IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA A.D.2016

CORAM: AKUFFO (MS), JSC
DOTSE, JSC
BAFFOE - BONNIE, JSC
AKOTO- BAMFO (MRS), JSC
BENIN, JSC
AKAMBA, JSC
PWAMANG, JSC

WRIT
No. J1/4/2016

21ST APRIL 2016

GHANA INDEPENDENT BROADCASTERS : PLAINTIFF

ASSOCIATION /APPLICANT

VRS

1. THE ATTORNEY-GENERAL : DEFENDANTS /RESPONDENTS

2. NATIONAL MEDIA COMMISSION

RULING

PWAMANG, JSC.

In this ruling the plaintiff/applicant will be referred to as 'applicant' and defendants/respondents as 'respondents'. This is a motion on notice for an order of interlocutory injunction filed by the applicant seeking to restrain the respondents from enforcing specified provisions of the **National Media Commission (Content Standards) Regulations, 2015 (LI 2224)** pending this court's determination of the substantive Suit No. J1/4/2016.

The relevant facts upon which the application has been brought are as follows; LI 2224, which came into force on 9th December, 2015, requires electronic communication networks and broadcast media institutions to obtain prior authorisation from the 2nd respondent before they can carry any content on their networks. Under the LI it is an offence to carry any content on a network without authorisation and upon summary conviction one may be fined or imprisoned for not less than two years or more than five years or both fine and imprisonment.

In its substantive suit filed on 8th January, 2016, applicant prayed for, among other reliefs, declarations to the effect that the requirement for prior authorisation of content amounts to censorship, control and direction of media institutions by the 2nd respondent which plaintiff claims is inconsistent with Articles 162(1) and (2), 162 (4), 167 (d) and 173 of the 1992 Constitution which guarantee freedom of the media.

Applicant also contends that the provisions on criminal sanctions in LI 2224 are inconsistent with Article 162 (4) of the constitution as they impair free expression guaranteed under the Constitution.

LI 2224 provided a grace period of three months within which existing operators were to obtain content authorisation failing which they cannot carry any content on their networks or they do so on the pain of being arrested and prosecuted. Applicant, whose members have apparently not obtained content authorisation while their challenge against LI 2224 is pending, filed this motion for interim relief on 3rd March, 2016, before the lapse of the grace period. Respondents have opposed the motion and filed affidavits in opposition and statements of case. We have read closely all the processes filed and taken note of the *viva voce* submissions by applicant's lawyer and lawyers for respondents.

It is useful at this juncture to quote the succinct statement of the law on interlocutory injunctions by Dr. Date-Bah JSC in the case of **Welford Quarcoo v Attorney-General [2012] 1SCGLR 259.** At page 260 of the Report the respected jurist delivered himself as follows;

> "It has always been my understanding that the requirements for the grant of interlocutory injunctions are: first, the applicant must establish that there is a serious question to be tried; secondly, that he or she would suffer irreparable damage which cannot be remedied by the award of damages, unless the interlocutory injunction is granted; and finally that the balance of convenience is in favour of granting him or her the interlocutory

injunction. The balance of convenience of course means weighing up the disadvantages of granting the relief against the disadvantages of not granting the relief. Where the relief sought relates, as here, to *a public law matter*, particular care must be taken not to halt the action presumptively for the public good, unless there are very cogent reasons to do so, and provided also that any subsequent nullification of the impugned act or omission cannot restore the status quo".

The position of the law that, where a case falls under public law, a court ought to be slow in granting interlocutory injunction was also underscored by this court in the case of **Republic v High Court (Fast Track Division) Accra; Ex parte Ghana Lotto Operators Association (National Lottery Authority; Interested Party) [2009]SCGLR 372**. While the authorities urge caution, the jurisdiction of the court to grant interlocutory injunction in a public law matter is beyond debate. Thus in the case of **Ex parte Ghana Lotto Operators Association, supra,** Atuguba JSC said as follows at page 400;

> "It is not surprising therefore that it has been held by this court that when a body is entrusted with statutory discretion, the courts should be careful not to clog its exercise with injunctions: see **Attorney-General v Commission on Human Rights and Administrative Justice [1999-2000]1GLR 358, SC**. This, however, does not mean that an interim injunction cannot lie against the improper use of statutory discretion: see **Awuni v West African Examination Council [1971]1 GLR 63."**

In its equity jurisdiction, the authority of the court extends to the grant of interim injunctions in exceptional circumstances to halt the enforcement of a statute the constitutionality of which is being challenged on prima facie good and substantial grounds. In the case of **Cruickshank v Bidwell, 176 US 73**, **80 – 81 (1900)** for example, Chief Justice Fuller, delivering the decision of the U S Supreme Court, stated as follows;

> "It is settled that the mere fact that a law is unconstitutional does not entitle a party to relief by injunction against the proceeding in compliance therewith, but it must appear that he has no adequate remedy by the ordinary process of the law, or that the case falls under some recognised head of equity jurisdiction … Inadequacy of remedy at law exists where the case made demands preventive relief, as for instance, the prevention of multiplicity of suits or the prevention of irreparable injury."

In a similar vein, in the case of **R v Secretary of State for Transport; Ex parte Factortome (No. 2) [1991] AC 603**, the House of Lords, in order to prevent irreparable injury, granted an interim injunction restraining the British Minister for Transport from implementing an Act of the British Parliament on registration of European fishing vessels pending a determination by the European Court on whether the British Act of Parliament contravened European Union Law.

Where the application for interlocutory injunction is made in a public law case, the court is required to balance the public interest against the interest of the applicant.

It is against the background of the above principles that we consider the application before us. It has not been contended by respondents that applicant's action does not present serious questions for determination by this court. In fact, the matters raised in the writ of summons relate to constitutional issues of great importance to the practice of democracy in Ghana. Applicant's main ground for this motion is that its members stand to suffer irreparable injury if the respondents are not restrained from enforcing LI 2224 in that they are likely to be prosecuted and may suffer imprisonment in the meantime that the substantive suit has not been determined.

Prosecution, as we know, goes with all the pre-trial criminal justice processes of arrest, detention, preferring of charges and presentation of the accused persons before the criminal court. According to the applicant, these indignities by themselves without actual imprisonment constitute serious injury which, if not prevented by injunction, cannot be afterwards adequately remedied by any decree which the court can pronounce in the result that the court declares LI 2224 unconstitutional.

The respondents referred to Article 130 (2) of the 1992 Constitution which deals with stay of pending proceedings, including criminal proceedings, where the constitutionality of a statute has been challenged before a court other than the Supreme Court and a referral has been made to this court. They contend the Article provides sufficient protection to applicant. It is however worth noting that that provision would come into play only after a person has suffered the

indignities of the pre-trial criminal justice processes as outlined above and is conditional on the accused person's capacity to raise objection as to the constitutionality of LI 2224.

The relevant question in our view is whether there is a real probability of the prosecution of applicant's members. The respondents in their affidavits in opposition and statements of case have evinced a clear intention to enforce the law by the arrest, and at least, presentation of members of applicant association before court for criminal proceedings while the substantive suit is pending. In our judgment, restraining the threatened prosecution will better prevent the irreparable injury in this case than relying on Article 130 (2) of the Constitution.

On the balance of convenience in this case, we have compared the injury members of applicant are likely to suffer by the curtailment of their constitutionally guaranteed rights to freedom of expression and of the media if we refuse the injunction, to the general public's interest in a more regularised broadcast content in the interim. In our considered view, since the general public has put up with the status quo for all this period that the airwaves have been liberalised and determination of the substantive suit is not likely to delay, the balance tilts in favour of applicant's members.

The facts of this case are distinguishable from the recent cases decided by this court on interlocutory injunctions in public law causes that have been relied upon by respondents in opposing the application. In both **Welford Quarcoo v Attorney-General (supra)** and **Ransford France (No.1) v Electoral Commission and Attorney-General [2012]**

1 SCGLR 689, the plaintiffs did not stand to suffer any personal irreparable injury. Their actions were directed at ensuring compliance with the provisions of the constitution but without being personally affected in a direct manner. However in this case the members of applicant stand to be directly affected by the enforcement of the impugned legislation. In fact, members of applicant appear to be the main target of the impugned statute so their special circumstances are an important consideration. Furthermore, in the earlier cases, the programmes of activities leading to general elections would have been disrupted if the interlocutory injunctions prayed for were granted, but that is not the case here.

After pondering over the exceptional circumstances of this case as explained above, we have arrived at the decision to grant the prayer of the applicant. We find it just and convenient to grant an order of interlocutory injunction restraining respondents from enforcing the impugned provisions of LI 2224 pending the determination of the substantive suit.

(SGD) G. PWAMANG

JUSTICE OF THE SUPREME COURT

(SGD) S. A. B. AKUFFO (MS)

JUSTICE OF THE SUPREME COURT

(SGD) V. J. M. DOTSE

JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE - BONNIE

JUSTICE OF THE SUPREME COURT

(SGD) V. AKOTO – BAMFO (MRS)

JUSTICE OF THE SUPREME COURT

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT

(SGD) J. B. AKAMBA

JUSTICE OF THE SUPREME COURT

COUNSEL

KWAME BOATENG ESQ. WITH HIM RAPHAEL AGYEMANG FOR THE PLAINTIFF /APPLICANT.

GRACE EWOAL (PSA) FOR THE 1ST DEFENDANT./RESPONDENT

THADEUS SORY ESQ. FOR THE 2ND DEFENDANT/RESPONDENT