

**IN THE HIGH COURT FOR ZAMBIA**  
**AT THE PRINCIPAL REGISTRY**  
**HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

**Consolidated Cause  
and Cause**

**2014/HP/1905  
2014/HP/1918**

BETWEEN:

**MTN ZAMBIA LIMITED  
AIRTEL NETWORKS ZAMBIA PLC**



**1<sup>ST</sup> APPLICANT  
2<sup>ND</sup> APPLICANT**

**AND**

**THE ZAMBIA INFORMATION & TECHNOLOGY AUTHORITY**

**RESPONDENT**

**BEFORE : HON. G.C. CHAWATAMA**

*For the Applicant* : *Mr. M. Chakoleka & Mr. M. Chitaba – Mulenga Mundashi  
Kasonde Legal Practitioners*

*For the Respondent* : *Mr. M. Lungu – Legal Counsel, Information & Communication  
Technology*

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## **RULING**

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**CASES REFERRED TO:**

1. *Chikuta V Chipata Rural Council (1974) ZLR Page 241,*
2. *New plastic Industries V Commissioner of Lands and Another (2001) ZLR Page 51*
3. *BP Zambia PLC V Zambia Competition Commission and another SC November, 22 of 2011.*
4. *Fredrick Jacob Titus Chiluba V A 2003 ZLR Page 53,*
5. *Zambia Democratic Congress and lastly Bank of Zambia and Access hearing Limited and Another (2008) ZLR 159*
6. *Zambia Wildlife Authority, Mukela Manyando, Mubiana Munyinde And African Parts Zambia Limited V Muteeta Community Resources And Board Development Co-Operative Society (2009) ZR*



AUTHORITIES REFERRED TO:

1. *Article 94 Constitution of Zambia, Chapter 1 of the Laws of Zambia*
2. *Order 53 of the Rules of the Supreme Court of England (1999) Edition.*
3. *Order 14A Rules of the Supreme Court (1999) Edition.*
4. *Section 73 of the information and Technology Act No. 15 of 2009.*

On the 28<sup>th</sup> November, 2014 and the 2<sup>nd</sup> December, 2014, the Applicants MTN Zambia Limited and Airtel Networks Zambia PLC, respectively sought leave of the court to apply for Judicial Review pursuant to Order 53 of the Rules of the Supreme Court of England (1999) Edition.

On the 26<sup>th</sup> November, 2014 and the 2<sup>nd</sup> December, 2014 the court granted the respective Applicants leave to apply for Judicial Review in respect of the Respondent's decision to suspend the Applicants' approved market promotion tariffs. On the 9<sup>th</sup> December, 2014 the Respondents filed a notice of intention to raise a preliminary issue by way of objection on a point of law pursuant to *Order 14A Rules of the Supreme Court (1999) Edition.*

On the 7<sup>th</sup> January, 2015 an affidavit in opposition to notice of intention to raise a preliminary issue by way of objection on a point of law was filed by the Applicants.

The parties were heard on the 30<sup>th</sup> January, 2015. Counsel for the Respondent, Mr. Lungu informed the court that the Respondent would rely on the affidavit sworn by **Thomas Malama** filed on the 9<sup>th</sup> December, 2014. The Respondent took issue with the manner and



mode of commencement of this matter. Mr. Lungu informed the court that the brief facts were that the Respondent issued a directive to the Applicants to suspend all promotion activities and that the Applicants being aggrieved with this directive have brought to court an application for Judicial Review. Counsel informed the court that the cause taken is irregular, misconceived and thus a nullity.

The court was referred to Section 73 of the information and Technology Act No. 15 of 2009. Counsel's argument was that the matter has been commenced by way of Judicial Review when it should have been commenced by way of appeal. It was further argued that the High Court has no jurisdiction to grant the remedies sought. The court was referred to the case of *Chikuta V Chipata Rural Council (1974) ZLR Page 241*, *New Plastic Industries V Commissioner of Lands and Another (2001) ZLR Page 51* and the case of *BP Zambia PLC V Zambia Competition Commission and another (2011) SC*.

According to Counsel these authorities state that the mode of commencement of any action depend on the mode provided by relevant statute and where an aggrieved person chooses to ignore the provision of the statute the matter is liable to be dismissed. Counsel prayed that the matter be dismissed with costs for having been wrongly commenced.

In opposing the application Counsel for the Applicant, Mr. Chiteba referred the court to the affidavits in opposition to the application sworn by **Susan Mulikita** and another by **Yiluna Kapelembi**.



The court's attention was drawn to the fact that the Respondent has not satisfied the court as to the requirement under Order 14A. Order 14A Rule 2 (7) provides that an application under the said order must be commenced either by way of summons or motion. Counsel stated that the application before the court have been commenced thus, secondly that order 14A has mandatory requirements in order for the court to be vested with jurisdiction to determine a matter under the said order. The court was referred to Order 14A Rule 2 (3). Counsel stated that the first requirement is that the Defendant must have given notice of intention to defend. He pointed out that the record will show that there has been an affidavit in opposition on the part of the Respondent which should have shown the intention to defend. Counsel went on to quote Order 14A Rule 2 (4) and in particular paragraph 1:3.

Mr. Chiteba submitted that this application under Order 14 A of the White Book is incompetent on account of the wrong mode of commencement and failure to satisfy requirements. Counsel further stated that on the merits of the application all the authorities cited are on point save for the fact that they are not applicable in this matter. In respect of Section 73 that the Respondent relied upon, Counsel stated that the provision provides for an appeal procedure where a person is aggrieved with the decision of the Respondent. Counsel stated that Judicial Review is not concerned with the merits of the decision rather with the decision making process. The court was



asked to take note that Section 73 does not provide for an appeal process where an aggrieved person seeks to challenge the decision making process employed by the Respondent. The court was referred to Order 53 (14) (19).

The court was further referred to the cases of *Fredrick Jacob Titus Chiluba V A 2003 ZLR Page 53, Zambia Democratic Congress and lastly Bank of Zambia and Access hearing Limited and Another (2008) ZLR 159*. Counsel stated that what was being challenged is the decision making process employed by the Respondent and not the decision itself. The court was asked to consider that in the documents filed by the Applicant they are contending

- 1. Procedural impropriety on the part of the Respondent in that they were not given an opportunity to be heard.*
- 2. The Applicants are also raising the issue of illegality on the ground that the Respondent does not have any legal backing for the decision challenged.*

Mr. Chiteba, drew the court's attention to the fact that it is trite law that under the rules of the High Court as well as the Supreme Court of Zambia, resort maybe had to the Rules of Supreme Court of England in instances where Zambian Court Rules are either silent or not fully comprehensive. Counsel pointed out that the rules relied on for appeal under Section 73 and 74 of the ICT Act established an adhoc tribunal and not a permanent one. An aggrieved party is thus



expected to submit a form to the Minister for setting up a tribunal to hear a decision. The court was asked to consider the fact that in exhibit "YK2" the directive was to take effect within three days, meaning it would have been impossible to employ the appeal procedure as well as stay the procedure complained of.

The court was reminded that under article 94 of the Constitution of Zambia, this court has original and unlimited jurisdiction to hear all matters except that those reserved for the Industrial Relations Court. In response Mr. Lungu informed the court that under the ICT Act are Rules of procedure known as administrative rules of procedure which entitle an aggrieved person to apply for a stay against a decision pending the outcome of a decision by the tribunal.

I have perused Sections 73 and 74 of the ***Information and Communication Technologies Act No. 15 of 2009***.

Section 73 provides as follows:

***(1) A person who is aggrieved with the any decision of the Authority may appeal to the Tribunal within thirty days of such decision.***

***(2) A person who is aggrieved with the decision of the Tribunal may appeal to the High Court within thirty days of the Tribunal's decision.***

This Section does indeed provide a channel for appeal for a person aggrieved by the decision of the Authority. I have also looked at



authorities referred to by Mr. Lungu. The cases of *Chikuta v Chipata Rural council and New Plastic Industries V Commissioner of Lands and Another* both state that the mode of commencement will be stipulated in the relevant statute. I agree with Mr. Chitebe that these cases are not applicable in this matter. In addition these cases do not support Mr. Lungu's contention in his application, as his reliance on Section 73 of the *Information and Communication Technologies Act* merely indicates that the Applicants herein have jumped the stage of appeal which is provided for by the Act. Section 73 does not have anything to do with the mode of commencement of actions before the courts. I do not find any applicability of the case of *BP Zambia v Zambia Competition Commission Limited* in this case.

On the mode of commencement of the preliminary application under order 14A, Mr. Lungu cannot be faulted as the order even allows for an oral application. Secondly, there was an opportunity for both parties to be heard on the application notwithstanding that there was no intention to defend filed by the Respondent.

Coming to the issue of whether the Applicants should have pursued the appeal to the Authority as provided under section 73, I have examined the affidavit evidence before me.

The affidavit filed on 2<sup>nd</sup> December, 2014, in support of the Application of the 1<sup>st</sup> Applicant and sworn by **Yiluna Kapelembi**, shows that the Respondent had for the first 3 quarter of 2014, produced reports



indicating that the Applicant's quality of service has fallen below the Respondents minimum performance requirements in specified parameters and therefore warranting the constitution of an inquiry into the same. Further that the Respondent had in each instance responded to the findings in the said reports requesting further information and clarification from the Respondent to understand the said Respondent's measurement criteria, among others but there has been no response to this. However, on 24<sup>th</sup> November, 2015, the Applicant received a letter from the Respondent advising that it has with immediate effect suspended all market promotion activities and that the Applicant was to comply within three days of receipt of the letter. This was followed by an article in the Daily Nation Newspaper edition of 28<sup>th</sup> November, 2014 regarding the Respondent's decision to suspend all market promotion activities for all mobile operators in Zambia.

Similarly, the 2<sup>nd</sup> Applicant's affidavit deposed to by **Susan Mulikita** shows that on 26<sup>th</sup> November, 2014, the Applicant received a letter from the Respondent advising that it had with immediate effect suspended all market promotion activities and the Applicant should comply within three days of receipt of the letter. The 2<sup>nd</sup> Applicant wrote back to the Respondent, as did the 1<sup>st</sup> Applicant, stating the difficulties the Respondent's decision had on its currently approved promotional tariffs. The 2<sup>nd</sup> Respondent was equally surprised with the article in the Daily Nation Newspaper of 28<sup>th</sup> November, 2014 expressing the Respondent's decision.



Without delving into the matter itself, prima facie, this is a matter which I can entertain in Judicial Review. It is clear that what is being contested from the two affidavits from the two Applicants is the decision making process and not the decision in which case they would be amenable to the provisions of Section 73.

The Supreme Court has stated in the case of ***Zambia Wildlife Authority, Mukela Manyando, Mubiana Munyinde And African Parts Zambia Limited V Muteeta Community Resources And Board Development Co-Operative Society (2009) ZR*** that:

***“Where an applicant has presented an arguable case, the Court is perfectly entitled to grant leave to that applicant to allow for full investigations even after granting leave”.***

I believe the Applicants have an arguable case and that it is a proper case for Judicial Review. I therefore dismiss the Respondent’s preliminary application.

Costs are in the cause.

Leave to appeal is hereby granted.

**DELIVERED AT THIS 12<sup>TH</sup> DAY OF NOVEMBER, 2015.**

  
**G.C. CHAWATAMA**  
**JUDGE**