

REPORTABLE - 1

ECONET WIRELESS (PRIVATE) LIMITED
versus
POSTAL AND TELECOMMUNICATIONS
REGULATORY AUTHORITY OF ZIMBABWE
and
MINISTER OF TRANSPORT AND COMMUNICATIONS
and
TEL-ONE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
OMERJEE J,
HARARE, 3 February, 2004

Advocate *E Matinenga* for the applicant
Mr *Muzangaza* of Messrs Muzangaza Tomana and Mandaza for the first respondent
Mrs *F Maxwell* of the Attorney-General's Office on behalf of the second respondent
Mr *Mhishi* of Messrs Dube, Manikai and Hwacha on behalf of the third respondent

URGENT CHAMBER APPLICATION

OMERJEE J: The applicant is a duly registered telecommunications operator who obtained a licence in or about September 2002 issued in terms of the provisions of the Postal and Telecommunications Act [Chapter 12:05] as read with the Postal & Telecommunications (Licensing, Registration and Certification) Regulations 2001 published in Statutory Instrument 11A of 2001 ("the Regulations"). This licence is valid for a period of fifteen years.

On Friday 30th January, 2004 the Second Respondent published in the Government Gazette, the Postal & Telecommunications (International Telecommunications Services) Regulations 2004 in Statutory Instrument 18 of 2004 ("the latter Regulations"). Broadly speaking, the effect of the latter regulations is to put in place a mechanism for the control and monitoring of international telecommunications traffic in the hands of the Third Respondent.

The Applicant lodged the present application on an urgent basis as it was of the view that the rights it enjoys in terms of its licence were being controlled or restricted by virtue of the latter Regulations

Specifically Clause 5.1.1. of the licence issued to the Applicant gives it the right to control and operate a limited facility for the transmission and receipt of international cellular traffic, originating and terminating in the Applicant's network. A closer scrutiny of the latter regulations reveals that the effect thereof amongst other things, is to amend the terms of the licence currently held by the Applicant. Section 4 of the latter regulations vests exclusive authority and control of international communication services in the Third Respondent. It reads as follows -

"Access to international telecommunications services

- 4, TelOne (Private) Limited shall -
 - (a) provide access to all international telecommunications services;
 - (b) provide international interconnection capacity for all other public licensed telecommunications operators including Voice Over Internet Protocol".

Counsel for all three Respondents were agreed and conceded that the latter regulations have the effect of amending the terms of the licence currently held by the Applicant.

The procedure to be complied with in regard to an amendment of an existing licence are governed by section 42 of the principal Act as read with section 11 of the regulations. Section 42(2) makes it mandatory for the authority to give prior notice in writing of its notice to amend the licence including the nature of the proposed amendment. Furthermore, this section obliges the authority to afford the affected party - the Applicant - the opportunity to make representations. The lawmaker in enacting this provision expressly incorporated the *audi alteram partem* rule i.e. the right to be heard. The regulations in section 11 are similarly consistent with the

provisions of section 42 of the principal Act. The regulations expressly require the authority, the First Respondent, to allow the affected party, a period of thirty days within which to make representations regarding any proposed amendment to its licence.

In the light of the legal position, it was hardly surprising that Counsel representing the First Respondent submitted that to the extent that the licence of the Applicant would in effect be amended by the latter regulations, the procedure outlined in the Act regarding the amendment of an existing licence, had not been complied with. Counsel was not in a position to offer any evidence of any consultation having taken place as between the First Respondent and the Applicant in this instance. Counsel further submitted that the First Respondent is the authority in terms of the Act and the regulations to amend an operator's licence. He revealed in the course of the hearing that the First Respondent is not the party that had sought to amend the Applicant's licence. Counsel representing the First Respondent conceded that the Applicant had accordingly established its case in this matter.

Counsel representing the Second Respondent also conceded during the hearing that the amendment of the Applicant's licence, the result of the latter regulations must be done in accordance with the law governing such amendments. She submitted that the Second Respondent had acted in good faith in enacting the latter Regulations. Counsel conceded however, that in doing so there had been no compliance with the provisions of section 42 of the Act. Counsel further conceded that the Applicants had established their case.

Counsel for the Third Respondent largely confined his submissions to the issue of technical capacity to absorb additional international telecommunications traffic. Counsel was of the view that in regard to the specific issue before the Court -

namely the amendment of the licence of the Applicant, compliance with the law was mandatory.

The concessions by Counsel are in my view proper. It is clear that there was no compliance with the provisions of the Act to the extent that the latter regulations purports amongst other things, to amend the licence currently held by the Applicant. Counsel for all the Respondents were of the view that given this background, the order to be given should be final in nature and not an interim or provisional order. In the circumstances the order as consented to by all parties and in final form is as follows -

"That the provisions of the Postal & Telecommunications (International Telecommunications Services) Regulations S.I. 18.04 be and are hereby declared null void and of no effect to the Applicant in so far and to the extent that they purport to amend the Applicant's licence".

In regard to costs, it was submitted by Counsel representing the First Respondent that his clients were simply before the Court to explain their position. Counsel freely conceded that the Applicants had established their case and were entitled to relief. Counsel for the Third Respondent restricted their submissions to the issue of their technical capacity, as the latter regulations impose upon them certain responsibilities. They were not strictly a party to the issue for determination raised by the Applicant. This leaves the Second Respondent who, on the concession by Counsel caused the promulgation of the statutory instrument.

In view of the determination made it follows that costs in this matter should be payable by the Second Respondent. It is so ordered.

Kantor & Immerman, legal practitioners for applicant
Muzangaza Tomana and Mandaza, legal practitioners for first respondent
Office of the Attorney-General, for second respondent
Dube, Manikai & Hwacha, legal practitioners for third respondent