

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC  
OF SRI LANKA**

**In the matter of an Appeal in terms of Section 22 (4)  
of the Sri Lanka Telecommunications Act No 25 of  
1991 as amended by Act No 27 of 1996.**

1. B.A.C Abeywardena, No. 68, Attidiya Road,  
Ratmalana.

2 ELECTROTEKS C E K E (PRIVATE) LIMITED  
(Formerly RTEC MOBILE LANKA PRIVATE  
LIMITED) No 68, Attidiya Road, Ratmalana.

Carrying business under the name and style of  
TELEVISION AND REDIO NETWORKS at No. 68,  
Attidiya Road, Ratmalana.

**APPELLANT**

**CA/TEL/REG/01/2013**

Vs,

1. Telecommunications Regulatory Commission of Sri Lanka, No 276, Elvitigala Mw, Colombo 08.
2. K.W.E Karaliyadde, 51/64, 1/9 Lawyers Complex, Dias Place, Gunasinghepura, Colombo 12.

**RESPONDENT**

**Before : Vijith K. Malalgoda PC J (P/CA) &  
A.H.M.D Nawaz J**

**Counsel:** Manoj Bandara with Lakshana Perera for the Petitioners  
Ali Sabry PC with Ruwanthe Cooray for the 1<sup>st</sup> Respondent  
P.L. Gunawadena for the 2<sup>nd</sup> Respondent

**Argued On:** 03.12.2014, 07.05.2015, 13.08.2015

**Written Submission On:** 20.10.2015

**Order On:** 02.12.2016

## **Order**

### **Vijith K. Malalgoda PC J (P/CA)**

Appellants to the present appeal B.A.C Abeywardena and Electroteks C E K E (Private) Limited filed the present appeal under the provisions of section 22 (4) of the Sri Lanka Telecommunications Act 25 of 1991 as amended by Act No 27 of 1996.

The provisions relevant under the Sri Lanka Telecommunications Act to the present case are as follows;

- Section 22 (1) No person shall use any radio frequency or any radio frequency emitting apparatus in Sri Lanka or in any ship or aircraft registered in Sri Lanka; except under the authority of a license issued by the commission for that purpose under subsection (2), Every.....
- (2) Every license issued by the Authority for any such purpose as is referred to in subsection (1) shall
- b) be issued on the payment of such fee as may be determined by the commission by rules made in that behalf;
- Provided.....

- c) be subject to such conditions and the restrictions as may be determined by the authority which may include the Prohibition of the use including the sealing of such radio frequency emitting apparatus in the event of any such conditions and restrictions
- (3) The Authority may at any time revoke and determine any license granted under this section on the breach of the any of the conditions and restrictions to which, it is subject or in the event of any default in the payment of any consideration payable there under or on the failure of the licensee to comply with any regulations for the time being in force under this Act relating to the same
- (4) Where the Authority
- a) refuses an application made for a license; made under subsection (1) or
  - b) revokes a license under subsection (3)
- the applicant or the licensee may within one month after the date of the communication to him of the decision of the authority appeal against such refusal or revocation, as the case may be, to the Court of Appeal which may on such appeal confirm or set aside the decision of the Authority

The two appellants who are carrying on business in partnership under the name and style of Television and Radio Network (hereafter referred to as TRN) has obtained a license on or about 30<sup>th</sup> May 1996 under section 28 of the Sri Lanka Rupavahini Corporation Act No 6 of 1982 from Hon. Minister of Media, Tourism and Aviation (Minister in Charge of the said Act) to operate and maintain a Private Television Broadcasting Station. The said license obtained by the TRN was produced marked P-3 before this court.

The relevant provisions of the Sri Lanka Rupavahini Corporation Act No 6 of 1982 read as follows;

- Section 28 (1) No person other than the corporation established under this Act shall maintain a Television Broadcasting Station unless such person has obtained a license from the Minister.
- (2) The Minister may in consultation with the corporation issue to any person a license for the establishment and maintenance of a Private Television Broadcasting Station.

According to P-3, the said license the Petitioners were authorized to, “operate and maintain a Private Television Broadcasting Station including Cable and Pay Television transmitting” subject to the terms and conditions in the said license.

As revealed before this court, there are two licensing regimes which are relevant for the operation of a Television Broadcasting Network and among them the 1<sup>st</sup> is the license obtained under section 28 (1) of the Sri Lanka Rupavahini Act. The said license permits the establishment and maintenance of the Private Television Broadcasting Station.

The Private Television Broadcasting Station set up under the above provision will need to obtain a radio frequency spectrum in order to telecast the programs and the said radio frequency spectrum will be given to the licensed Private Television Broadcasting Station by the Telecommunication Regulatory Commission Sri Lanka, (here on after referred to as TRCSL) under the provisions referred to above in the Telecommunication Act. Under the provisions of the Telecommunication Act the 1<sup>st</sup> Respondent TRCSL is the Sole Authority to manage Radio frequency spectrums in Sri Lanka.

Section 10 (1) of the said Act which refers to the powers of the TRCSL reads thus,

- Section 10 (1) The Authority shall be the sole lawful body in Sri Lanka to manage and control the use of the Radio Frequency Spectrum and incidental and restricted

emissions, matters relating to the stationary satellite orbit and shall have the power where it deems necessary to withdraw or suspend its use or prohibit any such emission.

In other words, without a radio frequency spectrum given by the TRCSL a Television Broadcasting Station will not be able to telecast their programs.

When the Petitioners received the license from the Minister to operate a Private Television Broadcasting Station including a Cable and Pay Television transmitting, in May 1996, they have taken steps to import necessary communication equipment in the years 2003-2004 and obtained a Broadcasting license under section 22 of the Telecommunication Act which was valid from 01.11.2004 - 31.10.2005 for the first time, subject to the terms and conditions imposed by the TRCSL on payment of a license fee and the said license to operate Radio Frequency Equipment had been renewed annually up to the year 2011 which license was valid till 2012. The petitioners have produced the said licenses issued by the TRCSL before this court marked P-6 (a)- (f).

According to the Petitioners their broadcast was being carried from 21A Floor of the Ocean View Building at Station Road, Bambalapitiya Colombo 04 under the name and style of Television and Radio Network from its inception and on 26<sup>th</sup> May 2012 officers from the Criminal Investigations Department who arrived at the said premises of the Ocean View Building without any prior notice had sealed the said premises and left leaving a police officer to guard said premises while the transmission was on.

On 28<sup>th</sup> May the said CID officers had visited along with some officers from TRCSL and disconnected the power supply of the TRN's broadcast station shutting down the operation of the Petitioners Television Network, which was carried out by the Petitioners on valid licenses obtained under the provisions of the Sri Lanka Rupavahini Corporation Act and the Telecommunications Act.

As submitted by the Petitioners, they subsequently learnt of a complaint made by one Anupriya Nanda Ruwanpitiya Technical Investigation Officer of TRCSL to the Criminal Investigations Department, (here in after referred to as CID) stating that a television broadcast was being carried out at 21A and 19B Floor of the Ocean View Building without a license issued by TRCSL and violating the condition of the license issued by TRCSL not naming the suspect party, but the Petitioners took up the position that, the TRCSL had never informed the Petitioners of any breach of the conditions in the license issued to them.

However when the Magistrate's Court case was called on 01.06.2012, CID moved to withdraw from the case and made an application to handover the investigation directly to the TRCSL. This was initially permitted by the Magistrate and permitted the TRCSL to continue its investigations. Even at that stage TRN was not even named or summoned to court but the operation of the Television Network was shut down due to the Act of the CID and the TRCSL.

As revealed before this court, the 1<sup>st</sup> Petitioner who went before the Magistrate's Court on 01.06.2012 made an application to restore the disrupted television broadcast.

TRCSL had filed its first report before the Magistrate's Court on 08.06.2012 after they were permitted to carryout investigations on 01.06.2012 making the following allegation against the TRN.

- a) That the TRN has been broadcasting in Colombo by using UHF channel frequency No 49 without a license and UHF channel frequency No 49 is not allocated to the TRN which is an offence under section 22 (1) of the Telecommunications Act.
- b) That the TRN was transmitting digital telecast by using UHF channel 48 and channel 51 while TRN is licensed to do an analogue transmission violating the License conditions TRC alleged that this too is an offence under section 22(2) and 22 (3) of the Telecommunications Act.

- c) That the action of TRN is highly detrimental to the national policy planning which is now been carried out in implementation of digital television technology in future.

However on hearing the case for both parties by the Magistrate on 08.06.2012, on 12.06.2012, made order restoring the disrupted television service of TRN.

In the said order the Learned Magistrate whilst ordering the CID to restore the case to its original condition has further observed that the TRCSL can act under the provisions of the Telecommunications Act with regard to the violation they complaint of.

In the meantime the 1<sup>st</sup> Respondent issued the letter dated 8<sup>th</sup> June 2012 which was produced marked P-14 under the heading “Violation of Broadcast Station License (T V)” calling for explanation on the following charges against TRN.

- i. Operating a digital transmission and not analogue transmission as specified in the license.
- ii. Using UHF channel 49 which was not assigned to the TRN.
- iii. Operating a pay television transmission

When compared the complaint lodged by TRCSL at CID and the subsequent show cause letter issued to the TRN it is observed by this court, that the complaint, made against the Petitioners by the TRCSL are almost identical and with regard to this position the 1<sup>st</sup> Respondent TRCSL had placed the following material before us.

On complaint, received from authorities (specially from national intelligence) that certain digital transmission have been observed on UHF channel 48 and 51 the commission conducted monitoring of frequencies and found out, that digital transmission have been transmitted by Television and Radio Network (commonly known as TRN) and analogue transmission as permitted in the license. A part from the illegal and unlawful digital transmission, the TRCSL had intercepted that the Petitioner had

also engaged in using channel 49 which was never assign to the appellant and also had engaged in commissioning and operating a Pay TV transmission.

As submitted above, TRCSL was well aware that the 2<sup>nd</sup> Petitioner was operating a digital Transmission from its transmitting center at 21A Floor of the Ocean View Building but in their complaint to CID they have refrain from naming the person who is responsible for the said operation but complained that a digital transmission is carried out from 21A and 19 B Floors of the Ocean View Building.

However when the explanation was called from the Petitioners on the allegations referred to above, Petitioners sought for the appointment of an independent inquirer prior to any decision and/or action is taken with regards to the alleged violations of the license conditions.

During the same time Petitioners went before the Court of Appeal and a writ application was filed before the Court of Appeal [CA/Writ/329/12] seeking inter alia,

- b) Issue a writ of *Prohibition* preventing the 1<sup>st</sup> Respondent from in any way or manner cancelling and/or suspending the licenses granted to the Petitioners and/or Television and Radio Network, under in terms of Sri Lanka Rupavahini Corporation Act marked P3;
- c) Issue a writ of *Prohibition* preventing the 1<sup>st</sup> Respondent from in any way or manner cancelling and/or suspending the licenses granted to the Petitioners and/or Television and Radio Network, under in terms of Sri Lanka Broadcasting Corporation Act marked P2;
- d) Issue a writ of *Prohibition* preventing the 1<sup>st</sup> Respondent from in any way or manner cancelling and/or suspending the licenses granted to the Petitioners and/or Television and Radio Network, under in terms of Sri Lanka Telecommunications Act marked P12;
- e) Issue a writ of *Certiorari* quashing the decision of the 1<sup>st</sup> Respondent to proceed with the purported inquiry as contemplated by P14 and P17 (b);



- f) Issue a writ of *Prohibition* restraining and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from proceeding with the purported inquiry contemplated by P14 and P17 (b);

Even though the parties were summoned for an inquiry by the investigating officer appointed by the TRCSL to inquire into the allegations against the 2<sup>nd</sup> Petitioner the only proceedings of the said inquiry is limited to the document produced marked R1 (26) which referred to as follows;

“August 10<sup>th</sup> 2012,

The inquiry commenced at 2.00 pm. I informed Mr. B.A.C Abeywardena-Managing Director Television and Radio Network No 68, Attadiya Road, Ratmalana to submit his views in writing in respect of the letter dated 08<sup>th</sup> June 2012 bearing No. TRC/SM/BT/0013/96/UHF on violation of Broadcast Station License (TV) bearing No. BT-0004691 addressed to Mr. B.A.C Abeywardena by the Director General of TRCSL.

Further I instructed Mr. B.A.C Abeywardena to submit his views in writing within two weeks time. Subsequently Mr. Abeywardena requested further one week time for him to send his views in writing. Similarly I informed the representatives from TRCSL to make their views in writing in respect of the inquiry on violation of Broadcast Station License (TV) bearing No.BT-0004691. Further I have instructed Mr. Abeywardena to submit his Witten Submissions in respect of the letter dated 8<sup>th</sup> June 2012 bearing No. TRC/SM/BT/0013/96/UHF on violation of Broadcast License bearing No. BT-0004691 addressed to Mr. B.A.C Abeywardena by the Director General of TRCSL.

(Written Submissions are expected on or before 31<sup>st</sup> August 2012)

A letter said to have send by the inquirer requesting the parties to file Written Submission as agreed before him was produced by the Petitioners marked P- 18 (b) and took up the position that, the Petitioners have requested a copy of the Written Submissions filed by the TRCSL for the Petitioners to

reply the allegations against them, in the absence of any knowledge with regard to the nature of the complaint made against them.

However it was the position taken up by the 1<sup>st</sup> Respondent that in the absence of filing any Written Submissions before the inquirer (2R), the said 2<sup>nd</sup> Respondent after sending a reminder had proceeded with the inquiry based on the Written Submissions filed by the TRCSL and his recommendation was submitted to the TRCSL.

On the recommendations of the 2<sup>nd</sup> Respondent the 1<sup>st</sup> Respondent had decided to revoke and withdraw the license granted to the 2<sup>nd</sup> Petitioner and the said decision was communicated to the 1<sup>st</sup> Petitioner by the 1<sup>st</sup> Respondent by letter dated 31<sup>st</sup> December 2012 which is produced before this court marked P-24 and thereafter by letter dated 07.01.2013 informed the 1<sup>st</sup> Petitioner the decision of the 1<sup>st</sup> Respondent to reject the application submitted by the 2<sup>nd</sup> Petitioner for renewal of the TV Broadcasting license bearing No.BT-0004691.

Being dissatisfied by the said decision of the 1<sup>st</sup> Respondent TRCSL, the Petitioners have filed the present appeal before this court under section 22 (4) of the Telecommunications Act.

Even though the pleadings in CA/Writ/ 329/12 was also completed, the Petitioners preferred to pursue the present application before this court and the parties have agreed to argue the present application without pursuing the said Writ Application.

As submitted above, the present application before us is an appeal filed under section 22 (4) of the Telecommunications Act against a decision taken by the TRCSL under section 22 (3) of the said Act.

Section 22 (3) of the said Act provides the TRCSL to revoke and determine any license granted under section 22 (1) of the said Act,

- a) On the breach of any of the conditions and restrictions to which it is subject
- b) Any default in the payment of any consideration payable

- c) Failure of the license to comply with any regulations for the time being in force

As revealed before this court, the 1<sup>st</sup> Respondent had called for the explanation on three charges referred to in P-14 but was found responsible for two charges referred as follows;

- a) You have violated terms and conditions of the Broadcasting Station License (TV) by commissioning and operating digital transmission instead of analogue transmission which you were permitted to operate in terms of the License.
- b) You have violated the terms conditions and restrictions of the Broadcasting Station License (TV) by using UHF Channel 49 which is not assigned to Television and Radio Network.

The Petitioners, who challenged the above decision of the TRCSL before this court, placed several material including expert reports and argued that the recommendations of the 2<sup>nd</sup> Respondent were biased against the Petitioners and the said recommendations were not based on scientific data available in the case.

As observed by this court, an explanation was called from the 2<sup>nd</sup> Petitioner on three charges including a charge of, “operating a pay television transmission” but was not found responsible for the said charge by the 2<sup>nd</sup> Respondent.

In this regard this court is mindful of the fact that the Petitioners were granted a license by the Minister to operate a “Private Television Broadcasting Station including a cable and pay Television Transmitting” under section 28 (2) of the Sri Lanka Ripavahini Corporation Act.

Even though the 2<sup>nd</sup> Respondent who inquired in to the charges against the 2<sup>nd</sup> Petitioner had acted only on the material placed before him by the TRC, we observe that the said inquirer was careful in finding the Petitioners responsible on two charges except for the above charges which dealt with operating a pay television network.

Whilst relying on the license issued by the Minister to operate a pay television network, the Petitioners placed before this court an opinion from a former Director General of Telecommunication Regulatory Commission, A. Manicavasagar to the effect that, “pay television transmission is always associated with digital broadcasting technology. The signal encryption, a major feature in pay television transmission cannot be performed unless the video signal is converted into a digital broadcasting format” (P-27).

If the said opinion is to be accepted as correct, this court observes that the operating a pay television channel and signal encryption under the digital broadcasting technology will work hand and hand and it cannot be separated.

The Petitioners have further challenged the finding that the Petitioner had illegally used the UHF Channel 49 which is not assigned to him, by submitting an opinion from the former Director General Telecommunications A. Manicavasagar to the effect that, “the frequency occupation for allocated to the Petitioners 697.75MHZ is within the frequency band used for UHF TV Channel 49 under ITU Recommendations.” The Petitioners sought to negate the allegation.

As revealed before this court, the Petitioners’ were not represented before the inquiry conducted by the inquirer appointed by the TRCSL, and the decision communicated to the TRCSL had reached based on the submissions tendered on behalf of TRCSL only. In this regard the Respondent took up the position that the Petitioners when served with a show cause notice, initially requested for an impartial inquiry to be conducted and thereafter when an independent inquirer was appointed, after agreeing to submit written submissions before the inquirer had later avoided appearing before him by giving various reasons.

Even though the Respondents used the term “after agreeing to submit written submissions” and submitted that the Petitioners have voluntarily agreed to file written submissions, this court cannot agree with the contention of the Respondents since the proceedings before the inquirer on 10<sup>th</sup>

August 2012 does not show any voluntary undertaking given by the 1<sup>st</sup> Petitioner to file written submissions even though he had requested extra one week time to file the written submissions.

In these circumstances this court is mindful of the following observations made by Wade on the principle of Natural Justice

“It is fundamental to fair procedure that both sides should be heard; *audi alteram partem*, ‘hear the other side’. This is the more far reaching of the principles of Natural Justice, since it can embrace almost every question of fair procedure, or due process, and its implications can be worked out in great deal. It is also broad enough to include the rule against bias, since a fair hearing must be an unbiased hearing; but in defence to the traditional dichotomy, that rule has already been treated separately”

(Administrative Law H.W.R. Wade & C.F. Forsyth 10<sup>th</sup> Edition page 401)

As observed above, the 1<sup>st</sup> Respondent had information through intelligence and thereafter making inquiries, was aware that the Petitioners were using digital technology at the time the complaint was made with the CID, but the 1<sup>st</sup> Respondent decided not to name the Petitioners in their complaint with the CID. However, when they failed in their attempt to stop the functioning of the Petitioners through proceedings in the Magistrate’s Court, a Show cause notice was issued on the Petitioners and the Petitioners were summoned for an inquiry before the 2<sup>nd</sup> Respondent. As revealed before this court, other than the show cause notice, no further information was available with the 1<sup>st</sup> Respondent and/or any complaint received by the 1<sup>st</sup> Respondent and/or the investigation findings, were made available to the Petitioners for them to get ready for the inquiry.

The manner in which the 2<sup>nd</sup> Respondent directed the Petitioners to submit their written views, too confirms that the conduct of the 2<sup>nd</sup> Respondent when holding the inquiry was against the rules of Natural Justice.

In the case of *Ridge V. Baldwin (1964) AC 40 at page 79* Lord Reid after discussing at length the conduct of watch committee when dismissing the appellant, had observed,

“So I would hold that power of dismissal in the Act of 1882 **could not then have been exercised and cannot now be exercised until** the watch committee have informed the constable of the grounds on which they propose to proceed and have **given him a proper opportunity to present his case in defence.**”

Next comes the question whether the Respondents’ failure to follow the rules of Natural Justice on March 7 was made good by the meeting on March 18. I do not **doubt that if an officer or body realizes that it has acted hastily and reconsider the whole matter afresh, after affording to the person affected a proper opportunity to present his case then its later decision will be valid**” (emphasis added)

In the case of *O’ Reilly V, Mackman [1983] 2 AC 237 at 276* Lord Diplock observed that “the right of a man to be give a fair opportunity of hearing what is alleged against him and of presenting his own case is so fundermental to any civilized legal system that it is to be presumed that parliament intend that a failure to observe it should render null and void any decision reached in breach of this requirement.”

Indian Supreme Court in the case of *Canara Bank V. Debasis Das (2003) 4 SCC 557* discussed the main features of the principles of Natural Justice as follows; “over the year by a process of judicial interpretation two rules have been evolved as representating the principles of Natural Justice in judicial process, including therein quasi-judicial and administrative process. They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair play and justice which is not the preserve of any particular race or country but is shared in common by all men. The first rule is “*nemo judex in causa sua*” or “*nemo debet esse judex in propria cause sua*” that is “no man shall be a judge in his own cause”. The second rule is “*audi alteram partem*” that is “hear the other side”. A corollary has been deduced from the above two rules and particularly the *audi alteram partem*, namely “*qui aliquid*

*statuerit, parte inauditaaltera acquum licet dixerit, haud acquum fecerit*” that is “he who shall decide anything without the other side having been heard, although he may have said what is right, will not have been what is right” or in other words, as it is now expressed “Justice should not only be done but should manifestly be seen to be done.”

When considering the material revealed before us, it is clear that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have violated the rules of Natural Justice by not affording a fair opportunity to the Petitioners to present their case at the inquiry. In these circumstances we decide to allow the appeal preferred by the Petitioners under the provisions in section 22 (4) of the Telecommunications Act and set aside the decision of the 1<sup>st</sup> Respondent communicated to the 1<sup>st</sup> Petitioner by letter dated 31<sup>st</sup> December 2012 produced marked P-24.

The appeal is thus allowed and the impugned decision is set aside.

PRESIDENT OF ~~THE~~ COURT OF APPEAL

A.H.M.D. NAWAZ J

I AGREE,

JUSTICE OF THE COURT OF APPEAL