INFORMATION MEDIA INVESTMENTS (PRIVATE) LIMITED

versus

MINISTER OF TRANSPORT AND

TELECOMMUNICATION N.O

and

POSTAL AND TELECOMMUNICATIONS REGULATORY

AUTHORITY OF ZIMBABWE

HIGH COURT OF ZIMBABWE

BERE J

HARARE, 20 June 2012 and 27 October 2012

**Opposed Application**

*T.Z. Mazhindu*, for the applicant

Adv. *T. Mpofu*, for the 2nd respondent

BERE J: It is amazing how sometimes simple commercial disputes end up assuming unintended complications in their interpretation.

On 20 July 2011 the applicant, Information Media Investments (Private) Limited, (hereinafter referred to as IMI P/L) filed an application in this court seeking the following order:

“IT IS ORDERED THAT:

1. It is declared that the telecommunications authorization/licence which the first respondent issued to the applicant on 18 December 1998 is valid.
2. It is declared that the telecommunications authority/licence which the first respondent issued to the applicant on 18 December 1998 is valid for twenty five (25) years with effect from the 18th of December 1998.
3. The second respondent shall pay the costs of suit”.

The elaborate facts of this matter are well spelt out in the founding

affidavit of Great Makaya and can be further summarised as follows:

On 18 December 1998 the then Minister of Information Posts and Telecommunications, the Honourable Chen Chimutengwende granted the applicant what he referred to as “Authorization to Operate the Globalstar System in Zimbabwe”. In simple terms this was authorization given to the applicant to establish a telecommunications network in Zimbabwe.

The authorization document was signed by the Minister concerned and the applicant represented by Great Makaya.

The signed document’s tenure was given as 25 years and contained fairly detailed terms and conditions of that authorization.

For reasons which are detailed in the founding affidavit the telecommunications network could not be rolled out within the time frame anticipated by the applicant. There was need to find an alternative technical and financial partner and the Minister was kept abreast of these challenges and did not take issue with this.

On 5 June 2000 the applicant wrote to the first respondent to *inter alia* seek approval to source other technical and financial partners as well as the use of Satellite Gateway Frequency 3.4 Giga Hz and Terrestrial Sub-Gateway Frequency 800 Mega Hz which requests were subsequently granted.

Like many aspiring investors would testify in this country it has not been an easy walk for the applicant to get a foreign investor to partner it.

The applicant’s uncontroverted position is that it was not until 2009 that it managed to secure a partner with the requisite technology and finances.

As part of the prospective partner’s due diligence exercise and also considering that the applicant’s authorization had been dormant for ten (10) years, the prospective partner requested the applicant to get a letter from the second respondent confirming the status of its authorization or licence as the applicant has always held the view that the authorization document was in fact a licence.

Much to the applicant’s disbelief and shock, on the 12 November 2009 the second respondent advised it by letter that its licence authorization had expired. The second respondent indicated that the expiry was based on the fact that the applicant had failed to respond to a regulatory notice calling upon it to regularize its licence by the 30th of April 2002.

The applicant’s position is that it never saw the regulatory notice and was never served with same. Nothing to the contrary has been tabled to controvert the applicant’s assertion. The applicant was aggrieved by the unilateral cancellation of what it perceived to be its licence hence the instant application for a declaratory order.

The second respondent’s opposition to the relief sought has assumed basically two notable positions.

The first argument which was raised as a point *in limine* is that the refusal by the second respondent to issue a confirmatory letter or certificate for the licence creates a grievance which must be brought to the first respondent by way of an appeal in terms of s 96(1)(a) of the Act[[1]](#footnote-1) and that by bringing this application to the High Court the applicant has chosen the wrong procedure as this court has no jurisdiction to entertain the applicant’s application.

The second respondent also contended that the applicant was never issued with a licence and that even if it was issued with one, that licence must be deemed to have lapsed /rendered redundant because of the applicant’s failure to comply with the statutory obligations of such a licence as outlined in clause 4(d) of the second respondent’s notice of opposition.

On merits, the second respondent did not raise any notable new issues except to reiterate and expand on the argument that the applicant was never issued with a licence but with a document of intention to be granted a licence.

At this juncture, I propose to deal with the points raised by the parties in seratium.

1. Has the applicant adopted a wrong procedure?

In advancing the second respondent’s case it was passionately argued by

Advocate *Mpofu* that the applicant had adopted the wrong procedure by rushing to seek a declaratory order from this court before exhausting the domestic remedy at its disposal as provided for by s 96 of the Act (*supra*).

I was referred to the case of *Trust Holdings* v *Trust Bank Corporate Ltd* *and Ors[[2]](#footnote-2)*; *Girjac Services* (*Pvt*) *Ltd* v *Mudzingwa[[3]](#footnote-3)* and quite a host of other similarly decided matters.

In countering the arguments by the second respondent’s counsel, the applicant’s counsel Mr *Mazhindu* maintained that by seeking a declaratory order the applicant was quite justified in the circumstances as this action is provided for in terms of s 14 of the High Court Act[[4]](#footnote-4) and that the applicant’s situation justified the granting of the remedy sought.

Counsel also argued that s 96 of the Act (*supra*) must itself be never looked at as a bar to the court in exercising its wide discretion in granting a declaratory order in appropriate circumstances. To buttress his argument, counsel referred me to two cases viz, *Bulawayo Bottles* (*Pvt*) *Ltd* v *Minister of Manpower Planning and Social Welfare & Ors[[5]](#footnote-5)* and the *Standard Bank of SA Ltd* v *Trust Bank of Africa Limited[[6]](#footnote-6)*.

A perusal of the cases cited by both counsels show a common thread running through virtually all the cases, viz that the need to exhaust domestic remedies is not absolute and is not governed by a rule of thumb. It can be departed from where good reasons or special reasons exist for doing so. I consider it a special or good reason that the second respondent has unfairly violated the applicant’s rights and that there is need to take corrective action that does not continue to perpetuate this injustice.

It occurs to me that when this court sits as a civil court, its core business is to assist feuding or disputing parties reach some resolution in one way or the other. That dispute resolution is founded upon the inherent jurisdiction which is one of the most treasured attributes of this court. It must be in extremely special circumstances that this court jurisdiction is ousted.

I accept that the applicant could have safely proceeded to deal with its case in terms of s 96 of the Act (*supra*) but I do not accept that the applicant must be denied the desired relief as I deem the operation of s 96 not to be to the exclusion of this court’s intervention in appropriate circumstances. If anything I read that section to be complementary of any other action an aggrieved party might desire to take. The wording of the section does not seem to me to make it mandatory that the applicant must first exhaust that domestic remedy before seeking any other deemed competent remedy through this court. The use of the word “may” by simple application of the basic rules of interpretation seem to me to potentially invite other competent remedies like what the applicant has done to seek a declaratory order in this matter.

As already stated, it must be the correct position that where it is apparent to the court that an injustice has been done to a litigant and that prompt action is required to avoid perpetuating such an injustice the court should feel enjoined to adopt a robust approach to do justice between man and man.

In any event, where the court is seized with a matter requiring consideration for the granting or non granting of a declaratory order, the guiding principle must be whether the set of facts justify the granting or non granting of that remedy. I will come back to deal in greater detail with whether or not this is a proper case to grant the relief sought.

Did the authorization document amount to a licence or not?

To effectively answer this question one needs to look closely at the document marked Annexure ‘A’ on pp 20-22 of the applicant’s papers and the subsequent correspondence which tended to centre on that document.

The document, despite being headed “Authorization to Operate the Globalstar System in Zimbabwe”, does in fact contain what one would expect to get in a licence.

It contains the terms and conditions that would regulate the conduct of both the applicant and the first respondent. The life’s span of that document is given as 25 years renewable for a similar period subject to certain conditions. The document was signed by both the applicant and the first respondent. The subsequent correspondence between the applicant and the respondent like the specification of the frequencies to be used by the applicant elevated that document to the status of a licence. It is not possible to give it any other definition other than the one attributed to it by the applicant. It went beyond merely stating an intention to do business with the applicant.

If there was any doubt cast on the status of this document that doubt is completely destroyed by the letter dated June 19, 2000 from the first respondent’s Senior Secretary, one W.A Chiwewe which read as follows:-

“Thank you for your letter dated the 5th June 2000, in which you give us your proposed operating frequencies.

In line with our letter to you of 18th December, 1999 I now authorise you to operate on these frequencies. You will however, be expected to pay a licence fee of which you will be advised in due course”.

There can be no shadow of doubt in my view, that for all intends and purposes the authorization document was in fact a licence granted to the applicant by the first respondent.

Having carefully considered the points *in limine* I am of the firm view that these be found in favour of the applicant.

Having made this specific finding, I must now consider the matter on merits.

Was it competent for the first respondent to cancel the applicant’s licence in the manner it did?

One challenge that will forever continue to stare the second respondent right in its face is the unilateral manner in which it purportedly cancelled the applicant’s licence in direct violation of the rules of natural justice as evidenced by its letter of 12 November 2009. The applicant maintains in its papers that it never saw the Regulatory notice alluded to in that letter. The second respondent has not tabled any evidence to controvert the applicant’s position. Given the limited constituency which the second respondent had to deal with (less than five telecommunications licence holders) there is no cogent reason given as to why these companies were not served with notices in the usual manner. The conduct of the second respondent is demonstrably a violent attack on the rules of natural justice.

One of the very basic tenets of natural justice is that before one takes a decision that adversely affects the other, the affected individual must be given an opportunity to be heard.

I had occasion to deal with this principle of law in the case of *Langton Masunde* v *Minister of State for National Security, Lands, Land Reform and Resettlement* and this is what I stated in that case:

“In administrative law this concept is referred to as the *audi alteram partem rule.* It is part of our law. One of the most respected legal writers in Zimbabwe G. Feltoe states:

“Literally translated *audi alteram partem* means ‘hear the other party’. It

is an elementary notion of fairness and justice that a decision should not

be made against person without allowing the person concerned to

give his side of the story. Put in the context of administrative decision

making, the *audi* principle requires that a decision affecting a person’s

rights or his legitimate expectations of receiving a benefit, advantage or

privilege should only be made after hearing first from that person and

taking into account what he or she has said. If the decision-maker is

holding prejudicial information against the person concerned that

prejudicial information must be disclosed to the person and he or she

must be given a chance to refute that information[[7]](#footnote-7)”.

The evidence provided clearly show that the first respondent took a

unilateral decision to cancel the applicant’s licence. This should not be allowed to stand.

The thrust of the second respondent’s case as is apparent in clause 4 of its notice of opposition seems to be that the applicant was not licenced because it did not comply with the statutory obligations of such a licence some of which are listed in that clause. With respect, I believe this is not a persuasive argument. It completely misses the point. If the second respondent wants the applicant to comply with the statutory requirements, it must take appropriate corrective legal action to address that and not to unilaterally cancel the applicant’s licence.

Forcing compliance can be done in a completely different forum and if the second respondent’s officers have chosen to go on sabbatical leave instead of ensuring compliance by the applicant that is what the second respondent must deal with and not to deal with the applicant in the manner it has done.

I now move to deal with the requirements of a declaratory order and in doing so I wish to borrow the eloquently expressed views of WILLIAN J in *ADBRO INVESTMENTS CO. LTD* v *MINISTER OF THE INTERIOR & ORS*

“for a case to be a proper case, in my view, generally speaking it would require to be shown that despite the fact that no consequential relief is being claimed or perhaps could be claimed in the proceedings, yet nevertheless justice or convenience demands that a declaration be made, for instance as to the existence of or as to the nature of a legal right claimed by the applicant or of a legal obligation said to be due by a respondent. I think that a proper case for a purely declaratory order is not made out if the result is merely a decision on a matter which is really of mere academic interest to the applicant. I feel that some tangible and justifiable advantage in relation to the applicant’s position with reference to an existing future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought”[[8]](#footnote-8)

It is my well-considered view that the applicant’s case comments itself

well for the granting of a declaratory order because of the following reasons;

Evidence abounds that on 18 December 1998 the applicant was issued with a telecommunications licence by the first respondent. The applicant has over the years struggled to secure a reliable partner and there is no evidence to suggest that the delay was occasioned by the applicant.

There is undisputed evidence that at last the applicant has secured a partner and is now in a position to implement the project whose downstream benefits to this country cannot be over emphasized.

There is need to confirm the status of the applicant’s licence to cement the relationship between the applicant and its prospective partner to pave way for the swift implementation of the project.

The second respondent has indicated that the applicant’s licence has lapsed without any sound basis at law. The justice and convenience of this matter dictate that this court comes to the aid of the applicant by granting it a declaratory order, which order is not merely for academic interest but it set to bring about some tangible and justifiable advantage to the applicant.

Whichever way one looks at this matter, the relief prayed for by the applicant screams for recognition.

It is accordingly ordered as follows:-

1. It is declared that the telecommunications licence which the first respondent issued to the applicant on the 18th December 1988 is valid.
2. It is declared that the telecommunications licence which the first respondent issued to the applicant on the 18 December 1988 is valid for twenty five (25) years with effect from the 18th December 1998.
3. The second respondent shall pay the costs of suit.

*Mutezo & Mugomega,* applicant’s legal practitioners

*Muzangaza, Mandaza & Tomana*, 2nd respondent’s legal practitioners

1. Post and Telecommunications Act [*Cap 12:05*] [↑](#footnote-ref-1)
2. 2005(1) ZLR 198 (HC) [↑](#footnote-ref-2)
3. 1999(1) ZLR 243 (SC) [↑](#footnote-ref-3)
4. High Court Act [*Cap 7:06*] [↑](#footnote-ref-4)
5. 1988 (2) ZLR 129 (HC) [↑](#footnote-ref-5)
6. 1968(1) SA 102 (T) [↑](#footnote-ref-6)
7. Judgment No. HB 75/06 @ pp 8-9 [↑](#footnote-ref-7)
8. 1961 (3) SA 283T @ 285 B-D [↑](#footnote-ref-8)