

Banda asked to investigate MACRA over MML licence

By Gregory Gondwe: @Kalipochi

2 May 2012

Steven Nhlane, editor of the *Malawi News* has asked president Joyce Banda to investigate the Malawi Communication Regulatory Authority ([MACRA](#)) after the high court in Blantyre ordered the regulator to pay Malawi Mobile Limited (MML) a sum of US\$66 million for breach of contract last week.



Breach of contract

MML is a company that MACRA gave an operating licence in 2002 but revoked it three years later after it failed to roll out operations as part of the licence conditions. MACRA decided to revoke operating licence for the mobile phone company arguing that they had failed to roll-out its network on time, but MML contended in court that the revocation was breach of contract as they were supposed to roll-out 12 months after the launch of the company.

The company says its licence was however revoked when it was yet to launch the company and it therefore sued the regulatory body and the attorney general for breach of contract and claimed US\$135 million, but the court ruled that the amount in damages would be calculated at one half.

The company took the matter to court to challenge MACRA's decision and on 20 April 2012, Justice Frank Kapanda of the Commercial Division of the Blantyre High Court ruled that MML be given such a huge figure of fine after MACRA made no effort to defend the case.

"Just come to think of MACRA's fine of K11.5billion (US\$66m) it is supposed to pay MML, this is our tax lost through fraud," he said.

Government involved?

Nhlane went on to explain that MML is a company that never spent a penny in Malawi.

"How does that happen? My gut feeling is that there were big people in government behind the MML deal who made MACRA breach the contract so that so that MML should sue and at the end of the day they should share the loot,"

speculated Nhlane.

He said MACRA has lawyers, some of who are its employees and wondered why they did not advise management properly that it was going to pay through the nose if it breached the contract with MML.

"If they did let them bring out the evidence. They must tell us how they advised government. They must be taken to task," said Nhlane.

He said it is worrisome that heads will roll now before the matter is concluded because the scheme was made when Democratic Progressive Party of the late president Bingu wa Mutharika was in government.

Banda asked to step in

Nhlane advised the new president Joyce Banda not allow this madness to continue. The case started in 2005 but actual hearing took place in October 2011.

When delivering his ruling, Justice Kapanda said he was equally surprised why MACRA decided not to call any witnesses to defend the case in which it was sued together with the attorney general.

MACRA did not defend the case despite filing with the court and serving MML with four witness statements of Christopher Chibwana, Evans Namanja, Sheik Dinala Chabulika and Rose Phanga.

"I have it on good authority that failure to call material witness raises an assumption that shows that evidence would have been adverse to the party who would have called the witness," said the judge.

The judgement

In his judgment Justice Kapanda said that the four witnesses were material witnesses and therefore he found and concluded that failure to call these important witnesses shows that their evidence would have been adverse to the defendants.

On the other hand MML paraded four witnesses who included former MACRA Board chair, Abdul Pillane; private lawyer, Khuze Kapeta; South African investor, Patroklos Tsaperas and Michele Loiuse Scanlon.

No witnesses called

Justice Kapanda said he also noted that even the office of the attorney general, which was the second defendant in the case, did not file any witness statement with the court nor serve plaintiff with the same and accordingly did not call any witness to testify during the trial.

The judge then observed that what is noteworthy is that the defendants never called any other witnesses even in the case of a claim as colossal as this one.

"The failure to call any other witness does not bode very well on the part of the defendants," said Kapanda, who then ruled in favour of MML, noting that the defendants' lawyer failed to 'breakdown and discredit' the evidence of all four witnesses who testified on behalf of MML.

At the time that MML lawyers, George Makiyi and David Kanyenda, applied for hearing of the case, they asked the court to compensate their client with money lost on the profits for a period of 12 years until 2017 when their licence would have expired.

"I find and conclude that the plaintiff is entitled to a loss of profit not as leaded and assessed by the expert but to the sum of

US\$66 850 000. I also order this sum as quantum of loss of profits payable to the claimant," ordered Kapanda.

High court ruling upheld

In 2007 the Supreme Court of Malawi upheld a high court ruling that stopped MML from rolling out after the mobile service provider overstayed its roll out period.

At that time Justice Michael Mtambo, reading the judgment on behalf of his fellow appeal judges, Leonard Unyolo and Michael Mtegha, said the agreement to extend the roll out period for MML was invalid because it was made by a MACRA board which had been dissolved. This he said rendered the agreement between MML and MACRA invalid.

The Supreme Court judges said former MACRA board chair, Abdul Pillane issued the extension after he had already been removed as chairman.

"There's no arguable case here. How can there be a claim to something where there has not been any agreement between the parties?" asked Mtambo.

He added that although the company was registered locally, the majority of shareholders were based outside the country and as such there was need to give security for costs by showing the shareholders' property in the country, which they did not.

Court grants injunction

In 2003, the High Court had granted an injunction to MACRA restraining MML from recruiting staff until the court decided on the network's licence issue.

MACRA also sued Pillane on four counts ranging from uttering a suspended document to extend an agreement for MML, uttering a false document, to obtaining a document by false pretence and perjury, is scheduled to start on 27 October 2007 at Zomba Magistrates court.

Pillane was being prosecuted together with South Africa-based MML investor Petroklas Tsaperas and lawyer Khuze Kapeta but former director of Public Prosecutions Ishmael Wadi separated the cases. DPP also discontinued the cases involving Tsaperas and Kapeta to deal with Pillane's case first.

After it was registered in March 2005, MML was to become the third registered mobile network operator. It appointed Ericsson to roll out its system in a deal worth US\$ 25 million (about K2.75 billion), where Ericsson was to supply equipment for the roll out of MML network, supply software and establish infrastructure for the next three years.

The announcement comes after MACRA announced it would revoke the licence it issued to MML in 2002 for breach of contract.

MML was registered in 2002 and is owned and operated by a consortium of Malawians and Mauritius Telecom.

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