IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL DIVISION
JUDICIAL REVIEW CAUSE NO. 32 OF 2022

BETWEEN

THE STATE
On application by
RAISE 1996 (PRIVATE) LTD t/a MULTICHOICE MALAWI
CLAIMANT

-AND-

MALAWI COMMUNICATIONS REGULATORY AUTHORITY
DEFENDANT

CORAM: HON. JUSTICE VIOLET PALIKENA-CHIPAO
Mr. Wapona Kita, Counsel for the Claimant
Mr. Edward Dzimphonje, Counsel for the Respondent
Ms. V. Chitawo, Court Clerk and Official Interpreter

RULING

1. This is an application for leave for judicial review against the decision of the Defendant and for an injunction pending hearing of the application for judicial review. The application is opposed.
2. If permission is granted, the Claimant will seek the following reliefs;
   (1) An order that by subjecting the DStv subscription fees adjustment to it approval and ascribing the adjustment of the DSTV tariffs to the Claimant, who is neither licenced to nor responsible for broadcasting the said DSTV signal and adjusting its tariffs, the Defendant has acted

ultra vires in instituting an inquiry, making of its decision on the preliminary finding against the Claimant and directing the Claimant not to implement the adjusted DStv tariffs.

(2) A declaration that the defendant's decision subjecting DStv subscription fees to its approval, when it does not do so for Neflix and other similar audio-visual service providers from outside Malawi, is discriminatory.

(3) A declaration that the Defendant has acted illegally and irrationally in the *Wednesbury unreasonableness sense.*

(4) A like order to certiorari quashing the decision of the defendant in totality.

(5) If permission to apply for judicial review is granted, a consequent order of injunction, restraining the Defendant's implementation of any of its decisions and the directives contained in its letter of the 28th June 2022, the subject matter of the impudged decision, be granted.

(6) An order of costs at an indemnity scale.

3. The matter is that the Claimant, is a Malawian owned company that provides Subscription Management Services for DStv subscribers in Malawi. The Claimant, is holder of an Individual Content Services Licence for the Provision of Subscription Management Services in Malawi (DHT) which was issued on 21st August 2020. DStv service is provide by Multichoice Africa Holdings BV (Multichoice Africa) which is registered in Netherlands
4. On 3rd June, 2022 the Claimant informed the Defendant of the decision by Multichoice Africa, the service provider for DStv services in Malawi to increase subscription fee with effect from 15th July, 2022. By its letter dated 28th January, 2022 the Defendant instituted an inquiry against the Claimant and issued the Claimant with a notice of preliminary finding of breach of section 74(2) of the Communications Act and Clause 11.2 of the Individual Content Services Licence for the Provision of Subscription Management Services in Malawi (DHT). The notice also contained a direction that the Claimant should not implement the new tariffs as they had not been proved until the final determination of the matter.
5. The Claimant now challenges the decision-making process of the Defendant to institute an inquiry and come up with a preliminary finding and the decision directing the Claimant not to implement the revised tariffs on the following grounds;

(1) That the Defendant is acting beyond its authority by subjecting the Claimant to a preliminary finding concerning revision of a tariff beyond the scope of its licence. The Claimant has no right or powers to adjust DStv tariffs and it does not own or operate the DStv service. The Claimant is not the entity that has revised the tariff in issue but only communicated the revised tariff as advised by Multichoice Africa, the owners and operators of DStv services.

(2) That there is no licensee in Malawi who has revised DStv services subscription tariff in issue as the DStv service is not licenced in Malawi. Further that the Defendant is aware and acknowledged that DStv service is not licenced in Malawi through various engagements it has had with the Claimant.

(3) That section 74(1) of the Communications Act can only be invoked where a Licensee duly authorised and recognised under the Act to set or revise tariffs has made such a decision which does not obtain in this case since the Claimant is not so licenced.

(4) That whilst the Claimant acknowledged that and Clause 11.2 of its licence requires that the Claimant shall not change its approved tariff without written prior approval of the Defendant, the tariff referred to therein is not the DStv subscription tariff as there is nothing in the licence which allows it to set or revise DStv subscription tariff. Such tariffs refer to the tariffs which the Claimant may charge the DStv customers for the support/customer services it provides per its SMS licence which it does not currently charge.

(5) That the Defendant has obviously taken into account irrelevant and extraneous considerations in instituting the inquiry and making its preliminary finding against the Claimant as well as directing the Claimant not to implement the revised DStv tariffs. It has failed to direct itself properly in law and as such acted unreasonably in the *Wednesbury Case.*

(6) The Claimant also aver that the Defendant has acted unreasonably by inviting the Claimant to make a representation after it has already made a preliminary finding without hearing its side and is now reversing the burden of proof, to have the Claimant prove itself innocent against its finding of guilty, albeit calling it preliminary. It is obvious that the Defendant is bent to defend its own preliminary finding.

6. It is against the above background that the Claimant seeks leave to apply for judicial review and prays for an injunction restraining the Defendant from implementing its decision of instituting and carrying out an inquiry and issuing the Claimant with a notice of preliminary finding and directing the Claimant not to implement the revised DStv tariffs until the final determination of the substantive judicial review.
7. The Defendant version is that the Claimant notified the Defendant of its intention to adjust subscription prices for DStv customers effective 15th July 2022 and advertised to the general public that it will implement revised prices effective 15th July 2022. Then on 21st June 2022 before the Defendant responded, the Claimant wrote the Defendant again purporting to inform the Defendant that it considered the price adjustment approved whilst also in the same vein communicated that it had revised its intention to adjust the tariff. The Claimant further stated that it had (unilaterally) opted to stager the implementation of its tariff increase. The Defendant then on 28th June respondent to the Claimant communicating that its preliminary finding is that the Claimant has breached section 74 of the Communications Act and their licence conditions by adjusting prices without prior written approval of the Defendant. On 30th June, the Claimant was notified of a hearing on the matter that had been scheduled to take place on 14th July 2022.
8. The Defendant opposed the application on the following grounds;
    (1) that the Claimant has acted contrary to Clause 32 of the licence by not firstly exhausting alternative remedies under the licence which require that a dispute if not settled amicably between the parties be referred to arbitration;
    (2) that the preliminary inquiry is allowed under the terms of the licence as well as under the provisions of the Communications Act being the law governing the Defendant's operations and the factors that the Claimant did indeed raise the tariffs without prior approval of the Defendant as required;
    (3) that the Licence in issue clearly stipulates that prior consent should be sought as is stated in Clause 11.2;
    (4) That the Claimant suppresses material facts in his application namely;
        a) That the Claimant did not disclose that under its licence, it was required to exhaust all dispute settlement mechanism before approaching the court;

b) That the Claimant in fact sought prior approval of its tariff adjustment and appreciated the need for approval in its later dated 21st June 2022 but never asked the same in its later dated 3rd June 2022;

c) That the Claimant revised its intention to adjust tariffs from the initial 18% to a stagger implementation of 10% on 15th July, 2022 and 8% by the end of its financial year ending 31st March 2023 necessitating it to seek further approval to adjust the tariff in the revised manner;

d) That the Claimant has not disclosed that it has the right to manage the manner in which the tariff adjustment would be managed as demonstrated in its ability to unilaterally revise the proposed tariff adjustment without the interference of the Defendant;

e) That the Applicant has informed the general public of its intention to implement the fee adjustment without prior approval of the Defendant and that as such the preliminary finding was reasonable in the circumstances, fair and in good faith and certainly in accordance with the terms of the licence, dictates in meting out administrative justice and not in any way in contravention of the provisions of the Communications Act;

f) That the Claimant misrepresented to the court that it is not a licencee when in fact, the Claimant renewed its licence for provision of subscription management services pursuant to section 99 of the Communications Act.

g) That contrary to Claimants assertion, the Claimant having opted to exercise the rights under the licence in co-operation with a service provider, (Third party- Multichoice Africa Holdings BV) elected to be liable for any acts or omissions of such third party in exercise of the rights granted under the licence so long as they constitute contravention of the aforesaid licence. See Clause 4.5 of Exhibit CC2

(5) That the Claimant was accorded the right to be heard on the preliminary finding by being requested to make written presentation and tom further make an appearance at a hearing scheduled for 14th July 2022.

(6) That the preliminary finding is not a final determination but a process towards determining whether the Claimant has in fact complied with the licence terms. The Claimant would be heard and consequently the action is premature and stifles the internal grievous and administrative procedures provided for under the licence mechanism

9. The Defendant argued that the application for permission for leave for judicial review is an abuse of court process and should be dismissed.The Defendant also opposes the application for injunction arguing that it is unsubstantiated. It was also argued that it is not true that the Claimant should not comply with the national laws as this will be contrary to the rule of law and an affront to the principle of equality of all persons before the law. It was further argued that the application is in bad faith as previously the Claimant has sought approval of the Defendant before effective tariff adjustment.

10. The Defendant further argued that the balance of convenience lies in favour of maintaining the status quo and that the injunction is unjust as Malawians who are subscribers will have to pay adjusted tariffs without the Defendants assessment and approval as required by the law. The Defendant further argued that in the event that the Claimants application for judicial review is successful, it will be a matter of computing the revenue lost for not making the adjustment which the Defendant being a statutory body would be able to pay.

11. The Claimant has petitioned the court seeking leave to commence judicial review proceedings against the Defendant decisions. At the outset, I do remind myself that judicial review is concerned with the decision-making process and not the merits of a decision of a public body. As in the words of Lord Hailsham L.C. in ***Chief Constable of North Wales Police v Evans*** [1982] 3 All ER141 at 143, "the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected to and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question." This principle was applied in the case of ***State, Ex Parte Pindani Kamwaza; Traditional Authority Dambe and others*** [2007] MLR 378 (HC).

12. On application for judicial review, the court is guided by Order 19 rule 20 of the Courts (High Court) (Civil Procedure) Rules, 2017 (hereinafter the CPR). Order 19 rule 20(1) & (2) of the CPR provides as follows;

> (1) *Judicial review shall cover the review of__*
>
> *(a) a law, an action or a decision of the Government or a public officer for conformity with the Constitution; or*
>
> *(b) a decision, action or failure to act in relation to the exercise of a public function in order to determine__*
>
> *(i) its lawfulness;*
>
> *(ii) its procedural fairness;*
>
> *(iii) its justification of the reasons provided, if any; or*
>
> *(iv) bad faith, if any, where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened.*
>
> (2) *A person making an application for judicial review shall have sufficient interest in the matter to which the application relates.*

A law, an action or decision of the Government or public officer, will be reviewed to determine its conformity with the Constitution. The court can also review a decision, action or failure to act in relation to the exercise of a public function in order to determine its lawfulness, its procedural fairness, its justification of the reasons; or bad faith.

13. An applicant seeking to commence judicial review proceedings is firstly required to obtain leave to commence judicial review proceedings. The purpose for requiring leave is twofold;

> a) *to eliminate frivolous vexatious or hopeless applications for judicial review without the need for an inter partes judicial review hearing; and*
>
> b) *to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further investigation at a full inter partes hearing. (See* ***State, Ex Parte Pindani Kamwaza; Traditional Authority Dambe and others*** [2007] MLR 378 (HC)

At this stage, my duty therefore, is to determine whether the Claimant has disclosed a case fit for further investigations at a full hearing of the substantive application for judicial review, for which the Claimant seeks leave. Once the court is satisfied that on the material before it, the Claimant has disclosed a

case fit for judicial review, then leave should be granted (see ***Ombudsman v. Malawi Broadcasting Corporation*** [1999] MLR 329).

14. In determining that question whether a case for judicial review has been made up, I bear in mind what was stated in the case of ***The State v. Malawi Revenue authority Exp. Victor Ntuwa*** Judicial Review Cause No. 1 of 2017 which laid down conditions' precedent for the granting of leave to commence judicial review proceedings. The court stated as follows;

> *It is also important at this juncture to backtrack and remember the matters that must obtain for an applicant to be granted leave. It is trite that a court faced with an application for leave ought to be satisfied that (a) the person intended to be made a respondent is amenable to judicial review, (b) the applicant has sufficient interest in the matter to which the application relates, (c) the matters/issues raised in Form 86A show a prima facie case fit for further investigations at the intended judicial review proceedings, (d) the applicant does not have an alternative remedy or avenue that would resolve his or her complaint, (e) the application is made promptly, and in any event within three months of the date on which the grounds for the application first arose: see* ***Malawi Communications Regulatory Authority v. Makande and Another, MSCA Civil Appeal No. 28 of 2013 (unreported)***

15. The Defendant is a creature of a Statute as such there is no question that it is a public body. There is also no question that the Claimant has sufficient interest in the matter as the decisions subject of the application were made against the Claimant. The application was also made promptly, having been made before the expiry of three months from the date the alleged infringing decision was made as required under the CPR and also within 30 days as required under section 196 of the Communications Act. The issues however are whether the Claimant has alternative remedies and whether the matters raised by the Claimant show a prima facie case fit for further investigations during the substantive judicial review proceedings.

16. Leave for judicial review will not be granted where the Claimant has alternative remedies or avenue which can resolve his or her complaint. This is

so because judicial review is a remedy of last resort. It was argued by the Defendant that the Claimant has alternative remedies as provided under Clause 32 of the licence and sections 171-173 of the Communications Act and that therefore the application is premature. On its part the Claimant argued that the Act should be read as a whole and not selective as the Defendant has done. It was therefore argued that the application is not premature in that the Defendant has made a seize and desist order in accordance with section 173(2)(b) of the Communications Act. The Claimant also argued that under sections 174 and 196 of the Communications Act, the Claimant has the right of appeal and the right to judicial review and that section 196 of the Communications Act does not limit the point at which judicial review can be sought. The Claimant further argued that the provision on arbitration is found in the Licence and that the Act prevails over the licence.

17. Clause 32 of the licence issued to the Claimant provides as follows;

Dispute Resolution

1. *Any dispute arising out if or in relation to this Licence, shall if not settled amicably on written request of either party be referred to arbitration in accordance with the Arbitration Act and the seat of arbitration shall be Blantyre, Malawi*
2. *This clause shall not preclude the parties from seeking provisional remedies in aid of arbitration from a court of competent jurisdiction.*

It is clear from Clause 32(1) of the Licence that disputes should first go through arbitration if not amicably settled before seeking court relief. The issue of alternative dispute resolution mechanisms is not only found in the Licence as suggested by the Claimant. Section 172 (1) of the Communications Act mandates the Authority to employ alternative dispute resolution mechanisms in resolution of disputes and arbitration is one such alternative dispute resolution mechanism. As such it cannot be said that there is no provision for alternative dispute resolution under the Act.

18. Where there is an arbitration agreement between parties, arbitration takes precedence over court proceedings in accordance section 6(1) of the Arbitration Act (Cap 6:03 of the Laws of Malawi) (see ***Capital Investment Ltd. v. Dr. C.K. Makadia*** Civil Cause No 495 of 2003). Section 6(1) of the Arbitration Act provides as follows;

(1)"*If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings ".*

19. In the case of ***State v. Minister of Mining and Secretary for Mining Ex parte Nyala Mines Limited*** Judicial Review Cause No. 27 of 2013, the Applicant sought judicial review against the decision of the Defendant to cancel its licence. The Defendant raised a preliminary objection praying that the proceedings be stayed for the matter to be referred to arbitration owing to the existence of an arbitration clause in a Royalties Agreement entered into in relation to the mining operations. The arbitration clause contained in Article 4 of the Royalties agreement was in the following terms;

> *"SETTLEMENT OF DISPUTES*
>
> *Any dispute which may arise relating to the interpretation or application of this Agreement and which cannot be amicably settled by the Parties, shall, at the request of either Party, be submitted for arbitration in accordance with the Arbitration Act, Cap. 6: 03. "*

The court applying section 6(1) of the Arbitration Act had this to say;

> *Where an agreement provides for arbitration as an avenue for resolving disputes the court will honour the provision for arbitration and allow a party to refer the matter to arbitration where such procedure is not exhausted: Industrial Metalurgicus Pescamona v. Heavy Engineering Ltd [2002-2003] MLR 84 (SCA); Preferential Trade Area Bank v. Electricity Supply Corporation of Malawi and another [2002-2003] MLR 304 (HC).*

20. The Defendant may however be precluded from relying on arbitration clause where after commencement of court proceedings, the Defendant after appearance takes further steps in the proceedings or where the court is satisfied

that there is sufficient reasons why the matter should not be referred to mediation. In the case of ***State v. Minister of Mining and Secretary for Mining Ex parte Nyala Mines Limited*** Judicial Review Cause No. 27 of 2013 the court could not allow the Defendant to insist that the matter be referred to arbitration as required under the mediation agreement because the Defendant had sat back for a period of 4 years and only sought to refer the matter to arbitration after the Claimant had the matter set down. The Court found that the application to stay the proceedings and refer the matter to arbitration was not in the interest of justice and that the inaction for such a period only signified that the Defendant was not ready and willing to do all things necessary to the proper conduct of arbitration and that as such, there was sufficient reason why the matter should not be referred to arbitration.

21. In the present case, the Defendant did not do anything which would preclude him from raising the issue of arbitration. The Claimant on his part relied on the argument that there is no provision for arbitration in the Act and that under sections 174 and 196 of the Communications Act, the Claimant has the right of appeal and the right to the remedy of judicial review and has argued that the Act prevails over the licence.

22. As noted above, where an agreement provides for arbitration, the court honours the provision for arbitration unless if satisfied that there is sufficient reason why the matter should not be referred for arbitration. In terms of sections 174 and 196 of the Communications Act, this court agrees that indeed the two sections provide for the right of appeal and the right to the remedy of judicial review. Under section 174 of the Communications Act, a person who is not satisfied with an order of the Authority may appeal to the high Court within thirty days from the date the order was made. The Claimant did not come by way of appeal but by way of judicial review and so section 174 of the communications Act does not apply. Besides, there is no substantive decision that was made by the Defendant which would be subject of an appeal.

23. It must be noted that under Clause 32 (2) of the Licence, an aggrieved party is allowed to seek provisional remedies from the court in aid of arbitration. The Claimant has not indicated that it is seeking provisional remedy in aid of arbitration. The Claimant is seeking judicial review and 'a consequential order of injunction' in the event that leave for judicial review is granted. An

injunction would be granted as a provisional remedy in aid of arbitration but in the present case, it is being sought as a consequential order pending substantive hearing of judicial review. Judicial review cannot be said to be a provisional remedy in aid of arbitration. Judicial review is a substantive court proceeding and the nature of the declarations sought in the application are substantive. In as far as Clause 32 is concerned, the Claimant by not engaging other avenues of dispute resolution as provided for under the licence, has proceeded to apply for judicial review without exhausting other remedies.

24. Section 196 of the Communications Act which the Claimant is relying is in the following terms;

> *A licensee aggrieved by a decision of the Authority made under this Act may, within thirty days of receiving the order, apply to the high Court for judicial review of the decision.*

As argued by the Claimant, indeed section 196 of the Communications Act entitles an aggrieved party to seek judicial review of the decision of the authority within 30 days of receiving the order. The Communications Act does not provide for a different regime of principles applicable to applications of judicial review under the Act and so the principles applicable to applications for judicial review under the Act are the same principles applicable to judicial review proceedings as provided under the CPR. One of such principles is the requirement that before commencing judicial review, the applicant must have exhausted all other remedies (see ***The State v. Malawi Revenue authority Exp. Victor Ntuwa*** Judicial Review Cause No. 1 of 2017).

25. The application for judicial review is arising from the letter of the Defendant addressed to the Claimant dated 28th June, 2022. The letter is as follows;

> The Managing Director
> Multichoice Malawi
> Multichoice Malawi House
> P.O. Box 801
> **BLANTYRE**
>
> Dear Sir,
> **RE: NOTICE OF PRELIMINARY FINDING OF BREACH OF SECTION 74(1) OF THE COMMUNICATIONS ACT AND THE INDIVIDUAL CONTENT SERVICE LICENCE FOR THE**

PROVISION OF SUBSCRIPTION MANAGEMENT SERVICES IN MALAWI (DTH)

The Authority has made a preliminary finding that you have breached Section 74(1) of the Communications Act No. 34 of 2016 and Clause 11.2 of the Individual Content Service Licence issued to you for the provision of Subscription Management Services in Malawi, for adjusting tariffs for DStv services without prior written approval of the authority.

Therefore, this letter invites you to show cause why a final finding of breach should not be made against you and appropriate sanctions imposed on you. Revert to the authority within 14 days of this letter on your representations in writing on the preliminary finding.

In the meantime, you are hereby directed to cease implementation of the tariffs for DSTV services, as these have not been approved, until further determination of this matter by the Authority.

Yours faithfully,
Daud Suleman
DIRECTOR GENERAL

26. The section 74 of the Communications Act and the Clause 11.2 of the Licence referred to in the letter provide as follows;

Section 74 of the Communications Act

(1) Subject to this Act, a licensee may, with prior approval of the Authority, set or revise the tariffs for the services that it provides to the public.

(2) A licensee shall set or revise tariffs under this section, based on justifiable economic reasons.

(3) The setting or revision of tariffs by the licensee pursuant to subsection (1) shall__

a. be transparent, based on objective criteria and non-discriminatory;

b. guarantee equal treatment;

c. *not contain discounts that unreasonably prejudice the competitive opportunities of other licensees providing application services to the public; and*

d. *be sufficiently clear to enable end-users to determine the description of the service, the details relating to the nature of the service and the applicable fees.*

Clause 11 of the Individual Content Services Licence for the Provision of Subscription Management Services in Malawi (DTH) issued to RAISE 1996 (PRIVATE) LIMITED t/a "MULTI CHOICE MALAWI, provides as follows;

11.1 The Licencee shall not before providing the service, submit to the authority for approval its proposed tariff for the services

11.2 The Licencee shall not change its approved tariff without prior written approval of the Authority.

11.3 The Licencee shall publish the approved tariff on its website within 7 days of their coming into operation.

27. The reading of section 74 of the Communications Act and Clause 11.2 of the Individual Content Services Licence for the Provision of Subscription Management Services in Malawi (DTH), is to the effect that a Licensee cannot revise and effect change in its approved tariff without the written approval of the Authority. In the present case, the Claimant communicated with the Authority by letter dated 3rd June, 2022 that under the subject '**Notification of the Subscription Fee Increase for DStv Services in Malawi'** advising the Defendant that Multichoice Africa Holdings had advised the Claimant that they intended to implement DStv subscription fee increase effective 15th July, 2022. In the letter, the Claimant explained the proposed changes in the tariff and the justification for the same. The Defendant did not respond to the letter and then on 21st June 2022, the Claimant wrote to the Defendant again. The second letter is as follows;

Mr. Daud Suleman
The Director General
Malawi Communications Regulatory Authority
P/Bag 261
BLANTYRE

Dear Sir

SUBSCRIPTION FEE ADJUSTMENT IN RESPECT OF DSTV AND GOTV SERVICES.

1. We refer to our letters dated 3rd June 2022 on the above subject matter.
2. As set out in our licence conditions, the tariffs are deemed approved in the event that the Authority neither approves nor rejects them within 14 days of receiving the tariff notice.[1]The approval. Therefore, became effective on 17th June 2022.
3. As a gesture of goodwill, and in order to cushion the effect of the tariff increase on our customers, we shall stagger the implementation of the proposed tariff increase of 18% over 2 phases commencing with 10% increment. We have notified our customers of this 10% increment to come into effect on 15th July as per the attached extracts of the customer notification.
4. The remaining 8 percent will be levied before our financial year ends by 31 March 2023. We wish to assure the Authority that together the increase percentage of the two phases will not exceed 18%, calculated at the date of the deemed approval.
5. We assure you of our best intentions always.

Sincerely

Christopher Chibwana
Regulatory Manager

28. The wording of the letter of 21st June 2022 suggest to the court that the Claimant is aware that tariffs adjustments have to be approved before they are implemented. The Claimant specifically refers to DStv service subscription fee (tariff). It further suggests that there are two modes of approval; express approval by the authority and approval by operation of the law. The second approval according to the letter happens when the Authority, upon receiving notification of proposed adjustments of tariff neither approvals nor rejects the proposal within a period of 14 days. It is in respect of the second mode of approval, that the Claimant considered its proposed tariff adjustment for DStv and Gotv services approved. Having considered its proposed tariff

[1] See for instance Clause 17.3 of the Multichoice Malawi's Content Services Licence for Digital Terrestrial Television Broadcasting dated 21st August 2021.

adjustments approved, the Claimant went further to inform the Defendant that the implementation of the approved tariff would be staggered as a way of cushioning the effect of the increment on its customers. The letter also seems to suggest in my view that the Claimant has the capacity to determine how an increment can be managed.

29. According to the Defendant, this is not the first time for the Claimant to seek approval of the Defendant when it wants to effect adjustment in the tariff. On 29th June 2021, the Claimant wrote the Defendant seeking the Defendant's approval for proposed increment of subscription fees for DStv services in accordance with section 74 of the Communications Act. Just as with the letter dated 3rd June 2022, the Claimant provided the proposed adjustments and the reasons for the same. In a letter dated 12 August 2021 from the Claimant addressed to the Defendant, there is indication that the Defendant responded to the request on 2nd August 2021 partially approving and reducing DStv pricing. In the letter, the Claimant challenged the Defendant's refusal to approve the increment by the proposed percentages and the justification for the decision the Defendant. Notable is Clauses 14 and 15 of the letter which reiterates what was stated in the letter dated 21 June 2022 that tariffs are deemed approved if the authority neither approves not rejects the proposed tariffs within 14 days.

30. The 2021 exchange of communication between the Claimant and the Defendant on the same subject as the communication in June 2022, shows that according to the previous dealings between the parties, it is the practice that the Claimant seeks approval from the Defendant before effecting tariff adjustments and that such practice is based on section 74 of the Communications Act. These exchanges were not disclosed by the Claimant. These exchanges of 2021 between the Claimant and Defendant on the subject of increase of subscription of DStv and the letter of 21 June 2022 both which were not disclosed, are in my view material considerations to the issues at hand especially considering that there is no indication that the Defendant has departed from its expected conduct.

31. As noted above, it is the requirement of the law and licencing terms that before any tariff adjustment, a licencee must seek approval of the Defendant. The letter of 21 June 2022 from the Claimant to the Defendant shows that the Claimant had effected changes in its tariffs and had already communicated

with its customers as of 21st June 2022. It was after receipt of this letter that the Defendant wrote the Claimant the letter dated 28th June 2022 which is the subject of the present application. In the letter as noted above, the Defendant made a preliminary finding that there was a breach of section 74 of the Communications Act and Clause 11.2 of the Individual Content Services Licence for the Provision of Subscription Management Services in Malawi (DTH). The Defendant further invited the Claimant to show cause why a final finding of breach should not be made against it and why appropriate sanctions should not be imposed on the Claimant. The Defendant gave the Claimant 14 days within which to make a presentation in writing. The Defendant then directed the Claimant not to implement its revised tariff pending the final determination of the matter.

32. It is the Claimant's contention for the substantive judicial review proceedings that the Defendant has acted ultra vires its powers by subjecting the DStv subscription fees to its approval and ascribing the adjustment of the DStv tariffs to the Claimant who is neither licenced to nor responsible for broadcasting the said DStv signal and adjusting its tariffs

33. If leave is granted, the Claimant shall seek the following reliefs;

(1) An order that by subjecting the DStv subscription fees adjustment to it approval and ascribing the adjustment of the DSTV tariffs to the Claimant, who is neither licenced to nor responsible for broadcasting the said DSTV signal and adjusting its tariffs, the Defendant has acted *ultra vires* in instituting an inquiry, making of its decision on the preliminary finding against the Claimant and directing the Claimant not to implement the adjusted DStv tariffs.

(2) A declaration that the defendant's decision subjecting DStv subscription fees to its approval, when it does not do so for Neflix and other similar audio-visual service providers from outside Malawi, is discriminatory.

(3) A declaration that the Defendant has acted illegally and irrationally in the *Wednesbury unreasonableness sense.*

(4) A like order to certiorari quashing the decision of the defendant in totality.

(5) If permission to apply for judicial review is granted, a consequent order of injunction, restraining the Defendant's implementation of any of its

decisions and the directives contained in its letter of the 28th June 2022, the subject matter of the impugned decision, be granted.

(6) An order of costs at an indemnity scale.

34. The Claimant its submissions, has argued that it has not revised its tariff, that it has no licence to revise DStv tariffs, that the Claimant is not a licensee in terms of section 74(1) of the Communications Act for purposes of revising DStv tariffs. The Claimant therefore argues that the Defendant acted beyond its powers in bringing the Claimant within the ambit of section 74(1) of the Communications Act. The Claimant has argued on the authority of the Botswana case of ***Multichoice Botswana (Pty) Ltd vs. Botswana Communications Regulatory Authority (Bocra)*** Court of Appeal No. CACGB-177-18 delivered on 19th February 2019, that the decision of Macra to impose conditions in the Claimants Licence aimed at regulating the activities that are beyond the Claimant's control is irrational and unreasonable. It must be noted that according to the reliefs sought and the grounds thereof, the issue is not the imposition of conditions in the Claimant's Licence. The Claimant, whilst acknowledging that Clause 11.2 of the Licence obligates the Claimant to seek approval from the Defendant if it is to revise its tariff, argued that the tariff referred to cannot be the tariff charged by Multichoice Africa who is not a party to the Claimants Licence. The Claimant has heavily relied on the case of ***Multichoice Botswana (Pty) Ltd vs. Botswana Communications Regulatory Authority(above)*** which it argues, is on all fours with the present case.

35. In the ***Multichoice Botswana (Pty) Ltd vs. Botswana Communications Regulatory Authority case***, Multichoice Botswana (Pty) Ltd filed an application for the court challenging the validity of Clause 13 of the licence which it had applied for. Under section 31 of the Communications Regulatory Act, 'a person shall not carry out any broadcasting activity unless he or she has a valid licence issued by the board. In order to comply with the said section 31, Multichoice Botswana applied for and was granted a licence by Bocra described as a 'Subscription Management Service Provider Licence' on 29 June 2017. Multichoice Botswana raised an objection against Clause 13 of the licence which provides as follows;

"13.0 Tariff Regulation (Subscription Fees)

13.1 The Licensee shall submit to the Authority (i.e. Bocra), in writing a proposal, in respect of subscription fees it intends to apply. In

determining the subscription fees, the Licensee shall follow the principle of costs orientation.

13.2 The Licensee shall offer the licensed service and applications to the rates no higher than the prevailing approved subscription fees.

13.3 The Licensee shall ensure that to a large extent, the services are sufficiently unbundled so that the customers have diversified packages.

13.4 The Licensee shall adhere to the tariff principles and guideline as may be prescribed by the Authority from time to time."

36. Arising from these conditions in Clause 13, Multichoice Botswana brought an application in the High Court for the following relief;

(1) For an order declaring that the "subscription fees" and rates" referred to in clause 13.1 and 13.2 refer only to those fees and rates that Multichoice Botswana charges to subscribers.

(2) Alternatively, if Clause 13 regulates the total subscription fees paid by subscribers to receive the DStv subscription broadcasting service, that Clause 13.1, 13.2 and 13.4 to be reviewed and set aside.

(3) In any event, that Clause 13.3 be set aside.

37. Understandably, Multichoice Botswana just like Multichoice Malawi renders support services to customers subscribing to DStv subscription broadcasting service provided by Multichoice Africa, a company registered outside the two countries. It is noted that in the case of Botswana Multichoice, the Claimant was challenging the validity of Clause 13 on the grounds that Multichoice Botswana's licenced activities do not form part of broadcasting activities which are undertaken by Multichoice Africa and that consequently, Multichoice Botswana could not be bound to conditions that pertain to actual broadcasting in which it performs no part. Secondly, and in any event that Multichoice Botswana has no control and no input with regard to tariff rates charged to subscribers; nor to the content of the programming or the composition of packages or bouquets of channels presented to subscribers; and therefore, cannot comply with clause 13; and that Bocra is not allowed to impose conditions in a licence which are impossible to perform by the Licencee.

38. From the facts, Multichoice Botswana and Multichoice Malawi obtained licences for the provision of Subscription Management Service. The Licence in respect of the two companies, contain clauses which are to the effect that before effecting changes in the subscription fees, the provider is to seek

written approval from the authority. It will be noted that the Licence subject of the decision in the ***Multichoice Botswana Case*** was obtained in compliance of section 31 of the Communications Regulatory Act of Botswana which made provision for application for broadcasting or rebroadcasting licences. Section 31(4) (d) of the Communications Regulatory Act of Botswana makes provision for the classification of broadcasting licences, subscription management service licences and the applicable conditions thereto. It would appear the authority to impose conditions is arising out of this provision.

39. Multichoice Malawi obtained its licence under section 99 of the Communications Act. The section that deals with licencing conditions is section 40 of the Communications Act which provides as follows;

(1) A licence issued by the Authority shall __

a) be issued on payment by the applicant of the appropriate initial licence fees;
b) state the terms and conditions on which it is issued;
c) specify the services that may be provided; and
d) come into effect upon publication in the Gazette.

(2) The Authority shall ensure that all licences issued under this Act have standard terms and conditions in respect of the category or type of the licence.

40. It will be noted that the main issue in the ***Multichoice Botswana Case*** was the validity of conditions attached to the licence and in particular the conditions in relation to tariff regulation in Clause 13. In the present case however from the reliefs sought and the grounds for the same, what the Claimant is challenging is not the conditions in the licence but conduct of the Defendant. The challenged conduct is as follows;

(1) The decision of the Defendant in commencing an inquiry against the Claimant for breach of section 74(1) of the Communications Act and Clause 11.2 of the Individual Content Services Licence for the Provision of Subscription Management Services in Malawi (DHT) by subjecting the tariffs for DStv services effective 15th July, 2022 without prior written approval of the Defendant when both the Claimant and Defendant do not have jurisdiction over DStv services and its tariffs.

(2) The decision of the Defendant of making a preliminary finding against the Claimant that it is in breach of section 74(1) of the Communications Act and Clause 11.2 of the Individual Content Services Licence for the Provision of Subscription Management Services in Malawi (DHT) by

subjecting the tariffs for DStv services effective 15th July, 2022 without prior written approval of the Defendant when neither the Claimant has neither authority nor the power to adjust the said tariffs made since it is only Multichoice Africa Holdings BV (Multichoice Africa), the provider of DStv service that adjusts and has adjusted tariffs for DStv effective 15th July, 2022.

(3) That the decision of the Defendant directing the Claimant not to implement the revised DStv tariffs when both the Defendant and the Claimant have no right or power to stop the implementation of the revised DSTV tariffs as such power rest with Multichoice Africa only.

41. What comes clear from the Defendant's communication of 28th June which is the subject of the proceedings and from provisions of the sections referred to in the letter and from the previous dealings between the parties, there was nothing wrong for the Defendant to commence an inquiry against the Claimant on the possible breach of the law and to make a preliminary finding. It is clear from further clear that the decision was made was based on the documentation and previous dealings between the parties since the Claimant obtained the licence whose provisions were not challenged at any time. The Defendant merely made provisional finding which was subject to a hearing which was to take place after giving the Claimant ample time to respond to the allegations.

42. When the Defendant made its decisions, the Defendant gave the Claimant the right to make presentations as to why the Defendant should not hold the Claimant liable for breach of the 74(1) of the Communications Act and Clause 11.2 of the Individual Content Services Licence for the Provision of Subscription Management Services in Malawi (DHT). The Claimant had 14 days within which to make a representation and hearing was scheduled to take place before the effective date of the proposed tariffs adjustments. The issues raised by the Claimant in this application, should have been the issues that the Claimant should have raised with the Defendant in responding to the call to show cause. To come to court at this stage seems, in my view, to be premature.

43. The Claimant having come to court prematurely, and other available remedies not having been exhausted, the application for leave for judicial review is found wanting and it is dismissed with costs.

44. The application for injunction was consequential upon the granting of leave to commence judicial review. In the absence of leave for judicial review, the application for injunction cannot stand. It is also dismissed.

Made in Chambers on **25th** day of **July,** 2022 at Lilongwe.

V. Palikena-Chipao
JUDGE