DR DISH (PVT) LTD
versus
BROADCASTING AUTHORITY OF ZIMBABWE
and
OBERT MUGANYURA

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 1 & 8 September 2017

URGENT CHAMBER APPLICATION

T Nyambirai, for the applicant
T Magwaliba, for the respondent

HUNGWE J: The applicant seeks interim relief couched in the following terms:

"TERMS OF INTERIM RELIEF SOUGHT

Pending the final determination of this matter it is ordered that:

1. The operation of the purported termination of Applicant's Content Distribution Service License Number CD 0004 through a letter dated 22 August 2017 signed by Second Respondent on First Respondent's letterhead be and is hereby suspended.

2. Applicant shall be entitled to enjoy the full rights and benefits of its license as if the said letter of 22 August 2017 does not exist.

3. Applicant shall be entitled to distribute the Econet Media Limited (Mauritius) content based on the technical standards notified by the Applicant to the First Respondent and accepted by First Respondent on 21 October 2016."

The facts giving rise to this urgent chamber application can be gleaned from the applicant's founding affidavit and summarised as follows. The applicant is a holder of license number CD 0004 issued by the first respondent on 18 October 2012. It expires on 17 September 2022. The license was issued in terms of s 10 of the Broadcasting Services Act [*Chapter 12:06*], ("the Act"). The applicant avers that on 12 October 2016 the second respondent wrote to applicant on first respondent's letterhead purporting to act in terms of s

16 (2) of the Act calling upon the applicant to show cause why its license should not be cancelled. The applicant responded to this letter by way of a letter dated 16 October 2016 in which the applicant explained that MYTV Africa (Dubai) ("MYTV") had lost its content rights over Zimbabwe and as such it had secured a new partner in Econet Media (Mauritius) ("Econet"). Econet would take the place of MYTV Africa as the content supplier. The applicant was in the process of mobilizing funds from Econet with which it would pay off its outstanding license fees. Services would resume in December 2016. The applicant avers that it proceeded to submit to the first respondent the requisite statutory notifications in terms of ss 17 and 23 of the Act. On 21 October 2016, the applicant submitted a notice to the first respondent advising the first respondent that it had partnered with Econet as the content provider in the place of MYTV. The first respondent confirmed receipt and "acceptance" of the notification. The applicant avers that for ten months the first respondent did nothing in respect of the issues raised in the show cause letter. During that period, the applicant invested heavily in both human and capital resources.

The applicant avers that on 22 August 2017, four days after the payment of the outstanding arrears in license fees and ten months after the applicant had shown cause why its license should not be cancelled, the first respondent delivered two letters to the applicant. The first letter acknowledged receipt of the sum of US$434,000, 00 towards the clearance of outstanding arrears. It further advised that the Authority would apply the payment towards the outstanding arrears as at 16 October 2016 and refund the balance to the applicant. In the other letter the first respondent advised applicant that its license had been cancelled with effect from 22 August 2017. The letter indicated that the cancellation was in terms of s 16 (1) (d) of the Act. The reason for the cancellation was that applicant had ceased to provide the MY TV Africa service as specified in the license. The applicant avers that there was no evaluation of the reasons given by applicant for failing to distribute content belonging to MYTV. The applicant's notice to substitute Econet for MYTV as content provider was similarly not evaluated. There was no comment on the first respondent's earlier acceptance of Econet as content provider. First respondent considered only the license fees paid by the applicant and decided to refund part of it.

Aggrieved by the sudden turn of events, the applicant filed the present application seeking interim relief suspending the operation of the respondent's letter dated 22 August 2017 purporting to cancel applicant's license.

The respondents oppose the grant of the relief sought on several grounds. The main thrust of respondents' grounds of opposition, as I understood these, is firstly, that the relief sought by its very nature, cannot be obtained by way of an interdict. Secondly, the respondents contend that the technical standard and service which applicant was licensed to provide was the MYTV content. The applicant has never sought and was never granted an amendment to clause 1 of the terms and conditions attached to the license number CD0004 to provide Econet Media (Mauritius) Kwese TV Content in lieu of MYTV Africa. Instead, applicant has sought to smuggle and sneak in an amendment to clause 1 by proceeding to notify the first respondent of changes under s 17 of the Act by way of a letter dated 18 August 2016. Rather, the applicant ought to have proceeded by way of an application for an amendment of its license under s 15 of the Act. The respondents point to a prior attempt by the applicant in 2014 in which applicant sought to amend the license. On that occasion, applicant was advised to use certain forms for that purpose.

The respondent contend that were notifications in terms of s 17 be sufficient to effect amendments to licenses, then s 15 of the Act would be redundant. In any event the first respondent contends that it never accepted the notifications as such but merely acknowledged receipt of the same hence the documents relied upon by the applicant do not carry any signature by any of the first respondent's authorized signatories. The first respondent relies on applicant's earlier submission of an application to amend clause 1 of Part B of the terms and conditions of the license in terms of s 15(1) (c) as read with clause 13.1 of the Schedule to applicant's license. To enable it to provide Blue Ocean Satellite Television (BOSTV) content/channel as an indication of applicant's acceptance of the fact that amendments to the license are done in terms of s 15 rather than s 17 of the Act. Consequently, the applicant failed to effect the amendment to its license in terms of the law. In the circumstances, the license remain liable to cancellation for failure to adhere to the agreed terms and conditions. The first respondent avers that it had responded to that earlier application in 2014 by way of a letter dated 14 June 2014 advising applicant to make its application through the prescribed form BS1 and to pay the outstanding license fees. For two years, the applicant did not respond. Because the applicant did not respond during that time, the first respondent issued a notice of intention to cancel the license on 12 October 2016.

Applicant's argument that it applicant notified the first respondent in terms of s 17 of the Act that it was substituting MYTV for Econet Kwese TV content ought to be found to be inconsistent with applicant's earlier request to amend the license to provide BOSTV

channels; so the respondents argued. In short, the contention by the first respondent is that the applicant did not make any application to amend in terms of s 15 of the Act. As such there was nothing for the first respondent to object to. As for the ten month delay in issuing a determination on the response to the show cause letter, the first respondent contends that the applicant ought to have sought an order to compel it to perform its statutory duty if it felt that the response was taking long to come. The applicant always knew that a decision on the show cause response was still outstanding but went ahead as if it had gotten a reprieve.

Before an applicant for an interdict can succeed, he or she must meet the three requirements for an interdict which been repeatedly stated since the well-known case of *Setlogelo* v *Setlogelo* 1914 AD 221. These are;

(a) A clear right;
(b) An injury actually committed or reasonably apprehended; and
(c) The absence of similar or adequate protection by any other ordinary remedy.

An application for a temporary interdict, in the form of temporary relief, will also succeed if applicant is able to satisfy those three requirements. But the court always has a discretion to grant temporary relief even where a clear right has not been proved. This the court will do if:

(a) The right that forms the subject matter of the main action and the right the applicant seeks to protect is *prima facie* established, even though open to some doubt.
(b) There is well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he succeeds ultimately in establishing the right.

(c) There is no alternative satisfactory remedy available to the applicant;

(d) The balance of convenience favour the grant of interim relief.

I now proceed to consider whether the applicant has satisfied the above requirements in this application.

(a) Whether *prima facie* right established

As previously mentioned, in order to obtain an interim interdict it is necessary to establish a *prima facie* right. It is not important where the right is derived from – whether from a contract, the common law or in terms of a statute, but it must be an actual right; a mere interest in the relief sought is not enough. Presently, the applicant need not prove a clear right. A prima facie right is sufficient for it to succeed in obtaining interim relief. As stated

above the source of the right is immaterial. The applicant, as a holder of a licence duly granted by the first respondent ought to have drawn this court's attention to the 2007 amendment to the Act which provides:-

> **"2A Purpose and objectives of Act**
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> (1) The purpose of this Act is to regulate broadcasting services and provide for the control of the broadcasting service bands in order to attain the following objectives—
>
> (*a*) to ensure efficient use of the broadcasting service bands; and
>
> (*b*) to encourage the establishment of a modern and effective broadcasting infrastructure, taking into account the convergence of information technology, news media, telecommunications and consumer electronics; and
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> (*c*) to promote the provision of a wide range of broadcasting services in Zimbabwe which, taken as a whole, are of high quality and calculated to appeal to a wide variety of tastes and interests, providing education, information and entertainment; and
>
> (*d*) to ensure that the broadcasting services in Zimbabwe, taken as a whole, provide—
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> (i) regular news services; and
>
> (ii) public debate on political, social and economic issues of public interest; and
>
> (iii) programmes on matters of local, national, regional and international interest or significance; so as to foster and maintain a healthy plural democracy; and
>
> (*e*) to promote public, commercial and community broadcasting services in the interest of the public; and
>
> (*f*) to ensure the independence, impartiality and viability of public broadcasting services; and
>
> (*g*) to ensure the application of standards that provide adequate protection against—
>
> (i) the inclusion of material that is harmful or offensive to members of the public; and
>
> (ii) unfair treatment of individuals in television or radio programmes; and
>
> (iii) unwarranted infringements of privacy resulting from activities carried on for the purposes of television or radio programmes; and
>
> (*h*) to ensure that broadcasting licences adhere to a code of conduct acceptable to the Authority.
>
> (2) The Authority, the Minister and all other persons required or permitted to exercise functions under this Act shall pay regard to the objectives set out in subsection (1) when exercising those functions.
>
> [Section inserted by section 3 of Act 19 of 2007]"

In terms of s 2A (2) of the Act, the Authority, the Minister and all other persons required or permitted to exercise functions under the Act are obliged to pay due regard to the objectives set out in subsection (1) when exercising those functions. The whole conduct of the Authority in this saga leaves no doubt in one's mind that this matter was not properly handled nor were the purposes and objectives prioritised with regard to the applicant. In my

view the applicant has demonstrated that it has a *prima facie* right such as is required in an application of this nature.

(b) Whether there is a well-grounded apprehension of irreparable harm

The next question is whether there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing the right. If the applicant can show a *prima facie* right, then an interim interdict will only be granted if the harm to the applicant is likely to be irreparable. This is due to the fact that, as a clear right still has to be proved, it may be that a clear right cannot be proved and the interdict may be discharged on the return day. The interim order will only be granted if, by not granting the relief, it will be very difficult, if not impossible, to restore the *status quo ante*.

The applicant publicly announced that it was rolling out its broadcast service through the provision of Kwese TV content. Clearly, applicant has invested heavily in both human and capital resources for which a huge loss will naturally follow should the Board refuse to reverse second appellant's letter of cancellation. What is required to be established at this stage is not whether the applicant acted within the law in incurring those expenses but whether it will suffer irreparable harm should the interim relief not be granted. It seems to me that it is, at this stage, immaterial whether applicant brought such consequences upon itself or not; the inquiry is whether, as a fact, should the interim relief not be granted, applicant will suffer irreparable harm. I am satisfied that indeed such irreparable harm would visit the applicant.

(c) Whether no alternative satisfactory remedy available to the applicant

This is linked to the previous requirement, namely that in addition to there being a reasonable apprehension of irreparable harm, there must also be no alternative satisfactory remedy available, such as a claim for damages that would adequately compensate any loss.

Mr *Nyambirai*, for the applicant, urged me to find that in the application for a review of the decision that is sought regarding how the decision to cancel was arrived at, applicant will demonstrate that it was denied fair administrative justice. He went on to elaborate how applicant was led down the garden path and in the end suffered the ignominy of cancellation by the second respondent when he had no power to make such a decision. The applicant contends that at this stage the only avenue open for it is the grant of an interim order

suspending the effect of the letter of cancellation and restoring the *status quo ante.* The respondent argues that this would amount to the applicant getting a final order when it has not established a clear right. Whilst this may appear to be so, I do not see how else an applicant who has his license unprocedurally cancelled can avoid imminent ruin besides seeking such relief as the present one. Besides, it must always be borne in mind that the grant of temporary relief is always discretionary for the court. The court will take into account the facts which would have placed the applicant party in that position before exercising its judicial discretion to grant the relief. In the present matter it appears to me, from a reading of the Act together with the Schedules to it, that the second respondent acted *ultra vires* his powers as set out under the Act. The contention by the applicant is that the second respondent can only lawfully carry out those tasks as set out in clause 9(5) of Fourth Schedule.

That clause provides:

> "(5) Subject to the general control of the Board, the Chief Executive shall be responsible for—
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> (*a*) managing the operations and property of the Authority; and
>
> (*b*) supervising and controlling the activities of the employees of the Authority in the course of their employment."

I find that there is indeed a lot to commend in the argument advanced for the applicant in this regard. I do not read into the phrase "managing operations and property of the Authority" to include making decision which amount to undoing what the Board had done. In my view this is exactly what the second respondent did when he wrote the letter cancelling the license granted to the applicant by the Board in 2012. On the face of it, second respondent wields no such power as he apparently exercised here. One would have thought that if he was of the view that there was a contravention of the law, he would have approached the Minister with a request to appoint a Board since the first respondent has no Board. Once that Board was in place he would then then draw the Board's attention to the offence by the applicant. The Board would have then duly exercised its powers in terms of the Act. In my view, there is *prima facie*, quite good prospects that the applicant would, in the main matter, establish such rights as an entitlement to fair administrative justice. Section 3 (1) of the Administrative Justice Act, [*Chapter 10:28*] provides:

> **"3 Duty of administrative authority**
>
> (1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall—
>
> (*a*) act lawfully, reasonably and in a fair manner; and

> (*b*) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and
> (*c*) where it has taken the action, supply written reasons therefor within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned."

Clearly, the applicant is entitled to challenge such an arbitrary exercise of power by an administrative authority.

(d) Whether the balance of convenience favour the grant of interim relief

Ultimately the granting or refusal of an interim interdict lies in the exercise of judicial discretion by the court. In exercising this discretion, the court must take account of the balance of convenience in relation to both the applicant and the respondent, and in deciding whether the balance of convenience leans in favour of the applicant (if the interim interdict is granted) or the respondent (if it is not). The court may also take into account the applicant's prospects of success in relation to whether or not it is likely that the applicant will ultimately be able to show a clear right; as well as any potential prejudice to third parties.

In doing so the court takes into account all the relevant factors put forward by both the applicant as well as the respondent. The applicant has shown that its prospects of succeeding in establishing a clear right in the main matter are bright. Clearly, if the interim relief is not granted, the applicant will suffer heavily as opposed to the first respondent who will not suffer any harm should the interim relief be granted. Should the relief sought not be granted, innocent third parties who have committed themselves into the service provided by the applicant will suffer unduly. The problem is not the subscriber's creation nor did they knowingly contribute to it. In my view the balance of convenience favour the granting of the relief sought.

Consequently, the application succeeds. It is therefore ordered as follows:

Pending the final determination of this matter it is ordered that:

1. The operation of the purported termination of Applicant's Content Distribution Service License Number CD 0004 through a letter dated 22 August 2017 signed by Second Respondent on First Respondent's letterhead be and is hereby suspended.

2. Applicant shall be entitled to enjoy the full rights and benefits of its license as if the said letter of 22 August 2017 does not exist.

3. Applicant shall be entitled to distribute the Econet Media Limited (Mauritius) content based on the technical standards notified by the Applicant to the First Respondent and accepted by First Respondent on 21 October 2016.

Mtetwa & Nyambirai, applicant's legal practitioners
T H Chitapi, respondent's legal practitioners