

25 August 2017

The Chief Executive Officer
Broadcasting Authority of Zimbabwe
27 Boscobel West Drive
Highlands
HARARE

Dear Sir

Re: Invalid Notice of cancellation of License No. CD0004 held by Dr Dish (Pvt) Ltd

Introduction

We act for Dr Dish (Pvt) Ltd. We have been instructed to respond to your letter of 22 August 2017 in terms of which you purported to cancel our client's license number CD/0004 for the provision of a Content Distribution Service in terms of Section 16 (1)(d) of the Broadcasting Services Act [Chapter 12:06] ("the Act").

Your letter claims that our client had been licensed to provide the MY TV AFRICA Service only, thus implying that the license did not authorize our client to distribute the Kwese content. The reason you give for your decision is that our client had ceased to provide the service for which it was licensed.

We are instructed that the purported cancellation of our client's license is invalid. We set out the reasons for our client's contention below:

The Chief Executive Officer of the Authority acted ultra vires his powers.

The control and management of the operations of the Broadcasting Authority of Zimbabwe is vested in the Broadcasting Authority of Zimbabwe Board in terms of Section 4 (1) of the Act. The Chief Executive Officer's powers are subject to the control of the Board, and are limited to the specific provisions of the Fourth Schedule to the Act, and to such powers as are assigned to him by the Board.

The cancellation of a license in terms of Section 16 (1) (b) is not a matter that the Chief Executive Officer is authorized to deal with without the specific authority of the Board, or a specific empowering provision in the Act. The Broadcasting Authority of Zimbabwe does not have, and has not had a board for quite some time. Therefore, the decision to cancel our client's license, not being a decision of the Board, is ultra vires the powers conferred on the Chief Executive Officer of the Authority, and is thus invalid.

The decision to terminate the license is irrational in so far as it purports to restrict our client's license to content provided by MY TV AFRICA alone.

You issued a letter dated 12 October 2016 in terms of which you asked our client to show cause why its license should not be terminated on the grounds that our client had failed to pay annual

license fees for the past three years, and that our client had ceased to provide the licensed service. In issuing the show cause letter, you purported to act under Section 16 (2) of the Act. On the grounds that we have already advanced, the show cause letter was invalid as it was not issued by the Board, or under the authority of the Board.

In any event, our client showed sufficient cause why its license should not be cancelled. Our client explained that its former supplier of content, MY TV AFRICA had lost its content rights over Zimbabwe. However, our client had secured an alternative supplier of content, Econet Media. Econet Media was not only going to supply content, but was also going to provide the funds to clear the outstanding license fees.

Although clause 1 of Part B of the License states that our client shall offer MY TV AFRICA service, that statement must be read in the context of the whole License. The License itself, on its face, and in the preamble to Part B of its terms and conditions, classifies the nature of the License as a License to provide “a Content Distribution Service”. Part A defines “Content Distribution Service” as “a service provided by a content distributor comprising content aggregated within or outside Zimbabwe that is made available in Zimbabwe..” The reference to content aggregated within the Country is important as it enables the Licensed service provider to meet the local content requirements set out in the Act. In the context, reference to MY TV AFRICA was not meant to be restrictive of the content providers our Client could have. The identity of the suppliers of content is a matter that can change, subject to notice

being given to the Authority in terms of Section 17 of the Act. As we will demonstrate hereunder, notice of the change of the provider of content was not only given in terms of Section 17 of the Act, it was also considered and accepted by the Authority on 21 October 2016. Therefore, contrary to what is stated in your invalid cancellation letter dated 22 August 2017, the License did not prohibit our client from replacing MY TV AFRICA as the provider of content. In any event, our client's competitor, DSTV, distributes content supplied by several content providers. Therefore, your interpretation of the License as prohibiting our client from changing its providers of content is not correct, is absurd and irrational.

Your conduct after the 16th October 2016 and your failure to act until 22 August 2017 is inconsistent with the decision to terminate the license and makes the decision to terminate the license irrational

Our client's response to the invalid Show Cause letter was dated 16 October 2016 and delivered to you the same week. On 21 October 2016, after you had had ample time to peruse our client's response to your invalid show cause letter, our client proceeded to lodge with you the notifications required by Section 17 of the Act. Such notifications included the notification of the substitution of Econet Media Mauritius as the content provider in the place of MY TV AFRICA. Our client also notified you of the consequent changes in its shareholding structure and its Board composition and stated that arrangements for the payment of fees arrears, and the fees for the

ensuing year were being made. At that stage you were aware that the payment for the fees would come from arrangements made through our client's new partner. You confirmed receipt and acceptance of the notifications in writing that you date stamped 21 October 2016. The written acceptance of the notification in a separate document that you stamped was not a mere acknowledgment of receipt of the notifications. It signified that the notifications had been considered and approved, otherwise it would have been sufficient to stamp the letters as a mere acknowledgement of receipt. The acceptance of the notifications in that manner was a clear indication that our client had shown adequate cause that its license should not be cancelled and that the matter of violation of the provisions of section 16 (1) (d) of the Act was now in the past.

On the understanding that it had shown sufficient cause why its license should not be cancelled, our client proceeded to finalize its agreements with Econet Media Mauritius and Econet Kwese TV, a Zimbabwean Company. Curiously, when speculative reports broke in the media that Kwese TV had been licensed in Zimbabwe, Zimpapers, one of the prospective partners that Econet Media was in negotiations with, but failed to agree with on commercial terms, renewed its interest in a partnership with Econet Media. Furthermore, the Zimbabwe Broadcasting Corporation has approached and is currently in discussions with Econet Media for the provision of some of its exclusive sports content. While Econet Media Mauritius is finalizing the formalities relating to its investment in Zimbabwe as a content provider, and its offering to cushion

Zimbabwean Consumers from the foreign currency shortages, Econet Kwese TV proceeded to release the money needed for the payment of the arrear and current license fees. The payment was effected on 18 August 2017. Your letter of 22 August 2017 that was disguised as a response to a letter that our client sent to you in October 2016, almost a year ago, is certainly an ill-considered and mischievous response to the payment made by our client. Such conduct magnifies the level of bad faith with which you have conducted yourself in this matter. The delay; your acceptance of subsequent statutory notifications filed by our client; your failure to address subsequent developments that have taken place since October 2016, and the fact that you knew, or ought to have known that the money paid to you came from our client's new partners, make the belated purported cancellation of our client's license irrational. Your conduct including your failure to speak against our client's finalization of agreements with Econet Media constitute your acceptance of our client's response to your invalid show cause notice. Alternatively, your actions, or your failure to act constitutes an estoppel against you relying on the pre- 12 October 2016 default by our client to terminate its license.

The decision to terminate our client's license is irrational because the content distributed by our client is much cheaper, is payable locally using bond notes and RTGS money, and thus much more favorable to the consumer.

At the moment, DSTV has a monopoly over satellite television broadcasting in Zimbabwe. For as long as they have operated in Zimbabwe, DSTV has exploited the Zimbabwean consumer by charging a huge premium to Zimbabwean customers compared to what they charge in South Africa. The following is their historical pricing of the content that they offer:

DStv SA Packages	2015 Price	2016 Price	DSTV Zimbabwe
DStv Access	R99	R99	R176
DStv Compact	R319	R345	R512
DStv EasyView	R39	R29	Not Available
DStv Extra	R425	R459	R880
DStv Family	R199	R219	R336
DStv Indian	R319	R345	R560
DStv Premium	R699	R759	R1,296
DStv Select*	R199	R219	Not Available
M-Net Analogue/CSN*	R335	R369	Not Available
XtraView Access Fee	R80	R85	R176

Over and above this exploitation of the Zimbabwean consumer, subscribers in this country are required to pay using hard currency or offshore money. Bond notes and electronic transfers that are not supported by nostro dollars are not accepted. According to the 2017 monetary policy presented by the Reserve Bank of Zimbabwe Governor, DSTV subscriptions and card payments, at USD206.66million, were the second major driver of foreign currency drain in Zimbabwe. On 16 February 2017, FinX quoted the RBZ Governor as saying that between July and December 2016 alone, USD45million or 22% of the USD206.66 million was used for payment for DSTV’s satellite TV service .

On the contrary, the Kwese content provided by Econet Media is much cheaper. It is pertinent to note that DSTV has made radical reductions in its price during 2017 once the possibility of Kwese coming into Zimbabwe was announced, clear evidence that they were deliberately charging monopolistic prices to consumers in this country. The following is the comparison of the pricing of the DSTV content to the pricing of the Kwese content:

DSTV CURRENT vs KWESE PRICING August 2017

	DSTV	DSTV	KWESE	COMMENTS
Package	DSTV Pricing ZW	South Africa pricing		Kwese does not discriminate. Its charges are the same across Africa
Access	\$11	\$7.60		
Family	\$17	\$17		

Compact	\$28	\$26.50		
Compact Plus	\$47	\$35	\$25 ex VAT	The only difference is that DSTV has exclusivity over some, but not all the English Premier League Games.
			\$29 inc VAT	
Premium	\$72	\$58		

Note that DSTV pricing does not include VAT. Therefore, the Kwese Charge has also been stripped of the VAT component for purposes of comparison. DSTV has been in Court with ZIMRA over its refusal to charge for, and remit VAT to ZIMRA.

The Masiyiwa family that is the beneficial owner of Econet Media Mauritius is a Zimbabwean family. Due to their understanding of the economic hardship that the homeland is experiencing, they have directed Econet Media to approach Exchange Control with proposals that will allow Zimbabwean subscribers of Kwese to pay using their bond notes and RTGS money, and to defer the remittance of payments outside Zimbabwe while more permanent solutions to cushion Zimbabweans against the currency shortages are being sought. In the interim period, Econet Media Mauritius will itself absorb the requirement for the payment of foreign currency to the owners of the content. In the circumstances, the Kwese product is much more favorable to the interests of Zimbabwean consumers and is thus much more aligned to the purpose and spirit of the Broadcasting Services Act than the DSTV content that you seek to protect. On the basis of this comparison alone, the decision to terminate our client's license is irrational, oppressive of the Zimbabwean consumers, against the spirit and purpose of the Broadcasting Services Act and unpatriotic.

The termination of our client's license shows bias or discrimination against our client, and is a violation of our client's freedom of expression and of the media, and that of the public generally.

Apart from DSTV which is a virtual monopoly on satellite television broadcasting, and is much more expensive, some of the top providers of content have now invaded the content distribution space although their content is accessed through the internet. The same content that one watches over satellite television is now available on the internet, and some of it is available real time. Some of the providers of the content provide access to it through You Tube, WhatsApp, Twitter and Facebook. These channels of providing the same content whose distribution is sought to be regulated by the Broadcasting Services Act are not licensed and do not have to pay license fees as our client did. If one adopts a purposive approach to the construction of the Broadcasting Services Act in the context of the Bill of Rights, which one must, the termination of our client's license would discriminate or show bias against our client while favoring DSTV, You Tube, WhatsApp, and Twitter. It would further violate not only our client's freedom of expression and of the media, but also the freedom of expression and of the media of members of the public. The termination of our client's license in these circumstances is not reasonably justifiable in a democratic society, does not "foster and maintain a healthy plural democracy" as required by the Act, and does not maintain or promote "effective competition between persons engaged in the provision of broadcasting services".

Demand

We are instructed to demand, as we hereby do, the retraction of your letter of 22 August 2017 within the next 24 hours, failing which, we have instructions to file an urgent application declaring the purported cancellation of our client's license to be unlawful and striking down any sections of the Broadcasting Services Act that purport to authorize the violation of our client's constitutional freedom of expression and of the media, and the freedom of expression and of the media of the general public. In that event, we would like to advise you that we have also received instructions to apply to the Constitutional Court separately under the access to information provisions of the Bill of Rights in the interest of protecting our client's rights and in the interests of public accountability, for the disclosure of information on the licensing and financial matters relating to Transmedia and Multichoice. The information we will require relates to who the shareholders of Transmedia are and the proof thereof, where the payments made to Multichoice go, including whether any of the payments go to the shareholders of Transmedia and the jurisdiction from which such payments come and the country in which such payments are received. We shall write to you separately regarding our client's demand for information relating to Multichoice and Transmedia.

We also take this opportunity to notify you that we have received instructions to issue summons against you in your personal capacity for any damages that our client is suffering as a result of your illegal actions. Our client is currently calculating the damages based on the loss of revenue per day from the day you communicated your

illegal decision thereby forcing them to stop business, to the day when your illegal decision will be set aside by the Courts. The law is clear that employees who cause damages to others by purporting to exercise powers that they do not have are not shielded from personal liability for their actions. Therefore, the longer you defend your illegal actions, the higher the amount of damages our client shall claim from you.

Yours Faithfully

Tawanda Nyambirai

Partner

Mtetwa & Nyambirai Legal Practitioners