

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
MUREMBA J
HARARE, 31 January 2017 & 3 May 2017

Opposed Application

U Sakhe, for the applicant
Ms F. Mahere, for the 1st respondent
Ms V. Munyoro, for the 2nd respondent

MUREMBA J: The applicant has been in the business of providing internet services since 1997. It is suing the first respondent (POTRAZ) as a body corporate and authority responsible for the licensing and regulation of telecommunication service providers in terms of s 30 of the Postal and Telecommunications Act [*Chapter 12:05*]. The second respondent, the Minister of Information is being sued as the authority responsible for the administration of the Postal and Telecommunications Act. The third respondent, the Minister of Transport is being sued as the Minister who was responsible for the administration of the Postal and Telecommunications Act when the Regulations under Statutory Instrument 122 of 2013 were promulgated. The third respondent did not file any papers in response to the application.

The facts of the matter are as follows. From 1997 to 2005 the applicant was providing internet access services under a Franchise License from Tel-One. On 19 July 2005 it started

operating on its own and was issued with a class B licence which was valid up to 18 July 2015, but was later extended to 30 June 2016 and then to 30 August 2016.

The applicant stated that in 2014 it approached the first respondent in relation to issues to do with its class B licence terms and its duration. There was also an issue to do with the upgrade and convergence of all Internet access licences to class A licences. The applicant said that it wanted clarification on these issues. The parties failed to reach a consensus on the issues and this resulted in the applicant appealing to the second respondent, the Minister of Information in terms of s 96 of the Postal and Telecommunications Act. The second respondent called for a hearing and resultantly, issued a Ministerial order on 30 June 2015 which was to the following effect.

“It is ordered that:

1. The commencement date for Telecontract (Pvt) Ltd Class B licence Number 1APB 200507002 is the 19th July 2005 and shall subsist for a period of ten (10) years expiring on 18th July 2015.
2. POTRAZ issue to Telecontract by the 10th July 2015 a draft IAP Class A licence for consideration.
3. POTRAZ issue to Telecontract (Pvt) Ltd an Internet Access Provider Class A Licence subject to fulfilment of all statutory requirements.
4. POTRAZ complies with all its statutory obligations provided for under the Postal and Telecommunications Act [*Chapter 12:05*] and in particular, the enforcement of the provisions of section 37 (5) regarding publication of licences by licencees.
5. POTRAZ publishes all Internet Access Provider licences in accordance with section 5 (5) Of Statutory Instrument 262/2001 by the 1st of August 2015.”

In compliance with clause 2 of the Ministerial order, the first respondent duly issued the applicant with the draft IAP Class A licence. So the applicant was given an opportunity to apply for a class A licence. In terms of Statutory Instrument 122 of 2013, the fees for a class ‘A’ licence are US\$5 500 000.00 (five million and five hundred thousand United States dollars) and US\$2 750 000.00 (two million and seven hundred and fifty thousand United States dollars) is for a class B licence. These fees are for a period of 14 years. In terms of these regulations and the Postal and Telecommunications Act, the licence fees should be paid on or before issuance or renewal of a licence. These regulations were promulgated by the third respondent in consultation with the first respondent. The applicant was unable to raise the fees that are required for the class A licence it wanted.

Having faced challenges in raising the fees for a class ‘A’ licence, the applicant wrote several correspondences to the first respondent making proposals that it be allowed to make payments based on a payment plan it submitted. The applicant proposed to pay at least 30 % of

the fees initially and the balance over a period 10 years. The applicant outlined the challenges it was facing in raising the whole amount at once, but the first respondent did not find this acceptable. On 10 June 2016, the first respondent issued a circular rejecting any requests for proposals to pay the licence fees by way of instalments. It stated that all the fees must be paid before or at the time that the licence is issued or renewed. Before the issuance of this circular, the applicant had been advised of this position in a letter addressed to it on 1 April 2016.

The refusal by the first respondent to accept payment plans prompted the applicant to make the present application seeking the following order.

- “1. The decision by the 3rd respondent in consultation with the 1st respondent setting the Class “A” License Fees at US\$5,500,000.00 be and is hereby set aside.
2. The Postal and Telecommunications (License Registration and Certification) (Amendment) Regulations, 2013 (No 6) (S.I 122 of 2013) prescribing license 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.
3. 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.
4. 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 section 37(5) regarding publication of licenses by licensees.”

The applicant stated in its application that,

“This is an application for an order declaring that the Telecommunications License Renewal Fees set out in the Postal and Telecommunications (Licensing, Registration and Certification) (Amendment) Regulations, 2013 (Statutory Instrument 122 of 2013) (“the 2013 Licensing Regulations”) are grossly unreasonable and that the 2013 Licensing Regulations are invalid, *ultra vires* the Postal and Telecommunications Act [*Chapter 12:05*] and therefore null and void.

The applicant further seeks an order in terms of s 4 of the Administrative Justice Act [*Chapter 10:28*] directing the first respondent to publish all Internet Access Provider licenses and ensure that all licenses comply with the provisions of s 37 (5) of the Postal and Telecommunications Act [*Chapter 12:05*].”

The applicant averred that the first respondent has taken the position that all licence fees must be paid up front despite the amount being outrageously high and arbitrary. It averred that the refusal by the first respondent to accept payment plans has resulted in it being unable to pay the licence fees of US\$5.5 million which amount is arbitrary, grossly unreasonable, unfair and prohibitive with no justification in this current economy. The applicant averred that in setting the licence fees, the Minister did not exercise his powers in a reasonable, non-arbitrary and

justifiable manner. It averred that such fees must be set in a reasonable manner on the basis of necessity and in line with international standards of practice. It averred that any deviations must be justifiable taking into account the macro and micro economic environment in Zimbabwe. It further averred that Zimbabwe being a member of the International Telecommunications Union (ITU), it should be guided by the ITU guidelines in setting the licence fees so as to avoid setting fees that are arbitrary. It further stated that whilst different considerations will apply in different jurisdictions, the fee structure should however, be transparent. The applicant averred that there are three main guidelines or methods for telecommunications licencing according to the ITU which are (i) a fee that is paid as a premium or 'rent' to a government or licencing authority for the right to operate a network or provide a service; (ii) administrative charges to compensate the regulator for its costs in managing and supervising use of spectrum , and (iii) administrative charges to compensate for costs incurred in performing other regulatory functions such as licencing operators, ensuring compliance with licence terms, resolving interconnection disputes, establishment and supervision of other aspects of regulatory work.

The applicant averred that using the ITU guidelines, the initial fee that is charged should be to cover and reimburse the first respondent, POTRAZ for costs related to and incidental to issuance of the licence. The cost must be apportioned between the current and prospective licensees. It averred that it was challenging the first respondent to show its costs of administration in regard to the 8 class 'A' Licensees that it (the applicant) believes are currently licenced. The applicant further stated that it wants the first respondent to disclose whether or not any of these 8 licensees have previously been given terms of payment in regard to licence application or renewal fee. The applicant averred that in the absence of a clearly ascertainable and justifiable methodology for setting the licence fees at US\$5.5 million, the only inference that can be drawn is that the licencing regulations under S.I 122/2013 are arbitrary and grossly unreasonable. It further averred that the fees of US\$ 5.5 million are not justifiable and proportionate to any administrative charges meant to compensate the first respondent for its costs of administration.

The applicant averred that over and above the initial or renewal licence fees, all class 'A' Internet Access Provider Licensees are still required to pay annual licence fees in the sum of US\$ 100 000.00 or 2% of the gross annual turnover, whichever is higher. The applicant averred that

this must be factored in in setting the initial or renewal fees. The applicant further averred that the licence fees as they are cannot be afforded by the ordinary telecommunications licensee. The applicant stated that the only reasonable inference is that the object in setting such high fees is to prohibit or hinder businesses from providing such services. The applicant said that it does not have the financial capacity to pay the US\$5.5 million licence fees up front and will have to close down at the expiry of its class 'B' licence despite having been in business for almost 20 years to the prejudice of the fiscus, its 100 permanent employees and 40 weekly contract employees who all will be rendered jobless. It further averred that it is a 100% indigenous company with no external funding which privilege some of the bigger telecommunications providers may have. It said that as such it can only pay the licence fees from the revenue that it generates.

The applicant also averred that the first respondent in terms of s 4 of the Postal and Telecommunications Act has a duty to ensure a level playing field and to promote competition between persons engaged in the provision of postal and telecommunications services. The applicant averred that the second respondent should have set the licence fees with this duty in mind. It further averred that the exorbitant fees and the insistence of an upfront payment restrict competition in the industry. It stated that it confines the provision of services to a small number of market players who are already established in the industry thereby creating economic discrimination of the smaller and newer entrants into the market yet in terms of s 64 of the Constitution of Zimbabwe Amendment (No 20), Act 2013, every person has a right to choose and carry on any trade of their choice. The applicant averred that it is now being denied the right to carry on a trade of its choice by reason of the unreasonable and grossly exorbitant licence fees. The applicant averred that the right to choose and carry on a trade of one's choice includes the right to a fair and reasonable licence fee that permit any market entrant to participate in the telecommunications industry and the right to fees that do not form indirect barriers to entry or expansion in the industry.

The applicant further averred that the licence fees were set without any consultations of the affected and interested parties. It stated that as a class 'B' licence holder then, it was never consulted prior to the revision of the licence fees. It submitted that although s 99 of the Postal and Telecommunications Act does not provide for a duty to consult with stakeholders and licensees, the Minister as an administrator and legislator, in line with the general principles of

natural justice ought to have consulted prior to promulgating the Regulations. The applicant averred that it had that legitimate expectation. It said that it could not have been the intention of the legislature to create barriers through grossly unreasonable and exorbitant fees. It said that as such the regulations setting the fees ought to be struck down by being declared invalid and *ultra vires* the Postal and Telecommunications Act.

Although the first respondent had raised some points *in limine* in its opposing affidavit, it abandoned them at the hearing and argued the matter on the merits. The first respondent averred in its opposing affidavit that it is averse to the issue of payment plans because in terms of the law, the licence fees should be paid up front. It said that paying by way of instalments can only be an exception rather than the rule. It averred that it has since learnt a lesson from prospective licensees without financial resources that obtain licences for speculation purposes. It said that such licensees then either fold to its prejudice (the first respondent), to the prejudice of the consumers and the fiscus or they end up involving the first respondent in litigation in a bid to keep the licences alive with the hope that one day they will find the financial resources to pay the fees.

The first respondent further averred that the licence fees are not arbitrary, unreasonable, unfair, prohibitive and *ultra vires* the Act. It submitted that if this was a genuinely held belief the applicant ought to have challenged the fees at the time when they were set in 2013. It said that the applicant would not have challenged the fees simply because its attempts to pay in installments were rejected as having no basis in law. The first respondent averred that there is a Parliamentary Legal Committee on Legislation whose duty is to hear the views of the public in view of any proposed legislation. It said that when there are views against a proposed legislation, the committee issues an adverse report, but S.I 122/2013 never received such a report when the necessary consultations were conducted. The first respondent stated that the applicant correctly outlined the ITU guidelines that should be followed in setting the fees. It stated that these were followed when S.I 122/2013 was promulgated. The first respondent submitted that there is no evidence to show that the 8 class 'A' licensees that the applicant believes to be there share the applicant's views that the licence fees are exorbitant and unreasonable. The first respondent averred that the licence fees are reasonable considering that they are meant to cover a period of 14 years. The first respondent also averred that the fact that one prospective applicant has

problems raising the fees does not make the position one of general application. It averred that the applicant has been advised to present its business plans and cash flow projections to a financier and get funding which is repayable over a period of time just like other licensees do. The first respondent averred that a view that the licence fees are grossly unreasonable must of necessity be informed by much more than the inability of one person to pay. It said that in proposing a payment plan, the applicant had agreed to pay the very same fees, albeit in instalments. The first respondent averred that it has no reason to want to restrict the number of operators since the greater the number of licensees, the greater the revenue inflow to its coffers. It said that consultations with stakeholders were done hence there was no challenge of the regulations since August 2013 up to 29 June 2016 when the applicant made this application. The first respondent averred that it has not done anything to infringe the applicant's right to carry on a trade of its choice under s 64 of the Constitution. It said that the fact that the applicant proposed to pay the licence fees over a period of time (10 years) does not mean that such must simply be accepted. It said that this must have a foundation in law. The first respondent averred that it is not feasible to consult each and every stakeholder but consultations were made before the fees were set. It said that if the fees were exorbitant as the applicant says, there would have been an outcry back then in 2013. It stated that the complaint by the applicant 3 years down the line is nothing, but failure to plan on the part of the applicant. It stated that since 2013, a number of licences have expired and have been renewed under S.I 122/2013 and new entrants have also been licensed under the same regulations. It averred that to now change the set fees just to accommodate a single person who has been aware of the regulations since their promulgation will result in unfairness and chaos. The first respondent averred that the order as sought by the applicant would be incompetent and irregular as it will result in a gap in the law. The first respondent averred that the mere fact that the applicant says it cannot afford the licence fees does not make the regulations *ultra vires* the Act.

At the hearing the second respondent abandoned the points in *limine* that he had raised in his opposing affidavit. In response to the averment that the licence fees are exorbitant, he said that by its own admission the applicant is unable to pay the licence fees, so it does not meet the requirements of the business it desires. He said that the business is meant for entities that meet the requirements. The second respondent averred that some averments that were made by the

applicant can be best responded to by the third respondent. The second respondent averred that the fees are reasonable and justified. He said that whilst there are guidelines which should guide the setting of fees they remain as such, and they have no legal effect. He said that consultations were done before the promulgation of the statutory instrument. He said that the regulations cannot be said to be *ultra vires* the Act simply because the applicant has failed to raise the required fees.

In the answering affidavit and in response to the first respondent the applicant averred that the first respondent had made no effort to give evidence which justifies the quantum of the licence fees. The applicant averred that from the onset it never accepted the set fees as reasonable and it sought payment terms as a way of easing the exorbitant fees. The applicant said that other class 'A' licensees must have been granted payment terms which is a sign that the licence fees are exorbitant and grossly unreasonable. The applicant further said that the first respondent did not adduce evidence to show that consultations were carried out with the relevant stakeholders. It also stated that the first respondent did not indicate which licensees were consulted or when the consultative process took place. The applicant went on to attach an annexure showing licence fees regimes in other countries in the region and said that, comparatively, our licence fees are exorbitant. The applicant averred that this court should simply declare the regulations to be *ultra vires* the Act. It said that it is not the duty of this court to replace the regulations or to worry about the gap that will be created when it declares the regulations to be *ultra vires* the Act. The applicant stated that the first respondent had not attached a report it received from the Parliamentary Legal Committee in support of the averments it made that it received no adverse report.

The applicant averred that any averments made by the second respondent with regards to the procedures that were taken by the third respondent before the promulgation of the regulations in 2013 are of no use because he was not involved then as he only took over the administration of the Postal and Telecommunications Act in 2014 under Statutory Instrument 25 of 2014.

In arguing the matter Mr. Sakhe submitted that delegated or subsidiary legislation can be declared invalid on the grounds of unreasonableness. In support of his argument he went on to cite a plethora of cases which I will mention later on in the judgment. Mr. *Sakhe* also went on to deal with the test for reasonableness. He submitted that no reasonable regulator fully exercising

its mind would reach such fees. He said that s 134 (c) of the Constitution provides that every piece of subsidiary or delegated legislation must be consistent with the Act of Parliament under which it is made. He said that the fees which were set by the 2013 Regulations are so high and irrational that when Parliament gave the second respondent the power to set the fees in terms of s 99 of the postal and Telecommunications Act, it could not have intended that the Minister would set such fees which do not have any reasonable basis or justification. He referred to the case of *Satelite Users Association v PTC* HH 225/91 wherein the court set aside the Radio Communication Services (Amendment) By-Laws, 1990 (No. 8) (S.I 145 of 1990) prescribing fees for television receive-only station licences for being *ultra vires*. Mr. *Sakhe* argued that the regulator must show that it has taken certain factors into account before setting a specific fee. He submitted that a reasonable regulator would

- (i) conduct research on the cost of administration relating to its licensing regime.
- (ii) consult with stakeholders regards the fees.
- (iii) conduct research on the effect of the proposed licence fees on current and prospective licensees and the industry.
- (iv) consult with parent minister in respect of trends of telecommunications in the region and elsewhere in the world.

Mr. *Sakhe* argued that in setting the fees the regulator did not use the reasonable man's test or the ITU guidelines. He said that there is no evidence of any research and consultation having been done and there is no evidence that the Parliamentary Legal Committee looked at this Statutory Instrument before it was promulgated. There is no evidence of how the US\$5. 5million was arrived at. He said that as such the applicant is entitled to reach the reasonable inference that the amounts set were thumb suck. He said that there is no rational link between the fees that were set and any of the grounds of reasonableness. He said that the Minister as an administrative authority is bound by the Administrative Justice Act [*Chapter 10:28*]. He said that s 3 binds all administrative authorities to act lawfully, reasonably and fairly towards a person with an interest, right or legitimate expectation. He said that the Minister is in breach of the legitimate expectation of the applicant to have licence fees that are transparently and reasonably set.

Ms. *Mahere* for the first respondent, in arguing the matter challenged the procedure that the applicant adopted in bringing this application as an application for a declaratur. She argued

that this court has no expertise or statutory authority to determine the appropriate level of licence fees that should be payable by licencees, so it cannot therefore usurp the functions and powers of the first respondent which is the licensing authority. Citing the case of *Tsvangirai & Anor v Registrar-General & Ors* 2002 (1) ZLR 251 (H), Ms. *Mahere* further submitted that this court has no jurisdiction to intervene in administrative decisions. In that case the applicants had made an application for an order compelling the first respondent to extend the voting days by one in respect of Presidential, council and mayoral elections. The court held that a court has no general jurisdiction to intervene in administrative decisions or to direct administrative authorities on how they should act in the absence of illegality, irrationality or procedural impropriety. Ms. *Mahere* further argued that an administrative authority's discretion cannot be interfered with absent a reviewable irregularity. She argued that this is a matter which the applicant ought to have brought as an application for review in terms of order 33 of the High Court Rules, 1971. She said that in terms of that order, r 257 requires that for a review application to be brought, the grounds upon which the applicant seeks to have the proceedings set aside or corrected should be stated shortly and clearly. Citing the case of *Chataira v ZESA* S-83-01, she submitted that the present application does not meet this requirement of r 257 and should therefore be dismissed. Ms. *Mahere* further argued that S.I 122/2013 is not *ultra vires* the Postal and Telecommunications Act since s 99 (2) of the said Act empowers the Minister in consultation with the Authority to make such regulations. She submitted that S.I 122/2013 falls squarely within the ambit of s 99 (2) of the Act. She also queried what it will mean for the future if the licence fees of US\$5.5million are set aside. She questioned what will happen to all those that have paid that amount so far.

Ms. *Munyoro* for the second respondent argued that the regulations are not *ultra vires* the Act as the Minister acted within his powers by promulgating the Regulations. She further argued that the presumption of validity works in favour of the Statutory Instrument. She said that the applicant cannot seek to challenge the regulations simply because it has failed to raise the required fees. Just like Ms. *Mahere*, she argued that affordability is not what determines if the licence fees are reasonable or not.

In determining this matter I propose to deal with the reliefs that the applicant is seeking in its draft order.

- (i) *That the decision by the 3rd respondent in consultation with the 1st respondent setting the Class “A” License Fees at US\$5,500,000.00 be set aside.*

This relief makes it clear that the applicant wants the decision of the Minister in setting the licence fees at US\$5.5 million to be set aside. In wanting the decision to be set aside the applicant has mentioned quite a number of irregularities that it alleges were made by the first and third respondents in arriving at the amount of US\$5.5 million. In summary, it averred that the first and third respondents did not carry out the necessary consultations and research with the relevant stakeholders; they did not make use of the ITU guidelines and did not present the Statutory Instrument to the Parliamentary Legal Committee for scrutiny before making it into law. It is clear that the applicant is alleging gross irregularities in the process leading to the decision of setting of the licence fees at US\$5.5 million. The applicant also alleges that the amount set is grossly unreasonable.

Setting aside of a decision or proceedings is a relief normally sought in an application for review¹, yet the present application has not been brought as such, but as an application for a declaratur. When I look at the grounds upon which this relief is being sought, I am inclined to agree with Ms. *Mahere* that this application ought to have been brought as an application for review. In *Geddes Ltd v Towonezvi (supra)* the court held that:

“In deciding whether an application is for a declaration or review, the court has to look at the grounds of the application and the evidence produced in support of them. The fact that an application seeks a declaratory relief is not itself proof that the application is not for review. The court should look at the grounds on which the application is based, rather than the order sought.”

Section 27 of the High Court Act [*Chapter 7:06*] sets out the grounds on which any proceedings or decisions may be brought on review. The provision reads,

“27 Grounds for review

- (1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be—
- (a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
 - (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
 - (c) gross irregularity in the proceedings or the decision.”

¹ *Geddes Ltd v Towonezvi* 2002 (1) ZLR 479 (S) @ 485 H.

S 27 (1) (c) states gross irregularity in the proceedings or the decision as one of the grounds. Under common law grounds for review are irrationality, illegality and gross unreasonableness. In the present application by citing the irregularities that the first and third respondents made and the unreasonableness of the amount that was set, the applicant is basically asking this court to review the decision of the first and third respondents so as to render their decision void. This makes it clear that the application should have been brought as an application for review. Consequently, I cannot make a determination on its merits as it does not meet the requirements of an application for a review. In terms of Order 33 r 259 of the High Court Rules, 1971, an application for review should be made within 8 weeks of the proceedings in which the irregularity or illegality complained of is alleged to have occurred and in terms of r 257 the grounds upon which the applicant seeks to have the proceedings set aside or corrected should be stated shortly and clearly.

In the result, I cannot set aside the decision of the third respondent setting the class ‘A’ licence fees at US\$5.5 million.

(ii) *That the Postal and Telecommunications (License Registration and Certification) (Amendment) Regulations, 2013 (No 6) (S.I 122 of 2013) prescribing license Fees for Internet Access Provider Licences be declared ultra vires the Postal and Telecommunications Act [Chapter 12:05].*

As was correctly submitted by Mr. Sakhe subsidiary legislation may be struck down on the grounds of unreasonableness. The cases that he cited are pertinent and spot on. From outside this jurisdiction he cited the following cases: *Slatter v Naylor Cas* (1888) 13 APP 446 @ 452-453; *Kruse v Johnson* (1898) 2 QB 91 @ 99-100; *Minister for Primary Industries & Energy v Austral Fisheries Pty Ltd* [1993] FCA 46 and *Mixnam’s Properties Limited v Chertsey Urban District Council* (1964) 1 QB 214. In this jurisdiction he referred to the cases of *State v Nyamupfukudza* 1983 (2) ZLR 43 (SC) @ 46 D and *PF Zapu v Minister of Justice* 1985 (1) ZLR 305 (SC). In short, all these cases say that delegated legislation may be declared invalid on the ground of unreasonableness if it leads to manifest arbitrariness, injustice, partiality that a court would say, ‘Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*.’ However, the onus is on the person challenging a regulation as

being unreasonable to show that it is unreasonable². This means that if the applicant shows the court that the licence fees are unreasonably high that can render the Statutory Instrument setting them unreasonable and *ultra vires* the Act.

In *casu* what is pertinent to note is that the unreasonableness of the amount of the fees that the applicant is alleging is based on the ground that the Minister in the process of setting the fees made a number of gross irregularities which I have already outlined in relief (i) above. It is the applicant's averment that it is the gross irregularities that the first and third respondents made when they were in the process of determining the appropriate fees which resulted in them setting fees that are unreasonably high. The issue of the gross irregularities being central to the issue of unreasonableness, it is my considered view that the applicant adopted the wrong procedure in bringing this application as an application for a declaratur. As I have already said above, it should have been brought as an application for review with a request seeking the setting aside of the Minister's decision of setting class A licence fees at US\$5.5million. The request for a declaratory order that the regulations prescribing the licence fees be declared *ultra vires* the Act for being unreasonable would have been sought as a species of relief under the review application. In the absence of a review of the Minister's decision on how he arrived at US\$5.5 million the court has no way of determining if the amount is reasonable or not.

In the circumstances, I cannot therefore grant the declaratory order that is being sought.

(iii) *An order that the first respondent publishes all Internet Access Provider Licences in accordance with s 5 (a) of S.I 262 of 2001 within 30 days of the date of this order.*

In S.I 262 of 2001 there is no s 5 (a), but s 5 which says:

"The Authority shall cause all the licences issued to be published in the Gazette."

S 5 of S.I 262 of 2001 does not set the time limits within which the licences should be published. In the Ministerial order that the second respondent granted on 30 June 2015, he ordered the first respondent to publish all Internet Access Provider Licences in accordance with s (5) of S.I 262 of 2001 by 1 August 2015 following an appeal that had been made to it by the applicant following a misunderstanding with the first respondent. It is interesting to note that by the time this application was heard on 31 January 2017 the first respondent had not yet complied with the order of the Minister.

² *Satellite Television Users Association* case *supra* at p 231.

The applicant wants the first respondent to be ordered to publish all licences in the Gazette. It is the applicant's argument that the first respondent lacks transparency and clarity in the manner in which telecommunications services providers are licensed. It is alleged to operate under a veil of secrecy hence its reluctance to publish the licences as is required by the law. The applicant avers that this is evidence that the first respondent does not conduct its affairs in a fair manner. The applicant averred that this conduct by the first respondent violates s 3 (1) of the Administrative Justice Act which requires it as an administrative authority to act lawfully, reasonably and in a fair manner and to act within a specified period or reasonable period in the absence of a specified period. The provision reads as follows.

“3 Duty of administrative authority

(1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall—
(a) act lawfully, reasonably and in a fair manner; and
(b) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and
(c) where it has taken the action, supply written reasons therefor within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned.”

The applicant stated that it was making this application in terms of s 4 (1) of the said Act which authorises any person who is aggrieved by the failure of an administrative authority to comply with section *three* to make an application for relief to this court. The section reads,

“4 Relief against administrative authorities

(1) Subject to this Act and any other law, any person who is aggrieved by the failure of an administrative authority to comply with section *three* may apply to the High Court for relief.
(2) Upon an application being made to it in terms of subsection (1), the High Court may, as may be appropriate—
(a) confirm or set aside the decision concerned;
(b) refer the matter back to the administrative authority concerned for consideration or reconsideration;
(c) direct the administrative authority to take administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;
(d) direct the administrative authority to supply reasons for its administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;
(e) give such directions as the High Court may consider necessary or desirable to achieve compliance by the administrative authority with section *three*.
(3) Directions given in terms of subsection (2) may include directions as to the manner or procedure which the administrative authority should adopt in arriving at its decision and directions to ensure compliance by the administrative authority with the relevant law or empowering provision.

(4) The High Court may at any time vary or revoke any order or direction given in terms of subsection (2).”

In response, the first respondent did not dispute that it has not complied with the ministerial order of 20 June 2015 which it ought to have complied with by 1 August 2015. However, it cited some administrative constraints that it later encountered which it says the second respondent is aware of. The first respondent averred that the person who has the right to complain is not the applicant, but the Minister, the second respondent who is entitled to remedies under s 102 of the Postal and Telecommunications Act. Section 102 reads,

“ Proceedings on failure of Authority to comply with Act or direction

(1) If at any time it appears to the Minister that the Authority has failed to comply with this Act or with a direction given to it in terms of section *twenty-five* or *twenty-six*, he may, by notice in writing, require the Board to make good the default within a specified period.

(2) If an act or thing required to be done in terms of this Act is omitted to be done or is not done in the manner or within the time so required, the Minister may order all such steps to be taken as in his opinion are necessary or desirable to rectify such act or thing, and the said act or thing when done in terms of the said order shall be of the same force and validity as if originally done in accordance with the appropriate provisions of this Act”

The first respondent averred that the second respondent has not complained, so all is in order. The first respondent further averred that if the applicant is aggrieved in any way by the delays it should complain to the second respondent who has resort to s 102 of the Act.

The second respondent did not respond to this issue leaving it to the first respondent to respond.

I am not inclined to grant the relief that the applicant is seeking because it has not shown that it has a legal right and sufficient interest in the matter to warrant it to ask for this relief. The fact that the applicant believes that the first respondent is not performing its affairs in a fair manner does not give it the *locus standi* to seek to compel it to publish all licences in the Gazette in terms of S.I 262 of 2001. The question that can be asked in this matter is, what is the applicant’s interest in the relief that it is seeking? It appears to me that the applicant is trying to use the courts to investigate the first respondent, which is not proper. The words ‘any person’ used in s 4(1) refer to a person with a legal right and sufficient interest in the relief that he is seeking. I will therefore not grant the relief.

(iv) *An order for the first respondent to comply with the provisions of s 37 (5) of the Postal and Telecommunications Act regarding publication of licences by licensees*

Section 37 (5) of the Postal and Telecommunications Act reads,

“Within 30 days after the issue of a licence referred in subsection (4) the licensee shall, at his own expense cause the licence to be published in a newspaper circulating in the area in which he intends to operate as a licensee.”

As was correctly submitted by Ms. *Mahere* the provision imposes no obligation for the first respondent to comply with. The obligation is on the licensee to publish his licence at his own expense. The applicant is therefore seeking an incompetent relief against the first respondent. I therefore cannot grant this relief.

In the result, the application is dismissed with costs.

Kantor and Immerman, applicant’s legal practitioners
Muzangaza Mandaza & Tomana, 1st respondent’s legal practitioners
A-G, Civil Division, 2nd respondent’s legal practitioners