



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**JUDICIAL REVIEW CASE NUMBER 53 OF 2015**

**BETWEEN:**

**THE STATE**

**AND**

**THE MALAWI COMMUNICATIONS REGULATORY**

**AUTHORITY**

**1<sup>st</sup> RESPONDENT**

**AND**

**THE PRESIDENT OF THE REPUBLIC OF MALAWI 2<sup>nd</sup> RESPONDENT**

**EX PARTE**

**TalkAWE! LIMITED**

**APPLICANT**

**CORAM: JUSTICE M.A. TEMBO**

Mambulasa, Counsel for the Applicant

Majamanda, Counsel for the 1<sup>st</sup> Respondent

Santhe, Counsel for the 2<sup>nd</sup> Respondent

Kakhobwe, Official Court Interpreter

**ORDER**

This Court discharged the leave that it had granted to the applicant to apply for judicial review of the 1<sup>st</sup> respondent's decision to re-open negotiations with Lacell Private Limited which the applicant alleged is a discriminatory decision to the applicant and other entities that have not been given an opportunity to compete with Lacell Limited on an individual licence that the 1<sup>st</sup> respondent is negotiating with the said Lacel Limited.

This Court further declined the applicants application for renewal of leave to apply for judicial review of the 2<sup>nd</sup> Respondent's decision to appoint the Board of the 1<sup>st</sup> respondent and the 1<sup>st</sup> respondent's Director General and Deputy Director General who made the decision to re-open negotiations with Lacell Private Limited that the applicant seeks to review.

The two decisions of this Court were based on the ground that the applicant in fact had no sufficient interest in this matter. The following are the reasons for that decision. The facts of the matter will be outlined first.

The applicant, a limited company, applied to the 1<sup>st</sup> respondent which is a communications licencing authority, for an individual licence to offer call-back, single sms, bulk sms and sms chat services. The application was made on 18<sup>th</sup> September 2012. In response, the 1<sup>st</sup> respondent advised the applicant that the applicant's application would be considered within the new categories of licences that were to be in the new proposed Convergence Licencing Framework (CLF) that was to be in place by July 2013. That therefore the essence of the 1<sup>st</sup> respondent's response was that the applicant could not be issued an individual licence sought until after the CLF was implemented within a statutory framework.

According to the 1<sup>st</sup> respondent's concept paper on the CLF the cut-off date for issuance of licences under the current licencing framework was 1<sup>st</sup> January 2015 and the date for implementation of the CLF is yet to be advised. The statutory framework for the CLF is not yet in place.

The applicant indicated that it was still waiting to hear from the 1<sup>st</sup> respondent on the implementation of the CLF and its accompanying statutory framework only to be surprised by reports in the Daily Times newspaper of 4<sup>th</sup> March 2015 that the 1<sup>st</sup> respondent had on 25<sup>th</sup> February 2015 reversed its earlier decision and approved to re-open negotiations with Lacell Private Limited on a proposed licence to be issue

to the said Lacell Private Limited. The applicant claimed that Lacell Private Limited, a telecommunications company, had applied to the 1<sup>st</sup> respondent for an individual licence in 2008 after the 1<sup>st</sup> respondent had advertised for such applications to be made in line with the Communications Act. Further, that Lacell Private Limited did not qualify after evaluations.

The applicant charged that the decision by the 1<sup>st</sup> respondent to re-open negotiations with Lacell Private Limited who had failed during evaluations and before the CLF is implemented under the relevant statutory framework and without fresh advertisement treats Lacell Private Limited's application as a general licence application (walk-in) when in fact the services being sought to be offered by Lacell Private Limited are under an individual licence.

The applicant further charged that the 1<sup>st</sup> respondent could not take the decision that it has taken when the applicant's decision could not and has not be considered primarily on the ground that the CLF is yet to be implemented and there is no statutory framework for the same. The applicant submitted that it feels totally discriminated against and unfairly treated as there was no invitation published by the 1<sup>st</sup> respondent for companies to apply which would have given an opportunity to the applicant to compete with Lacell Private Limited on an equal basis.

On the foregoing basis this Court granted the applicant leave to apply for judicial review of the 1<sup>st</sup> respondent's decision to re-open negotiations with Lacell Private Limited which the applicant alleged is a discriminatory decision to the applicant and other entities that have not been given an opportunity to compete with Lacell Private Limited on an individual licence that the 1<sup>st</sup> respondent is negotiating with the said Lacell Private Limited.

The 1<sup>st</sup> respondent applied to discharge the leave granted by this Court to the applicant and among other reasons argued that the applicant had no sufficient interest in this matter. It is on that ground that this Court discharged the leave herein.

The 1<sup>st</sup> respondent pointed out that, essentially, the applicant applied for a licence to provide services that it can only provide using another operator's network. On the other hand, Lacell Private Limited is to provide the full range of mobile services using its own telecommunications infrastructure. This fact was not denied

by the applicant. The 1<sup>st</sup> respondent then asked the question how the applicant could have competed with Lacell Private Limited since the applicant actually needs an operator like Lacell Private Limited that has a telecommunications network for it to provide services under the licence the applicant applied for.

The 1<sup>st</sup> respondent submitted that it is important that an applicant in matters of judicial review must have a sufficient interest in the matter subject of review. It referred to Order 53 rule 3 (7) Rules of the Supreme Court. Further, that the Wolfe Report on Access to Justice (1996) at 255 says that the applicant in matters of judicial review will have standing if he has been or will be adversely affected by the impugned decision or if it is in the public interest that the proceedings should be brought.

The 1<sup>st</sup> respondent further submitted that the Court has to find the appropriate balance in distinguishing who has sufficient interest and a mere busybody. It referred to Jowitt J. who said in *R v Legal Aid Board, ex parte: Bateman* (1992) 1 WLR 711 that though the problem of definition is elusive, common sense should enable one to identify a sufficient interest when it presents itself, like the horse which is difficult to define but not difficult to recognize when one sees it.

The 1<sup>st</sup> respondent finally submitted that it will be clear that the applicant is a busybody and does not have a sufficient interest in the matter at hand.

On its part the applicant submitted that its interest arises from the fact that it was treated differently from Lacell Private Limited and yet both fall in the same category of licences. And further that Lacell Private Limited has been treated differently in many cases.

This Court notes that the 1<sup>st</sup> respondent submitted that the applicant's licence was a general licence whereas the applicant submitted that it applied for an individual licence similar to that of Lacell Private Limited.

The definition of licences is contained in section 2 of the Communications Act which provides definitions as follows

“general licence” means a licence to operate a telecommunication network or to provide a telecommunication service for which the person concerned does not require an explicit authorization by the authority before exercising the rights stemming from the licence.

“individual licence” means a licence to operate a telecommunication network or provide a telecommunication service issued by the Authority to a body corporate under Part III of this Act and which gives that person specific rights and obligations.

The Communications Act further provides in section 18 Communications Act that

(1) The Authority may issue telecommunication licences of the following kinds—

- (a) general licences; and
- (b) individual licences.

(2) The Authority shall publish a list of the telecommunication networks and services which may only be provided under an individual licence.

(3) Notwithstanding section 17 and subsection (2) of this section—

- (a) the provision of voice telephony; and
- (b) the operation of a cable television network, may only be authorized under an individual licence.

(4) Before issuing any telecommunication licence, the Authority shall publish in the Gazette a complete draft of the proposed licence and consider any representations made to it concerning the draft.

(5) Any telecommunication licence issued by the Authority shall come into effect when published in the Gazette.

Section 2 of the Communications Act further provides that

“voice telephony” means the commercial provision for the public of the direct transport and switching of speech in real time between public switched network termination points.

This Court notes that, from a legal point of view, the applicant may be right that since it was proposing by its application to provide call back services, which is a voice telephony service, then a licence to provide the same could only be allowed under an individual licence as per section 18 (3) (a) Communications Act. And that, in that regard the applicant was seeking an individual licence.

However, this Court noted that it is clear from a factual point of view, that if the applicant needs an operator like Lacell Private Limited to provide its services it cannot actually be in the same operational category as Lacell Private Limited and claim that it can compete with those in the category of Lacell Private Limited. The

applicant and Lacell Private Limited are operationally in two different categories. As such, the applicant cannot claim that it feels totally discriminated against and unfairly treated as there was no invitation published by the 1<sup>st</sup> respondent for companies to apply which would have given an opportunity to the applicant to compete with Lacell Private Limited on an equal basis. How would the applicant compete with those in the category of Lacell Private Limited when the applicant has no telecommunications network of its own? That is a fundamental point made by the 1<sup>st</sup> respondent. It shows that the applicant is merely a busy body as contended by the 1<sup>st</sup> respondent. The applicant therefore has no sufficient interest in this matter as it actually would have to rely on companies like Lacell Private Limited and cannot therefore be on equal footing with such companies and cannot compete with such companies at all.

Consequently, this Court found that the applicant has no sufficient interest to seek a review of the decision by the 1<sup>st</sup> respondent to re-open negotiations on the terms of a licence that it had already awarded to Lacell Private Limited which licence the 1<sup>st</sup> respondent now seeks to issue to Lacell Private Limited at the conclusion of the negotiations. This is because the applicant could not compete with Lacell Private Limited even if what was being alleged by the applicant were true particularly because the applicant would have to rely on telecommunications operators such as Lacell Private Limited to provide its own services at all. Only those with operational prowess equivalent to Lacell Private Limited are the ones with sufficient interest to pursue a review as sought by the applicant herein.

Since the applicant was found to have no sufficient interest in this matter this Court ruled that the applicant had no standing to seek a renewal of leave to apply for judicial review of the 2<sup>nd</sup> Respondent's decision to appoint the Board of the 1<sup>st</sup> respondent and the 1<sup>st</sup> respondent's Director General and Deputy Director General who made the decision to re-open negotiations with Lacell Private Limited that the applicant seeks to review. The renewal sought would only have been entertained on the understanding that the applicant had sufficient interest in the matter herein.

In view of the foregoing findings of this Court, this Court decided that it should not consider the other ground as raised by the 1<sup>st</sup> respondent on its application to discharge the leave that had been granted to the applicant herein. This ground is

that the applicant did not disclose material facts and misrepresented the facts herein.

Costs are for the respondents.

Made in chambers at Blantyre this 24<sup>th</sup> July 2015.

**M.A. Tembo**

**JUDGE**