**DISTRIBUTABLE (63)**

**(1) BROADCASTING AUTHORITY OF ZIMBABWE (2) OBERT MUGANYURA**
**v**
**DR DISH (PVT) LTD**

**SUPREME COURT OF ZIMBABWE**
**HLATSHWAYO JA, PATEL JA & UCHENA JA**
**HARARE: FEBRUARY 26, 2018 & OCTOBER 25, 2018**

*T. Magwaliba*, for the appellants

*R. F. Mushoriwa*, for the respondent

**UCHENA JA:** The respondent applied to the High Court for an interim interdict seeking the suspension of the first appellant's cancellation of its licence. The application was granted. The appellants aggrieved by that decision appealed to this Court.

The first appellant is the Broadcasting Authority of Zimbabwe, a body corporate established in terms of s 3 of the Broadcasting Services Act [*Chapter 12:06*] (hereinafter referred to as the 'Act'). In terms of s 3 of the Act the first appellant among other things receives, evaluates and considers applications for the issuance of any broadcasting licence or signal carrier licence. The second appellant is the Chief Executive Officer of the first appellant. He was sued in his personal capacity for writing a letter on behalf of the first appellant cancelling the respondent's licence when the first appellant's Board Members' terms of office

had expired. It is however not disputed that he wrote the letter as an employee of the first respondent and in the course of his duties.

The respondent, Dr. Dish (Pvt) Ltd, was a holder of a Content Distribution Service License Number CD0004 issued to it by the first appellant in terms of s 10 of the Act. The licence was issued on 18 October 2012 and was to expire on 17 September 2022. The licence was granted subject to certain terms and conditions which included a technical standard that **'The licensee shall offer the following service; 'My TV AFRICA'** and the condition that the licensee shall provide a continuous service during the entire licence period and pay licence fees.

The respondent provided the licenced service (**MY TV AFRICA**) for a period of less than two years after which it stopped providing that service. On 23 February 2014 the respondent applied for an amendment of its licence in terms of s 15 (1) (c) of the Act to change the licensed technical standard from MY TV AFRICA to Blue Ocean Satellite Television (BOSTV). On 30 June 2014, the first appellant instructed the respondent to submit its application in Form BS 1 and to specify whether or not they were continuing with MY TV AFRICA content. The respondent was further instructed to pay all arrear licence fees. The respondent did not file the application in form BS I, nor continue to provide the licenced service and did not pay annual and arrear licence fees for three years.

As a result of the respondent's failure to provide the licenced service and its continued failure to pay arrear and annual licence fees, the second appellant on 12 October 2016, wrote a letter on behalf of the first appellant, calling on it to show cause why its licence should not be cancelled in terms of s 16 (1) (d) and (e) of the Act. By letter dated

16 October 2016 the respondent replied notifying the first appellant of the change in its partnership. It indicated that its licence should not be cancelled because it had secured a new partner, Econet Media (Mauritius), which would replace MY TV AFRICA Dubai as Service Provider and together they would pay the outstanding balance of its licence fees, and services would resume.

On 21 October 2016, the respondent wrote another letter to the appellant in terms of s 17 of the Act requesting formal recognition of the change in partnership to be reflected in the agreement between the parties. The relevant part of that letter reads as follows:

> "**2. NEW NOTIFICATIONS IN TERMS OF SECTION 17.**
>
> **2.1 Technical Standards**
>
> The services and technical specifications originally submitted for MY TV AFRICA Dubai will now be provided by ECONET MEDIA MAURITIUS in terms of the agreements signed between the parties"

The appellants through Joyce Kupukai its Legal Officer acknowledged receipt of the letter dated 21 October 2016, who in her supporting affidavit said she merely stamped the document but did not sign it. She said her conduct cannot be interpreted as an acceptance of the amendment of a licence. It was a mere acknowledgment of receipt. The appellants in November 2016 wrote a letter to the respondent advising it that its letter showing cause why its licence should not be cancelled was being considered. There was no further action till 18 August 2017, when the respondent paid arrear licence fees and fees for the current year. On 22 August 2017, four days after the respondent paid for the licence, the first appellant delivered two letters to the respondent. The first letter acknowledged receipt of US$434 000-00 towards the clearance of outstanding arrears. The second letter advised the respondent that the first appellant would calculate outstanding arrears as at 16 October 2016 and accept payment to satisfy those dues and return the remaining balance. Through the second letter the first appellant

advised the respondent that in terms of s 16(1)(d) of the Act, its licence had been cancelled with effect from 22 August 2017 because it was no longer providing service from MY TV AFRICA as per the conditions of its licence.

The respondent's legal practitioners wrote a letter to the appellants indicating that it had complied with the terms and conditions of its licence and therefore the first appellant could not cancel its licence. They in that letter indicated that the second appellant could not act on behalf of the Board to cancel the licence and as such the cancellation was a nullity. The letter demanded that the appellants withdraw the cancellation. Through the second letter the respondent informed the appellants that if they failed to withdraw their letter, it would approach the courts for relief. In their response the appellants advised the respondent to approach the courts if it felt that it has a case. The respondent approached the court a *quo* seeking interim relief suspending the decision of the first appellant to cancel its licence. The order sought by the respondent was 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 CD0004 through a letter dated 22 August 2017 signed by Second Respondent on First Respondent's letter head be and is hereby suspended.
2. Applicant shall be entitled to enjoy the full rights and benefits of its licence 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 the First Respondent on 21 October 2016.

**TERMS OF THE FINAL ORDER SOUGHT:**

**IT IS DECLARED THAT:**

1. The purported termination of Applicant's Content Distribution Service Licence Number CD0004 by the Respondents through their letter dated 22 August 2017 be and is hereby declared null and void, and of no force or effect.

2. 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 the First Respondent on 21 October 2016.
3. The Respondents shall bear the costs of this Application jointly and severally the one paying the other to be absolved."

In its application before the court *a quo*, the respondent challenged the cancellation of its licence on the grounds that the termination of the licence was *ultra vires* the powers conferred on the second appellant by the Act, such powers being reserved for Board Members, whose terms of office had expired. The respondent further submitted that the decision to cancel its licence was irrational, biased and violates its freedom of expression in terms of s 61 of the Constitution. The respondent further submitted that it gave the first appellant notice to replace its content provider in terms of s 17 of the Act which was accepted. According to the respondent, such acceptance was never revoked and the appellants cannot therefore 'purport to' cancel its licence on the ground that the respondent was no longer providing content from MY TV AFRICA as required by the terms and conditions of its licence. It was on these facts that the respondent sought an interim order suspending the cancellation of its licence pending a final order on the return day declaring the cancellation null and void.

In response to the application for the interim order, the appellants raised a number of preliminary points. The first being that the respondent has chosen an incorrect forum as the matter was supposed to be heard by the Administrative Court and that the interim relief sought by the respondent (applicant a *quo*) was the same as the final relief. The third point was that the harm had already been suffered and therefore cannot be interdicted. The last point was that the matter was not urgent. After considering the parties' submissions, the court *a quo* dismissed the preliminary points raised by the appellants and invited the parties to address it on the merits.

The appellants submitted that the respondent never sought and was never granted an amendment of its licence from MY TV AFRICA to BOSTV in terms of s 15 of the Act. They submitted that acknowledging receipt of the letter in which the respondent notified them of the change of the content provider was not acquiescence on their part. They further submitted that if the respondent thought the delay of ten months was too long it ought to have sought an order to compel it to make a determination of the issue. The appellants further submitted that the requirements for an interim interdict were not met. They therefore prayed for the dismissal of the application.

The court *a quo* found that the appellants irregularly cancelled the respondent's licence which established a *prima facie* right and was therefore entitled to an interim interdict. In view of the value of the investment which the respondent had made and the agreement between the parties, the court found that there would be irreparable harm if the interim relief was not granted. With regard to the requirement that there must be no other remedy, the court *a quo* found that the respondent had no alternative relief. As a result, the court *a quo* granted the interim relief sought by the respondent and suspended the cancellation of the respondent's licence. The appellants aggrieved by the court *a quo's* decision appealed to this Court on the following grounds.

**GROUNDS OF APPEAL.**

1. "The High Court erred in not finding that it has no jurisdiction to deal with the application arising from the suspension or cancellation of a licence when its jurisdiction was ousted by section 43(1) (e) of the Broadcasting Act [*Chapter 12:06*] (the Act).
2. The High Court further grossly erred in not finding that the application before it was not urgent, the licence in issue having been lawfully cancelled by the appellants on the 22nd of August 2017.
3. The High Court further erred in granting an order authorizing the respondent to distribute content from Econet Media Ltd (Mauritius) in the absence of an amendment to its licence in terms of section 15 of the Act and therefore holding that the notification

sent by the respondent to the appellants in terms of section 17 of the Act had the effect of amending the licence.

4. The High Court further erred in finding that the cancellation of the Respondent's license was *prima facie ultra vires* the Act on account of the absence of the Board while at the same time holding that the Respondents notification of the change of content could be validly accepted in the absence of the Board.
5. The High Court further grossly erred in finding that the Respondent had established irreparable harm notwithstanding that the alleged harm was self-inflicted and was suffered while the Respondent was operating unlawfully.
6. The High Court further grossly erred in failing to find that the Respondent had a more efficacious alternative remedy provided in terms of s 43 of the Act and a claim for damages.
7. The High Court grossly erred in improperly exercising its discretion to grant the relief sought and its decision was irrational on the basis of grounds of appeal 1-6 above."

In their heads of argument, the appellants argued that the court *a quo* erred in proceeding to determine a matter in which it did not have jurisdiction. They therefore argued that the judgment of the court *a quo* was a nullity, it having been granted when the court did not have jurisdiction. The appellants further argued that the requisites for an interim interdict were not satisfied. With regard to the issue of a *prima facie* right, the appellants argued that the respondent could not establish a *prima facie* right when it was operating outside the law by providing service from Econet Media (Mauritius) a technical standard not authorised by its licence.

The appellants further submitted that there could have been no well-grounded apprehension of irreparable harm on the part of the respondent which had failed to establish a *prima facie* right. They submitted that if there was such apprehension of irreparable harm, it was self-inflicted. They further submitted that the respondent had an alternative remedy and also that the balance of convenience did not favour the granting of the application.

During the hearing of the appeal, Mr *Mushoriwa* for the respondent submitted that the High Court's jurisdiction to grant a declaratory order cannot be ousted by the fact that the respondents can appeal to the Administrative Court against the decision of the first appellant to cancel its licence. Mr *Magwaliba* for the appellants conceded that the High Court has jurisdiction to grant a declaratory order. He therefore abandoned the appellant's ground of appeal relating to whether or not the court *a quo* had jurisdiction.

Even though the appeal is premised on seven (7) grounds of appeal, two issues arise for determination by this Court.

1. Whether or not the second appellant had authority to cancel the licence.
2. Whether the respondent established a *prima facie* right which entitles it to the order granted by the court *a quo*.

**Whether or not the second appellant had authority to cancel the licence.**

In paragraph 24 of his opposing affidavit the second appellant said his contract of employment authorised him to carry out the functions of the Board. He said it was that authority which authorised him to sign the licence and its terms and conditions when it was issued. He further said it was that authority which authorised him to cancel the licence.

The issue of the second appellant's authority remained in dispute on the pleadings and after the parties' submissions before the court *a quo*. Without hearing evidence to resolve the dispute, the court *a quo* at page 7 of its judgment said:

> "On the face of it, second respondent wields no such power as he apparently exercised here."

The appellants insist that the second respondent had authority to cancel the respondents licence. In para 13.2 of their Heads of Argument the appellants submitted as follows:

> "Whether or not the 2nd appellant had the right, in the absence of the Board to cancel a licence was a matter subject to dispute. It was hotly contested. This is so for reasons that the licence in issue was signed by the 2nd appellant. Equally the conditions of the licence were so signed. He was therefore entitled to act on behalf of the Board in the cancellation of the licence if he had been empowered to act on its behalf in the issuance of the licence."

The court *a quo's* decision was premised on its interpretation of the second appellant's powers in terms of s 9 (5) (a) and (b) of the Fourth Schedule of the Act, which it said could not be interpreted to include the power to cancel the respondent's licence. The court *a quo's* interpretation of s 9 (5) of the Fourth Schedule is not consistent with the wording of the whole section. A provision of a statute must be construed within the context of the part within which it is found. It should not be given a meaning which is inconsistent with the part within which it is found.

It is clear from a reading of s 9 (5), (6) and (7) that the Chief Executive Officer's duties are not confined to those mentioned in subs (5). They can be extended by the Board to include functions which can be performed by the Board except those of the Chairman. In view of the evidence before it, if the court *a quo* wanted to take the robust approach it should have drawn an inference from the evidence which is consistent with the law. It had before it a licence and conditions signed by the second appellant during the tenure of the Board. It had before It communication in the name of the second appellant demanding that the respondent should show cause why its licence should not be cancelled. It had before it communication addressed to the second appellant by the respondent asking him to perform functions normally performed by the Board. The cumulative effect of the above confirms that the second appellant exercised

powers consistent with his having been authorised to exercise powers which can be exercised by the Board. It had before it an allegation by the respondent that the first appellant had validly accepted its s 17 notification when the terms of office of Board members had expired. The respondent fully aware that the term of office of the Board had expired dealt with the second appellant as if he had authority to exercise the powers of the Board. In terms of s 9 (7) when authority is given to the Chief Executive it has to be proved to have been revoked before it can be held that he no longer has such authority. The only reasonable inference which can be drawn from the evidence which was placed before the court *a quo* is that the second appellant had authority to cancel the respondent' licence.

**Whether the respondent established a *prima facie* right which entitles it to the order granted by the court a *quo*.**

It is trite that before a court can grant an interim interdict, the applicant must lead evidence to satisfy the requirements for an interim interdict. In the case of *Airfield Investments (Pvt) Ltd v Minister of Lands, Agriculture and Rural Resettlement & Ors 2004 (1) ZLR 511 (S)* at 517 C-E MALABA JA (as he then was said:

> "It must be borne in mind that an interim interdict is an extraordinary remedy, the granting of which is at the discretion of the court hearing the application for the relief. There are, however, requirements which an applicant for interim relief must satisfy before it can be granted. In *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267 A-F, CORBETT J (as he then was) said an applicant for such temporary relief must show:
>
> "(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established though open to some doubt;
> (b) that, if the right is only *prima facie* established, 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 his right;
> (c) that the balance of convenience favours the granting of interim relief; and
> (d) that the applicant has no other satisfactory remedy."

Mr *Magwaliba* for the appellants submitted that for this Court to determine whether the respondent established a case for an interim interdict in the court *a quo*, it must be proved firstly that the respondent had a *prima facie* right to the order it sought. In this regard, it becomes necessary to define what a *prima facie* right is. The *Blackwell Dictionary of Western Philosophy* defines a *prima facie* right as 'a right that a person has in given circumstances, in contrast to an absolute right, which is universal and inherent and cannot be overridden in any situation.' What constitutes a *prima facie* right was explained in the case of *Judicial Service Commission v Zibani & Ors* SC 68-17 where PATEL JA at pages 19-20 said:

> "The requirements for the grant of interim or temporary interdicts are trite. The applicant must establish a *prima facie* right, a well-grounded fear of irreparable injury, the absence of any other remedy, and that the balance of convenience favours the applicant. See *ZESA Staff Pension Fund v Mushambadzi* SC 57-2002, at p 4 of the cyclostyled judgment.
>
> Insofar as concerns the first requirement, it is settled in principle that the grant of an interdict is based upon the existence of a right which in terms of the substantive law is sufficient to sustain a cause of action. To sustain such cause of action, the applicant must prove a legal and not merely a moral right and that this right is being infringed or threatened with infringement. **Where the alleged interference is in terms of an admittedly legal process, no legal right is established unless the applicant shows a right not to be disturbed in terms of such process. This is so because a party cannot have a right, whether *prima facie* or clear, contrary to the law. Thus, an interdict cannot ordinarily be granted where the allegedly offending conduct is properly premised on statutory authority.** This principle must apply with even greater force where the conduct in question is, as it is in *casu*, predicated upon and mandated by the Constitution itself."

It can be noted from the above case that to determine whether the court *a quo* grossly misdirected itself in granting the interim interdict sought, it must be shown that the court granted the interim relief where the respondent had no *prima facie* right. In order to establish whether or not the respondent had a *prima facie* right the enquiry must be whether the appellants interfered with a lawful process the respondent was engaged in since it is the

conduct of the respondent to the application before the court *a quo* which proves whether one has a *prima facie* right or not. If the applicant for an interdict is acting contrary to the law, no *prima facie* right can be established. No one is entitled to act unlawfully and the courts cannot grant orders protecting unlawful conduct. The determinant fact is therefore whether or not the respondent's conduct in operating contrary to the terms on which the licence was granted is lawful.

As already stated the respondent had previously applied to amend its licence content in terms of s 15. It was advised to submit its application in Form BS 1 and to specify whether or not they were continuing with MY TV AFRICA content. It was further instructed to pay all outstanding arrear licence fees. Instead of complying with the directions given by the first appellant, the respondent without using form BS I nor complying with the provisions of s 15 notified the first appellant of its change of content provider in terms of s 17 of the Act. Section 15 of the Act provides as follows;

> "**15 Amendment of licence**
> (1) Subject to this section, the Authority may at any time amend a licence or any term or condition of a licence-
> (*a*) to correct any error in the licence; or
> (*b*) for any reasons connected with regulating the technical administration, technical operation or general efficiency of telephony, telegraphy, posts, wireless broadcasting or television, or connected with the interests of defence, public safety, public order, the economic interests of the State, public morality or public health; or
> (*c*) if the licensee requests an amendment; or
> (*d*) if the Authority considers the amendment necessary to reflect the true nature of the service, system or business which the licensee is conducting."

Section 15 authorises the first appellant to amend a licence among other things if the licensee requests an amendment or if it considers the amendment necessary to reflect the true nature of the service. The terms and conditions of the respondent's licence obliges it to

provide service from MY TV AFRICA. The respondent could therefore only change from MY TV AFRICA to any other service provider, if its application to change its service provider in terms of s 15 of the Act had been granted. Instead of proceeding in terms of s 15, the respondent opted to notify the first appellant of changes in terms of s 17 of the Act, which provides as follows:

> "**17 Licensee to inform Authority of changes**
> (1) A licensee **shall without delay, but in any case no later than fourteen days after he becomes aware of the alteration, inform the Authority of any material alteration in the information or particulars furnished by him when he applied for his licence.**
> **(**2) A licensee **shall without delay inform the Authority of any transfer to or by any single person of more than ten *per centum* of the shares in the licensee.**"

Section 17 does not relate to conditions of a licence but to information which the applicant furnished to the Broadcasting Authority through its application for a licence. The provision allows the licensee to inform the first appellant of alterations in the information furnished by him when he applied for the licence. Such information does not include the change of service provider. Information which can be changed through s 17 of the Act includes the address of the licensee and its shareholding but not the service provider.

The licence required the respondent to provide service from MY TV AFRICA. The terms and conditions of the licence obliged it to offer those technical standards. To change from providing technical standards from MY TV AFRICA to any other service provider, the respondent was supposed to apply for an amendment of the licence in terms of s 15 of the Act. The respondent was aware of this requirement as demonstrated by its initially applying for a s 15 amendment in 2014. It is clear that an amendment could not be granted through an acceptance of a s 17 notification. An amendment can only be granted through the issuance of

an amended licence in terms of s 15. The respondent did not allege that it was issued an amended licence.

It is apparent that the respondent sought an order to protect conduct which is clearly contrary to the provisions of the Act. Section 15 of the Act provides the procedure the respondent should have complied with. The respondent should have made an application for an amendment instead of giving the first appellant notice in terms of s 17 of the Act. By providing service from Econet Media (Mauritius) when the terms and conditions of its licence required it to provide services from MY TV AFRICA, the respondent failed to comply with the terms and conditions on which the licence was granted. Therefore, the appellants correctly exercised their right in terms of s 16 (1) (d) of the Act to cancel the licence. Section 16 (1) (d) entitles the first appellant to cancel the licence if a licensee fails to comply with the terms and conditions of the licence or if the licensee has ceased to provide the service specified in the licence. It reads:

> "(1) Subject to this section, the Authority, on its own initiative or at the instance of any interested party, may suspend or cancel any licence if there is evidence that
> (*a*) ……
> (*b*) ……
> (*c*) ……
> (*d*) **the licensee has ceased to provide the service or system specified in the licence; or**
> **(*e*) the licensee has failed to comply with any term or condition of the licence;** or
> (*f*) ……"

The respondent while aware that it had not applied for and had not been granted an amended licence provided a service which it was not licenced to provide. It therefore contravened of s 16 (1) (d) of the Act. It therefore failed to establish a *prima facie* right. What the respondent asked the court to do is similar to what was commented on in Airfield

*Investments (Pvt) Ltd v Minister of Lands, Agriculture and Rural Resettlement & Ors (supra)* where MALABA JA (as he then was) at page 518 E-G; said:

> "The appellant was acting in contravention of para (b) of subs (1) of s 9 of the Act at the time it applied for the interim relief. It had not ceased to occupy, hold or use the land at the end of forty-five days from the date of service of the order of acquisition, nor had it ceased to occupy, hold or use the living quarters on the land at the end of ninety days from the date of service of the order of acquisition on it. An interim interdict as a remedy for the prohibition of unlawful conduct could not be granted for the protection of the illegal activities of the appellant. In other words, the appellant wanted the court to grant an order stopping the acquiring authority from acting lawfully so that it could continue to commit an offence in carrying on farming operations illegally."

In this case the respondent did not establish a *prima facie* right in the court *a quo*. The court *a quo* therefore ought to have dismissed the application for an interim interdict. An interim interdict cannot be granted to an applicant who has not established that he or she has a *prima facie* right.

It is therefore not necessary to consider the other requirements of an interim interdict since the respondent's case ought to have been dismissed on the basis that it did not have a *prima facie* right to challenge the cancellation of its licence when it was operating unlawfully. Alternatively, the first appellant could not be interdicted from doing what it is entitled to do in terms of s 16 (1) (d) of the Act.

The appeal has merit and should be allowed. Accordingly, it is ordered as follows:

1. The appeal is allowed with costs.
2. The judgment of the court a *quo* is set aside and substituted with the following:

*"*The application is dismissed with costs*".*

**HLATSHWAYO JA:** I agree

**PATEL JA:** I agree

*T.H Chitapi & Associates*, appellants' legal practitioners

*Mutetwa & Nyambirai*, respondents' legal practitioners