

**DISTRIBUTABLE** (66)

**EX TEMPORE**

**TELECONTRACT (PRIVATE) LIMITED**  
**vs**  
**(1) POSTAL AND TELECOMMUNICATIONS REGULATORY**  
**AUTHORITY OF ZIMBABWE (2) MINISTER OF INFORMATION,**  
**COMMUNICATION, TECHNOLOGY, POSTAL AND COURIER**  
**SERVICES (3) MINISTER OF TRANSPORT, COMMUNICATIONS**  
**AND INFRASTRUCTURE DEVELOPMENT**

**SUPREME COURT OF ZIMBABWE**  
**GWAUNZA JA, MAVANGIRA JA & UCHENA JA**  
**HARARE: OCTOBER 16, 2017**

*U. Sakhe*, for the appellant

Miss *F. Mahere*, for the first respondent

Miss *K. Warinda*, for the second respondent

**MAVANGIRA JA:** This is the unanimous decision of the court.

This is an appeal against a judgment of the High Court dated 3 May 2017 dismissing the appellant's application for a declaratur to the effect that Statutory Instrument 122/2013 is *ultra vires* the Posts and Telecommunications Act, [*Chapter 12:05*] and should therefore be declared invalid, null and void.

The brief facts are that the appellant is in the business of providing internet services. The second respondent is the regulator of such providers in that industry. The appellant was issued with a draft “IAP” class A licence thus giving it an opportunity to apply for a class “A” licence. In terms of S.I. 122/2013, the fees for a class “A” licence are US\$5 500 000.00 to cover a period of 14 years. In terms of the regulations (S.I. 122/2013) and the Postal and Telecommunications Act, the licence fees should be paid on or before issuance or renewal of a licence.

The Postal and Telecommunications (Licence Registration and Certification) (Amendment) Regulations, 2013 (No. 6) (S.I. 122/2013) were promulgated by the third respondent in consultation with the first respondent.

The appellant was unable to raise the fees required for the class “A” licence that it wanted. It wrote to the first respondent and proposed a payment plan. The payment plan was rejected by the first respondent which insisted that all fees must be paid before or at the time that a licence is issued or renewed. This prompted the appellant to approach the High Court seeking, *inter alia*, an order that the Statutory Instrument, S.I. 122/2013, prescribing fees for Internet Access Provider licences be declared *ultra vires* the Posts and Telecommunications Act and therefore invalid, null and void.

In determining the matter the court *a quo* held that the appellant should have proceeded in terms of an application for review under Order 33 of the High Court Rules. Having so found, the court *a quo* did not proceed to determine this matter on the merits.

We are persuaded by the appellant's contentions that its application before the High Court did not have to be filed in terms of Order 33. Rather, it was properly filed in terms of s 4(1) of the Administrative Justice Act, [*Chapter 10:28*] and s 14 of the High Court Act, [*Chapter 7:06*].

This court has, in any case, held that a litigant challenging the decision of an administrative authority may properly do so through an application, though not filed in terms of Order 33 of the High Court Rules.

We find accordingly, that the High Court should not have declined to determine the matter on the merits.

Mr *Sakhe* for the appellant urged this court to nevertheless determine the matter on the merits based on the evidence on record. This court, as a court of appeal, cannot usurp the functions of the court *a quo* and make a decision on the merits of the matter when the court *a quo* declined to do so. That being the case, the correct course of action for this court to take is to remit the matter to the court *a quo* for it to determine this issue on the merits.

On this basis, the court upholds the appellant's grounds of appeal numbers 1, 2 and 3.

Grounds of appeal numbers 4 and 6 in our view relate to the merits of the dispute and in view of our finding on the procedural issue, become irrelevant.

As far as the appellant's ground of appeal number 5 is concerned, we find that there is merit in the contention by the appellant that it is a service provider in the Internet Access Provider industry while the first respondent is the regulator of service providers in the same industry. Further, that since the concern of the appellant is that there was unfairness and irregularity in the exercise by the regulator of its authority in this respect, it had a legal right and sufficient interest in the matter, entitling it to approach the court *a quo* as it did.

In the result, it is ordered as follows:-

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* is set aside in its entirety.
3. The matter be and is hereby remitted to the court *a quo* for it to consider and determine the application on the merits.

**GWAUNZA JA:** I agree

**UCHENA JA:** I agree

*Kantor & Immerman*, appellant's legal practitioners

*Muzangaza, Mandaza & Tomana*, 1<sup>st</sup> respondent's legal practitioners

*Civil Division of The Attorney-General's Office*, 2<sup>nd</sup> respondent's legal practitioners