ECONET WIRELESS
versus
POSTAL AND TELECOMMUNICATIONS REGULATORY AUTHORITY OF ZIMBABWE (POTRAZ)

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 28 October 2014 & 3 and 17 November 2014

Urgent chamber application

T.Nyambirai, for the applicant
J. *Muzangaza*, for the respondent

DUBE J: This is an application for an interdict. The applicant is a telecommunications services provider. The respondent is the Regulatory Authority established in terms of s 3 of the Postal and Telecommunications Act [*Cap12:05*], the Act.

The salient facts of this court application may be summarised as follows. On 16 October 2014, the respondent issued Regulatory Determination Number 1 of 2014, a circular on Implementation of Excise Duty on airtime or network usage for voice, internet and data services provided by Public Telecommunication Service Providers. The determination fixes new National Interconnection tariffs and Mobile Voice tariffs for telecommunications operators for the period December 2014 to December 2016. Aggrieved by this decision, the applicant has launched this application. The applicant claims that the respondent varied or amended the existing tariffs without affording the applicant a right to be heard on whether or not the existing approved tariffs should be amended and if so, to what levels and when this should be done. That the respondent proposed to amend the existing tariffs by reducing them significantly. The applicant contended that respondent's direction that applicant propose tariffs which the respondent has itself set by 14 November 2014, is an effort to purge the illegality it committed by fixing tariffs for applicant without having first received a tariff proposal from the applicant. The applicant maintains that the respondent's failure to afford the applicant an opportunity to be heard violates principles of natural justice as well as provisions of the Constitution. The applicant contends that the determination is biased against

the applicant in that the tariff reduction will weigh heavily on the applicant than on the other operators who have not bothered to pay the $137, 5 million licence fees. The applicant avers that there is no level playing field. In addition, the applicant challenges the authority of the respondent to act in the manner it did. The applicant argues that s4 (g) and (i) as read with s 100 of the Act under which the respondent purported to act does not empower it to vary existing approved tariffs *mero motu*, without an application or proposal for the variation of the tariffs by a licensee. The applicant further submitted that the respondent violated the *audi altram partem* rule by imposing tariffs without first affording the applicant an opportunity to be heard on the proposed tariffs and the effective date of the tariffs. The applicant's position is that the respondent exceeded the powers conferred upon it and acted *ultra vires* the Act. Mr *Nyambirai* who represented the applicant contended that the applicant cannot purport to act in terms of s 42 as a tariff is not part of a licence and powers conferred upon the authority by s 42 (1) do not include the power to amend a tariff.

The applicant canvassed the requirements of a temporary interdict and urged the court to find in its favour. I will not for the purposes of this judgment, summarise arguments advanced by both parties with respect to the merits of the interdict.

The application is premised upon the trepidation that if the respondent is allowed to impose illegal tariffs before the applicant's rights are finally decided by the court, it will suffer irreparable harm if it subsequently succeeds in this dispute, in that it will not be able to recover the loss suffered as a result of the unlawful reduction in tariffs. The applicant reasons that the reduction in its tariffs will force the applicant to retrench some of its employees and to down scale its distribution network that has created 20,000 jobs. Further that the applicant will be forced to discontinue some of its scholarship programs in which it pays fees for more than 40 000 less privileged members of the society.

The terms of the interim order sought are as follows:

"**INTERIM RELIEF GRANTED**

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

1. That the implementation of the Postal and Telecommunication Regulatory Authority of Zimbabwe [Determination on Voice, Data and Internet Charges for Regulated Telecommunication Services in Zimbabwe] regulatory Authority of Zimbabwe (Circular on Implementation of Excise Duty on Airtime or network usage for voice, internet and data services provided by Public Telecommunication Service Providers) Regulatory Circular Number 1 of 2014 be and is hereby suspended."

The final relief sought is for an order suspending the operation of the determination until the respondent has collected licence fees from other mobile operators.

The respondent's submissions in response may be summarised as follows. The regulatory determination purports to cite s 100 instead of s 42 (1) (d) of the Act. The true intention or purpose of the action can be gleaned from the consequences and not the label placed on the determination. There has not been any unlawful interference by the respondent in the applicant's business. The conduct complained of has a basis in s 42 which gives the respondent powers to amend licences in specific instances and an amendment can be made in terms of s 42 (1) (d) if considered desirable and in the public interest. The regulatory determination does not seek to direct any licensee what to charge, but sets a limit above which no operator shall charge. The same section in subsection 2 enjoins the respondent, prior to amending the licence, to give its reasons for the decision and invite the licensee's input into the matter.

The respondent denied that the determination is discriminatory. Mr *Muzangaza* who appeared for the respondent submitted that there is no discrimination as the licence fees which other operators also pay have not been reduced. The other operators are expected to fork out the same full licence fees. He contended that the applicant has the advantage that it has been able to recoup part of its outlay on the back of high tariffs. He submitted that the tariffs have been reduced in the public interest.

The respondent took up two preliminary points. The respondent argued that the applicant has adopted a wrong procedure for seeking this relief. The respondent submitted that the remedy of an interdict is resorted to only when other alternative remedies are not available and when the delays associated with the use of other remedies could cause irreparable harm. The respondent submitted that that the applicant ought to have sought relief in terms of s 96 of the Act, as the effect of the regulatory determination complained about is to amend existing tariffs which are an extricable component of a licence. That the applicant ought to have requested for reasons from the Minister and if not satisfied with the reasons, appealed to the Administrative Court if need be. The respondent insists that a wrong procedure was adopted for seeking this relief, that the application is improperly before the court and ought to be dismissed on that basis alone.

The respondent's second point relates to the urgency of the application. The respondent submitted that the application is not urgent as the applicant has always been aware of the respondent's intentions. Mr *Muzangaza* submitted that the dispute has been raging on since 2013 when research was conducted by the respondent with the participation of the applicant. This resulted in the applicant penning a letter dated 24 June 2004 wherein the

applicant threatened to take the matter to court if the respondent did not withdraw its intentions. He submitted that this matter became urgent and ripe for taking to court in June 2014 and that the applicant has not explained its failure to take any action from July to 24 October 2014.The respondent asserts that the applicant has not been candid with this court and was selective in the information it presented to the court. That if the applicant had disclosed to the court the existence of the letter dated 24 June 2014 this would have negatively affected any notions of urgency.

The respondent also took issue with the certificate of urgency. It submitted that the certificate of urgency in support of this application is no certificate at all as it was done before the founding affidavit had been deposed and attested to. The respondent further averred that the founding affidavit does not disclose urgency.

The applicant opposed both preliminary points. The applicant insisted that this application is properly before the court. It submitted that this matter is not an appeal but a review against the determination and is properly before the court.

On the issue of urgency, Mr *Nyambirai a*sserted that this application was triggered by the regulatory determination of 16 October 2014. He asserted that the applicant acted timely and shortly after receiving the determination and further that the matter is urgent because the applicant seeks to prevent the implementation on 14 November 2014 of a decision to reduce its tariffs. He contended that the letter threatening legal action was in relation to a different matter concerning the Lyric Model and a tariff proposal to set up a group 5 tariff which application was declined by the respondent. The applicant is not pursuing that matter. The applicant contends that both the founding affidavit and the certificate of urgency are valid and disclose urgency.

The respondent’s opposing affidavit and written submissions raised the issue of urgency. The matter proceeded to argument on the merits without the respondent formally raising the issue of urgency, only to do so in response to applicant’s submissions on the merits. The applicant contends that the respondent let the court hear the matter on the merits having declined an opportunity to raise any preliminary objections. That is not a correct reflection of what transpired. No invitation was extended to the respondent to address the court on its preliminary issues. The court proceeded on the assumption that the parties had discussed the issue and come to some common ground over the issue of urgency. The applicant submitted that the respondent should have raised the issue if urgency from the outset. That it was irregular for the applicant to let the court hear the case on the merits, only

to raise the issue of urgency in response to applicant's submissions on the merits. It urged the court to disregard the issue of urgency. The applicant is clutching at straws. A preliminary point is one that is likely to dispose of the matter without the need to go into the merits of the matter. It is expected to be taken at the outset. If it is upheld at that stage, it obviates the need for the court to hear argument on the merits. It is therefore desirable that it be taken before commencement of argument on the merits in the spirit of for good order and convenience. Where a preliminary point is raised during the course of argument on the main matter, it becomes a point of contention which still requires resolution. The taking of a preliminary point on urgency albeit belatedly does not render it fatal to the taking of the point. One has to have regard to the fact that in applications of this nature, the court is required to be satisfied that the matter is urgent irrespective of the position of the opponents. A matter brought on an urgent basis does not assume urgency simply because an adversary failed to raise the issue of urgency timeously. The fact that the point was raised tardily does not defeat the point.

The requirements of urgency have been articulated in numerous decisions and the law is considered settled. The law is basically that in any matter where an applicant brings an application on an urgent basis, he should show that the matter cannot wait to be determined in the sense that if not dealt with immediately, irreparable harm will result and secondly that the applicant himself did treat the matter as urgent. See *Madzivanzira* v *Dextprint Investment (Pvt) Ltd* HH 145/02. In *Gwarada* v *Johnson* 2009 (2) ZLR 159 (H) the court added its voice to the debate and remarked thus,

> "Urgency arises when an event occurs which requires contemporaneous resolution the absence of which would cause extreme prejudice to the applicant. The applicant must exhibit urgency in the manner in which he has reacted to the event or threat."

Similar sentiments were expressed in *Kuvarega* v *Registrar General and Anor* 1998(1) ZLR 188 (H) where the court remarked as follows,

> "What constitutes urgency is not only the imminent arrival of the day of reckoning, a matter is also urgent if, at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. If there has been any delay, the certificate of urgency or supporting affidavit must contain an explanation of the non-timeous action"

The evidence on record reveals that there has been extensive correspondence and consultations with all stakeholders inviting representations regarding the proposed tariff and inviting licensees to submit tariff proposals. The applicant failed to disclose correspondence that took place between the parties prior to this application. The following letters were not

attached to the application and were made available by the respondent. On 20 March 2014, the applicant wrote to the respondent and expressed its views over the subject. The letter reads in part as follows,

> "We remain fully committed to the current initiative that will provide the Regulator with a tool …for use in evaluating tariff proposals that may be submitted by operators for approval by the regulator."

This letter was followed by another dated 12 June 2014 from the respondent to the applicant advising of the results of the survey and its intention to implement same. The applicant was invited to submit its views and comments on the exercise. On 24 June 2014, the applicant wrote to the respondent giving its views on the results of the survey. Part of the letter reads,

> "Our client has briefed us with your letter of 17 June 2014 in terms of which you declined its tariff proposal for the proposed Group 5 (hard to reach).We have also been briefed on your plans to implement a change to the tariff regime using the LCRIC MODEL……….It is clear from this section that the authority does not have power to impose tariffs. Once the authority has approved a tariff, it cannot amend or replace the tariff *mero motu*. The authority's power is restricted to approving or disapproving a tariff proposed by a licensee. The process of changing a tariff has to be initiated by the licensee."
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> In concluding this letter the applicant writes,
>
> "We hereby notify you that unless you withdraw your request for our client to submit a plan for the implementation of the results of the LCRIC model within the next seven days ,we shall apply to court for an order declaring that our client is entitled to maintain its tariff regime for the entire duration of the licence."

Two issues emerge from the letter of 24 June. The first relates to the refusal by the respondent to approve a tariff proposed by the applicant for the Group 5. The second issue relates to the applicant's plan to implement a change to the tariff regime using the LCIC Model. In that letter the applicant challenges the respondent's authority to impose, amend or replace a tariff *mero motu* in terms of s100 of the Act and threatens legal action if the respondent does not withdraw its request for submission of a plan for implementation of the results. The applicant became aware that the respondent intended to introduce the disputed tariff as early as 24 June 2014. By that date, the applicant was noticeably aggrieved and concerned about the respondent's authority or power to impose and amend the tariffs *mero motu.* Even though the determination had not been issued, the applicant was fully aware of the applicant's plans and undoubtedly disgruntled by the respondent's desired course of action. They saw it coming. The challenge raised in the letter of 24 June relates to the

respondent's powers to take the intended measures. The same challenge raised then, is the same pursued in this application. I am satisfied that the applicant was aware as early as June 2014 that the respondent had plans to implement a change to the tariff regime in issue using the LCRIC model. What the applicant ought to have done then is to stop the respondent in its tracts and thwart its intentions.

The applicant did nothing from June until 24 October 2014 to assert its rights. The applicant elected instead to threaten legal action which threats it did not pursue. The need to act arose when the applicant became aware of the respondent's plans to implement the proposed tariffs based on the new model. The determination of 16 October simply put ice on the cake. The applicant chose to act after the determination and only a few days before the determination was to be finalised. What constitutes urgency is not the imminent arrival of the day of reckoning. A matter is urgent if at the time the need to act arises, the matter cannot wait. This approach was well articulated the *Kuvarega* case where the court remarked thus,

> "What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules.''

A party who brings a matter on an urgent basis should show that the matter cannot wait in the sense that if it is not immediately dealt with, some irreparable harm will ensue. He must assert himself and take corrective action as soon as he becomes aware of the imminent harm. He must exhibit urgency in the manner in which he reacts to the event or threat and not wait until the deadline draws near. The applicant failed to take corrective measures when it was expected to take action. The applicant has decided to act now and expects everyone to jump in accordance with its whims. The applicant sat on its laurels, did absolutely nothing and cannot expect any sympathy from the court. The applicant did not treat this matter as urgent. This is not the sort of urgency envisaged by the rules. The urgency is self- created. I find that there was a deliberate or careless abstention from action until the deadline drew near.

The application was certified urgent by Dominic Musengi a legal practitioner of this court on 23 October 2014. The affidavit of Douglas Mboweni dated 24 October 2014 was used to found the application. The applicant's response to the suggestion that the legal practitioner who certified the matter urgent did so before the affidavit was made went as follows. Mr Musengi the legal practitioner who certified the matter urgent always insists that he wants to see the papers in draft form first so that he can make up his mind whether he

agrees that the matter is urgent. Mr *Nyambirai* drafted the papers and gave them to him and Mr Musengi looked at the papers and then asked the deponent to the affidavit to get the affidavit signed and commissioned. The reason why he always requires to see the affidavit in draft form was not given. The idea of seeing the papers in draft form eludes me.

Mr Musengi had no business wanting to see the affidavit in draft form. It is not competent for a legal practitioner required to certify a matter as urgent, to see the founding affidavit before it is signed to ensure that the affidavit discloses urgency before he agrees to certify the matter. It is not his duty to ensure that the affidavit discloses urgency. He is required to get a signed and commissioned affidavit and either agree or disagree on the urgency of the matter. There is no room for him to amend or suggest amendments to it so that it complies with the requirements of urgency. He has no business going out of his way to ensure that the affidavit discloses urgency and hence it was wrong to insist that the affidavit come in draft form. The practice of legal practitioners who are required to certify matters as urgent insisting on seeing founding affidavits in draft form is undoubtedly wrong. This sort of conduct is most inappropriate and ought to be discouraged.

The suggestion on the papers is that the certificate of urgency was signed before the deponent to the founding affidavit had made and signed his own affidavit. This means that Mr Musengi certified the application as urgent before the founding affidavit was in place. A certificate of urgency is required to be premised on a founding affidavit. A statement only becomes an affidavit when it is signed by the maker and sworn to and signed before a commissioner of oaths. There was no founding affidavit when the matter was certified urgent and hence there was no certification. For all intents and purposes, there was no valid affidavit before the legal practitioner and ultimately there is no certificate of urgency. This application has no leg to stand on. Even assuming that I am wrong in this view, a look at the certificate reveals that the issue of the urgency of the matter was not well thought and canvassed. As a result the certificate of urgency does not disclose urgency.

The applicant's founding is affidavit sketchy on the issue of urgency .It does not appear that the applicant had any notion that this matter was being brought on an urgent basis. Nowhere in his affidavit does he make use of the word "urgent". One does not get the impression that this affidavit is one that is meant to be used in support of an urgent application. The affidavit falls far short of what is required in matters such as this. A deponent to a founding affidavit required to be used in an urgent application should be alive to the fact that he is bringing a matter to court on an urgent basis. It is incumbent upon him to

articulate fully in his affidavit, the reasons why he has decided to bring the matter on an urgent basis and not wait and enrol the matter on the ordinary roll. He cannot simply regurgitate the history of the matter expect that he may persuade the court to find the matter urgent by merely outlining the irreparable harm likely to ensue. He must allege facts that render the matter urgent and explain why the relief sought cannot wait to be obtained in the ordinary course. He must make specific averments on the allegation that the matter is urgent and cannot wait .Where there has been a delay in bringing the application, such delay should be explained in the founding affidavit. This role should not be left entirely to the person who certifies the founding affidavit as urgent.

The deponent to the founding affidavit must not leave it to his counsel to address the issue of urgency of the matter at the hearing either, because that opportunity might never arise. A court dealing with an urgent matter is required to consider the urgency of the matter at the time the matter is placed before it and on the basis of papers placed before it. Before a court sets down an urgent application for hearing, it must be of the preliminary view that the matter is urgent. The court has no benefit at this stage of hearing applicant's counsel and hence the need for the certificate of urgency and founding affidavit to adequately address the issue of urgency.

The legal practitioner who certifies the matter as urgent should make his decision that the matter is urgent on the basis of information supplied to him in a founding affidavit. He cannot certify the matter urgent where the applicant itself does not hold the view that the matter is urgent. The founding affidavit does not disclose urgency.

The purpose of a certificate of service is to certify the matter urgent and highlight reasons why a matter is urgent and explain the justification for preferential treatment. It assists the court in deciding whether the application should be dealt with immediately or wait to join the ordinary queue. The court is required on the basis of that certificate alone, to make a decision regarding the urgency of the matter. Where the certificate is scanty in detail and fails to disclose sufficient reasons why the matter should be dealt with immediately, the certificate is rendered useless, warranting dismissal of the application. Legal practitioners are in the habit of certifying matters urgent when they have not applied their minds to the matters to which their certificate of urgency is required. A legal practitioner who certifies a matter as urgent should only do so on the basis of clear and satisfactory averments of urgency in the founding affidavit. This court is left to speculate regarding the urgency of this matter. The legal practitioner gives a summary of the dispute and in one paragraph says,

> "Applicant has a reasonable apprehension of irreparable harm if respondent is not stopped from implementing its directive. The loss of income that applicant will suffer will not be recoverable. Applicant will be forced to retrench some of its employees, and to reduce its distribution network that has created more than20,000 jobs directly and indirectly. Applicant will also be forced to reduce its scholarship programs that pay school fees for more than 40000 less privileged members of our society and has been doing so for years.
> In the circumstances, I urge this honourable court to hear this matter on an urgent basis."

There is no specific allegation or averment of urgency in the certificate of urgency. Mr Musengi does not use the word "urgent" at all until at the end of the certificate where in conclusion he urges the court to treat the matter as urgent. The certificate does not explain fully why the matter should get preference and why the applicant cannot wait to get substantive relief in the ordinary course. In *Kuvarega* (*supra*) the court expressed its displeasure at this sort of conduct. Legal practitioners who offer this service are required to acquaint themselves with the facts of the matter and satisfy themselves that a matter is urgent. They should not certify the matter as urgent when they have not read the founding affidavit of the applicant and are satisfied that the matter is urgent. Their roles are not simply to rubber stamp or endorse the matter as urgent when the papers do not disclose urgency. It is shocking that the legal practitioner did not pick the anomalies in the founding affidavit. The applicant has not shown good cause for preferential treatment.

The certificate of urgency fails to explain the inordinate delay in bringing this application in its certificate of urgency. In any case where there has been a delay in bringing a matter on an urgent basis, it is imperative that such delay be explained in the certificate of urgency. The certificate fails to address the reasons for the delay in bringing this application. I am not satisfied that the certificate of urgency discloses urgency.

The conduct of the applicant in this his matter calls for censure. The applicant deliberately omitted to attach letters that have a bearing on the urgency of the matter. In *Graspeak Investments (Pvt) Ltd* v *Delta Corporation (Pvt) Ltd & Anor* 2001 (2) ZLR 551 at 555 D the court dealt with material- non disclosure and dishonesty in urgent applications and held as follows,

> "The courts should, in my view, discourage urgent applications, whether *ex parte* or not, which are characterised by material non disclosures, *mala fides* or dishonesty. Depending on the circumstances of the case, the court may make adverse or punitive orders as a seal of disapproval of *mala fides* or dishonesty on the part of litigants. In this case the applicant attempted to mislead the court by not only with holding material information but also by making untruthful statements in the

> founding affidavit. The applicant's non-disclosure relates to the question of urgency. In the circumstances, I find that the application is not urgent and dismiss the application on that basis."

The courts frown at conduct such as exhibited here.

Had the court been aware of these correspondences it may have held a different view over the urgency of the matter at the time the application was set down. Mr *Nyambirai* is a senior and well respected member of the profession. We expect better than that from him. Litigants who play hide and seek with the court only have themselves to blame when courts penalise them for their conduct. The court should mark its displeasure at this sort of conduct. The court does that best with an award of punitive costs. The court will show its disgust by making an award of costs on a higher scale against the applicant.

I am not satisfied that that the certificate of urgency and the founding affidavit disclose urgency. Consequently I decline to deal with this matter on an urgent basis. Having found that the matter is not urgent, the court will not take the trouble to resolve the remainder of the arguments advanced in favour of this application.

I accordingly make the following order:

1. The application is not urgent.
2. The applicant shall pay costs of this application on a legal practitioner client scale.

Mtetwa and Nyambirai, applicant's attorneys
Muzangaza, Mandaza and Tomana, respondent's attorneys