

MTHWAKAZI PUBLISHING HOUSE (PVT) LTD

Versus

TAFATOAN P MAHOSO

And

THE MEDIA AND INFORMATION COMMISSION

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 9 MARCH 2005 AND 28 APRIL 2005

K I Phulu for applicant
Tomana for both Respondents

Urgent Application

CHEDA J: Applicant sought an order that it be permitted to dispose of its printed copies of the Weekly Times for the week-ending 4 march 2005 and that it be allowed to operate in the normal manner pending the resolution of the application, therefore preventing respondents and their agents from interfering with its normal operations.

Applicant is a publisher of the Weekly Times, a weekly newspaper which is a duly registered newspaper in terms of the laws of Zimbabwe.

First respondent is the Chairman of the Media and Information Committee (thereinafter referred to as “the Chairman”) while 2nd respondent is a body corporate established in terms of section 38 of the Access to Information and Protection of Privacy Act (AIPPA) [Cap 10:27] (hereinafter referred to as “the Commission”).

Applicant was issued with a licence to publish a weekly newspaper called The Weekly Times. Thereafter applicant commenced the publication of newspaper.

However, during that period the Commission noticed some irregularities in applicant's operations which culminated in certain enquiries being made. The Commission after the enquiry concluded that applicant was guilty of certain misrepresentations and/or had failed to materially disclose the identity of the mass media owner which non-disclosure offended against the provisions of the Access to Information and Protection of Privacy Act (hereinafter referred to as "the Act").

The Commission therefore cancelled the applicants' certificate in terms of section 71 which reads:

“Section 71

Suspension, Cancellation and enforcement of registration certificates

1. Subject to this section the commission may whether on its own instutance or upon the investigation of a complaint made by any interested person against the mass media services, suspend or cancel registration certificate of a mass media some of it has reasonable grounds for believing that-
 - (a) the registration certificate was issued in error or through fraud or there has been a misrepresentation or non-disclosure of a material fact by the mass media owner concerned; or
 - (b) ...
 - (c) ...”

Applicant on receipt of the cancellation notice filed a notice of appeal at the Administrative Court as provided for in terms of section 60 of the Act. This appeal is therefore pending.

The thrust of this application is that applicant be allowed to continue operating pending the final determination of its appeal and that it be allowed to distribute the paper it already printed. The basis of this argument is that applicant employs more

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than 30 people and that it has already accepted orders from advertisers who have already paid for the said service. The first question which falls for determination is whether or not this application is urgent. Applicant was notified of the cancellation of its licence on 24 February 2005 and filed this application on 3 March 2005. Applicant became aware of the Commission's determination on 24 February 2005 and they subsequently noted an appeal to the Administrative Court.

It is clear that applicant is under immense pressure to continue with the production and publication of its newspaper. The main reason is that they have already received confirmed orders for publication. Failure to fulfil these orders will obviously result in financial prejudice to it by way of loss of revenue and possible numerous law suits against it. In support of this argument applicant filed confirmation orders bearing various dates. These dates can be categorised into two sections, there are orders received and confirmed prior to 24 February 2005 and those received after 24 February 2005.

The 24 February 2005 is the determination date and the date upon which they became aware of that determination. Therefore, herein lies the problem, there are two confirmed orders of 25 February 2005. It is interesting to note that applicant continued to receive these orders a day after it became aware of the cancellation of the certificate.

Despite this knowledge they continued to accept orders as if they were licensed to publish their newspaper. The fact that they continued to receive and confirm orders is an indication that they wanted to covertly put pressure on the court in order to gain sympathy on the basis of a balance of convenience. The principle of

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balance of convenience is a hallowed principle, it therefore should not be used where there is clear deceit. On realising the contradiction of dates in the confirmation orders, I brought this discrepancy to the attention of their legal practitioner Mr *Phulu* who conceded that, confirmed orders received after the licence was cancelled indeed caused a problem. This I must say was very honest and professional of him as an officer of the court.

The urgency which applicant now claims as a basis for bringing this matter before me lacks *bona fides* as it is a self created urgency.

These courts can not allow a person who deliberately creates urgency on his part and thereafter put the court and the other part under pressure under the guise of urgency. Such conduct on applicant's past cannot justify urgency on anybody's part other than themselves.

It is pertinent to mention that a legal practitioner who issues certificates of urgency should fully apply his mind to the facts before him as the issuance of such certificate plays a very important role in the matter before a judge, for it is in that certificate that a judge places total reliance on the matter before him with regards to the urgency – see *General Transport & Engineering (Pvt) Ltd & Others v ZIMBANK Ltd* 1998 (2) ZLR 301 (H) at 303A-B where GILLESPIE J had this to say-

“It is, therefore, an abuse of a lawyer to put his name to a certificate of urgency where he does not genuinely hold the situation to be urgent ... Thus where a lawyer could not reasonably entertain the belief that he professes in the urgency of a matter he runs the risk of a judge concluding that he acted wrongfully if not dishonestly in giving his certificate of urgency.”

The application is therefore not urgent and should await the determination of

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their appeal by the Administrative Court. The application is accordingly dismissed with costs.

Coghlan & Welsh, applicant's legal practitioners

Muzangaza, Mandaza and Tomana Respondents' legal practitioners