TELECONTRACT (PVT) LTD

versus

POSTAL AND TELECOMMUNICATIONS REGULATORY

AUTHORITY OF ZIMBABWE

and

MINISTER OF INFORMATION, COMMUNICATION TECHNOLOGY,

POSTAL AND COURIER SERVICES

and

MINISTER OF TRANSPORT, COMMUNICATIONS AND

INFRASTRUCTURE DEVELOPMENT

HIGH COURT OF ZIMBABWE

CHIKOWERO J

HARARE12 July 2018 and 8 August 2018

**Opposed Application**

*U Sakhe*, for the applicant

*F Mahere*, for the 1st respondent

*V Munyoro*, for the 2nd respondent

No appearance for the 3rd respondent

CHIKOWERO J: The facts of this matter are well set out in the judgment of my sister Muremba J in case number HH 269/17.

It is therefore unnecessary for me to repeat the same facts. I must point out, however, that Muremba J did not decide this same application on the merits. Instead, she dismissed the application on the procedural ground that the relief should have been sought through an application for review, rather than a court application for a declaratory order.

On appeal, the judgment in case number HH 269/17 was set aside in its entirety. The Supreme Court remitted the matter to this court for consideration and determination on the merits.

I will therefore determine the application on the merits, oral argument having been presented before me on July 12th 2018. The relief sought by the applicant was as follows:

“1.The decision by the 3rd respondent in consultation with the 1st respondent setting the Class “A” Licence fees at US$5 500 000.00 be and is hereby set aside.

* 1. The Postal and Telecommunications (Licence Registration and Certification) (Amendment) Regulations, 2013 (No. 6) (S.I 122 of 2013) prescribing Licence fees for Internet Access Provider Licences be and are hereby declared ultra vires. The Postal and Telecommunications Act [*Chapter 12:05*] and therefore invalid, null and void.
  2. The 1st respondent be and is hereby ordered to publish all Internet Access Provider Licences in accordance with section 5 (a) of Statutory Instrument 262 of 2001 within thirty (30) days of the date of this order.
  3. The 1st respondent be and is hereby ordered to comply with its statutory obligations provided for under the Postal and Telecommunications Act [*Chapter 12:05*] and in particular, the enforcement of the provisions of s 37 (5) regarding publication of licences by licensees.
  4. The respondents shall pay the costs of suit.”

Paragraphs 1and 2 of the order sought are dependent on resolution of one issue. It is this. Whether the statutory instrument sought to be impugned should be struck down on the basis of gross unreasonableness.

Paragraphs 3 and 4 are resolved on the basis of statutory interpretation of the relevant provisions. In other words, it is a question of discovering the meaning of s 5 (5) of statutory instrument 262/01 and s 37 (5) of the Postal and Telecommunications Act [*Chapter 12:05*].

As regards the first two paragraphs of the draft order, the application is in substance one that seeks the striking down of Statutory Instrument 122 of 2013 as ultra vires s 99 (2) of the Postal and Telecommunications Act [*Chapter 12:05*] (hereinafter referred to as “the Act”).

In view of both the essence of the application and the Supreme Court order directing that the matter be determined on the merits, l find it of no moment to be detained by the debate whether what was before me was an application for a declaratory order or one where the applicant has had resort to the court’s inherent jurisdiction to declare subsidiary legislation as ultra vires on the basis of unreasonableness.

The position is settled that this court has the power to strike down subsidiary legislation as ultra vires the enabling Act of Parliament on the basis of unreasonableness: *PF ZAPU* v *Minister of Justice* (2) 1985 (1) ZLR 305 (SC). *S* v *Nyamupfukudza* 1983 (2) ZLR 43 (SC). *Satellite Television Users Association* v *Posts and Telecommunications Corporation* 1991 (2) ZLR 226 (HC). *Affretair (Pvt) Ltd and Another* v *MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (SC)[[1]](#footnote-1).

The onus to prove that subsidiary legislation is unreasonable such that it should be struck down as being ultra vires the parent legislation is on the applicant. The test was laid down in Kruse v Johnson [1898] 2 QB91 at 99; [1895-9] All ER Rep 105 in the following words of Rusell CJ at 110;

“… I do not mean to say that there may not be cases in which it would be duty of the Court to condemn by-laws, made under such authority as these were made, as invalid, because unreasonable. But unreasonable in what sense? If for instance, they were found to be partial and unequal in their operation between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the eyes of reasonable men, the court might well say, ‘Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.’ But it is in this sense, and this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there.”

This is the benchmark cited with approval, and applied, in all the local decisions I have referred to above. It is the law applicable in Zimbabwe. The South African Courts have gone the same route as is reflected by Tindall AJP in Belew V Brakpan Town Council 1937 TPD 439 at p 443.

“Where such a power (i.e to fix licence fees) is given, the court cannot interfere on the mere ground that it considers the fee unreasonably high. The size of the fee, however might in certain instances be a factor in considering whether the Council genuinely exercised its powers of licencing and regulating, or mala fides used such powers for achieving an ulterior object such as prohibition. For instance, the Council might prescribe a licence fee so outrageously high that the only reasonable inference was that the object was to prohibit the business in question entirely.”

Since the onus lay on the applicant to prove that both process leading to the promulgation of Statutory Instrument 122 of 2013 and the fixing of the licence fee at US$5 500 000.00 were ultra vires the parent Act I must examine the evidence tendered to support applicant’s contention.

Both parties were agreed that the power to make the regulations in question and to fix the licence renewal fees was derived from s 99 (2) of the Act. It reads:

“ The Minister may, after consultation with the Authority, make regulations prescribing all matters which by this Act are required or permitted or which, in the opinion of the Minister, are necessary or convenient to be prescribed for carrying out or giving effect to this Act.”

The relevant Minister for the purposes of the Act is the first respondent. Second respondent was the Acting Minster for purposes of administration of the Act at the time that the regulations were gazetted. The Authority is first respondent. All this was common cause.

I have not lost sight of the provisions of s 134 (b), (c) and (d) of the Constitution of Zimbabwe Amendment (Number 20) Act, 2013. However, in so far as the process of promulgating the Statutory Instrument is concerned, section 99 (2) of the Act gives second respondent the discretion to consult the first respondent.

It is not mandatory that such consultation be carried out. This notwithstanding, a reading of Statutory Instrument 122 of 2013 shows that such consultation was done before the regulations were made.

In this regard, Statutory Instrument 122 of 2013 reads;

“It is hereby notified that the Minister of Transport, Communication and Infrastructural Development has, in terms of section 99 of the Postal and Telecommunications Act [*Chapter 12:05*], after consultation with the Authority, made the following regulations…”(underlined for emphasis).

This consultation was, as is common cause, done. On its part, first respondent avers that it consulted the stakeholders in the industry. Applicant asserts that it was not consulted, and believes that no other industry players were consulted by the first respondent.

In fact, applicant’s position is that in the absence of evidence attached by first respondent to its affidavit showing that it consulted other industry players then l must find as a fact that no such consultations were done.

That cannot be correct. The onus lies on the applicant to prove that no industry players were consulted by first respondent. It therefore behoved the applicant to place such evidence before the court. At the time of filing of the application, applicant had been in the industry for at least twenty years. It could not have failed to know the identity of the other players in the same industry and to gather the necessary evidence from them to support its case.

I therefore find that the failure to attach relevant supporting affidavits was fatal to the applicant’s case in this regard. An application stands or falls on the founding affidavit. Further, the attempt by applicant to build up its case by attaching evidence of internet access renewal fees from other countries in the Southern African region was of no assistance. Such evidence was contained in the answering affidavit.

Even if such figures were contained in the founding affidavit the fact that our economies are different would militate against the court relying on those amounts from other countries. I have not acceded to applicant’s elaborate argument that l must find the process of promulgating the Statutory Instrument as unreasonable merely because there is no evidence of respondents’ application of the International Telecommunications Union’s standards and guidelines, research on the level of licence fees in the region and worldwide and thereafter consultation with local stakeholders to input into this data before fixing of local internet access provider licence fees.

Different jurisdictions have different processes of coming up with the content of subsidiary legislation. There was in any event no evidence put before the court that other countries followed the process advocated by the applicant in coming up with the content of their subsidiary legislation and in promulgating that legislation.

Now to the quantum of the internet access provider licence renewal fee at US$5 500 000.00 covering a period of fourteen years. No evidence was placed before the court to prove that pegging of the Class “A” internet access provider renewal licence fees at a once off upfront amount of US$5 500 000.00 over 14 years had the effect of being partial and unequal in its operation. There was no evidence that other class “A” internet access provider renewal licence fees were either affected differently by the quantum of the fees or were afforded payment plans to settle the same.[[2]](#footnote-2)

Further, a perusal of Part 1 (a) to (e) of Statutory Instrument 122 of 2013 shows that there were different figures by way of renewal fees for different classes of licence holders. Some are higher and some are lower than the US$5 500 000.00.

There is no indication whether all these fees are also for once off renewal periods covering a fourteen year period. In these circumstances, there is no peg on which this court would be justified in finding that the US$5 500 000.00 operates partially and unequally as between class “A” licence renewal holders among themselves on one hand and between this and other classes on the other.

I also remain unpersuaded that the fixing of the instant fee at US$5 500 000.00 was in bad faith. Applicant’s lone voice that the size of the fee threatened its continued operation is not evidence of bad faith. The fee applied to everyone similarly circumstanced.

Neither am I persuaded that the size of the fee was so oppressive or constituted gratuitous interference with applicant’s constitutional right to trade as could find no justification in the minds of reasonable men.

I am cognisant of the fact that there remained an annual fee payable by class “A” licensees. But the US$5 500 000.00 covered not five or ten but a total fourteen years. That period is a year shy of a decade and a half. Looking at that period, I am unable to agree that the sum of US$5 500 000.00 is outrageously high and prohibitive of trade. I am unable to find that it is unreasonable. There is simply no evidence on which l can sustain such a finding: *ZB Bank Ltd* v *Eric Rosen (Pvt) Ltd and others* 2015 (1) ZLR 314 (H).

I will quickly dispose of the two other remedies sought by the applicant. There is no legal provision stipulating how applicant should enforce the obligation imposed on a licensee to publish his or her licence in a newspaper circulating in the area where the trade will be carried out. That gap in the law is for the second respondent to cover by enacting appropriate legislation.

Second respondent cannot pass the buck to first respondent through a Ministerial order not backed by the necessary subsidiary legislation. As for first respondent’s obligations under s 5 (5) of Statutory Instrument 261/01, the relief sought is merited. Section 5 (5) of Statutory Instrument 261/01 reads;

“The authority shall cause all the licences issued to be published in the Gazette.”

It is settled that where no time frame is set out then the law requires that the act be performed within a reasonable period. The Ministerial order was issued on the 30th of June 2016.

First respondent did not even need it to act. The obligation to publish in the Gazette is statutory. It is the law. It simply has to be obeyed. The vague excuses tendered by the first respondent are simply unacceptable. It pleaded “administrative constraints,”without specifying the nature thereof.

In the result I make the following order:

1. The application is dismissed save that the first respondent be and is hereby ordered to publish all Internet Access Provider Licences in accordance with s 5 (5) of Statutory Instrument 262 of 2001 within thirty days of the date of this order.
2. The applicant shall pay the first and second respondents’ costs of suit.

*Kantor and Immerman*, applicant’s legal practitioners

*Muzangaza, Mandaza and Tomana*, 1st respondent’s legal practitioners

*Civil Division of the Attorney General’s office*, 2nd respondent’s legal practitioners

1. See also A Guide to Administrative and Local Government Law in Zimbabwe 2012 by G. Feltoe pp 9-10 [↑](#footnote-ref-1)
2. See also Batsirai Children’s Care v Minister of Local Government and others 2011 (2) ZLR 203 (H) [↑](#footnote-ref-2)