged and as such the argument is misplaced. Secondly, the date of

commencement of the new NTO licence was something that both parties agreed to and which was brought to a close upon the parties signing the new NTO licence. The Applicant cannot now turnaround and argue that after signing the licence it suddenly realises that it should have agreed to something else. Thirdly, it should at all times be remembered that in the various extensions that were granted, the Respondent always made it clear that the Applicant would be obligated to pay the appropriate regulatory and licence fees that would have accrued during the temporary extension period. Similarly, we contend that there was no promise or representation in this case that is clear, unambiguous or unqualified that can be relied on as a basis for a legitimate expectation by the Applicant to maintain this claim.

Analysis

The applicant's counsel has made some statement on irrationality of the decision but has not made out any case for challenging this decision for irrationality.

The decision to charge the applicant transitional fees pro-rated cannot be irrational as counsel for the applicant seems to argue since the decision is based on principles of fairness and reasonableness. In additional the other argument that the fees would have been determined based on 1998 SNO licence would have been outrageous and incredibly low.

This court agrees with submission of counsel for the respondent that the licence fee that was paid in 1998 was USD. 200,000. If this amount were to be prorated and applied as the fee payable for the transitional period, the Applicant would pay a licence fee of approximately USD. 18,890 for the period from 2018-2020. Clearly this would be an irrational position that would defy all logic.

The respondent's decision is supported by evidence and cannot be irrational or unreasonable simply because the applicant believes it does not favour them. The decision is made in accordance with the law and it is objectively based on the facts and it is objectively capable of furthering the purpose for which the power was given and for which the decision was purportedly taken.

A court has power to review an administrative action or decision if, it is not rationally connected to- the purpose for which it was taken; the purpose of the empowering provision; the information before the decision maker or the reasons given for it by the administrator.

The respondent's decision on the transition fees payable premised on pro-rated basis was a correct and just decision. A just or correct decision means that the decision-maker must *inter alia* interpret his or her authoritative power correctly, correctly assess the surrounding facts and circumstances, consider relevant factors and disregard irrelevant factors. See ***Kotze v Minister of Health [1996] (3) BCLR 417; Van Zyl v New National Party [2003]3 All SA 737***

The decision taken by the respondent is a decision taken by a specialised agency with expertise in the telecom sector; the courts should loath interfering with such decisions; According to **Halsbury's Laws of England, Vol. 61 (2010), 5th Edition, paragraph 613** it is stated that *"A court will generally be reluctant to disturb the findings of a tribunal with specialised knowledge of technical subject matter, irrespective of whether these findings be classified as law or fact"*. In the instant case, the Respondent has specialised knowledge of the telecoms sector and it applied this knowledge in arriving at the decision. It would not be rational or reasonable for the court to substitute the Respondent's decision with another decision that is in defiance of logic and common sense.

Legitimate Expectation

The applicant's counsel argued that the decision was in breach of its legitimate expectation. From a conceptual perspective, Matthew Purchase's (of the Matrix Chambers) Practice notes on legitimate expectations, **Legitimate expectations, Practical Law UK Practice Note 6-504-2351 (2017)**, legitimate expectation is a public law concept. It is an essential principle that can be summarised as follows: a public authority which has, by a promise or practice, conferred on a person a legitimate expectation of a procedural or substantive benefit may not frustrate that expectation if to do so would be so unfair as to amount to an abuse of power.

Whether or not a legitimate expectation exists is a factual question and must be answered and determined with reference to the circumstances and facts of each particular case. A legitimate expectation does not exist where the expectation relates to preventing the decision-maker from discharging a statutory duty. Neither can someone have a legitimate expectation of doing something contrary to the law.

The question of whether there is a legitimate expectation call for one to ask whether the duty to act fairly requires a hearing in a particular instance. Such a question is more than a mere factual one. In the case of ***President of South Africa v South African Rugby Football Union (SARFA 3) 1999 (1) BCLR 1059: 2000 (1) SA 1 (CC)*** the Constitutional Court said;

> *"The question whether the expectation is legitimate and will give rise to a hearing in any particular case depends on whether, in the context of that case, procedural fairness requires a decision-making authority to afford a hearing to a particular individual before taking a decision. To ask the question whether there is a legitimate expectation to be heard in any particular case is, in effect, to ask whether the duty to act fairly requires a hearing in that case. The question whether a 'legitimate expectation of a hearing' exists is therefore more than a factual question. It is not whether an expectation exists in the mind of the litigant but whether, viewed objectively, such expectation is, in a legal sense, legitimate; that is whether the duty to act fairly would require a hearing in those circumstances."*

Therefore the expectation must be legitimate in the legal sense, whether the duty to act fairly requires a hearing in the circumstances. An expectation must be more than a mere 'hope' or unrealistic expectation. Legitimate expectations go beyond enforceable legal rights, provided they have a reasonable basis. Whether the expectation of the claimant is reasonable or legitimate is a question of fact in each case. Whenever the question arises it is to be determined not according to the claimant's perception but in large public interest wherein other more important considerations may out-way what would otherwise have been the legitimate expectation of the claimant. *See* ***R v Department for Education and Employment, ex p Begbie [2000] 1 WLR 1115;Atwogyeire Robert v Board of Governors Kyambogo College School Miscellaneous Cause No.216 of 2016***

The applicant does not specifically show how their legitimate expectation was frustrated. It is true that there was supposed a hearing at different stages and the same were indeed carried out through the different meetings and consultations out of which a figure was agreed upon between the parties. It is on record that the negotiations constituted a hearing in the circumstances of this case and the engagement resulted in applicants confirming the position agreed upon before the President and later concluding the said meetings with Ministry for ICT and UCC. The nature of the meetings is what was expected of the respondent and wholly constitutes a hearing which is the meeting of the minds.

The respondent made a *bonafide* decision reached with consideration of public interest and it satisfies the requirements of non-arbitrariness and withstands the judicial scrutiny. The court should not bind a government agency to a previous policy by invoking the doctrine of legitimate expectation. See ***P.T.R Exports (Madras) (P.) Ltd v Union of India [1996] 5 SCC 268: [1996] AIR SC 3461***

The respondent did not breach any legitimate expectation of the applicant and the decision to demand payment in a prorated manner was justified in the circumstances as being the best rational mode of assessment for the

transitional fees for the period of October 2018 to July 2020 since it was paid for and had not been considered in the negotiated period of 2020 to 2032.

Whether the decision of the respondent was procedurally improper?

The applicant also contended that it was heard since the transition fees were levied unilaterally by government and they were not consulted before the decision was reached.

The respondent submitted that the Applicant does not show anywhere in its application that there was procedural impropriety. The Applicant only mentions in paragraph 29 of the affidavit in support of the application that it is advised by its lawyers that the decision is procedurally improper. It is not shown anywhere how the decision is procedurally improper. This position is re-echoed in paragraph 30 of the affidavit in rejoinder without giving any details about the alleged procedural impropriety.

Analysis

Fairness is highly a variable concept. Therefore, courts will readily accept that fairness is not something that can be reduced to one-size-fits-all formula. This therefore means that the courts shall answer questions of fairness on a case by case basis, having regard to factors such as complexity and seriousness of the case.

Essentially, procedural fairness involves elementary principles that ensure that, before a right or privilege is taken away from a person, or any sanction is otherwise applied to him or her, the process takes place in an open and transparent manner. It is also called 'fair play' in action and embraces the means by which a public authority, in dealing with members of the public, should ensure that procedural rules are put in place so that the persons affected will not be disadvantaged.

The applicant contended that the respondent never consulted them before imposing the transition fees and allegedly that it was unilaterally made without their input. The facts are quite clear from their own documents and evidence on court record. There were several meetings and communications between the parties and this in the court's view was enough to satisfy procedural fairness. Since October 2018, the parties where engaged in meetings and consultations that culminated into seeking guidance of the President and the applicant's Board and also specifically agreed that the transition period was to be paid for separately outside the new licence period of 12 years.

It is not in dispute that the applicants had already agreed on payment of sum that would have been agreed on in the NTO licence. The fact that the transition period was excluded, this meant that pro-rated formula was to be applied to the unpaid for transition period. The detailed negotiations indeed must have addressed this concern although the applicant has now backtracked and alleges that it was a unilateral decision whereas the evidence on record points to the contrary.

In working out what is fair the courts are wary of over-judicialising administrative process. They recognise that administrative decision-makers are not courts of law, and that they should not have to adopt the strict procedures of such court. The nature of meeting or consultations made through different communications or letters was procedurally sufficient to constitute consultation and hearing of the applicant in the circumstances of the present case.

The court should look beyond the narrow question of whether the decision was taken in a procedurally improper manner, to a question of whether a decision properly taken would have been any different or would have benefited the applicant. The applicant thought that she should have been given a separate hearing after the protracted negotiations and this was merely a question of perception but not standard procedure which has been applied to all other companies. In the case of ***R v Chelsea College of Art and***

Design, ex p Nash [2000] ELR 686, the court held that *" would a reasonable person, viewing the matter objectively and knowing all the facts which are known to the curt, consider that there was a risk that the procedure adopted by the tribunal in question resulted in an injustice or unfairness"*

In the case before this court, it has been shown that the respondent arrived at the amount payable as transition fees in the fairest manner and no reasonable person would think otherwise. Otherwise any amount beyond what was agreed and paid for in the NTO licence would have been challenged as being excessive and using the figure originally paid in SNO licence in 1998 would have been irrational since it would be extremely low.

Price fixation or assessment of fees is in the nature of legislative action even when it is based on objective criteria founded on relevant material. Rules of fairness may not be applicable on any such decision. It is nevertheless imperative that the action of the authority should be inspired by reason. A public body should not fix or make an arbitrary price or assessment. The court should only scrutinise a price or assessment based on the legislation and were it is not governed by the statute or the statutory order; the court's scrutiny would be very limited or reduced. ***Rayalseema paper Mills Ltd v Government of A.P [2003] 1 SCC 341; [2002]AIR SC 3699***

There was no procedural impropriety in the decision made by the respondent in imposing transition fees based on a pro-rated assessment and the same was fairly arrived at and guided by the amount paid for of US$100,000,000.

In the final analysis, I find no merit in this application and the same is dismissed with costs to the respondent.
I so Order.

SSEKAANA MUSA
JUDGE
23rd/04/2021