COMMUNITY RADIO HARARE

versus

BROADCASTING AUTHORITY OF ZIMBABWE

and

MINISTER OF MEDIA, INFORMATION & PUBLICITY N.O

HIGH COURT OF ZIMBABWE

MATHONSI J

HARARE, 12 October 2012 and 31 October 2012

*T. Magwaliba*, for the applicant

*L. Uriri,* for the 1st respondent

*Z. Makwanya*, for the 2nd respondent

**Opposed Application**

MATHONSI J: The applicant was formed by Harare residents in 2003 and registered as a Trust in 2006. Although in the founding affidavit deposed to by one Stewart Musiwa he himself as “the Director, of applicant company,” this is clearly a misnomer as the applicant is not a registered company but a trust.

The first respondents the Broadcasting Authority of Zimbabwe is a statutory body constituted in terms of section 3 (1) of the Broadcasting Services Act [*Cap 12:06]* for purposes, *inter alia,* of receiving, evaluating and considering applications for the issuance of broadcasting licences or signal carrier licences. It falls under the Ministerial portfolio of the second respondent, the Minister of Media, Information and Publicity.

In this application, the applicant originally sought the following order;-

“IT IS ORDERED THAT;-

1. The first respondent be and is hereby ordered to make a call in terms of section 10 of the Broadcasting Services Act [*Cap 12:06]* within 14 days from the date of this order, and to consider the applicant’s application within 30 days from the date of this order.
2. Failure by the first respondent to comply with paragraph 1 above, the licence is deemed to have been issued.
3. The first respondent be and is hereby ordered to make a call and receive applications in terms of section 10 of the Broadcasting Services Act [Cap 12:06] twice a year in the months of January and June of each successive year.”

The application which the applicant wants to prosecute which it wanted “deemed” to have been granted is that submitted in the form of a letter addressed to the first respondent, which reads as follows;-

“28 September 2010

The Chief Executive Officer

Broadcasting Authority of Zimbabwe (BAZ)

**HARARE**

Dear Sir,

RE: APPLICATION FOR A COMMUNITY RADIO BROADCASTING

LICENCE FOR CORAH

On behalf of my Board of Trustees I hereby write to apply for a broadcasting licence for Community Radio Harare (CORAH) in my capacity as the Station Manager.

CORAH was formed by Harare residents in 2003 and registered as a Trust in

2006. Over the years CORAH gained considerable support from Harare residents

through its documentaries, road shows and news letter, *Talking Harare*. In

addition, residents would like the content they initiate to be broadcast on radio. To date CORAH has 30 listening clubs representing various communities in and around Harare who play a crucial role in educating residents at grass roots level about the benefits of owing the means of communication, such as community radio. These groups form the core of CORAH membership and General Assembly from whom are drawn the Board of Trustees and Community Programming Advisory Board (COPAB).

CORAH has all the basic equipment that will enable the station to broadcast

anytime BAZ grants it a licence, and would prefer to cover a geographic footprint

of 45-50km radicals, that is, Harare and surrounding areas such as Ruwa,

Chitungwiza, Norton and Mazoe, areas into which CORAH’s growing

membership has already spilled. Your frequency allotment plan will enable

CORAH to secure the remaining equipment such as a transmitter and antenna,

that would require BAZ’s technical specifications.

Should you require any additional information about CORAH in order to expedite

your processing of this application, please feel free to correspond with the

undersigned as soon as possible.

Yours sincerely

Stewart Musiwa (Mr)

**Station Manager**

Mobile phone 263-912445039.”

Noble intentions indeed but I shall return to the application made to the first respondent shortly. The applicant, probably unhappy with the content of its draft order, and presumably with the benefit of counsel’s advice, filed an amended draft order which is in the following:-

“IT IS ORDERED THAT:

1. Having already carried out its function in terms of the first schedule to the Broadcasting Services Act, the first respondent shall in terms of section 10 (1) of the Broadcasting Services Act publish a notice in the Gazette and in a national newspaper inviting applications for licences to provide broadcasting services for Community Radio Stations within one month of this order.
2. Upon complying with clause 1 above and upon applicant’s application being made, the first respondent shall consider such application in terms of the law provided that the applicant shall have complied with all requirements set out under law bearing upon a valid application.
3. Should the first respondent fail to comply with clauses 1 and 2 above, the applicant shall be deemed to have been issued with a Broadcasting Services Licence for a Community Radio Station with such conditions as are envisaged in section 11 (1) of the Broadcasting Services Act.
4. The first respondent be and is hereby ordered to make a call and receive applications in terms of section 10 of the Broadcasting Services Act *[Cap* *12:06*] twice in the month of January and June of each successive year.
5. The first respondent shall pay costs of suit.”

The amendment to the applicant’s draft order was informed by a realisation, not only that before a licence can be issued there must be an invitation made by the first respondent for applications for licences, but also that the first respondent is required to carry out functions provided for in the First Schedule to the Act.

Returning to the application submitted by the applicant I have referred to, the first respondent rejected it. Its response is contained in a letter dated 24 January 2011 (quite late indeed), which states;-

“The Director

Harare Community Radio

**HARARE**

Att: STEWART MUSIWA

Dear Sir

RE: APPLICATION FOR A COMMUNITY RADIO BROADCASTING SERVICE

LICENCE

Reference is made to the above subject.

The authority notes that you have submitted an application to provide a broadcasting

service in Zimbabwe.

Please be advised that, in terms of section 10 of the Broadcasting Services Act [Cap

12:06] applications for the provision of a broadcasting service can only be received and processed by the Authority after an invitation for such applications has been published by the Authority.

Presently the Authority has not invited applications for the class of service that you wish

to provide.

We thank you for the interest shown and advise that you submit your application once the

Authority has invited applications for such class of service.

Yours faithfully

O. Muganyura

**Chief Executive Officer**”

The above letter prompted the applicant to launch the present application seeking an order aforesaid. In its founding affidavit deposed to by its Director Stewart Musiwa, the applicant underscored that it was founded with the main objective of establishing a community radio in Harare. In pursuance of that objective it submitted a letter to the first respondent which I have cited above which was rejected by the first respondent. The applicant maintained that since its establishment more than 11 years ago, the first respondent has never invited applications and therefore has never issued a Community Radio Licence. In the applicant’s view, this is a serious dereliction of duty and defeats the spirit of the law which established the first respondent.

The applicant insisted that the first respondent has a duty to enable “would be eligible applicants such as ourselves (the applicant) to apply for and obtain radio licences”. Having failed and or neglected to discharge its duties, the first respondent should be compelled to act judiciously and call for and consider applications for licences. The applicant has a legitimate expectation to be provided a fair and reasonable opportunity to apply for and be granted a licence.

The first and second respondents have opposed the application principally on the basis that the applicant is not entitled to be issued with a licence when an invitation for such licences has not been made in terms of section 10 of the Act. The first respondent further stated that there is a prescribed procedure to be followed in that exercise including the process of planning of frequencies, that it conducted a national survey on broadcasting needs of the country and then published a Statement of Priority in the government gazette, General Notice no 285 of 2004 in compliance with the first schedule to the Act. As that Statement of Priority does not provide for Community Radio frequencies in Harare, the first respondent is unable to invite applications for such service. There is no available band spectrum in Harare for community radio stations.

It is unfortunate indeed that the first respondent has not included Community Radio stations in its published statement of priorities. Which means that it would be after quite sometime that consideration will be given to such service. However the propriety of that statement of priorities is not the subject of the present application.

Mr Uriri for the first respondent strongly submitted that the application before me is not about protection of freedom of expression enshrined in the constitution of Zimbabwe, it is not about the validity of section 8 of the Broadcasting Services Act [*Cap 12:06*] and is certainly not about challenging the priority plan published by the first respondent. In his view, the application is about a claim by the applicant that it is entitled to apply for and be issued with a Community radio licence which entitlement has been frustrated by the first respondent’s dereliction of duty. I agree.

Mr Uriri challenged the applicant’s *locus standi* *in* *judicio* to bring such an application in light of section 8 of the Act. What the applicant seeks is a mandamus for the first respondent to perform its statutory duty, a breach of which has prejudiced the applicant. The requirements of a mandamus were set out in *Tribac (Pvt) Ltd v Tobacco Marketing Board* 1996 (2) ZLR 52 (S) 56 A-D where GUBBAY CJ said:-

“An application for a mandamus or mandatory interdict as it is often termed, can only be granted if all the requisites of a prohibitory interdict are established. See *Lipschitz v Wattrus* NO 1980 (1) SA 662 (T) at 673 C-D; *Kaputuaza & another v* *Executive Committee of the Hereros & others* 1984 (4) SA 295 (SWA) at 317E. These are:

1. A clear or definite right – this is a matter of substantive law.
2. An injury actually committed or reasonably apprehended – an infringement of the right established and resultant prejudice.
3. The absence of a similar protection by any other ordinary remedy. The alternative remedy must;- (a) be adequate in the circumstances; (b) be ordinary and reasonable; (c) be a legal remedy and (d) grant similar protection.”

Mr Uriri firmly argued that the applicant has failed to establish a clear or definite right to apply for and be granted a community radio broadcasting licence because it has approached the court as an aspiring community radio broadcaster. It claims a right to apply for and obtain such a licence when it is common cause that the applicant is a trust.

Section 8 of the Act which deals with persons disqualified to be licenced provides;

“(1) Subject to subsection (3), a broadcasting licence shall be issued only to individuals who are citizens of Zimbabwe or to a body corporate in which a controlling interest is held, whether through any individual, company or association or otherwise, by one or more individuals who are citizens of Zimbabwe.

(2) ………………………

(3) No licence for a community broadcasting service, commercial broadcasting service or data casting service shall be issued to a person other than a body corporate.”

Mr Magwaliba for the applicant argued that the application before me is based on the right of every Zimbabwean citizen to freedom of expression as enshrined in section 20 of our constitution. As such any citizen is entitled to litigate to enforce that right. While conceding that a trust is not a corporate body, Mr Magwaliba took the view that as the applicant is made up of trustees representing members who are entitled to litigate to enforce their rights to receive information, the applicant is therefore at liberty to compel the first respondent.

I have difficulties with this agreement. At best it deliberately ignores the clear prohibition contained in section 8 (3) of the Act. At worst it turns the whole scenario on its head. What is clear though is that a trust is not a juristic person. See *Honore’s South African Law of Trusts* 5th edition page 419.

Clearly therefore, the applicant being a trust composed of natural persons and not having corporate personality, cannot, as a matter of law, apply for a Community radio licence by virtue of section 8 (3) of the Act. The first requirement for a *mandamus* is not met. The applicant having failed to demonstrate a clear right cannot be granted the relief that it seeks. The matter should simply end there. I agree with Mr Uriri that it possesses no statutory right to apply for, nor a legitimate expectation to be granted a community radio licence.

Further, it is not the individual trustees who have come to court alleging a breach of their right to freedom of expression as argued by Mr Magwaliba. In fact they have not made any such allegation. In any event, a trust cannot even be regarded as a “person”. *Crundal Brothers v* *Lazarus* 1990 (1) ZLR 290 at 298B.

I am not even persuaded that the applicant would have established the rest of the requirements or a mandamus set out above. But then all the essentials must be present for it to be granted, which is not the case *in casu*.

Having come to that conclusion, it is unnecessary for me to deal with the merits of the matter. The present applicant, having failed to prove *locus standi in judicio* to bring the application, simply cannot succeed.

In the result, the application is dismissed with costs.

*Messrs Manase & Manase*, applicant’s legal practitioners

*Munangati & Associates*, 1st respondent’s legal practitioners

Civil Division of Attorney Generals’ Office, 2nd respondent’s legal practitioners