ASSOCIATED NEWSPAPERS OF ZIMBABWE
and
MEDIA AND INFORMATION COMMISSION
versus
MINISTER OF INFORMATION AND PUBLICITY

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 15 October 2006 and 9 May 2007

Opposed Court Application

Advocate E Matinenga, for the applicant
Ms *Chizodza-Chinounye*, for the 1st respondent
Mr *Mutsonziwa*, for the 2nd respondent

GOWORA J: The applicant is a company which is duly registered as such in accordance with the laws of this country. It is indisputably a mass media provider. The applicant was the publisher of two newspapers, The Daily News, which was a daily newspaper and The Daily News on Sunday. It is not registered in terms of the Access of Information and Protection of Privacy Act [*Chapter 10:23*] (AIPPA) as a mass media provider and is thus not publishing the newspapers concerned. It has launched these proceedings for an order that it be deemed to be registered in terms of the Act. However, before I delve into the merits of the application, I must deal with an application by the respondents.

The respondents have filed chamber applications seeking an order for leave to file supplementary affidavits after the applicant had filed its replying affidavit. The rules are clear that no other affidavits shall be filed after the answering affidavit unless the court or a judge has given leave. An applicant who wishes to be granted leave to file affidavits in addition to those allowed by the Rules must give a satisfactory explanation for the need to file the affidavit. There must be a satisfactory explanation as to why the information being sought to be placed before the court was omitted from the earlier affidavits. The discretion is that of the court whether or not to allow the affidavits to be filed, and in its exercise of this discretion the court is guided always by principles of fairness and the need to ensure that the other parties to the dispute do not suffer prejudice as a result which cannot be cured by the award of an order for costs. The applicant must also establish the *bona*

fides of its explanation. See *Kasiyamhuru v Minister of Home Affairs & Ors*[1]; *Silver's Trucks (Pvt) Ltd & Anor v Director of Customs & Excise*[2].

In *casu*, the respondents base their application to file the further affidavits on new matters allegedly raised in the answering affidavit by the applicant's representative. A perusal of the affidavit in question reveals that the deponent has gone to some length to depose to new matters that were not in the founding affidavit. The applicant details the history between the parties dating back to 11 September 2003 when initiated the process to apply for registration. The answering affidavit also goes into details about the police having occupied its premises and the subsequent applications made to have the police interdicted from interfering with its operations. The applicant further avers in the answering affidavit that the police had removed quantities of printing and other equipment pursuant to a warrant issued by the Provincial Magistrate. All these were matters not contained in the founding affidavits. It is my view that the applicant has raised new matters in the answering affidavit. The respondents wish to respond thereto and I cannot see any prejudice to the applicant in allowing the supplementary affidavits to be filed. The answering affidavit opened up a can of worms and I believe it only fair for the respondents to be given the opportunity of responding to the averments contained therein which were not in the founding affidavit. The respondents are therefore granted leave to file supplementary affidavits.

The application before me is vigorously opposed by both respondents. It is important that the background to this application be set out chronologically for a proper appreciation and perspective on the dispute before me and the relief being sought. In 2002 Parliament promulgated the Access to Information and Protection of Privacy Act [AIPPA] which required that any provider of mass media services be registered as such with a Commission set up in accordance with the Act. The first respondent herein, the Commission, is the body set up for that purpose. Regulations[3] to facilitate the registration of such provider were also promulgated after the Act came into force. The applicant did not seek registration, but instead took up a Constitutional challenge against the Act to the Supreme Court in 2003. Having been required to bring itself within the law before approaching the court it then sought registration in terms of section 66 of the Act. The application was dealt with by the Commission which denied the applicant registration. An appeal was then launched to the Administrative Court which found in favour of the applicant and set aside the decision of the Commission. Part of the order granted by the Administrative Court was to the effect that the applicant was deemed to have been registered for purposes of providing mass media services in

[1] 1999 (1)SA 643
[2] 1999 (1) ZLR 490
[3] S.I. 169C of 2002

terms of the Act. The Commission then filed an appeal in the Supreme Court against the decision of the Administrative Court. In the meantime, having brought itself within the ambit of the law, the applicant re-launched its constitutional challenge against various sections of the Act.

The two matters were dealt with at the same time by the Supreme Court. In the Constitutional challenge the second respondent herein, the Minister, was also cited as the second respondent. A composite judgment in respect of both matters was handed down on 14 March 2005. The findings by the Supreme Court and its determination of the issues on the Constitutional challenge are not relevant for present purposes and I will therefore confine myself to the determination of the appeal against the decision of the Administrative Court deeming the applicant as having been registered as a mass media service operator.

Before the Supreme Court, the appeal by the Commission succeeded to the extent that the Supreme Court decided that the Administrative Court had misdirected itself in ordering that the applicant be deemed to have been registered when it had not determined the allegations by the Commission that the applicant had not complied with the Act. The order by the Administrative Court was accordingly set aside.

Before the Administrative Court the applicant had alleged that the Chairman of the Commission had been biased against the applicant. It is common cause that in fact, prior to the application for the registration of the applicant being made to the Commission, the Chairman of the Commission had authored articles wherein he described the applicant as an outlaw and that its application would not be considered on the turn. Although the Supreme Court found that actual bias had not been established on the part of the Chairman, nevertheless the Court concluded that the utterances by the Chairman could have created an apprehension in the minds of reasonable men that justice would not be done. However, the Supreme Court also found that the applicant had requested of the Commission that it, the applicant, be heard on the question relating to the allegation that it had failed to comply with AIPPA. This request was turned down. The Supreme Court accordingly found that there was an irregularity in the manner in which the Commission had dealt with the application. The court decided that the applicant should be heard on the allegations of non-compliance with AIPPA. The Court therefore concluded that the proceedings of the Commission were voidable on the grounds of bias. As a consequence, the Supreme Court ordered that the issue of the registration of the applicant be remitted to the Commission for consideration *de novo*.

As a result of the decision of the Supreme Court the applicant made another application for registration in terms of AIPPA. Again the application was unsuccessful. On 28 July 2005 under Case Number HC 3744/ 05 the applicant filed an application with the High Court to have a decision of the

Commission denying it registration to be set aside. It sought a review of the decision of the Commission made on 18 July 2005 in which the applicant was denied registration. The panel which considered the application had been chaired by the Commission's Chairman despite protestations from the applicant which were grounded on the findings by the Supreme Court of the likelihood of perceived bias on his part. On 8 February 2006 this court under Case No H.C 3744/05, in a judgment delivered by MAKARAU J as she then was, issued an order in favour of the applicant in the following terms:

1. The decision by the respondent of 18 July 2005 is hereby set aside.
2. The respondent is to consider the applicant's application *de novo*.
3. The respondent is to bear the applicant's costs.

In that application only the Commission was cited. For some reason the Minister was not cited as a party to that application. The learned judge therein found that not only was the Chairman biased, but that the entire Commission had exhibited bias against the application to register by the applicant. Fortified by the order and the remarks of my sister judge in the aforementioned matter, the applicant through its legal practitioners of record, on 13 February 2006 addressed a letter to the Commission. As the letter contains certain pertinent issues it would be more appropriate if I quoted excerpts *in extenso* instead of paraphrasing the same. The pertinent portion of the letter reads as follows:

'The outcome of the matter was that the High Court set aside with costs the decision of the Commission referred to above and also ordered that the application for registration be heard de novo. The basis for the High Court ruling was essentially the same decision of the Supreme Court of Zimbabwe on the same matter in its judgment No SC 111/04 in which it found that the Chairman of the Commission by his conduct in making certain remarks about Associated Newspapers of Zimbabwe (Private) Limited had created an apprehension in the minds of reasonable man (sic) that justice would not be done in its application. Consequently therefore the decision of the Commission could not stand. The above being the position it is the expectation of Associated Newspapers of Zimbabwe (Private) Limited that a fresh consideration of its application will now be undertaken in compliance with section 66 (3) of the Access to Information and Protection of Privacy Act Chapter 10:27. This requires that the matter be considered and finalized within a month.

We confirm too that the decision of the Supreme Court referred to above made it quite plain that the considerations by the Commission of the applications such as the one brought by our client was a formal matter and did not depend on the discretion of the Commissioners.

It is our view that the application which has been placed before the Commission by our client fully complies with the legal requirements pertaining thereto and ought to be granted. If on the other hand the Commission is inclined to give any weight at all to matters previously raised by Dr Mahoso then in terms of the Supreme Court judgment our client will have to be afforded a hearing thereupon.

We make the final point that it is clear from the High Court judgment of the 8th February 2006 that the High Court accepted that it was not only the Chairperson of the Commission who was disabled from further sitting to consider this matter but the rest of the Commissioners as well. The Commission was advised by the court to take this fact into account in further dealing with this matter." (the underlining is mine)

A copy of this letter was delivered to the Minister. On 16 February 2006 the Commission responded through a standard letter in which receipt of the letter was acknowledged and an assurance given that the contents thereof would be attended to in due course. Undeterred, the applicant's legal practitioners decided to address the Minister on the issue and on 22 February 2006 a suitable letter was written to the same referring to the judgment of this court. A copy of the response received from the Commission was also sent as an attachment to that letter. The applicant's legal practitioners requested the Minister to ensure that Commissioners were put in place to deal with the matter bearing in mind the findings of MAKARAU J (as she then was). A copy of the judgment was also attached to the letter. An indication was made in the letter that it was not the intention of the applicant to engage in further litigation on the issue. The Commission was finally awoken from slumber and on 3 March 2006 it decided to respond substantively to the letter of 13 February 2006 in the following terms:

"Reference is made to your letter dated the 13th February of 2006 and the judgment by the Honourable Justice MAKARAU dated the 8th of February 2006.

As you rightly pointed out, the Chairperson and all the present Commissioners are disabled from handling the same application.

As such we write to advise that the Commissioners are unable to consider the ANZ's application for registration as is apparent in the court order."(emphasis is mine)

The letter was signed by Tafataona P Mahoso, the Executive Chairman to the Commission. Concerned at the clearly expressed disinclination on the part of the Chairman to act in terms of the judgment, the applicant's legal practitioners on 10 March addressed a suitable letter to the Minister. I will not reproduce it, but the gist of the letter was to request the Minister, in view of the attitude taken by the Commission, to appoint new Commissioners to deal with the matter in compliance with AIPPA. A copy of the letter from the Chairman to the Commission was annexed to the correspondence. Needless to state the letter did not have the desired effect in that it did not elicit any response. The applicant has as a consequence approached this court for appropriate relief.

The Chairman of the Commission in an affidavit deposed to by him in opposing the application, admits that the judgment of MAKARAU J, as she then was, found that all the current

Commissioners were disabled from dealing with and considering the application for registration. He further suggests that in the absence of any provisions in AIPPA permitting the delegation of those powers that are exercised by the Commissioners, it was felt that no such delegation could take place. The Commission therefore referred the matter to the Minister and ultimately the Commission was still waiting for directions from its parent ministry on how best to proceed. In closing, the Chairman to the Commission takes issue with the appropriateness of the nature of the relief being sought by the applicant.

The Minister has also, under a separate notice of opposition, opposed the granting of relief to the applicant. The Minister denies having received the first letter addressed to him on 22 February 2006. He admits however, having received the letter of 10 March 2006. This letter only reached his office on 16 March 2006 and whilst he was still consulting with his legal practitioners on the best way to handle the matter this application was then served on him. I note that the court application was served on both respondents on 28 March 2006.

The Minister accepts that due to the finding of bias made against the members of the Commission, they could not have deliberated on the application. However, he has taken the stance that despite this finding he retains confidence in them and does not wish to replace them. The Minister further avers that he finds no reason to invoke the provisions of section 40 (3) of AIPPA as, in his view, no member of the first respondent has done anything to justify such action by him. It is his view that no member of the Commission has done any act that is outside the law.

It is correct, which fact is conceded by the applicant, that the existing legislation does not permit for the delegation of powers vested in the Commission to anyone else. What is however surprising is that, despite the finding by the Supreme Court in 2005 that the remarks by the Chairman of the Commission prior to the application having been heard could have created an apprehension in the minds of reasonable people that justice would not be done, no effort was made on the part of the Minister to put in place a legal structure or framework that would permit the application to be heard and determined by an impartial body. Instead of this being done, the Minister permitted a situation to prevail where those same members that had been found to be likely to be biased against the applicant, received and considered yet another application for the registration of the applicant in terms of AIPPA. The Supreme Court found that the perceived bias on the part of its chairman vitiated the proceedings by the Commission when it had considered the application from the first. For the Minister to suggest, in his opposing affidavit, that he retained confidence in the members of the first respondent and found no reason to displace them in the light of the finding by the Supreme Court would be indicative of a disinclination on his part to allow the applicant to exercise its right to

apply for registration in terms of the Act. Those findings touched in a fundamental way on the manner in which the Commission had conducted business in relation to the application by the applicant. The Commission had been found to be devoid of impartiality in regard to the registration of the applicant.

It is immaterial in this instance whether or not the Minister was a party to the proceedings in the Supreme Court matter relating to the first application for registration, as whatever the outcome of that case would have been, it would have been brought to his attention what the findings by the Supreme Court would have been. It is to be noted however, that in view of the fact that the challenge by the applicant on constitutional basis on the Act also cited the Minister as a respondent, it therefore stands to reason that the judgment would have been availed to him as he was an interested party. He could not have failed to realize that the Commission's chairman having been found wanting by the Supreme Court had been effectively disabled from determining any further applications involving the applicant. It therefore behooved him, bearing in mind the time limitations set in the Act, which Act he administers, to put in place measures for the speedy determination of the application for registration by the applicant which obviously was not going away. This he failed to do. Even if it did not occur to the Minister at that early stage when the Commission still sat as it was and considered the application resulting in the review proceedings before MAKARAU J as she then was, it must have then occurred to the Minister once those proceedings were taken on review before this court, to then put his house in order to accommodate the findings by the Supreme Court. An amendment to the Act to appoint ad hoc members of the Commission to deal with the issue of the applicant could have been resorted to. After the decision of MAKARAU JP it was confirmed that the Commission could not be clothed with any measure of acceptability on the issue. In fact the learned judge having made a finding that the Commission in its entirety was disabled from dealing with the application, ordered that the application be considered de novo. It was not done nor were there measures put in place to deal with it. It must have occurred to all the parties concerned at that stage that the Commission could not by any stretch of the imagination be considered as being able to consider the application which was not going to be abandoned any time soon by the applicant and therefore measures had to be put in place for a structure that could do so in terms of the Act.

The Minister indicated that he is having consultations with his legal practitioners over how to resolve the issue. By now his consultations should have borne fruit but still the court is none the wiser as to what course he intends to take to ensure that the application is dealt with. He does not even suggest that the amendment, which he believes is the best course possible, has been put into effect and that the Legislature has been requested to pass such amendment. The suggestion is made

in the heads of argument filed on behalf of the applicant that the Minister is politically intent upon frustrating the registration of the applicant as a mass media provider. No evidence has been placed before this court to substantiate such argument as to political motivation.

I turn now to the nature of the relief being sought by the applicant. In terms of the draft order attached to its application, the applicant sought an order in the following terms:

IT IS ORDERED THAT:-

1. Applicant is deemed to be registered as a mass media service in terms of section 66 of the Access to Information and Protection of Privacy Act [*Chapter 10:27*].

2. First respondent is ordered to issue to Applicant a certificate of registration as a mass media service in terms of section 66 of the Access to Information and Protection of Privacy Act [*Chapter 10:27*]

3. First respondent shall pay the costs of this application.

According to the applicant there is nothing in the Administrative Justice Act [*Chapter 10:28*] (hereinafter referred to as the Act) which prevents this court from declaring that the applicant is deemed to have been duly registered in terms of AIPPA. The applicant however goes on to further contend that in terms of common law this court can issue a mandatory interdict directing the first respondent to register the applicant in terms of section 69 of AIPPA.

In support of its application the applicant has referred to several authorities, both from this jurisdiction and from beyond our borders viz :- *Traube v Administrator*[4]; *West Rand Bantu Affairs Administration Board v Jacques*;[5] *Honnievale Wine and Brandy Co v Gordonia Liquor Licensing Board*[6]. Within this jurisdiction I have been referred to the following authorities:-*Director of Civil Aviation v Hall*[7], *Enhanced Communications Network (Pvt) Ltd v The Minister of Information and Ors* [8], and *Affretair (Pvt) Ltd and Anor v MK Airlines (Pvt) Ltd*[9].

The argument is made on behalf of the applicant that taking into account the provisions of the Act there is no bar to my making an order that the applicant be deemed to be registered based on the case of *Traube v Administrator, Transvaal & Ors* (supra). Whilst the Act does provide for relief against an administrative authority which has not acted in accordance with its statutory duty, it does not exclude an applicant from seeking other appropriate relief from such administrative authority.

[4] 1989 (2) SA 396
[5] 1976 (4) SA 903
[6] 1953 (3) SA 500
[7] 1990 (2) ZLR 354
[8] HH 205/1997
[9] 1996 (2) ZLR 15

When one has regard to the preamble to the Act it is clear that amongst other rights, the intention is to provide for the right to administrative actions and decisions that are lawful and procedurally fair and to provide fro relief by a competent court against administrative actions and decisions that are contrary to the provisions of this Act. None of the parties addressed me on the specific requirements in the provisions and in the absence of full argument thereon, it is not for me to make a pronouncement on the terms of the Act. My view is however, that the Act provides the best possible form of relief to a litigant aggrieved by a recltrant administrative authority.

It is contended further on behalf of the applicant that *in casu* a mandatory interdict would be appropriate as the legislation envisages registration except in limited circumstances. Mr *Matinenga* contended on behalf of the applicant that the Media and Information Commission exists only if there are functionaries appointed to it. If there are no functionaries then it ceases to exist. He further argued that from the date that the Supreme Court judgment was handed down both respondents were aware that the Commission could not entertain the application for its registration by the applicant. This was reaffirmed by the judgment of MAKARAU J (as she then was). In so far as the applicant was concerned it was clear that there was no administrative body to deal with the application.

Both respondents in their opposing affidavits have taken issue with the nature of the relief that the applicant seeks. Both opine that this is not a competent prayer to seek before this court and that in fact the court cannot grant the relief as it appears on the draft order as to do so would amount to this court usurping the administrative functions of the Commission. Both are of the view that the High Court does not have the power to grant such relief. They also contend that even the act of deeming the applicant to have been registered is beyond the capacity of this court.

I cannot deny that there is merit in the argument being proffered on behalf of the applicant. Both judgments reaffirmed the inability of the Commission to consider the application, and thus there was no administrative body to deal with the matter of the applicant. Although the bodies are there, all the Commissioners have effectively been disabled by the judgments which found them to be biased against the applicant. However, to contend as Mr *Matinenga* states, that there in fact no administrative body in existence is to go too far. The membership of the Commission has the lawful authority envisaged in the Act to carry out the administrative acts for which it has been appointed. None of the Commissioners suffer from a legal impediment as envisaged in s 40(3) of the Act. In regard to the applicant it, the Commission, has however been found to suffer from a disability. Such disability, being specifically to do with the applicant, does not denude its lawful authority to do its tasks and perform the functions the Commission is meant to perform in terms of AIPPA except as it relates to the applicant. In terms of section 2 of the Act, an administrative authority includes a

Minister or Deputy Minister of the State. It is therefore not correct that there is no administrative authority in existence to deal with the application. Consequently there is no reason why the relief provided for in terms of section 4 of the Act cannot be availed to the applicant. Indeed it would be most appropriate for an order in terms of section 4(2)(c)for the Minister to be directed to take such administrative action as would put in place conditions and a legal frame work for the application for registration by the applicant to be considered and determined. I am therefore not with the applicant when it suggests that there is in fact no administrative body to deal with its application. The bodies currently constituting the Commission have been disabled by the judgments of the Supreme Court and the High Court but it is within the power of the Minister to deal with such disablement as regards the applicant.

Is it a correct submission by the respondents then that the relief the applicant ought to have sought is what is provided for in terms of section 4 of the Administrative Justice Act? Should and can the court, as argued by the applicant issue a mandatory interdict and deem the applicant to be duly registered in terms of the Act? Examining in detail the relief sought by the applicant, it is clear that it is premised on a lack of action on the part of the Commission. What is before me is not the review of a decision made by the Commission. What I have been asked to consider is for this court to place itself in the shoes of the Commission and make the decision whether or not the applicant should be granted a licence to operate a mass media service. This court is in fact being requested to substitute its own discretion for that of the Commission. It might be argued on behalf of the applicant that AIPPA allows no discretion to the Commission to deny a licence save in certain limited circumstances. Whilst this proposition might have substance, it is nevertheless correct that in order to be granted such licence, an applicant needs to satisfy the Commission that there has been compliance with the AIPPA That is an issue that has not been determined by the Commission *in casu.* The application was not considered. The Commission did not make a finding as to whether or not the applicant had complied with the Act. In order to accede to the relief being sought this court would then to consider whether the applicant has complied with AIPPA and hence itself become the licensing authority.

In *Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt) Ltd* (supra) the court was faced with the question of when or how far a court may go in usurping the functions of an administrative authority. Quoting from Baxter,[10] MCNALLY JA had this to say at p 24D-F.

[10] Administrative Law p 681

"The function of judicial review is to scrutinize the legality of administrative action, not to secure a decision by a judge in place of an administrator. As a general principle, the courts will not attempt to substitute their own decision for that of the public authority; if an administrative decision is found to be ultra vires the court will usually set it aside and refer the matter back to the authority for a fresh decision. To do otherwise 'would constitute an unwarranted usurpation of the powers entrusted [to the public authority] by the Legislature.' Thus it would be said that '(t)he ordinary course is to refer back because the court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary. In exceptional circumstances this principle will be departed from. The overriding principle is that of fairness."

It goes without saying that a court does not exercise administrative functions and that it cannot imbue itself with such power without legal justification. This is why in its draft order the applicant has prayed that this court grant an order declaring that the applicant be deemed to have been registered in terms of the Act. If indeed the court had the legal justification to do such administrative acts, except in rare and exceptional situations, the applicant would have sought an order in its draft that the court grants the applicant substantive registration in accordance with the provisions of AIPPA. The fact that it did not and sought instead an order wherein the court would deem it to have been duly registered is an acknowledgment that the court cannot register the applicant as a mass media operator under the AIPPA. In the event, can the court still deem the applicant as registered in terms of the AIPPA? I do not think that the applicant seriously disputes the principle that a court will not interfere in the sphere of administrative actions or decisions except in very exceptional situations. It settled law that a court will normally interfere in the administrative sphere in the following circumstances:-

a) where the end result is a forgone conclusion and a referral back would be a waste of time;

b) where further delay would cause unjustifiable prejudice to the applicant;

c) where the statutory tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again; and

d) where the court is in as good a position to make the decision itself.

In order to do justice to the submissions from counsel, it is necessary that I examine each of the authorities cited in detail.

In *Traube v Administrator, Transvaal and Others* (supra) the applicant therein, was a qualified medical practitioner who was employed at Baragwanath Hospital, Soweto in 1985 as an intern. She completed her internship in 1986 and was then offered a position as senior house officer for the first half of 1987 and thereafter for the second half. Both stints were successful. She then applied for the same post for the first half of 1988 and was informed that her application had not been successful. The applicant sought therefore a review of the decision denying her the post and an

order directing the respondents to take all the necessary steps to cause her to be appointed to the position of senior house officer at Baragwanath Hospital, Soweto. It was common cause in that matter that the only reason that had caused the respondents not to offer her the position was her signature to a letter addressed by the applicant and a number of other doctors to the South African Medical Journal complaining about conditions at Baragwanath. Having reviewed all the facts and circumstances of the dispute the learned judge came to the conclusion that no reasonable or unbiased person could come to the conclusion that the applicant was unsuitable for appointment as a senior house officer.

In *West Rand Bantu Affairs Administration Board v Jacques*, (supra) the respondent had been offered a post as principal welfare officer responsible for juvenile employment in the municipality of Johannesburg. She was then seconded to the appellant at the same post for a period of six months. Before the expiration of such period she was offered the same position by the appellant whilst the appellant put into place a position structure. She accepted the offer in writing. Thereafter she was advised that her service with the appellant would commence on 1 November 1973. After the restructuring process was completed the respondent was informed by letter that her post would be that of senior welfare officer. The responsibilities that she had had apparently been shifted to Department of Labour. She applied for an order that her former post be declared redundant in accordance with the provisions of the Bantu Affairs Administration Act 45 of 1971. Her application succeeded and the appellant was ordered to give the respondent a redundancy notice. On appeal, the court decided that the appellant had in fact made a declaration of redundancy, which it however refused to recognize. It was found by the court that in the circumstances of the case, it would be competent for the court to make the declaratory order sought. The appellant could not, by refusing to recognize that it had declared redundancy avoid the consequences flowing from such a declaration. In the result the appeal court upheld the decision of the court a quo but amended the order in form and not in substance.

In *Honnievale Wine & Brandy Co v Gordonia Liquor Licensing Board* (supra) the respondent had refused to issue the applicant with a liquor licence. The applicant then took the board to court on review and the decision was set aside. The court declined to order that the applicant's liquor licence be renewed. It considered that although the powers of the court under section 29(2) of the Liquor Act were sufficiently wide to permit the court to do so, yet, the cases where such recourse would be appropriate were rare and were limited to those instances where the court was satisfied that if the matter were referred back, the board would have granted the licence. The court there found that for a

court to direct the issue of a licence in any other circumstances would constitute an unwarranted usurpation of the powers entrusted by the Legislature to liquor licensing boards.[11]

My reading of the above quoted authorities does not lead me to conclude that the orders that were granted were in circumstances where the court assumed unto itself the mantle thrust upon the administrative authority and imposed its own discretion. The court in the first decision had to consider the reasonableness of the decision made by the administrative authority. Having found the decision to be unreasonable it accordingly set aside such decision and declared that the applicant qualified to be given the position in issue. In the second decision the court was required to make a declaratur as to the employment status of the applicant taking into account the actions of her employer. There was no requirement on the court to make a decision that would entail the establishment of an entity subject to licencing and permits by an administrative authority, as is the current application. The authorities therefore presented before me have not given me comfort such that I can depart from the norm and assume unto myself the discretion that should be in terms of our legislation exercised by the Commission.

Although an application for registration under AIPPA is made in terms of section 66 of the same, it is section 69 which determines the powers of the Commission in considering such application. The section provides:-

"(1) The Commission may not refuse to register a mass media service unless-

a) it fails to comply with the provisions of this Act; or

b) the information indicated on the application for registration is false, misleading or contains misrepresentation; or

c) the mass media service seeks to be registered in the name of an existing registered mass media service;

and the Commission shall forward a written notification of the refusal of registration, stating the grounds upon which such refusal is based."

The applicant contends that there is within this jurisdiction precedent for this court to grant the order sought and declare the applicant to be deemed duly registered in terms of the enabling Act. *In Enhanced Communications Network (Pvt) Ltd v The Minister of Information, Posts and Telecommunications* (supra) this court, in a judgment rendered by SANDURA JP (as he was then) gave an order declaring the applicant to have been deemed to be a licenced cellular telecommunications provider from March 1997. The other relief granted is not pertinent to the resolution of this matter. This in fact was the final chapter of a long and bitter battle fought by the applicant, Econet, to operate a cellular network. The legal battles are chronicled in *T S Masiyiwa*

[11] At 503E-F

Holdings (Pvt) Ltd & Another v Minister of Information.[12] I see no need to repeat the history here in this judgment. However, in a nutshell the applicant therein, had applied to the Supreme Court in one of the earlier cases for a declaration that the monopoly granted to the Posts and Telecommunications Corporation to provide cellular services was unconstitutional. The Supreme Court found that the monopoly was an infringement of the fundamental right of the freedom of expression.

Thereafter Econet (the applicant) received authorization from the Zimbabwe Investment Center to proceed with its project to establish a public mobile cellular and it the set about putting into place the machinery, including manpower, bases, substations, equipment and authorizations from local authorities to operate its network. All this ground was being done on the assumption that the Minister would put in place legislation regulating the field of cellular networks. On 5 February 1995 with the publication of the Presidential Powers (Temporary Measures) (Cellular Telecommunications Services) Regulations S.I 15A of 1996 it was suddenly an offence for anyone other than the Posts and Telecommunications Corporation and except with a licence issued under the Regulations to operate a cellular communications network within the country. Resulting from this Econet then approached the Supreme Court, alleging the violation of ss 16, 20 and 23 of the Constitution and praying for an order that it be declared free to continue to operate a cellular telecommunications system within, into and from Zimbabwe without let or hindrance.

The court found that the Posts and Telecommunications Corporation had been granted preferential treatment under the Act as well as the Regulations. The control mechanism provided for in the regulations, whilst not interfering with the Corporation's entitlement to commence operations, was designed to delay the entry of a competitor into the field. This, as the court found, would have the effect of violating the Constitution. The court found the mechanism to be restrictive. It also found that the more restrictive the mechanism was, the longer it would take for a competitor to enter the field. It is also found that the regulations were not being implemented with any haste, mainly due to the desire on the part of the Minister to secure a niche in the market for the Corporation and that section 20 of the Constitution had been contravened and that such contravention was not reasonably justifiable in a democratic society like Zimbabwe. Having considered that there was no benefit to the applicant in striking down the regulations, as that would restore the absence of a regulatory framework, the court exercising its discretion under s 24(4) of the Constitution, then issued an order in which the Minister was put on terms to comply with the regulations within a specified period. The court also ordered that in the event that the Minister did not comply with the time limits set in the order, then Econet would be deemed licenced. The court also imposed conditions on the licence

[12] 1996 (2) ZLR 754 (SC)

issued as a result of its order. When the Minister failed to comply with the order by the Supreme Court within the time frame set in the order, the applicant then approached the High Court and sought an order that it be deemed to have been licenced in accordance with the order of the Supreme Court. This in effect is the relief granted by SANDURA JP as he then was in the *Enhanced Communications Networks'* case.

Although the decision by the Supreme Court in the *T S Masiyiwa* matter was grounded on the violation of the Constitution, the behavior of the Minister in that case is not too dissimilar to the present. As I have stated earlier one gets an impression of a disinclination to act in terms of the enabling Act and afford the applicant a chance for the application to be properly considered on its merits. What distinguishes the Masiyiwa matter from the present is that in that case there was relief provided for in terms of the Constitution by the Supreme Court where the applicant was granted a mandatory interdict arising out of the violation of s 20 of the Constitution. In terms of s 24 thereof the Supreme Court has the to hear and determine any application made by any person and make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights. The court then granted appropriate relief with a provision that if the regulatory authority failed to comply then and in that event, the applicant be deemed licenced. The current application is therefore, on the papers premised on that authority.

In the application before me, the point was made on behalf of both respondents that the application to the Commission for registration as a media service provider had itself not been availed to court if this was the relief sought by the applicant. Mr *Matinenga* attempted to produce it from the bar but there was strenuous objection from counsel of both respondents. There was no application made for its production in court before Mr *Matinenga* tendered it to be placed in the record. It was therefore not admitted as part of the record. It was thereafter sent to me under cover of a letter written by the applicant's legal practitioners subsequent to the hearing. This in my view, represents a most unorthodox manner of producing documents to court. The hearing had closed without the application for registration being adverted to. The respondents, have not been availed the opportunity to comment on its contents. In the absence of an application to court to have it admitted, I do not see how the applicant can expect me to have regard to it. I will not refer to it in my deliberations.

This court cannot know of its own accord which provisions of AIPPA the applicant has to comply with in order to qualify for registration. Put another way there is no way that this court can state that the applicant has complied with the provisions of AIPPA in order to qualify for the grant of

a certificate of registration in accordance with the same. That is knowledge that would peculiarly be in the ambit of the Commission as the administrative authority for purposes of issuing a certificate of registration. In the *T S Maisiyiwa* matter all the requirements for the granting of a licence to an applicant were in the papers submitted to the court. I also observe that in the two authorities from within this jurisdiction, *Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt) Ltd (supra) and Director of Civil Aviation v Hall* (supra) the issue related to the review of decisions refusing to issue permits or licences provided for in the enabling legislation. In the *Affretair* case, MK had made an application to the Board for a licence to run an air freight service. The Board had shown clear bias in favour of Affretair in refusing to grant MK Airlines an operating licence. Before the Board dismissed the application it held an inquiry so all the facts pertaining to the application were before it. An appeal against an order of the High Court granting the order was unsuccessful. In the case of Hall the Supreme Court refused to uphold an order in terms of which the High Court had granted an order renewing an aeroplane licence in favour of Hall. The court was of the view that such renewal or grant required to ensure the safety of the pilot and his passengers and that the determination of such was based on specialist technical knowledge which would be in the purview of the Director. The Legislature taking into account the gravity of the responsibility had as a result given wide discretionary powers to the director to impose conditions on such grant or renewal. In such an instance, the court was not in a position to substitute the discretion of the Director with its own.

One of the reasons given by the Supreme Court in granting the appeal against the decision of the Administrative Court was that there were no facts placed before the President of the Administrative Court to the effect that there had been compliance with the Act on the part of the applicant. I want to believe that the judgment by the Supreme Court was perused by the applicant and its legal practitioners. The applicant and its legal practitioners were aware that the Supreme Court stated that there is no way that the applicant could be deemed to have been registered in the absence of a factual basis of compliance on its part with the provisions of the Act. Before me, such relief is also being sought yet no effort has been made, in the event that this court would have assumed such discretion, to place before the court evidence that there has been due compliance with the provisions of the Act. Failure to comply with the provisions of the Act is one of the criteria provided in the Act to deny the applicant a registration certificate. An onus is therefore on an applicant to show such compliance. This has not been done in *casu.*

The contention is made that the question of delay especially where there is no administrative agency to deal with the application should convince the court that the applicant should be registered. I have already commented that in terms of the definition in the Administrative Justice Act there is an

administrative authority and I will not be-labour the point herein. It is obvious in this case that further delay in dealing with the registration of the applicant will cause prejudice to the applicant and in an abstract sense to its readership. The applicant made its application in 2003 and four years on it has still not been registered. Whilst the initial mistake might be laid at the door of the applicant that it chose not bring itself within the ambit of the Act upon its promulgation, it has now sought to do so and a wait of four years cannot be found to be but prejudicial to it. It is however not in every instance where the existence of delay will cause the court to assume to itself the discretion which is vested in the administrative authority, even where the decision maker itself is the cause of such delay. See *Johannesburg City Council v Administrator, Transvaal*.[13] Where delay is a factor the object should be to minimize future delays. I do not believe that an order deeming the applicant registered will necessarily achieve that object.

Although there was bias found on the part of the Commission and its chairman, no such finding can be alluded against the Minister. He has stated in his affidavit that he was never afforded an opportunity to address the problem and wants the opportunity to deal with the matter in terms of section 4 of the Administrative Justice Act. The contention by the Minister is that instead of seeking the order in the draft, the applicant should have approached the court for an order that he be compelled to act in accordance with the provisions of the Administrative Justice Act. I must state that I agree with those remarks. Section 3 of the Act enjoins an administrative authority to act lawfully reasonably and within the period specified by law. In the absence of due compliance by the administrative authority, section 4 provides for remedies appropriate to the circumstances. I did not hear the applicant say that the remedies provided for in the Act are inadequate for its purposes. I am not satisfied that there is herein such bias against the applicant that sending the matter to the Minister to deal with is going to be futile.

A court where it is an as good a position as the administrative authority to make the decision can itself assume the functions of the administrative authority upon application by an aggrieved party. I have already spoken on the lack of capacity by this court to determine whether or not there has been due compliance by the applicant with the provisions of AIPPA. Apart from the Act itself regulations to facilitate the applications exist. The regulations, apart from providing for the standard forms that have to be completed require that a business plan be produced to the administrative authority. There is also a requirement for a market analysis, particulars of financial resources, and particulars of previous experience in the provision of mass media services. I did not hear the applicant to argue that the court could place itself in the shoes of the administrative authority and deal with the

[13] 1969 (2) SA 72

application on its merits. To do so the court would have to take into account all these requirements which are factors in the determination of due compliance on the part of an applicant. The court in such a situation cannot be in as good a position as the authority and make a decision. These are also facts not before the court but which go toward the consideration of the application itself.

In my view, it is clear that the applicant has not made out a case for the court to assume the discretion to deem that the applicant is duly registered or is deemed to be so registered. In presenting argument on behalf of the applicant, Mr *Matinenga* submitted that in the event that the court was not disposed to grant an order in terms of paragraph 2 of the draft it should instead consider an alternative order viz-: that the court order that pending the consideration of an application by the applicant for registration, it be permitted to continue carrying on the activities of a mass media service provider. Clearly the applicant if it were to start operations as a result of the order of this court would not be continuing to operate. It ceased operating the service a while ago. Effectively therefore it would be operating as a result of the order issued by this court. Additionally the manner in which the amended draft order is phrased is such that were the order to be granted it would in effect end up being a registration of a mass media service provider by the court instead of the administrative authority. This court is not in a position then to set conditions on such operations and what those conditions should be. I believe that the applicant is still requesting this court to impose its own discretion to register it as opposed to the administrative authority permitted by law to do so.

The application therefore fails. Costs should normally follow the result. The reason that the application has not succeeded is not due to lack of merit but rather that the applicant followed the wrong procedure. In the premises I do not believe that an order of costs against it would meet the justice of the case. The respondents are not entitled to an order of costs in view of the manner in which the application for registration was handled. Given the attitude being displayed by the Minister, since the dispute arose, it is obvious that he does not intend to put in measures or even change the composition of the Commission in order for the application for the registration of the applicant to be dealt with by an impartial body. Clearly this would be in violation of the applicant's rights in terms of the Act. The applicant has had to come to court yet again due to the lack of action on the part of one of them and the failure to ensure that they comply with the AIPPA on the part of both.

In the result I make the following order. The application is dismissed. Each of the parties is ordered to pay his or its own costs.

Gill, Godlonton & Gerrans , legal practitioners for the applicant.

MV Chizodza-Chineunye, legal practitioners for the first respondent.

Civil Division of the Attorney-General's Office, legal practitioners for the second respondent.