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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

JUDICIAL REVIEW CASE NUMBER 31 OF 2022

BETWEEN:

**THE STATE (On the application of
GLOBE INTERNET LIMITED)**

CLAIMANT

AND

**THE MALAWI COMMUNICATIONS REGULATORY
AUTHORITY**

DEFENDANT

CORAM: JUSTICE M.A. TEMBO

Njobvu and Misanjo, Counsel for the Claimant
Mankhambera, Court Clerk

ORDER

1. The claimant is an internet service provider who is regulated by the putative defendant under the Communications Act. This matter concerns the claimant's request to challenge some regulatory decisions made by the putative defendant in respect of the claimant.
2. This is the order of this Court on the claimant's application, under Order 19 rule 20 (3) of the Courts (High Court) (Civil Procedure) Rules without notice to the defendant, for an order for permission to apply for judicial review of three decisions of the putative defendant communicated to the claimant by a

letter dated 18th July, 2022, namely, the decision ordering the claimant to cease and desist from using the frequencies in the 700MHz band and requiring the claimant to surrender to the defendant the said frequencies within 30 days from the date of the letter; the decision of the defendant requiring the claimant to pay a fine of US\$73, 260 and the decision of the defendant requiring the claimant to produce an account within 30 days of the letter of the revenue the claimant has made from the usage of the radio frequency spectrum in the 700 MHz band from 1st April, 2022.

3. If permission is granted, the claimant will seek several reliefs, namely, a declaration that the defendant's decisions referred to above, are contrary to section 43 of the Constitution, are not in conformity with sections 44 (3) and 83 of the Communications Act, were made in bad faith, are unreasonable in the Wednesbury sense and/or are in violation of the claimant's legitimate expectation; a declaration that the defendant's decision ordering the claimant to cease and desist from using the frequencies in the 700 MHz spectrum (including Band 28 to which the claimant was just recently migrated by the defendant) and requiring the claimant to surrender to the defendant the said frequencies, is unjustified in the circumstances and/or contravenes the right to economic activity under the Constitution and is also arbitrary, a like order to certiorari quashing the defendant's decision and an order for damages for loss suffered by the claimant on account of the impugned decisions. The claimant also applied for an order of injunction restraining the defendant from implementing the three impugned decisions.
4. This Court upon a perusal of the papers filed by the claimant, granted the order for permission to apply for judicial review of the impugned decisions as well as an order of injunction restraining the defendant from implementing the impugned decisions except for the decision of the defendant that the claimant cease and desist from using the 700 MHz spectrum herein. This Court therefore declined to grant permission to apply for judicial review and declined to grant an injunction with regard to that decision that the claimant cease and desist. This order contains the reasons for that decision.
5. The claimant stated the facts on which its present application is based. In 2018, the claimant indicated that it was granted a licence for the provision of internet services in band 17 under the 700MHz spectrum. It was realized that this licence was mistakenly issued and in November, 2019 the licence was

renewed on a temporary basis for one year since the band 17 was not allowed within the Southern Africa Development Community (SADC) International Telecommunications Union (ITU) Band Plan and the claimant had to migrate to a new band.

6. In March, 2021, the claimant was advised to migrate from band 17 to band 28 within the same 700MHz spectrum not as another temporary band but as its assigned new band. The claimant finished migrating to the said band 28 as directed by the defendant, by November, 2021 and the migration process took about nine months.
7. On 18th March, 2022, the defendant then gave the claimant notice of its intention not to renew the claimant's licence for 700MHz (which would seemingly include band 28) which was expiring on 31st March, 2022. In response, the claimant asked for permission to continue using band 28 considering that it was less than six months after they had finished migrating to band 28. The defendant did not respond to the request but instead issued a letter to the claimant on 29th June, 2022 purporting that it had made a preliminary finding to the effect that the claimant was using frequencies in the 700MHz spectrum without a licence.
8. The preliminary findings were obviously misguided because the claimant had used band 17 and then migrated to band 28, both under 700 MHz spectrum, by the defendant who issued licences in respect of the same. The only licence which the defendant had indicated it would not renew was for band 17 which was expected since the claimant had migrated to band 28 anyway,
9. On 14th July, 2022, a meeting was held at the defendant's office for a 'hearing' on the alleged breach in the letter dated 29th June, 2022. At the said 'hearing' the claimant presented all facts to show that there was no breach by the claimant but that the apparent 'breach' was of the defendant's own making when it decided not to renew the claimant's licence and/or respond to the claimant's letter of 24th March, 2022. The claimant further presented an account of events that led to its acquisition of the 700 MHz spectrum that it could not simply turn off the network as that would disrupt business, customers and employees. The claimant contends that the hearing was in bad faith and was not a real hearing.
10. Subsequently, as communicated in the defendant's letter dated 18th July, 2022, the defendant made a final order finding the claimant in breach of operating

in the 700 MHz frequencies without a licence and proceeded to make the decisions complained of in this matter.

11. It is clear on the facts that what was expiring in March, 2022, and would not be renewed, was band 17 temporary licence not band 28 licence to which the claimant was urged to migrate.
12. The claimant's asserts that it is unthinkable that the defendant would assign band 28 to the claimant, allow the claimant migrate from the old band to band 28 and then refuse to renew the licence which allows the claimant to conduct business using that very same band. It asserts further that no reasonable regulator in the shoes of the defendant would make the decisions complained about.
13. The claimant is of the view that it legitimately expected that the band 28 licence would be renewed as is usually the case with any licence and that therefore it's expectation was unlawfully violated by the defendant's cease and desist decision. The claimant further contends that its right to be accorded reasons for administrative action has been violated by reason of the cease and desist decision because the defendant never gave reasons for not renewing the band 28 licence and never responded to its letter of 24th March, 2022 that raised some matters. The claimant also takes the view that the defendant acted in a discriminatory manner as it is only the claimant whose frequency licence was never renewed after being assigned.
14. This Court is aware that the purpose of a permission application like the instant one is firstly to eliminate at an early stage, applications which are either frivolous, vexatious or hopeless and secondly to ensure that an application is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. See *State and Governor of the Reserve Bank of Malawi ex parte Finance Bank of Malawi* Miscellaneous Civil cause number 127 of 2005 (High Court) (unreported); *Ombudsman v Malawi Broadcasting Corporation* [1999] MLR 329 and *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Limited* [1981] 2 All ER 93.
15. This Court is further aware that permission to apply for judicial review will be granted if the Court is satisfied that there is an arguable case for granting the relief claimed by the applicant. At this stage, there is no need for this Court to go into the matter in depth. Once the Court is satisfied that there is an

arguable case then permission should be granted. The discretion that the court exercises at this stage is not the same as that which the court is called on to exercise when all the evidence in the matter has been fully argued at the hearing of the application for judicial review. See *Ombudsman v Malawi Broadcasting Corporation*.

16. This Court must therefore consider whether the facts as presented by the claimant show that there is an arguable case for further investigation at a full hearing. There is no need for this Court to go into the matter in depth. Once the Court is satisfied that there is an arguable case, then permission should be granted.
17. This Court observes that the facts as presented by the claimant on this application bear some material variance to the facts as disclosed by the supporting documentary evidence exhibited on the application as to what really happened in this matter leading to the defendant's cease and desist decision directed at the claimant. According to documentation exhibited on the application, this Court observed that indeed as narrated by the claimant, the claimant was to migrate from band 17 to band 28 in the 700 MHz spectrum by 9th December, 2019. On 10th November, 2020, the period for migration was extended at the instance of the claimant to November, 2020 and the temporary licence for band 17 was similarly renewed. By a letter dated 16th April 2021, it is indicated that on 10th March, 2021 a meeting was held between the claimant and the defendant on the issue of migration out of band 17 to band 28 in the 700 MHz spectrum. In that letter, the defendant communicated to the claimant that reference was made to the meeting held on 10th March, 2021 at the defendant's premises where the claimant requested to migrate from band 17 to band 28 within the 700 MHz band and for an extension of the temporary licence for a year. The defendant communicated further that it was pleased to inform the claimant that the claimant's request had been granted so that the claimant was allowed to use 10MHz spectrum in band 28 for one year up to 31st March, 2022. Furthermore, that the claimant will be required to use the band in line with the recommended ITU regional 1 channelization. Crucially, the defendant notified the claimant that this served as a temporary relief to the claimant since the defendant was planning to assign spectrum in this band using a competitive frequency assignment model. That meant there would be an auction and the highest bidder would get that band 28 frequency.

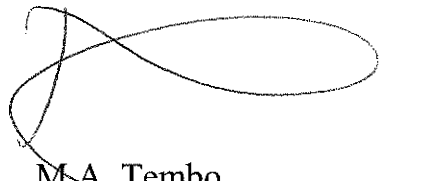
This crucial aspect in this matter has been alluded to in the claimant's narrative on this application.

18. Thereafter, by a letter dated 18th March, 2022, the defendant referred the claimant of the letter of 16th April, 2021 and reminded the claimant that it will be offering the band 28 on a competitive basis model and that the licence to the claimant in that regard would expire on 31st March, 2022. The defendant reminded the claimant to strategize on how it would offer its services using a different band duly assigned to the claimant. The claimant was also warned of the consequences of operated using band 28 after expiry of the relevant licence. The claimant wrote the defendant on 24th March, 2022 asking for continued usage of band 28. The defendant never responded indeed. It is in the aftermath of the expiry of the band 28 frequency licence that the defendant made its preliminary breach and subsequently heard the claimant and made the final decision finding the breach. There was another letter that appears to be out of sync with the developments on the band 28 frequency licence that was written by the defendant to the claimant dated 5th November, 2021 that stated that the band 17 temporary licence was to expire on 31st March, 2022 and would not be renewed. This letter appears to be clearly erroneous when it refers to band 17 and does not represent the development of matters as understood between the parties in this matter. The claimant however relied heavily on this letter as the operative letter with regard to band 28 issues. It is not.
19. The true facts on this application show that the claimant did not narrate the fact that by letter dated 16th April, 2021, after the meeting of 10th March, 2021, the defendant advised the claimant, crucially, that the claimant was allowed to use band 28 for one year up to 31st March, 2022. And crucially, that this served as a temporary relief to the claimant because the defendant planned to assign the band 28 using a competitive frequency assignment model. In that case, the claimant was warned beforehand as to what was intended for band 28 and contrary to the claimant's argument on this application this Court's view is that there could be no legitimate expectation on the part of the claimant that the band 28 would be subject to renewal as usual. On 28th March, 2022 the defendant was therefore within its rights to realize the idea of assigning band 28 using a competitive assignment model and notifying the claimant of the said decision. At this stage the reasons for the decision were plainly clear.

The claimant cannot therefore contend that it was never communicated the reason why the band 28 frequency licence was not going to be renewed. In the circumstances, the claimant writing on 24th March, 2022 seeking continued use of band 28 and the defendant's lack of a response cannot be a reason for saying that the defendant is the one that caused the breach that led to the defendant's preliminary finding of breach.

20. In the foregoing premises, this Court is unable to agree with the claimant that the defendant's decision directed at the claimant to cease and desist should be subject of a review at a full hearing for being unreasonable, for being a violation of the claimant's legitimate expectation, for violating section 43 of the Constitution and for being discriminatory. This Court is therefore compelled to decline the claimant's application for permission to apply for judicial review of the defendant's ceased and desist decision for being unfit for further consideration at a full hearing for judicial review, as envisaged in the case of *Ombudsman v Malawi Broadcasting Corporation* [1999] MLR 329.

Made in chambers at Blantyre this 12th August 2022.



M.A. Tembo
JUDGE