INFORMATION MEDIA INVESTMENTS (PRIVATE) LIMITED
versus
MINISTER OF INFORMATION, COMMUNICATION & TECHNOLOGY, POSTAL AND COURIER SERVICES
and
POSTAL AND TELECOMMUNICATIONS REGULATORY AUTHORITY OF ZIMBABWE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 8 & 23 March 2016

Opposed application

A Bangidza, for the applicants
M Chimombe, for the 1st respondent
F Mahere, for the 2nd respondent

TSANGA J: The issue in this opposed application emanates from the type of telecommunications licence granted by the second respondent, Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) to the applicant, Information Media Investments (Private) Limited (IMI P/L) in 2013. The granting of the licence followed a declaratory order by the High Court in October 2012. Effectively, the declaratory order stated that the authorisation which had in the initial instance been granted to the applicant by the then Minister of Information and Telecommunications way back in December 1998, to operate what was referred to as a "Globestar System in Zimbabwe", a type of telecommunications network, remained valid. This authorisation had been withdrawn on the grounds that it had expired. The applicant had challenged this on the basis that the authorisation obtained had been for a 25 year period and was therefore still valid. However, for various reasons, it had failed to roll out its programme over the years as intended.

Having obtained the declaratory order and a licence having been issued, what IMI P/L now seeks is that POTRAZ in particular be ordered to add what is described as "the frequency of Terrestrial Cellular Sub network" to that licence. This is said to have been omitted yet as alleged it goes to the root of the service IMI P/L applied for and intended to

provide. The dispute arises from POTRAZ's refusal, as the regulating authority, to add the clause to the licence on the basis that what was granted to IMI P/L was a telecommunications licence to operate a "global mobile by satellite network". POTRAZ's line of opposition is that the type of licence being applied for is not being given to private players. It is also averred that the frequencies and bands that were provided by applicants are so general that it would be impossible for any technical person to set up a communication system without further information. Also emphasised by POTRAZ is that the function of licensing is solely within its purview in terms of s 4 (1) (d) and (e) of the relevant telecommunications Act. More significantly, POTRAZ emphasises that the conduct complained of amounts to a refusal to amend the licence or constitutes an amendment of the licence and therefore the applicant's procedure should have been in terms of s 96 (1) of the Postal and Telecommunications Act [*Chapter 12:05*].

The first respondent who is the Minister of the Ministry of Information, Communications, Technology, Postal and Courier Services (the Minister) also avers that it will be prejudiced by sanctioning the additional scope of terrestrial cellular network and that the new scope sought by the applicant has a different application procedure and licensing fee structure. The Minister additionally avers that the applicant has already failed to pay the $2.4 million for the licence which was issued and that the licence sought requires them to pay $137.5 million in licence fees. It is said that this is what is being paid by other service providers and that were it to issue the type of licence sought, it would be authorising an uneven playing field.

Points in *limine*

At the hearing, Ms *Mahere* who represented POTRAZ, raised three points in *limine* on its behalf. They all rested on the same foundation, namely, the lack of expertise of this court to address what is essentially an executive and administrative matter requiring specialist knowledge. The first of these was that the applicant had failed to exhaust domestic remedies before coming to this court. The second point was that the order sought is defective due to lack of clarity on what exactly was being sought. The third point was that there are material dispute of facts which this court does not have the ability to resolve. Each of these will be addressed more fully below against the backdrop of the applicable legal provisions in the Post and Telecommunications Act [*Chapter 12:05*] which is at the gist of the non-exhaustion of local remedies argument. The essence of the POTRAZ's position before this court can be

summarised as being that the court should defer to the expertise of the appointed agencies as their capacity to fact find in this specialist field is certainly higher than that of this court.

The law and its analysis

Section 4 of the Act is pertinent in that it sets out fully the functions and powers of POTRAZ as an authority. Among its functions in terms of s 4 (d) is:

> "to exercise licensing and regulatory functions in respect of postal and telecommunications systems and services in Zimbabwe, including the establishment of standards and codes relating to equipment attached to telecommunication systems."

And in terms of s 4 (e)

> "to exercise licensing and regulatory functions in respect of the allocation and use of satellite orbits and radio frequency spectrum in Zimbabwe for all purposes, including the establishment of standards and codes relating to any matter in connection therewith".

Section 96 of the Act which deals with appeals from POTRAZ'S decisions provides as follows:

> **"Appeals**
>
> (1) Subject to this section, any person who is aggrieved by
> (a) a decision of the Authority not to issue a licence or certificate
> ***(b) any term or condition of a licence issued to him, or a refusal by the Authority to specify a term or condition in a licence; or***
> (c) a refusal by the Authority to renew a licence or certificate; or
> ***(d) any amendment of a licence or a refusal by the Authority to amend a licence; or***
> (e) the suspension or cancellation of a licence; or the grant or refusal by the Authority to grant any approval or authority in terms of this Act ; or
> ***(f) the outcome of any mediation by the Authority of a dispute between licensees; or***
> (g) such decision of the authority as may be prescribed;
> ***(h) such decision of the Authority as may be prescribed***[1]
>
> **may** within twenty-eight days after being notified of the decision or action of the Authority concerned, appeal in writing to the Minister, submitting with his appeal such fee as may be prescribed.;
>
> Provided that such appeal shall not suspend the operation of any license or certificate issued by the authority.
>
> 2) For purpose of the determining an appeal noted in terms of subsection (1) the Minister may require the Authority to furnish him with reasons for the decision or action that is subject of the appeal and a copy of any evidence upon which reasons are based.
>
> 3) The Minister, after due and expeditious inquiry, may make such order on any appeal noted in terms of subsection (1) as he considers just.
>
> 4) **An appeal shall lie to the Administrative Court** against any order of the Minister in terms of

[1] Provisions in bold are my emphasis of the applicable provisions to the dispute in question.

subsection (3)
5)…..
6).....
7)……"

As stated, the first point in *limine* that was raised was that the relief ought to have been sought in terms of s 96 whereby the conduct of POTRAZ, in refusing to add the clause in question, should have been subjected to an appeal to the Minister. In particular, subsections b), d), f) and h) of s 96 were deemed to speak substantively to the grievance in question. By approaching this court, IMI P/L was said to have chosen the wrong route altogether as it had not exhausted domestic remedies. The case of *Djordjevic* v *Chairman Practice Control Committee, Medical & Dental Practitioners Council of Zimbabwe & Anor*[2] was referred to in support of this contention on the need to exhaust domestic remedies before approaching the courts unless there are good reasons for not doing so. The general thrust adopted in that case was that the courts will not interfere in the sphere of practical administration in the absence of good reason to do so.

On the other hand, through its lawyer Mr *Bangidza,* IMI P/L denied that this is a correct interpretation of s 96 on the basis that the word "may" in s 96 gives an applicant an option whether or not to follow that procedure. He read this section as indicating a choice whether or not to use this conduit of appeal or some other channel of choice, such as this court in this instance. He argued that the use of the word "may" is to invite other competent remedies. He further argued that in granting the declaratory order, it had been emphasised by the judge in that case that it must only be in extremely special circumstances that this court's jurisdiction is ousted. Furthermore, it had been equally emphasised in that judgment that the need to exhaust domestic remedies is not an absolute rule of thumb. (See *Information Media Investments (Private) Limited* v *Minister of Transport and Telecommunication N.O & Anor*[3]*)* In addition, it was argued that insisting that IMI P/L should have approached POTRAZ and the Minister as part of its domestic remedies, would have essentially amounted to approaching the same people who had unilaterally cancelled its authority/ licence in the first place, which had had to be reinstated by way of a quest for a declaratory order. Thus, IMI P/L emphasised that it would have been highly unlikely that it would have obtained any joy hence its approach to this court for remedial action.

[2] 2009 (2) ZLR 221 (H)
[3] HH 419-12

In finding resolution to the first point in *limine* it seems to me that the point of departure must of necessity be the unpacking of the use of the word "may" in s 96 (1). According to the on-line legal dictionary[4], the use of the word "may"must be read in context. It also goes on to state as follows:

> "Whenever a statute directs the doing of a thing for the sake of justice or public good, the word 'may' is the same as the word 'shall' ".

It also says that:

> "The words 'shall' and 'may' in general acts or private constitutions are to be construed imperatively."

Bouvier's Law Dictionary [5] construes the word as follows:

> "In interpreting, the word 'may' should be construed as equivalent to 'shall' or 'must' in cases where the good sense of the entire enactment requires it or where it is necessary in order to carry out the intention of the legislature; or where it is necessary for the preservation or enforcement of the rights and interest of the public or third persons, but not for the purpose of creating or determining a character of rights. Where there is nothing in connection of the language or in the sense and policy of the provision to require an unusual interpretation, the use is merely permissive and discretionary".

An examination of cases that have considered the use of the word "may" portray a thrust in favour of contextual reasoning in the usage of the word. For example, Justice Ward in *Chief Pass Officer, Johannesburg* v *Mashamba* [6] stated that it is only by considering the general provisions of the law in question and the purview of the whole legislation in the subject that we can tell whether "may" confers discretionary power or an obligatory duty. No definite rule can be laid down as to when may confers a discretion and when a duty.

In *Custodian of Enemy Property* v *Brakpan Mines*[7] Wessel JP stated that the word "may" is wholly discretionary and may means "may". However, he further elucidated on its use as follows:

> "But there is no doubt that the legislature has in the past used, and will no doubt in future use, the word 'may' for the purposes of conferring an enabling power on an official……Sometimes the legislature uses the formula 'may and shall'. At times it uses the term 'may' as an abbreviated form of 'may and shall', and then the officer enabled to do an act is in fact obliged to do the act if the required conditions are fulfilled. At other times the legislature uses the formula 'may and it shall be lawful' with the intention that a power and a discretion to exercise it should be conferred upon that official. It is only by considering the general provisions of the law in question and the purview of the whole legislation on the

[4] http://legal-dictionary.the freedictitionary.com
[5] John Bouvier, *Bouvier's Law Dictionary Volume 2* (London: Sweet and Maxwell, Boston: Boston Book Company) 1898 at p 384
[6] *[1917]TPD* at 399
[7] *[1922] TPD at p188*

> subject…. that we can tell whether 'may' confers a discretionary power or an obligatory duty. No definite rule can be laid down as to when 'may' confers a discretion and when a duty"

The above paragraph was also cited with approval in the case of *Santo* v *General Accident Insurance Co (Zimbabwe) Ltd*[8] where it was also held that the word "may" is ambiguous and that it could be permissive or mandatory in its application depending on the context. In the context of the particular case "may" was construed as "shall". The use of the word "may" was also considered in *Moyo* v *President Board of Inquiry & Ors*[9] where in the context of the case it was deemed to impose a duty and not a discretion. The same conclusion was also reached on the use of the word in *Masiyiwa* v *TM Supermarkets*[10]. Much therefore depends on the context at hand.

Therefore, the issue at hand is to ascertain the contextual use of the word "may" in the relevant Act. The issuing of telecommunications licences is clearly a specialised field for which the legislature saw fit to create a specialised administrative agency in the form of POTRAZ to apply and execute its mandate. Undoubtedly, among its duties in its specialised role is to determine factually and expertly applications brought before it. The relevant body, namely POTRAZ together with the Minister are authorised to engage in the administration and adjudication of the statute concerned. Section 96 in particular embodies the separation of powers between the executive and the judiciary in the initial instance in resolving issues arising from the granting of licences. Dealing with a specialised subject matter as it does, the Act clearly locates power in the initial instance in the executive branches, with power moving to the courts only for the final review of the administrative decision. What is clear from the provision is that any dissatisfaction with the decision of POTRAZ as regards a licence must first be appealed to the Minister responsible for the Act. I therefore do not read the use of the word "may" as discretionary in the overall context of the Act. It is in my view intended to be imperative. He is granted authority to determine the range of grievances as outlined in s 96 of the Act. Also apparent from the provision is the clear intention to provide a quick remedy for addresses grievances as the appeal to the Minister must be made within 28 days of the decision being appealed against upon payment of a stipulated fee.

It is also this section that addresses the issue of procedure in terms of the judicial review of administrative action. Remedial intervention only kicks in once all the questions of facts ideally suited to the expertise of POTRAZ as the administrative agency have been

[8] 1995 (1) ZLR 322 (S)
[9] 1996 (1) ZLR 319 (H)
[10] 1990 (1) ZLR 166 (SC)

addressed to their logical conclusion, and once grievances arising therefrom have been equally addressed by the Minister as the appeal authority. If dissatisfied with the decision of the Minister, then an appeal lies to the Administrative Court which has the power to confirm vary or rescind the order made. It is therefore the Administrative Court that that is clearly articulated as the court of resolution of any alleged administrative injustices that may have arisen from the appeal to the Minister. In terms of general review of decisions of administrative bodies the focus would generally centre on issues of procedural and substantive due process.

Ms *Mahere* also argued on behalf of POTRAZ that the High Court in several decisions emanating from this court has already largely held that it has no jurisdiction to interfere in administrative decisions and that it only does so in the exercise of its review powers. Cases alluded to for this line of argument included *Tsvangirai & Anor* v *Registrar general & Ors;* [11] *ANZ* v *Media Information Commission and Another;*[12] *Affretair (Private) Limited* v *MK Airlines (Private) Limited.*[13] She further argued that IMI P/L seeks to avoid the very many questions regarding compliance with the law which would have arisen if it had gone through the appeal route in terms of s 96 of the Act. It was argued that its approach to this court is an attempt to short circuit due process and that it should not seek to obtain a licence through a *mandamus*.

I agree fully that it is s 96 that the applicant should have engaged. As I have already outlined the legislature articulated the processes and procedures to be followed in a matter such as this. The hearing by the Minister is part of the delegated authority in terms of the Act. Clearly, this is not a case where the courts can say they have the same expertise as PORTRAZ in the matter justifying an exercise of their original jurisdiction, which granted is provided for constitutionally. There is no justification for requiring this court to proceed outside of the stipulated procedures when there are equally other bodies that have power to hear the matter. Whilst appreciating that the High Court has original jurisdiction in all civil and criminal matters in terms of s 171 of the Constitution, the use of the High Court's original jurisdiction, as I stated in the case of *Machote* v *Manpower Development Fund*,[14] cannot ignore the existence of other legislation that may clearly be intended to be considered in the exercise of that original jurisdiction.

[11] 2002 (1) ZLR 25 (H)
[12] 2007 (1) ZLR 272 (H)
[13] 1996 (2) ZLR 15
[14] HH 813-15

As articulated in that case:

> "(W)hen a court has original jurisdiction this refers to its standing and right to hear a case as the first court of first instance. Constitutionally, the High Court has indeed been conferred with unfettered power to exercise original jurisdiction in all civil and criminal matters as argued by the respondent. Such original jurisdiction is exercisable even in matters regulated by statute. However, whilst s 171(1) (a) does confer upon the High Court original jurisdiction over all civil and criminal matters throughout Zimbabwe, this overall authority also has to take into account other applicable constitutional provisions as well as legislation in force that in reality places some breaks or limits on its exercise of original jurisdiction in specific instances"[15].

The reason given by IMI P/L that this court should intervene because approaching the Minister would not have been practical given his initial withdrawal of the authority, in my view cannot stand. Once the court had issued the declaratory order which was a complied by reinstating the licence, then the case was brought back on track to be dealt with in terms of the law applicable as outlined in s 96 of the Act in the face of any grievances. That IMI P/L chose not to utilise the stipulated legal procedures because of its own beliefs cannot now be used as its basis for circumventing the provision and asking this court to make a decision through the back door. I therefore uphold the first point in *limine* that domestic remedies ought to have been utilised and that IMI P/L ought to bear the consequences of failing to comply with the law in addressing its grievance.

The second point in *limine* relates to para 1 of the draft order on the basis that its wording is so general as to be incapable of enforcement. It reads as follows:

> "The 1st and 2nd respondents be and are hereby ordered to add to the clause of terrestrial cellular sub network to the licence that was issued 2nd July 2013."

The argument on the second point in *limine* was that the application ought to be dismissed as the court does not know what it is being asked to add. In response, IMI P/L pointed to the fact that among their documents in support of the application were the letters from the then Minister clearly indicating what had been issued to them at the time. In my view, the second point in *limine* harks back to the issue of the special expertise of the administrative body in the subject matter in question which I have touched on above and needs no repeating. Much has happened in the field in the last 18 years in this country especially in developing the grounded rules and operational parameters applicable to licences.

[15] At page 4

This is clearly an issue where this court has no good reason not to defer to the expertise of the relevant body in question. Accordingly the second point in *limine* is upheld.

The third point in *limine* is also of a similar vein. It is that there are material disputes of fact which this court cannot resolve as they would require expertise provided in the Act. Again, the issue of POTRAZ as the expert agency whose decision is appealable to the Minister has been canvassed. Significantly the Minister may request reasons for the decision taken which is being appealed against. The point in *limine* is equally upheld, more so given the expert nature of the underlying factual reasons that have been averred by both Potraz and the Minister for refusing to amend the licence in question.

Costs have been sought on a higher scale on the basis that the application was ill founded as IMI P/L clearly has no finances to pay the licence fees and merely sought the amendment in question for speculation purposes. It was also argued that punitive costs are justified as the application seeks to short circuit due process well knowing that the appeal before the relevant authority is well out of time. Looking at the totality of the case, I must say I agree that the application is ill founded as there was a clearly articulated administrative remedy for the applicant's grievance which it chose to ignore.

There is no need to go into the merits of this matter, for the reasons I have outlined.

Accordingly, I order as follows:

The application be and is hereby dismissed with costs on a higher scale.

Tavenhave & Machingauta, applicant's legal practitioners
Civil Division of the Attorney General's Office, 1st respondent's legal practitioners
Muzangaza Mandaza & Tomana, 2nd respondent's legal practitioners