

TELECEL ZIMBABWE (PVT) LTD  
versus  
POSTAL AND TELECOMMUNICATIONS  
REGULATORY AUTHORITY OF ZIMBABWE (POTRAZ)  
and  
THE MINISTER OF INFORMATION TECHNOLOGY,  
POSTAL AND COURIER SERVICES N.O  
and  
THE CHIEF SECRETARY IN THE  
OFFICE OF THE PRESIDENT AND CABINET N.O  
and  
EMPOWERMENT CORPORATION (PVT) LTD

HIGH COURT OF ZIMBABWE  
MATHONSI J  
HARARE, 7 May 2015 and 13 May 2015

### **Urgent Chamber Application**

*F Girach*, for the applicant  
*JC Muzangaza*, for the first respondent  
*Ms CM Dube*, for the second respondent  
*GN Mlotshwa*, for the fourth respondent

MATHONSI J: After hearing arguments from counsel on 7 May 2015, I granted the provisional order and said the reasons would follow. These are they:

This matter has got a chequered history indeed. The applicant is an incorporation which provides national cellular telecommunications service in Zimbabwe, among other services, by virtue of a licence issued in terms of the Postal and Telecommunications Act [*Chapter 12:05*] (the Act) by the first respondent, which is the statutory authority established in terms of the Act to superintend the licencing and regulation of telecommunication service in this country under the watchful eye of the second respondent, the minister charged with the administration of the Act.

The applicant was initially issued with a national cellular telecommunications licence in May 1998. It was issued with a revised licence on 26 June 2002, a licence which in terms

of its clause 4 was valid for 15 years from the date of its signing. That licence contains the terms and conditions under which the applicant is required to provide the service.

I have said that the relationship between the parties has had its fair share of problems. At some point, because of the squabbles relating to the applicant's shareholding which the regulatory authority insisted did not comply with the country's indigenisation laws and, more importantly, with the terms of the licence, the authority cancelled the licence on 9 August 2007. The applicant appealed that cancellation to the responsible minister in terms of s 96 of the Act on 10 August 2007 and approached this court by urgent application in HC 4301/07 for interim relief. This court, per Musakwa J, issued a consent order on 15 August 2007 to *wit*,

"It is hereby ordered that:

1. Pending the determination of the appeal by the second respondent the order cancelling the licence and directing the applicant to switch off its telecommunications issued by the first respondent be and is hereby suspended.
2. There is no order as to costs."

Just as well the applicant had the presence of mind to seek the suspension of the cancellation order, because it was not until 29 April 2010 that the Minister finalised the appeal, almost 3 years later. The Minister's decision communicated by the Secretary for Transport, Communications and Infrastructural Development on that date is helpful:

"RE: TELECEL ZIMBABWE LICENCE

Your minute AM/mn/342/10 dated 28 April 2010 refers. The Ministry holds the view that cancelling Telecel Zimbabwe's licence is not tenable *vis-a-vis* the thousands of subscribers the mobile operator now has and the many negative messages such action would convey to potential investors both in the sector and across the whole economy.

Thus, at a meeting between Honourable Minister NT Goche (MP) and Telecel's chief Mr Kia Uebach on 1 April 2010, government's requirement that Telecel Zimbabwe reverts back to its original 60:40 position in respect of its local: foreign shareholding was stated/indicated. Telecel undertook to address this challenge. Clearly, it will be difficult for the Government to support the renewal of the licence come 2013 should Telecel fail to comply with Government's pre-condition. In our view, the ball is now in Telecel Zimbabwe's court."

That way the licence was reinstated on the understanding that the share holding would be regularised to meet government requirements. Since 2010 the parties have been engaged in dialogue over the shareholding which went on and on with no end in sight. A lot has happened including an agreement signed by the parties on 6 August 2013. However, not

happy with what the applicant had done, the first respondent again cancelled the applicant's licence on 28 April 2015 on the basis that the applicant had failed to comply with the Act. It then set about issuing a raft of provisions in its final regulatory order which reads:

“11. REGULATORY ORDER

HAVING REGARD to the provisions of the Act, Telecel licence conditions, persistent compliance default, all relevant evidence and the submissions made by Telecel Zimbabwe Limited, POTRAZ hereby makes the following order in the exercise of its power under the Act.

- 11.1 Telecel's licence to provide National Cellular Telecommunications Service is hereby cancelled with effect from the date of this order.
- 11.2 Telecel immediately notifies its subscribers and relevant stakeholders of the termination of its licence upon receipt of this order
- 11.3 Telecel ceases to operate its cellular telecommunications network and ceases to offer any communication service upon receipt of this order.

The effect of the cancellation is as follows:

- (a) Radio frequency spectrum allocated to Telecel for the provision of cellular telecommunication services are hereby withdrawn with effect from the date of receipt of this order (see Annex 01 for the detailed spectrum information).
- (b) Radio frequency spectrum allocated to Telecel for the establishment of Microwave Fixed Links in 7, 8, 13, 18, 22 and 23 GHz bands are hereby withdrawn with effect from the date of receipt of this order.
- (c) Radio frequency spectrum allocated to Telecel for the establishment of a C-band VSAT Earth Station are hereby withdrawn with effect from the date of receipt of this order.
- (d) The number resources used by Telecel Zimbabwe Limited to offer telecommunication services are hereby withdrawn with effect from the date of this order.

12. SPECIAL DISPENSATION TO TELECEL

NOTWITHSTANDING the provisions of subparagraphs 11.2 and 11.3 above, however, and being mindful of the disruptive effect of an immediate cessation of operations upon the subscribers and other stakeholders of Telecel, POTRAZ hereby grants a special dispensation to Telecel for it to continue with its operations for a period of thirty (30) days from the date of receipt of this order. The purpose of the dispensation will be to afford Telecel an opportunity, among other things to:

- 12.1 Facilitate the migration of subscribers from Telecel to other licenced telecommunications operators.
- 12.2 Notify its employees and agents of the cancellation of its operating licence.

- 12.3 Notify its stakeholders in the mobile financial services sector of the cancellation of its licence.
- 12.4 Notify the general public of the cancellation of its licence.
- 12.5 Begin the process of decommissioning its telecommunications equipment which process has to be completed within ninety (90) days calculated from the date of receipt of this order.”

Hence on the stroke of the pen and by Regulatory decree, scores of employees had lost employment and a number of subscribers had lost a service, never mind other stakeholders and never mind the labour laws of this country dealing with notice of termination of employment.

The applicant has now come to court on an urgent basis seeking the following relief:

“TERMS OF FINAL ORDER SOUGHT

That you shall show cause to this Honourable Court why a final order should not be made in the following terms:

1. That pending determination of the finalisation of the appeal by the applicant pursuant to the provisions of s 96 of the Posts and Telecommunications Act Chapter 12:05 that Regulatory Order No 1 of 2015 and special licence and concomitant dispensations imposed by the Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) be and are hereby suspended
2. That pending finality to the appeal process as provided by the Posts and Telecommunications Act Chapter 12:05 applicant shall not dispose of any movable assets or infrastructure without notice to the 1<sup>st</sup>, second and third respondents.
3. That there be no order as to costs.

INTERIM RELIEF (GRANTED)

Pending determination of this matter the applicant is granted the following relief:

- (a) That first to third respondents be and are hereby interdicted from in any way of (*sic*) interfering with the normal business activities of the applicant pursuant to the provision of its telecommunication services and related business activities to the public and its subscribers in Zimbabwe.
- (b) The dispensation time periods mentioned in Regulatory Order No 1 of 2015 and the cancellation of applicant’s licence be and are hereby suspended until such time as there has been a final determination of (*sic*) a final order sought in terms of this application.”

In its founding affidavit deposited to by Angeline Vere its General Manager, the applicant states that after all its attempts to reduce its foreign shareholding to a level

acceptable to the first respondent were rejected by the latter, which retains the exclusive right of approval in terms of clause 12 of the licence, the first respondent resorted to the drastic action of cancelling the licence on terms set out in the regulatory order aforesaid.

Clause 12 of the licence provides:

“12.1 Ownership

12.1.1 Foreign Investment and Shareholding Structure

1. The holder of this licence must be incorporated in Zimbabwe. The licensee shall ensure that the foreign ownership shall be limited to forty nine percent (49%)
2. Changes in the shareholding structure at any stage must be approved by the Authority before it is effected.
3. In the event that the licensee’s initial shareholding structure does not conform to the provisions of clause 12.1.1.1 the licensee shall within five (5) years from date of signing of the licence ensure (*sic*) that the foreign ownership is reduced to forty nine percent (49%).” (The underlining is mine.)

Over the years the applicant has tried to comply by introducing a new partner to assume ownership of the 11 per cent balance of the 60 per cent shareholding held by the foreign partner Telecel International Limited (TIL) but the first respondent either rejected the proposed partner or insisted it had to be approved by the Minister. At one stage the applicant was told the 11 per cent shareholding could only be sold to the fourth respondent which holds the other 40 per cent stake.

The applicant introduced an employees share ownership scheme (ESOP) in terms of which its employees would own the 11 per cent shares currently in the hands of TIL in order to move the shareholding to indigenous people. This was rejected. It proposed listing on the Zimbabwe Stock Exchange as another option which was also rebuffed. Instead the first respondent cancelled the licence. The reason given for the cancellation appears in paragraph 1 of the first respondent’s “judgment” of 28 April 2015 which reads:

“1. INTRODUCTION

This case concerns Telecel Zimbabwe Limited (hereinafter referred to a ‘Telecel’) non compliance with licence conditions, provisions of the Postal Telecommunications Act [Chapter 12:05] (hereinafter referred to as ‘the Act’) as read with Indigenisation and Economic Empowerment laws. The Postal Telecommunications Regulatory Authority of Zimbabwe (hereinafter referred to as ‘POTRAZ’) has to determine whether the licence issued to Telecel to provide National Cellular Telecommunication Services should be cancelled or not and issue an appropriate order.”

The applicant stated that following the cancellation and the “appropriate order” it has appealed to the second respondent, the responsible Minister but meanwhile the regulatory order remains extant as the appeal does not have the effect suspending the order appealed against. Whichever way, it is unlikely that the Minister will dispose of the appeal before the expiration of the period of 30 days it has been given to close shop, a period which is unreasonable in the circumstances given that it employs more than 700 direct employees (at the hearing counsel for the employees corrected that figure, there are 820 direct employees) whose employment contracts would have to be terminated. In addition, in terms of the Act, they are entitled to 28 days during which to lodge an appeal. The applicant therefore craves the interim relief aforesaid.

While the other respondents did not oppose the application, in fact Mr *Mlothhwa* for the fourth respondent supported it and Ms *Dube* for the second and third respondents had no submissions to make except that the Minister would await the appeal, the first respondent surprisingly opposed the application vehemently as if everything depended on the cancellation of the licence and the closure of the applicant.

Mr *Muzangaza* for the first respondent contested the validity and urgency of the application. He submitted that the application does not comply with r 241 (1) of the High Court Rules, 1971 in that the purported Form 29B does not contain a summary of the grounds on which the application is brought. For that reason there is no application at all before me. Mr *Girach* who appeared for the applicant conceded the omission of the grounds which he however said are contained in the founding affidavit. He submitted that I should condone what he called “a minor omission.”

I take the view that the rules of court are there to assist the court in the discharge of its day to day function of dispensing justice to litigants. They certainly are not designated to impede the attainment of justice. Where there has been a substantial compliance with the rules and no prejudice is likely to be sustained by any party to the proceedings, the court should condone any minor infraction of the rules. In my view to insist on the grounds for the application being incorporated in Form 29B when they are set out in abundance in the body of the application, is to worry more about form at the expense of the substance. Accordingly, by virtue of the power reposed to me by r 4C of the High Court Rules, I condone the omission.

Mr *Muzangaza* was not done. He submitted that the applicant should not be entertained on an urgent basis because the matter is simply not urgent, in fact this is self-

created urgency. The applicant was aware of the intention to cancel its licence as at 5 March 2015 when the first respondent advised it of that intention by letter of that date. It should have taken remedial action then instead of waiting until 30 April 2015 to file this application. For that reason, the matter is not urgent and the applicant should be turned away for that reason alone.

In my view there is no merit whatsoever in that point *in limine*. I find myself having to repeat what I stated in *The National Prosecuting Authority v Busangabanye & Anor* HH 427/15 at p 3:

“In my view this issue of self-created urgency has been blown out of proportion. Surely a delay of 22 days cannot be said to be inordinate as to constitute self-created urgency. Quite often in recent history we are subjected to endless points *in limine* centered on urgency which should not be made at all. Courts appreciate that litigants do not eat, move and have their being in filing court process. There are other issues they attend to and where they have managed to bring their matters within a reasonable time they should be accorded audience. It is no good to expect a litigant to drop everything and rush to court even when the subject matter is clearly not a holocaust.”

I agree with Mr *Girach* that raising the issue of urgency by respondents finding themselves faced with an urgent application is now a matter of routine. Invariably when one opens a notice of opposition these days, he is confronted by a point *in limine* challenging the urgency of the application which should not be made at all. We are spending a lot of time determining points *in limine* which do not have the remotest chance of success at the expense of the substance of a dispute.

Legal practitioners should be reminded that it is an exercise in futility to raise points *in limine* simply as a matter of fashion. A preliminary point should only be taken where firstly it is meritable and secondly it is likely to dispose of the matter. The time has come to discourage such waste of court time by the making of endless points *in limine* by litigants afraid of the merits of the matter or legal practitioners who have no confidence in their client's defence *viz-a-viz* the substance of the dispute, in the hope that by chance the court may find in their favour. If an opposition has no merit it should not be made at all. As points *in limine* are usually raised on points of law and procedure, they are the product of the ingenuity of legal practitioners. In future, it may be necessary to rein in the legal practitioners who abuse the court in that way, by ordering them to pay costs *de bonis propriis*.

A matter is urgent if, when the need to act arises, the matter cannot wait. That is the simple test for urgency. While there is a catena of authorities pronouncing on urgency, it all

boils down to the remarks of Makarau JP (as she then was) in *Document Support Centre (Pvt) Ltd v Mapuvire* 2006 (1)ZLR 232 (H) 243G; 244A-C where the learned judge pronounced:

“Some actions, by their very nature, demand urgent attention and the law appears to have recognized that position. Thus, actions to protect life and liberty of individuals, or where the interests of minor children are at risk, demand that the courts drop everything else and, in appropriate cases, grant interim relief protecting the affected rights. The rationale of the courts acting swiftly where such interests are concerned is, in my view, clear. .... It is now accepted that in some cases, even purely commercial interests can be protected urgently in appropriate cases. In *Silvers Trucks (Pvt) Ltd & Anor v Director of Customs & Excise* 1999(1) ZLR 490(H), SMITH J considered the matter of the release of certain attached imports on the basis that the applicant would face bankruptcy and its 67 employees would lose their jobs as a result. In my view, the reasoning adopted by SMITH J in this regard is still in line with the objective test that had the courts waited, there would have been no need for the court to act subsequently. The applicant would have been liquidated and the return to it of the attached imports would not have reversed the effect of non-timeous action by the court. It would be of no further benefit to the applicant to pursue the legal interest. In my view, urgent applications are those where if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant.” (The underlining is mine)

See also *Triple C Pigs & Anor v Commissioner General, Zimbabwe Revenue Authority* 2007 (1) ZLR 27(H) 30 G; 31A-B.

It is not factually correct for Mr *Muzangaza* to suggest that the applicant did not do anything from 5 March 2015. On that date the first respondent gave notice of an intent to cancel the licence and invited the applicant to make representations as to why such cancellation should not be effected. This was as it should have been in terms of the procedure set out in s 43 (2) of the Act. The applicant made those representations which did not find favour with the first respondent and it duly cancelled the licence on 28 April 2015 issuing an order which ignored completely the applicant’s right of appeal to the Minister.

In my view, the need to act arose when the applicant received the notice of cancellation dated 28 April 2015. It obliged by filing this application on 30 April 2015, 2 days later. There can be no possibility of self-created urgency. For that reason I dismissed the point *in limine* as being fanciful and without merit. This is a matter which cannot wait at all because the operation of the regulatory order started immediately and in 30 days the applicants would have to close with all the attendant consequences.

What the applicant seeks is a temporary, interim or interlocutory interdict. HOLMES JA set out the requirements for the grant of such an interdict in *Ericksen Motors (Welkon) Ltd v Proten Motors, Warrenton and Anor* 1973(3) SA 685(A) 619 C – G (quoted with approval

by SANDURA JA in *Charuma Blasting and Earthmoving Services (Pvt) Ltd v Njainjai and Ors* 2000(1) ZLR 85(S) 89E-H) as :

“The granting of an interim interdict pending an action is an extra ordinary remedy within the discretion of the court. Where the right it is sought to protect is not clear, the matter of an interim interdict was lucidly laid down by INNES JA in *Setlogelo v Setlogelo* 1914AD 221 at p 227. In general the requisites are:

- (a) a right which, ‘though *prima facie* established, is open to some doubt’.
- (b) a well-grounded apprehension of irreparable injury,
- (c) the absence of ordinary remedy;

In exercising its discretion, the court weighs *inter alia* the prejudice to the applicant if the interdict is withheld against the prejudice to the respondent if it is granted. This is sometimes called, the balance of convenience. The foregoing considerations are not individually decisive, but are interrelated, for example, the stronger the applicant’s prospects of success the less the need to rely on prejudice to himself. Conversely, the more the element of ‘some doubt’ the greater, the need for the other factors to favour him..... Viewed in that light, the reference to a right which, ‘though *prima facie* established is open to some doubt’; is apt, flexible and practical, and needs no further elaboration.”

See also *Bozimo Trade and Development Co (Pvt) Ltd v First Merchant Bank of Zimbabwe Ltd & Ors* 2 000(1) ZLR 1(H) 9 F-G.

In respect of the establishment of a *prima facie* right Mr *Girach* alluded to s 96 of the Act which gives the applicant a right to appeal the decision of the first respondent to the Minister and to s 71 of the Constitution of Zimbabwe relating to the right to protection of property. On the other hand, Mr *Muzangaza* submitted that the applicant would not possibly have any right, *prima facie* or otherwise, when it has been operating outside the law, that is without compliance with the indigenization laws of this country, which Mr *Girach* countered by submitting that the Indigenization and Economic Empowerment Act [*Chapter 14:33*] only came into effect in April 2008 long after the licence had been issued on 26 June 2002.

Mr *Mlotshwa* for the fourth respondent brought a new dimension to the issue. He submitted that to the extent that the cancellation is premised on indigenization laws as stated in the first respondent’s “judgment”, the cancellation is invalid because the first respondent is not the enforcement authority of that Act, the Minister of Youth, Empowerment & Indigenisation is in terms of s 5 thereof. It is him who initiates the process of cancellation for want of compliance with that Act.

It is not necessary for me to determine all those issues because that is the province of the second respondent when dealing with the appeal. I am sitting only to decide whether a

case had been made for an interim interdict. I think it has been. Section 96(1) of the Act provides:

- “Subject to this section, any person who is aggrieved by
- (a) a decision of the Authority not to issue a licence or certificate; or
  - (b) any term or condition of a licence issued to him, or a refusal by the Authority to specify a term or condition in a licence, or
  - (c) a refusal by the Authority to review a licence or certificate; or
  - (d) any amendment of a licence or a refusal by the Authority to amend a licence; or
  - (e) the suspension or cancellation of a licence ; or
  - (f) the grant or refusal to grant any approval or authority in terms of this Act; or
  - (g) the outcome of any mediation by the Authority of a dispute between licensees ; or
  - (h) such decision of the Authority as may be prescribed;
- may, within twenty eight days after being notified of the decision or action of the Authority concerned, appeal in writing to the Minister, submitting with his appeal such fee as may be prescribed;  
Provided that such appeal shall not suspend the operation of any licence or certificate issued by the Authority.”

After cancelling the applicant’s licence, the first respondent issued a special licence effective from 28 April 2015 to 26 May 2015 to facilitate only the winding up of the applicant’s operations presumably including the termination of the employment contracts of 820 employees. Such termination would ordinarily require 3 months’ notice where there are good grounds in terms of the labour laws of this country. The applicant cannot lawfully employ those employees after 26 May 2015.

All that against the backdrop of the applicant’s right of appeal to the Minister which right subsists until the expiration of 28 days on 28 May 2015 if one includes weekends and public holidays. By the time the applicant’s right of appeal expires, the applicant would have closed down in terms of the regulatory order. What that means therefore is that the regulatory order effectively obliterates the applicant’s right of appeal reposed to it by s 96 of the Act. Clearly therefore that regulatory order is not only unreasonable in the extreme in its effect, it also infringes upon the right of appeal given to the applicant by the Act. That right has been taken away.

More importantly, there is the possibility that the Minister may take a while to determine the appeal. There is no time limit given by the Act for him to determine an appeal. Subsection (3) of s 96 only requires him to make an order on appeal “after due and expeditious inquiry”. A precedent has already been set in that regard. When the applicant appealed another cancellation by the first respondent in August 2007, the Minister took almost 3 years to determine the appeal.

In terms of s 68 of the constitution the applicant has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair. In terms of s 69 it has a right to a fair hearing in the determination of its civil rights. Those rights cannot be derogated from at the whim of an impatient and overzealous regulatory authority.

The concept of administrative justice is now embedded in our constitution. It provides the skeletal infrastructure within which official power of all sorts affecting individuals must be exercised. The elements are:

1. Lawfulness in that official decisions must be authorised by statute, prerogative or the constitution.
2. Rationality in that official decisions must comply with the logical framework created by the grant of power under which they are made.
3. Consistency in that official decisions must apply legal rules consistently to all those to whom the rules apply.
4. Fairness in that official decisions should be arrived at fairly, that is, impartially in fact and appearance giving the affected persons an opportunity to be heard.
5. Good faith in the making of decisions in that the official must make the decision honestly and with conscientious attention to the task at hand having regard to how the decision affects those involved.

Where an administrative authority makes a decision which renders nugatory the right of the affected party to appeal, that decision cannot be said to accord with the dictates of administrative justice which I have set out above. It cannot be rational neither can it be fair and in fact borders on unlawfulness.

I therefore entertain no doubt that the requirements of an interdict have been met. The applicant does have a *prima facie* right to appeal which has been curtailed, if not negated. There has been an infringement of that right which, if allowed to perpetuate would adversely prejudice the applicant and its employees. It would have to close before it has exhausted remedies available to it.

In weighing the balance of convenience as I am required to do, I can conceive of no prejudice that may be sustained by the first respondent except for a wounded ego which perhaps is the only reason why it chose to oppose the application. It is a truism that the first respondent has acted in an overzealous and precipitate manner without regard to the rights of

stakeholders in this matter. It has in fact proceeded rough-shod over the rights of those that it is sworn to superintend and in so doing it has created a train smash of gigantic proportions.

It is for these reasons that I granted the provisional order as amended, the interim relief of which is in the following:

“INTERIM RELIEF GRANTED

Pending determination of this matter the applicant is granted the following relief:

- (a) That first to third respondents be and are hereby interdicted from in any way interfering with the normal business activities of the applicant pursuant to the provision of its telecommunication services and related business activities to the public and its subscribers in Zimbabwe.
- (b) The dispensation time periods mentioned in Regulatory Order No. 1 of 2015 and the cancellation of applicant’s licence be and are hereby suspended until such time as there has been a final determination or a final order sought in terms of this application.”

*Messrs Honey & Blackenburg*, applicant’s legal practitioners

*Messrs Muzanagaza, Mandaza & Tomana*, 1<sup>st</sup> respondent’s legal practitioners

*Attorney General’s Office*, 2<sup>nd</sup> and 3<sup>rd</sup> respondent’s legal practitioners

*Messrs GN Mlotshwa & Company*, 4<sup>th</sup> respondent’s legal practitioners