REPORTABLE (17)

Judgment No S.C. 128\02
Civil Application No 162\2001

CAPITAL RADIO (PRIVATE) LIMITED v (1) THE BROADCASTING AUTHORITY OF ZIMBABWE (2) THE MINISTER OF STATE FOR INFORMATION AND PUBLICITY (3) THE ATTORNEY-GENERAL OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA, CHEDA JA, MALABA JA GWAUNZA AJA
HARARE JUNE 19, 2002 & SEPTEMBER 25, 2003

A.P. de Bourbon S.C., for the appellant

J.Tomana, with him *B. Patel*, for the first respondent

Y. Dondo, for the second respondent

CHIDYAUSIKU CJ: The applicant in this case is a company duly incorporated with limited liability according to the laws of Zimbabwe, having as its main object, the purpose of carrying on a broadcasting service within Zimbabwe. The first respondent is the Broadcasting Authority of Zimbabwe (BAZ) and the second respondent is the Minister of State for Information and Publicity in the President's Office who is cited in his official capacity as the Minister responsible for the administration of the Broadcasting Act [Chapter 12:01] (hereinafter referred to as the Act). The Attorney-General of Zimbabwe is cited as an intervener in terms of section 24(6) of the Constitution of Zimbabwe. He is entitled to respond to and be

heard on any of the issues raised in the founding affidavit in terms of the said section of the Constitution.

On 22 September 2000 in the case of *Capital Radio (Private) Limited v The Minister of Information, Posts and Telecommunications* S-99-2000 the applicant made application to this Court for, and ultimately obtained, a ruling declaring that section 27 of the Broadcasting Act 12:01 was unconstitutional in that the monopoly it granted the Zimbabwe Broadcasting Corporation was an infringement of the right to freedom of expression guaranteed under section 20(1) of the Constitution. The same order also struck down section 14 of the Radiocommunication Services Act [12:04] for the same reason. The applicant thereafter imported one antenna and one transmitter, hired some broadcasting equipment and began broadcasting on 28 September with a test signal. The second respondent sought to stop the applicant from broadcasting on the basis that such broadcasting was unlawful in terms of the Presidential Powers (Temporary Measures) Broadcasting Regulations. The Presidential Powers (Temporary Measures) Act under which the above regulations were made was a stop gap measure intended to fill the legal vacuum created by this Court declaring section 24 of the Broadcasting Act unconstitutional which left the Broadcasting Services without a legal framework. The Presidential Powers (Temporary Measures) Act was superceded by the Act which came into force on 4 April 2001. The applicant contends that the Act contravenes the Constitution in certain respects. In particular, and in terms of the draft order, the applicant seeks an order declaring the following sections of the Act unconstitutional:-

(a) Section 4(2) and 4(3)

(b) Section 6

(c) Section 8(1) and (2) and 22(2)

(d) Section 8(5)

(e) Section 9(1),(2) and (3)

(f) Section 11(1) in conjunction with para 9(1)(b) and (c) of the Fifth Schedule

(g) Section 11(4)

(h) Section 12(1)(f), (2) and (3)

(i) Sections 15 and 16

The challenge to sections 2, 3 and 4 of the Fifth Schedule was withdrawn during the proceedings.

In essence the applicant's case is that the impugned provisions contravene section 20 of the Constitution of Zimbabwe. The application is being brought in terms of section 24 of the Constitution. Section 24(1) of the Constitution confers *locus standi* only on an applicant who alleges that the declaration of rights has been, is being, or is likely to be, contravened in relation to the applicant. Section 24(1) provides as follows:-

> "24(1) If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress."

It is not sufficient to merely allege that a particular provision is inconsistent with the Constitution without a reference to the applicant's constitutional right.[1] I shall revert to this later.

In my view the impugned sections fall into two broad categories. The one category regulates the licensing process and the other category regulates the manner of operation once an applicant is successful and is operating as a broadcaster.

It is common cause that the applicant has or intends to apply for a radio broadcasting service licence. I have no doubt that those impugned sections of the Act that regulate the process of obtaining a radio broadcasters licence, if unconstitutional, would or are likely to adversely affect the applicant. The applicant's *locus standi* to challenge those sections is beyond question. The applicant's *locus standi* to impugn those sections of the Act that regulate the operations of a licensed radio broadcaster, which it is not, is debatable.

This Court is essentially an appeal court. It enjoys no original jurisdiction except in constitutional matters in terms of section 24 of the Constitution. Thus the jurisdiction and the *locus standi* of litigants seeking to approach this Court in terms of section 24 has to be found within the four corners of section 24 of the Constitution. This restriction does not affect a litigant that wishes to institute a constitutional application in the High Court. The provisions of section 24 do not, in any way, circumscribe the *locus standi* of an applicant in the High Court. In the High

[1] United Parties v The Minister of Justice, Legal and Parliamentary Affairs & Ors 1997 (2) ZLR 225 (S)

Court the common law test, namely having an interest in the matter under adjudication, is sufficient to establish *locus standi*.[2] In a constitutional application in the High Court all that a litigant is required to show to establish *locus standi* is a substantial interest in a matter.

A direct approach to the Supreme Court requires a litigant to allege that his not another person's fundamental right has been violated. Obviously it is not sufficient to merely allege that one's fundamental right has been, is, or is likely to be violated. The factual basis for such an allegation has to be set out. It follows, therefore, that when a litigant is denied a hearing by this Court because he has no *locus standi* that does not necessarily mean that the door to litigation has been closed. It may merely mean that the litigant has commenced his application in the wrong forum taking into account the basis of his *locus standi*.

A constitutional application commenced in the High Court can always find its way to the Supreme Court on appeal. In short, the basis of a litigant's *locus standi* in the High Court is much wider than it is in this Court sitting as a constitutional court. In my view it would be doing violence to the language of section 24 of the Constitution to ascribe to it the meaning that it is sufficient to allege an interest in the matter in order to establish *locus standi*.

The applicant, as already stated, initially approached this Court in the case of *Capital Radio (Private) Limited v Minister of Information, Posts and*

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[2] Van Winsen, Celliers and Loots stated in Herbstein & Van Winsen: *The Civil Practice of Supreme Court of South Africa* 4 Ed, at 364;

Zimbabwe Teachers Association & Ors v Minister of Education 1990 (2) ZLR 48 at 51B *et seq*

Telecommunications S-99-2000 on the basis that section 27 of the Broadcasting Act [Chapter 12:01] was unconstitutional. As I understand the judgment the applicant applied to this Court, in that case, on the basis that as an individual its right to receive and impart information was abridged by section 27 in that, that section restricted the means of communication between individuals. If the applicant had sought relief in the same capacity in these proceedings, namely that as an individual, its right to receive and impart information was being or is likely to be abridged by the impugned sections of the Act I would have little difficulty in concluding that the applicant had *locus standi* in respect of all the impugned sections. This capacity could have been pleaded in the alternative. However, the applicant has elected to approach this Court on the basis that it is an aspiring radio broadcaster and as such certain provisions of the Act are likely to abridge its fundamental rights as an aspiring broadcaster. In my view by adopting this approach the applicant narrowed its own basis for *locus standi*.

I might also add that where facts are common cause and the question of whether on the admitted facts a litigant has *locus standi* that issue is a question of law which need not be pleaded. Failure to raise that issue on the papers is not fatal. The court can and indeed should apply the law to the admitted facts but whenever possible both counsel should be given an opportunity to make submissions on the points of law that may not have been raised on the papers or in argument.

I shall further address the issue of *locus standi* when I come to deal with the specific sections that have been impugned.

It is contended by the applicant that the specific provisions of the Act set out in the draft order are *ultra vires* the Constitution, in particular, section 20, which guarantees the freedom of expression.

Section 20 of the Constitution which guarantees freedom of expression provides in the relevant part as follows:-

> "20 Protection of freedom of expression
>
> (1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision –
>
> (a) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health;
>
> (b) for the purpose of –
>
> (i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;
> (ii) preventing the disclosure of information received in confidence;
>
> (iii) maintaining the authority and independence of the courts or tribunals or Parliament;
>
> (iv) regulating the technical administration, technical operation or general efficiency of telephony, telegraphy, posts, wireless broadcasting or television or creating or regulating any monopoly in these fields;

(v) in the case of correspondence, preventing the unlawful dispatch therewith of other matter; or

(c) that imposes restrictions upon public officers; except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

It would appear to me from the affidavits filed of record that the following issues fall for determination in this case.

1. Whether section 20(1) of the Constitution includes freedom of the press.
2. If section 20 of the Constitution does include freedom of the press, does the setting up of a regulatory authority constitute a permissible derogation of that freedom of the press?
3. If the setting up of a regulatory authority is a permissible derogation are the impugned sections setting up such authority and the other impugned sections within the permissible constitutional derogations?

I will now deal with the above issues *seriatim*.

DOES SECTION 20(1) OF THE CONSTITUTION INCLUDE FREEDOM OF THE MEDIA SUCH AS THE ELECTRONIC MEDIA *IN CASU*?

Mr *Tomana*, for the first respondent, submitted that the applicant's contention that press freedom is protected under section 20 of the Constitution and, therefore, that restrictions or regulations imposed on the entrants into electronic media was erroneous. He argued that there was an important distinction between press freedom

and the freedom of expression which is that press freedom is not a human right while freedom of expression is a human right. He further submitted that section 20 of the Constitution confers and protects a human right which is specifically given to a private human being in his individual capacity to enjoy. This right, so the argument goes, is not given to a media institution at all. Mr *Tomana* further argued that the explicit language of section 20 of the Constitution makes it obvious that it is referring to a human being and not the media or the press. In short, he argued that the domain wherein free speech is exercised by everyone is distinctly different from the domain wherein the media demands press freedom while using the common asset or the people's strategic and limited asset, the air waves. He concluded by submitting that the applicant's assumption that press freedom is subsumed under section 20 of the Constitution as well as Article 19 of the International Charter of the Civil and Peoples' Rights, (ICCPR) is fatally incorrect. Mr *Tomana* contends that no cause of action has therefore been established and all prayers founded on section 20 of the Constitution should fail.

In support of this contention Mr *Tomana* relied on the work of Robert W. McChesney entitled *Rich Media Poor Democracy* at p 269. He also relied on a presentation by Kaarle Nordenstreng to the International Symposium on the Mass Media Declaration of UNESCO held on 26 – 28 June 1987 entitled "On the Nature and Significance of the Declaration".

The applicant, on the other hand, contends that the freedom of expression enshrined in section 20 of the Constitution includes freedom of the press and any interference with the means of communication between citizens constitutes

an abridgement of that right. Such an abridgement has to be saved by one of the provisos in section 20 of the Constitution to be lawful.

Thus, in this regard, the issue that falls for determination is what meaning is to be ascribed to section 20 of the Constitution. Put differently, does the freedom of expression entrenched by section 20 of the Constitution include freedom of the press?

The issue here is one of the interpretation of section 20 of the Constitution. It is trite that in interpreting statutes, including the Constitution, the golden rule is that in order to ascertain the intention of the legislature the words of a statute or legislation are to be given their ordinary or primary meaning. It is only where that primary meaning of the words are obscure or lead to absurdity that other principles of interpretation are invoked to assist in the ascertainment of the intention of the legislature.

Some support for this approach can be derived from the fact that in other jurisdictions where the legislature has sought to entrench freedom of the media or the press explicit and unambiguous language has been used.

For instance in the South African Constitution the following provisions are found:-

> "16.(1) Everyone has the right to freedom of expression, which includes –

(a) freedom of the press and other media;

(b) freedom to receive or impart information or ideas;

(c) …

(d) …" (underlining is mine)

Thus the freedom of expression as set in the South African Constitution is spelt out clearly and unambiguously to include freedom of the press. This is not the case with section 20 of the Zimbabwe Constitution. Is this difference in the wording of any legal significance? The approach that words of a statute be ascribed their ordinary or literal meaning tends to support the first respondent's contention.

However, there is another different approach to constitutional interpretation. This approach is supported by a long line of cases both nationally and internationally. On this approach a Constitution is considered a document that is *sui generis* requiring special guidelines of interpretation. These guidelines or principles include –

1. the Constitution must be interpreted as a living Instrument;[3]
2. the Constitution must be given a generous and purposive construction;[4]
3. the Constitution must be construed as a whole;[5]
4. the spirit of the Constitution as reflected in the preamble and national objective and directive principles of state policy is to guide interpretation by the court;[6]

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[3] *Minister of Home Affairs v Fisher* [1980] AC 329 at 329; *Dow v Attorney-General* 1992 LRC (Const) 623-3; *Muhozya v Attorney-General DSM)* Civil Case No 206/93 (Tanzanian High Court decision, unreported)

[4] *S v Zuma & Ors* 1995 (4) BCLR 401; *Sakal Papers v Union of India* AIR 1962 SC 305

5. ratified treaties should provide a legitimate guide in interpreting constitutional provisions.[7]

This Court has had occasion to consider what meaning is to be ascribed to section 20 of the Constitution. The court concluded that section 20 of the Constitution has to be interpreted using the broad principles set out above. Indeed Mr *de Bourbon* did not seek to argue this point strenuously. He took the view that the issue of what meaning is to be ascribed to section 20 of the Constitution has already been determined by this Court on the basis that freedom of expression extends to corporate persons and includes freedom of the press and that any restriction on the means of communication including the press abridges freedom of expression conferred by section 20 of the Constitution. The case of *Retrofit v Posts and Telecommunications Corporation & Anor*[8] clearly supports this contention.

It may be argued that this Court, in interpreting section 20 of the Constitution to include its application to artificial persons and the freedom of the media, in effect amended the Constitution, a function constitutionally exercisable by the legislative arm of the government. Whatever merit this argument may have, the fact of the matter is that the legislature, upon becoming aware of this ascribed meaning of section 20 of the Constitution, did not seek to amend the Constitution. In this regard it is also interesting to note that the 1999 Draft Constitution which was rejected in a referendum but was crafted by a constitutional commission composed of

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[5] *Rattigan v Chief Immigration Officer and Ors* 1994 (2) ZLR 54 (S)
[6] *New Patriotic Party v The Inspector General of Police* Judgment of the Supreme Court of Ghana 4/93 (unreported)
[7] *Dow v Attorney-General (supra) Derbyshire County Council v Times Newspapers* 2 WLR 449
[8] 1995 (2) ZLR 199 (S)

members of the legislature sought to guarantee freedom of the press in very specific terms. The Draft Constitution provided in section 45 as follows:-

> "45.(1) Everyone has the right to freedom of speech and expression, which includes –
>
> (a) freedom to uphold opinions;
>
> (b) freedom to seek, receive and communicate ideas and information regardless of frontiers;
>
> (c) freedom of the press and other media of communication;"
> (underlining is mine)

The present Lancaster House Constitution has seen its better days. The need for its amendment, if not overhaul, commands consensus among Zimbabweans. Divergence of opinion only emerges on the nature and extent of such amendments. As I have said the liberal approach to constitutional interpretation is supported by a long line of cases. "A Constitution is a living instrument which must be construed in the light of the present day conditions."[9]

The Supreme Court of Pakistan expressed similar sentiments in the case of *Nauraz Sharif v President of Pakistan*[10]:-

> "… basic or fundamental rights of individuals which presently stand formally incorporated in the modern constitutional documents, derive their lineage from and are traceable to the Actival Law. With the passage of time and the evolution of civil society, great changes occur in the political, social and economic conditions of society. There is, therefore, the corresponding need to re-evaluate the essence and source of fundamental rights as originally provided in the Constitution. They require to be construed in consonance with changed conditions of the society and must be viewed and interpreted with a vision to the future."

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[9] *Muhozya v Attorney-General, supra*
[10] PLD 1993 SC 473

I respectfully agree with the above approach and appreciate the need to ascribe to section 20 of the Constitution a liberal interpretation in order to breathe life into a Constitution with a declaration of rights in great need of rejuvenation.

The importance of freedom of expression that includes freedom of the press has been proclaimed by this Court and courts in other jurisdictions as well as international organisations.

Thus, as the applicant correctly submitted, Article 19 of the Universal Declaration of Human Rights proclaims the right to freedom of expression in the following terms:-

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information through any media and regardless of frontiers."

Similarly Article 19 of the International Covenant on Civil and Political Rights proclaims as follows:-

> "(1) Everyone shall have the right to hold opinions without interference.
>
> (2) Everyone shall have the right to freedom of expression;
>
> this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

Zimbabwe is a party to the African Charter and Peoples Rights. The African Charter provides in Article 9 as follows:-

> "1. Every individual shall have the right to receive information.
>
> 2. Every individual shall have a right to express and disseminate this opinion within the law."

The African Commission on Human and Peoples' Rights noted, in respect of the above Article 9 of the ACHPR:-

> "This article reflects the fact that freedom of expression is a basic human right vital to an individual's personal development, his political consciousness and participation in the conduct of the public affairs of his country." (Ref on p 6 of Applicant's heads of argument)

Zimbabwe, as I have already stated, is a party to the ACHPR and consequently Article 9 should provide a legitimate guide in interpreting section 20 of the Constitution.

The European Court of Human Rights has also recognised the key role of freedom of expression:-

> "Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man… it is applicable not only to 'information' or 'ideas' that are favourably received… but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society.'"[11]

Similarly, the Inter-American Court of Human Rights stated:-

> "Freedom of expression is a cornerstone upon which the very existence of a democratic society rests."[12]

The right of free speech is universally recognised as one of the most precious of all political rights which is central to open, transparent, accountable and democratic government.

The above and other academic evaluations of the importance of free speech have received world wide judicial recognition and have been most elegantly expressed by Mr Justice CARDOZO in his often quoted words:-

> "Of that freedom (thought and speech) one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom."[13]

In the case of *Chavunduka & Anor v Minister of Home Affairs and Anor*[14] this Court had this to say:-

> "This Court has held that s 20(1) of the Constitution is to be given a benevolent and purposive interpretation. It has repeatedly declared the importance of freedom of expression to the Zimbabwean democracy … Furthermore, what has been emphasised is that freedom of expression has four broad special objectives to serve: (i) it helps an individual to obtain self-fulfilment; (ii) it assists in the discovery of truth, and in promoting political and social participation; (iii) it strengthens the capacity of an individual to participate in decision-making; and, (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change."

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[11] Handyside v United Kingdom (1976) 1 EHRR 737, para 49
[12] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No 5, para 70
[13] Rights of Access to the Media at page 3
[14] 2000 (1) ZLR 522 (SC) at 558D-E

On the basis of the authorities, I am satisfied that the freedom of expression conferred by section 20 of the Constitution has to be interpreted to include freedom of the press and is also enjoyed by corporate persons. Freedom of the press is one thing. Abuse of the freedom of the press in another. Every right minded person supports the former and abhors the latter. In efforts to remedy the ills of the latter undue restrictions should not be imposed on the former.

DOES THE SETTING UP OF REGULATORY AUTHORITY CONSTITUTE A PERMISSIBLE DEROGATION OF THE FREEDOM OF EXPRESSION OR THE PRESS?

It is common cause that the setting up of a regulatory authority is a permissible derogation of the fundamental right of the freedom of expression. The applicant concedes that much in paragraph 20 of the heads of argument wherein it is submitted:-

> "Freedom of expression is not, however, absolute. Every system of international and domestic rights recognises carefully drawn and limited restrictions on freedom of expression to take into account the values of individual dignity and democracy. Under international human rights law, national laws that restrict freedom of expression must comply with the provisions of Article 19(3) of the ICCPR:
>
> > 'The exercise of the rights provided for in paragraph 2 of this article carried with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> >
> > (a) For respect of the rights or reputations of others;
> >
> > (b) For the protection of national security or of public order (*ordre public*) or of public health or morals.'"

In my view this concession is properly made and finds support in other jurisdictions. For instance in the case of *Athukorale and Ors v Attorney-General of Sri Lanka*[15] the Supreme Court of Sri Lanka held that:-

> "having regard to the limited availability of broadcasting frequencies, the regulation of broadcasting was necessary to ensure the adequate coverage of issues and to prevent the monopolistic domination of the frequency spectrum by the government or by a few individuals. On that basis regulation did not violate the right to freedom of speech but rather advanced it by serving the interest of the whole community and giving listeners and viewers the opportunity to consider a range of views. However, in order to safeguard the fundamental rights of freedom of thought and expression the regulatory body had to be independent of the government. …"

It is also apparent from the same judgment that regulation, particularly the need for licensing was necessary for the maintenance of law and order. In this regard the court had this to say:-

> "Article 14 of the Constitution deals with those great and basic rights which are recognised and guaranteed as the natural rights inherent in the status of a citizen of a free country. Freedom of speech … goes to the heart of the natural right of an organised freedom-loving society to impart and acquire information … This freedom is not absolute. There is no such thing as absolute or unrestricted freedom of speech and expression, wholly free from restraint' for that would amount to uncontrolled licence which would lead to disorder and anarchy. Absolute and unrestricted individual rights do not and cannot exist in a modern State. The welfare of the individual, as a member of collective society, lies in a happy compromise between his rights as an individual and the interests of the society to which he belongs … Our Constitution has rightly struck a proper balance between the varying competing social interests, and has … set forth the restrictions to which the fundamental right of speech and expression may be subject …"
> (underlining is mine)

The Court went further in stating the necessity to licence and stated:-

[15] (1997) 2 BHRC 610

"Scarcity is not entirely a thing of the past, and therefore states have a continuing and compelling need to regulate the use of the frequency spectrum. The US Senate said that 'broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust.' (See S Rep No 562, 86th Cong 1st Sess 8-9 (1959) US Code Cong & Adm News p 2571.) That observation was cited with approval by the US Supreme Court in *Red Lion Broadcasting Co.* The Supreme Court of India too has endorsed the view that airwaves/frequencies are limited and must be regarded as 'a public property' with regard to which the State must exercise control so that they will be used for the public good: see *Secretary, Ministry of Information and Broadcasting, Govt of India v Cricket Association of Bengal* (1995) AIR (82) 1995 Supreme Court 1236 (esp paras 78, 185, 192, 193, 194). It is recognised that states 'have the right and the duty to ensure the orderly regulation of communications, and this can only be achieved by a licensing system' (*Groppera Radio AG v Switzerland* (A/173) (1990) 12 EHRR 321 at 350, per Berdhardt J). Because of the public property nature of frequencies, licences to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them during a specified time: see *Red Lion Broadcasting Co*.

Radio and television, because of their pervasive and wide reach and influence on members of the public, constitute a most important means of mass communication. In order to play its role in advancing freedom of speech, the state, because of the limited availability of frequencies, must endeavour to ensure that the medium continues to be effective. Because of the limited availability of frequencies, chaos would ensue if the spectrum is uncontrolled and the usefulness of radio and television as a means of communication would soon come to an end, with unfortunate consequences for the right to free speech and independent thought. If there is to be effective communication, only a few can be licensed and the rest must be barred from the airwaves. The matter was explained in *Red Lion Broadcasting Co* 395 US 367 at 387-388 in the following words:-

> 'Just as the Government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound track, or any other individual does not embrace a right to snuff out the free speech of others … When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is probably greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even

> if the entire radio spectrum is utilized in the present state of commercially acceptable technology. It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927 …'

The Court had earlier explained the need for a regulatory authority:-

> 'Before 1927 the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard. Consequently the Federal Radio Commission was established …' (See 395 US 367 at 375-376)."

In the case *Groppera Radio AG v Switzerland* 12 EHRR 321 the European Court for Human Rights recognised the need for licensing. At page 399 (para 61) the court had this to say:-

> "The Court observes that Article 19 of the 1966 International Covenant on Civil and Political Rights does not include a provision corresponding to the third sentence of Article 10(1). The negotiating history of Article 19 shows that the inclusion of such a provision in that Article had been proposed with a view to the licensing not of the information but rather of the technical means of broadcasting in order to prevent chaos in the use of frequencies. However, its inclusion was opposed on the ground that it might be utilised to hamper free expression, and it was decided that such a provision was not necessary because licensing in the sense intended was deemed to be covered by the reference to 'public order' in paragraph 3 of the Article. This supports the conclusion that the purpose of the third sentence of Article 10(1) of the Convention is to make it clear that states are permitted to control by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. It does not, however, provide that licensing measures shall not otherwise be subject to the requirements of paragraph 2, for that would lead to a result contrary to the object and purpose of Article 10 taken as a whole."

On the basis of the above authorities and indeed the concession made by the applicant I am satisfied that the regulation of the Broadcasting Services is not

unconstitutional or, put differently, is a permissible derogation. I now turn to deal with the issue of whether the particular impugned sections go beyond the limit permissible in terms of the Constitution.

ARE THE IMPUGNED SECTIONS OF THE ACT BEYOND THE RESTRICTIONS PERMISSIBLE IN TERMS OF THE CONSTITUTION?

I have concluded that in general terms legislation providing for regulation of the electronic media is constitutionally permissible. Indeed many constitutions, including the Zimbabwean Constitution, expressly permit derogation from the fundamental rights contained therein. However, such derogation or restriction has to meet certain criteria or requirement to bring it within the ambit of what is constitutional.

The following are some of the criteria that a restriction has to satisfy for it to be constitutional.

(a) the restriction has to be prescribed by law;[16]

(b) the restricting law must be foreseeable;

(c) the restricting law must be subject to effective control;[17]

(d) the restricting law must not negate the essential of the right in question;[18]

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[16] *In re Chikweane* 1995 (1) ZLR 235 (S)
[17] *Authokorale v Attorney-General supra, Perera v Attorney-General supra, State of Bihar v Misra* AIR 1971 SC 1667 at 1675, *Malundika v The People,* Supreme Court of Zambia 95/95 (unreported); *Pumbun v Attorney-General* [1993] 2 LRC 317
[18] *S v Makwanyane & Anor* 1995 (6) BCLR 665, *New Pastriotic Party v Inspector General of the Police, supra*

(e) the restricting law must be reasonably required to protect the right of others.[19]

In the case of *Nyambirai, supra*, this Court concluded that in determining whether a law providing for the compulsory payment of contributions by employers and employees was reasonably justifiable in a democratic society this Court should have regard to the attitude of many other countries towards similar schemes. Similarly in this case it would be instructive if this Court should have regard to legislation providing for the regulation of the media in other countries. I shall now proceed to examine similar legislation in other countries.

UNITED KINGDOM

The Broadcasting Act 1990 (as amended) is the Act that regulates the broadcasting industry in the United Kingdom. It vests regulatory powers of the Broadcasting Industry in two bodies, namely, The Radio Authority and the Independent Television Commission (I.T.C.). Significantly these two authorities exercise regulatory powers over non-state broadcast institutions only. They do not have any say over British Broadcasting Corporation whether television or radio. These come under the direct regulation of the British Government through interfacing structures. Thus the highly influential national and international broadcaster in the United Kingdom is not regulated by any authority outside the British Government.

Section 1(2) of the Broadcasting Act spells out who appoints the Commission:-

[19] *R v Oakes* (1986) 19 CRR 366, *Nyambirai v Nassa and Anor* 1995 (2) ZLR 1 (S)

(2) The Commission shall consist of –

(a) a chairman and a deputy chairman appointed by the Secretary of State; and

(b) such number of other members appointed by the Secretary of State, not being less than eight nor more than ten, as he may from time to time determine."
(underlining is mine)

This provision is almost identical with section 4 of the Act.

Section 83(2) gives the Secretary of State for Culture Media and Sport the same powers in respect of the Radio Authority.

Schedule 1 of the same Act provides the details of the Commission. Conditions militating against appointment to the Commission relate to connection with the BBC, the Broadcasting Complaints Commission, the Broadcasting Standards Council, and financial or business connection with the broadcasting industry. Outside that, the Secretary of State is required to ensure that the special interests of Wales and Scotland are represented on the Commission. The remuneration of members of the Commission is determined by the Secretary of State, as is also the borrowing powers of the Commission. The same powers also relate to the Radio Authority and are spelt out in Schedule 8.

The British Act makes the Commission and the Radio Authority the licensing authorities for non-state television and radio respectively as they do not cover the BBC.

Section 10 of the British Act gives the Secretary of State or, for that matter, any other Minister of the Crown power and control over broadcast content of licensed private broadcasters. It reads:-

> "10.(1) If it appears to him to be necessary or expedient to do so in connection with his functions as such, the Secretary of State or any other Minister of the Crown may at any time by notice require the Commission to direct the holders of any licences specified in the notice to publish in their licensed services, at such times as may be specified in the notice, such announcement as is so specified, with or without visual images of any picture, scene or object mentioned in the announcement; and it shall be the duty of the Commission to comply with the notice.
>
> (2) Where the holder of a licence publishes any announcement in pursuance of a direction under subsection (1), he may announce that he is doing so in pursuance of such a direction.
>
> (3) The Secretary of State may at any time by notice require the Commission to direct the holders of any licence specified in the notice to refrain from including in the programmes included in their licensed services any matter or classes of matter specified in the notice; and it shall be the duty of the Commission to comply with the notice.
>
> (4) Where the Commission –
>
> (a) have given the holder of any licence a direction in accordance with a notice under subsection (3), or
>
> (b) in consequence of the revocation by the Secretary of State of such notice, have revoked such a direction, or where such a notice has expired, the holder of the licence in question may publish in the licensed service an announcement of the giving or revocation of the direction or of the expiration of the notice, as the case may be.
>
> (5) The powers conferred by this section are in addition to any power specifically conferred on the Secretary of State by any other provision of this Act.
>
> (6) In relation to any licensed service provided from a place in Northern Ireland, the reference in subsection (1) to a Minister of the Crown includes a reference to the head of any Northern Ireland department."

Section 11 and the Fifth Schedule of the Act which are impugned seem to be modelled on the above provisions of the British Act.

The same Act is also significant in that it lays the basis for the licensing of Television Channels 3,4 and 5. While the Act specifies a number of criteria for the selection of a licensee, it makes special precautionary provisions for the cash dimension of set criteria. Nominally, section 17 provided that the licence should go to the highest cash bid. However, section 17(5) qualifies this in a way that betrays the locus of licensing power. It provides that should the Commission have any reason to suspect in respect of an applicant that "any relevant source of funds is such that it would not be in the public interest for the licence to be awarded to him", the application together with supporting documents is referred to the Secretary of State. The Commission shall not award the licence in such a case unless the Secretary of State has given his approval.

Subsection 17(6) states:-

> "On such a reference the Secretary of State may only refuse to give his approval to the licence being awarded to the applicant in question if he is satisfied that any source of funds is such that it would not be in the public interest for the licence to be awarded."

The above section confers on the British Secretary of State, a political functionary, considerable power to determine what constitutes in the public interest for the purpose of refusing or the granting of a broadcasting licence. Section 4 of the Zimbabwean Act constitutes the Broadcasting Authority to be appointed by the Minister after consultation with the President composed of no fewer than five and not more than

nine members. The Broadcasting Act (United Kingdom) similarly constitutes a body corporate called Independent Television composed of not less than eight and not more than ten members. In both Acts there are limitations in terms of criteria of who is to be appointed to the regulating Authority.

In terms of section 6 of the Act the Minister is the licensing authority. The Board shortlists, and by public inquiry, determines or otherwise, the applicants and makes recommendations to the Minister to issue or not to issue a licence to an applicant. See section 10(9).

It would appear that sections 4 and 6 of the Zimbabwean Act are modelled on sections 3 and 5 of the British Broadcasting Act. In terms of British provisions once appointed the ITC is the licensing authority. There is no involvement of the Secretary of State in regard to the granting or otherwise of licences except in circumstances set out in section 17(5) as read with subsection 6 quoted above. Thus the most significant difference between the Zimbabwean and United Kingdom legislation in this regard is that under the Zimbabwean Act the Minister continues to have decision-making powers over the authority subsequent to its appointment while the United Kingdom Act confers decision-making powers to the Commission independent from the Secretary of State subsequent to its appointment except for the special circumstances set out in section 17(5) as read with subsection 6 of the United Kingdom Act.

AUSTRALIA

In Australia the Australian Broadcasting Services Act of 1992 governs the broadcasting industry. Unlike other Acts which shy away from projecting the national interest, the Australian Act's objects are definitive on protecting Australia's national and cultural interests. Part 1 section 3 of the Act seeks to ensure that "international broadcasting services are not provided contrary to Australia's national interest" and thus insist that broadcasters promote services that develop and reflect "a sense of Australian identity, character and cultural diversity". Beyond resisting the swamping of Australian cultural interest by global media structures, the Australian Act also upholds the national interest by ensuring that Australians have "effective control of the more influential broadcasting services". To that end the Australian Act disallows foreign control of broadcasting in Australia (Part 5 section 57). Similarly section 8(1) of the Zimbabwean Act seeks to control foreign influence of broadcasting in Zimbabwe.

The Australian Act creates the Australian Broadcasting Authority ("ABA") as the licensing and regulating authority. ABA is made up of seven members who are appointed by the Governor-General without reference to any other body or persons outside governmental structures (Part 12 section 155). The Governor-General also appoints the Chairman and Vice-Chairman from the group who are full-time employees. The responsible Minister for Communications, Information Technology and the Arts can assign on either a full-time or part-time basis appointees for specific assignments related to broadcasting. The Minister may also appoint associate members. ABA reports to the responsible Minister who also has the right to give "written directions" to it in terms of Part 12 section 162. The

directives are required to be gazetted "as soon as practicable after giving the direction".

As a licensing authority, ABA can, in terms of Part 4 section 36(2), get "specific directions from the Minister for the purpose of a determination (on licensing)." The Australian Act is more stringent on licensing international broadcasters than the Zimbabwean Act. In terms of Part 8B and section 121, ABA is required to refer all applicants for international broadcasting licence to the Minister of Foreign Affairs who must determine the suitability of the applicant in relation to the Australian national interest and compliance with international broadcasting guidelines. Thus section 121 FD specifically provides that:-

> (1) If –
>
> (a) an application for an international broadcasting licence is referred to the Minister for Foreign Affairs under subsection 121FB(1) or (5); and
>
> (b) the Minister for Foreign Affairs is of the opinion that the proposed international broadcasting service concerned is likely to be contrary to Australia's national interest;
>
> the Minister for Foreign Affairs may, by written notice given to the ABA, direct the ABA not to allocate an international broadcasting licence to the applicant.

In terms of content, Part 7 section 113 of the Australian Act, allows the Minister to specify through a Government Gazette "an event, or events of a kind, the televising of which should, in the opinion of the Minister, be available to the general public." This provision is strikingly similar to section 11 of the Zimbabwean Act.

IRELAND

In Ireland the Broadcasting and Wireless Telegraphy Act 1988 and the Broadcasting Act 2001 govern the broadcasting industry and creates the Broadcasting Commission of Ireland and the Broadcasting Complaints Commission. The former licences and regulates only non-state broadcasting activities (public broadcasters are excluded). The latter develops and enforces Codes and Standards for all broadcasters. Both bodies are under the Ministry of Arts, Heritage, Gaeltacht and the Islands. In terms of subsection 3(1) of the Irish Broadcasting and Wireless Telegraphy Act, 1988, "A broadcast shall not be made from any premises or vehicle in the State unless it is made pursuant to and in accordance with a licence issued by the Minister.

Both the Broadcasting Commission and the Broadcasting Complaints Commission are appointed by the Government through the responsible Minister and should consist of not less than seven and not more than nine members, with both genders having not less than three members. Government has the power to remove a member of the Commission for state reasons. Thus in Ireland a Minister of government is vested with a lot more power to control the broadcasting industry than is provided for in the Zimbabwean Act.

The Irish Act also provides for programme content. In terms of the Irish Act all broadcasters are required to be (1) "mindful of the need for understanding and peace within the whole island of Ireland and (2) ensure that the programme material aforesaid reflects the varied elements which make up the culture of the whole island of Ireland and have special regard for the elements which distinguish that culture, and, in particular, the *Gaeltachtai*".

The Zimbabwean Act does not go as far as the Irish Act in seeking to control programme content.

NIGERIA

The Nigerian broadcasting sector is monitored and regulated by the National Broadcasting Commission ("NBC"). The NBC does not licence but recommends applications for licensing "through the Minister of Information and National Orientation to the President for the grant of radio and television services. It derives its powers from Decree (Act) 38 (1992) and Decree (Act) 55 (1999) enacted by the new civilian and democratic Government of Nigeria. The Director General of NBC is appointed by the President through recommendation by the Minister.

NORWAY

The Norwegian Broadcasting Industry is governed by Act No 127 of 4th December 1992. The Norwegian Act provides for Mass Media Authority which does not regulate but is "an administrative body placed under The Royal Ministry of Cultural and Church Affairs" to handle non-state broadcasting and press issues (public broadcasters are excluded). The Broadcasting Division of the Authority, among other duties, processes applications for broadcasting licences for local radio and television, satellite broadcasting; monitors advertisements and sponsorship in broadcasts and imposes sanctions against offenders of the Act.

In Norway the Licensing Authority is The Royal Ministry of Cultural and Church Affairs, under Chapter 2 (General Provisions) section 2:1. Even then, the

regulatory powers of the Ministry are heavily circumscribed by the King who enjoys sweeping powers under the Act. The relevant section reads:-

> "The Ministry issues licences for broadcasting and local broadcasting. Conditions may be attached to such licences. The King may issue regulations concerning the allocation of licences and the terms and conditions of licences, *inter alia*, on the operation and revocation etc., of licences, on licensing areas and ownership restrictions. The King may issue regulations concerning circumstances in which a broadcaster is required to comply with Norwegian broadcasting rules. The King may also issue regulations to fulfil Norway's administrative authority for broadcasting and local broadcasting, etc. The ministry may lay down further rules concerning the tasks of the Mass Media Authority."

The King also has powers to order broadcasters to carry announcements from government authorities "where such announcements are of major importance" (section 2:4). He also has the power to determine content both by way of disallowing it or ordering it. He determines the commercial fortunes of broadcasters by his sweeping powers to regulate advertising and sponsorship (Chapter 3:1-4).

The only time the Mass Media Authority has licensing powers is when it comes to local/community broadcasting. In terms of Chapter 7:1, the Mass Media Authority:-

> "shall grant licences for the operation of local broadcasting services. The Ministry shall appoint a Licensing Council which gives the Mass Media Authority advice and recommendations in connection with the allocation of licences for local broadcasting services. The Ministry shall determine the mandate and composition of the Licensing Council."

The Norwegian Act confers more powers of control on a government Minister than the Zimbabwean Act.

Complaints against any broadcaster are handled by the Complaints Committee for Broadcasting Programmes which, in terms of Chapter 5:1 of the Broadcasting Regulations, is appointed by the responsible Ministry.

UNITED STATES OF AMERICA

The Broadcasting Industry of the United States is regulated by the Federal Communications Commission (FCC) that was established by the Communications Act of 1934. The FCC describes itself as "an independent United States government agency". Appointment to the five-member Commission is by the United States President "by and with the advice and consent of the Senate" and lasts for five years. Appointments are for full-time service. Commissioners have to be citizens of the US and are required to take an oath of office. The US President also appoints one of the Commissioners to serve as Chairperson and Chief Executive Officer of the Commission. Significantly three Commissioners out of five "may be members of the same political party." Its budget comes directly from Congress. The FCC is the licensing authority with powers to revoke licences as well as to receive representations from the public. It has the powers to review and adjust application fees. In discharging its functions, the Commission may elect to delegate some of its responsibilities to a panel of commissioners.

SWEDEN

In terms of the Swedish Radio and Television Act (1996), Sweden has two licensing Authorities, namely the Swedish Government which licences non-state (public broadcasters are excluded) national and international broadcasters; and the Radio and Television Authority which licences community broadcasters. The Government is assisted by the Broadcasting Commission which is "a state authority" similar to the Broadcast Authority of Zimbabwe to "examine" and ensure content compliance for radio and television programmes. Specifically, Chapter 2 sub-section 2 of the Act reads:-

> "Licences to broadcast television programmes and licences to broadcast sound radio programmes throughout Sweden or to other countries are issued by the Government."

Thus in Sweden licences are issued by a political organ and not an independent authority.

Chapter 9(3) of the Act requires that the Broadcasting Commission which is constituted by Government consist of a chairman and six other members, with deputies also being determined by Government. The same subsection requires that the Chairman and the Vice-Chairman "be active or former professional judges."

The same Act requires that all broadcasters carry announcements "which are of importance for the general public, without charge, if requested by a public authority," a provision similar to section 11 and the Fifth Schedule.

Equally, broadcasters are required "to prepare a contingency plan for the operations during a high-level alert in conjunction with severe national stresses in

peacetime and submit the plan to the Government and to a public authority determined by the Government."

MALAYSIA

The Malaysian Broadcasting Industry is governed by the Communications and Multimedia Act (1998) and Malaysian Communications and Multimedia Commission Act (1998). Section 6 on the Communication and Multimedia Commission Act provides that:-

> "The Commission shall consist of the following members who shall be appointed by the Minister:
>
> (a) a Chairman;
>
> (b) a member representing the Government; and
>
> (c) No less than two but no more than three other members".

Section 12 of the same Act provides for the following:-

> "(1) The Minister may at any time revoke the appointment of any member of the Commission without assigning any reason therefore.
>
> (2) A member of the Commission may, at any time, resign from his appointment by giving a notice in writing to the Minister."

Section 18 adds:-

> "(1) The Commission shall be responsible to the Minister.
>
> (3) The Minister may give to the Commission directions of a general character not inconsistent with the provisions of this Act relating to the

performance of the functions and powers of the Commission and the Commission shall give effect to such directions."

The Communication and Multimedia Act 1998/Act 588 clearly puts the Minister before the Communications and Multimedia Commission which, in terms of section 7 of the Act, must operate on the basis of "directions" from the Minister which must be kept in a register. In terms of the Malaysian Act the Minister "may, from time to time, determine any matter specified in this Act as being subject to Ministerial determination, without consultation with any licensees or persons".

The same Act, in terms of section 30, makes the Minister of Energy, Communications and Multimedia the licensing authority, with the Commission playing an administrative and advisory role as spelt out in the preceding section. It reads:-

"(1) The Minister shall have due regard to the recommendation of the Commission given under section 29 before making a decision.

(2) The Minister may, acting on the recommendation of the Commission, by written notice –

(a) grant an individual licence in accordance with the provisions of this Part; and

(b) declare that an individual licence granted under this Part be subjected to special or additional conditions."

The Minister is also responsible for renewing licences (section 34) and also for their revocation (sections 37-38).

It is apparent from the above that the Malaysian Act confers on the Minister a lot more power than does the Zimbabwean Act.

SOUTH KOREA

In South Korea the Broadcasting Act No 6139 of January 12th 2000 regulates the private (public broadcasters are excluded) broadcast industry in South Korea. It creates a nine-member Korean Broadcasting Commission which is appointed by the President of the Republic of Korea, from among those persons with specialized expertise and who are representatives of different fields of society" (Article 21(1)). Article 21(2) enjoins the President to appoint three persons from the nine "who are recommended by the Speaker of the National Assembly after consulting with the assembly men representing each negotiating party of the National Assembly and three persons who are recommended by the Speaker of the National Assembly in consideration of their expertise with respect to broadcasting and ability to represent the viewers." In making these recommendations, the Speaker is required to present the criteria and grounds for recommendation. Significantly, Article 24(1) considers all the members "public officials in political service."

To protect the independence of the Commission, Article 26 provides that a member shall not be subject to any external direction or interference with his duty, and shall not be dismissed from his office contrary to his consent except for stated offences. Article 9(1) makes the Minister of Information and Communication the licensing authority. It reads:-

> "… a person who intends to operate a terrestrial broadcasting business or satellite broadcasting business shall, upon receiving the recommendation of

> the Korean Broadcasting Commission, obtain a licence from the Minister of Information and Communication for a broadcasting station as prescribed by the Radio Waves Act."

The same also goes for cable broadcasters. Renewal of licences is also done by the Minister of Information and Communication as is also the revocation.

AUSTRIA

The Broadcasting scene for non-state actors in Austria is governed by the Federal Act on the Establishment of an Austrian Communications Authority ("KommAustria") and a Federal Communications Board. In terms of the Austrian Act, broadcast affairs are regulated by two bodies, KommAustria or Austrian Communications Authority which licences and regulates all broadcasters, and the Federal Communication Board which controls and supervises the State-owned Austrian Broadcasting Corporation.

Section 3 of the Act provides for the constitution and management of KommAustria:-

> "(1) KommAustria shall consist of one Director and the requisite number of staff.
>
> (2) The appointment of the Director and deputy Director shall be preceded by a public invitation to apply for the position in accordance with section 3 of the Public Tender Act of 1989.
>
> (3) KommAustria is an authority directly subordinate to the Federal Chancellor. As regards its external business practice, it is an independent authority."

Section 6 of the Austrian Act firmly places KommAustria under control of the Federal Chancellor by underlining that all broadcast matters "shall lie with the Federal Chancellor."

SOUTH AFRICA

The Independent Communications Authority of South Africa Act 2000 establishes the Independent Communications Authority of South Africa, (ICASA) that regulates the Broadcasting Industry. Section 3 provides that ICASA shall be:-

> "independent and subject only to the Constitution and the law and must be impartial and must perform its functions without fear, favour or prejudice. The Authority must function without any political or commercial interference."

Significantly, the South African Act protects IBA from interference from government and political parties. In terms of its constitution and appointment of members, the ICASA Act provides for the appointment to Council of seven councillors appointed by the President on the recommendation of the National Assembly according to the following principles:-

(a) participation by the public in the nomination process;

(b) transparency and openness; and

(c) the publication of a shortlist of candidates for appointment, with due regard to subsection (3) and section 6.

The President appoints one of the councillors as Chairperson of the Council. In terms of section 5(3):-

"Persons appointed to the Council must be persons who –

(a) are committed to fairness, freedom of expression, openness and accountability on the part of those entrusted with the governance of a public service; and

(b) when viewed collectively –

(i) are representative of a broad cross-section of the population of the Republic; and

(ii) possess suitable qualifications, expertise and experience in the fields of, amongst others, broadcasting and telecommunications policy, engineering, technology, frequency band planning law, marketing, journalism, entertainment, education, economics, business practice and finance or any other related expertise or qualification."

A unique feature of the South African Act is section 5(4) which requires that appointed councillors:-

"must take an oath or affirm that he or she -

(a) is committed to fairness, freedom of expression, openness and accountability; and

(b) will uphold and protect the constitution and the laws of the Republic, including this Act and the underlying statutes."

Among persons disqualified as councillors are public servants, members of parliament, any provincial legislature or any municipal council and office bearers or employees of any party, movement or organisation of a political party nature (section 6(c)(d)(e).

The tenure of office of councillors is protected by section 8(2)(3) which provides that removal from office is only after investigations by the National

Assembly; adoption by the same Assembly of a resolution calling for the removal of a councillor; adoption of that resolution by the President who then removes the councillor.

ICASA is the licensing authority.

CANADA

The Canadian Broadcasting Industry is governed by The Canadian Radio-television and Telecommunications Commission Act and the Broadcasting Act. The broadcasting sector comes under the regulatory authority of Canadian Radio-television and Telecommunications Commission (CRTC).

The CRTC is constituted in terms of subsections 3 of the Canadian Radio-television and Telecommunications Commission Act. It is constituted by not more than thirteen full-time members and not more than six part-time members all of whom are appointed by the Governor in Council. In terms of the same section a member shall hold office during good behaviour for a term not exceeding five years but may be removed at any time by the Governor in Council for cause.

Subsection 7(2) expressly bolsters the independence of the CRTC when it comes to issuing licences. It states that "No order may be made under subsection (1) in respect of the issuance of a licence to a particular person or in respect of the amendment, renewal, suspension or revocation of a particular licence". What is more, subsection (5) requires that an order to the Commission by the Governor in Council should "be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the making of the order." The

order itself is made after the responsible Minister has consulted with the Commission and once made, it has to be gazetted.

The responsible Minister has powers to issue directions to the Commission in situations where he is appealed to by an aggrieved broadcaster with a sustainable case. However, the directive would have to be gazetted and brought before each House of Parliament within the first fifteen days of sitting.

Ownership and responsibilities for the broadcasting system is vested in Canadians by operation of the law. Thus the Canadian Broadcasting Act, 1991 provides in section (3) that:-

> "(a) the Canadian broadcasting system shall be effectively owned and controlled by Canadians;
>
> (b) the Canadian broadcasting system operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty;
>
> (c) the Canadian broadcasting system should, (i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada; (ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view.
>
> (d) the programming provided by the Corporation should, (i) be predominantly and distinctively Canadian; (ii) reflect Canada and its regions to national and regional audiences, while serving the special needs of those regions; (iii) actively contribute to the flow and

> exchange of cultural expression; (iv) be in English and French reflecting the different needs and circumstances of each official language community, including the particular needs and circumstances of English and French; (v) contribute to shared national consciousness and identity; (vi) be made available throughout Canada by the most appropriate and efficient means and as resources become available for the purpose; and (vii) reflect the multicultural nature of Canada."

ITALY

The Italian Act No 249 of 31 July 1997 governs the private (non-state) broadcasting sector and creates the Italian Communications Regulatory Authority (AGCOM) and provides that AGCOM be "fully autonomous and independent in its judgments and evaluations". AGCOM which has eight Commissioners, is appointed by both the Senate of the Republic and the Chamber of Deputies, each electing four Commissioners who are "subsequently appointed by a decree of the President of the Republic." Equally, the President of the Authority is "appointed by a decree of the President of the Republic on the proposal of the President of the Council of Ministers in agreement with The Ministry of Communications". This appointment would have to be confirmed by the competent Parliamentary Commissions. The authority is accountable to Parliament.

NEW ZEALAND

The Broadcasting Act of 1989, as amended, governs the private (non-state) broadcasting sector and sets up the Broadcasting Standards Authority. Four members of the authority are appointed by the New Zealand Governor-General, on the recommendation of the Minister of Broadcasting. One member is appointed after consultation with the broadcasters and another after consultation with public interest groups. The authority reports to Parliament through the Minister of Broadcasting.

The licensing function is largely taken for granted and deemed done, with emphasis laid on code and standard enforcement, research and planning.

FRANCE

In France the broadcasting industry is controlled by a college known as *Counsel Superieur de l'audiovisuel* (CSA), which is "an independent administrative authority" meant to guarantee broadcast freedom in France by regulating private broadcasters (non-state). CSA has nine councillors nominated for six years by Presidential decree. Three of these members including the President are designated by the French President, three by the President of the Senate and three by the President of the National Assembly. CSA issues broadcasting licences to private radio and television companies. In terms of content, its accent falls on "defending France's cultural sovereignty" within the context of European integration. CSA sees the broadcasting media as "a democratic necessity" but maintains that "freedom, however, goes hand in hand with responsibility. On the basis of the latter, it regulates programming content.

The above comparison of similar legislation in other jurisdictions reveals that there is very little original in the Zimbabwean Act. The Zimbabwean Act is modelled largely on the British Broadcasting Act of 1990 as amended and the Australian Broadcasting Services Act of 1992. Thus, generally speaking, the provisions in the Zimbabwean Act are to be found in similar legislation in other jurisdictions.

Constitutions of many Commonwealth countries, including the Constitution of Zimbabwe, explicitly provide for derogation of a fundamental right. Such derogation has to be in terms of the law that satisfies the criteria I have referred to earlier on. Apart from satisfying the said criteria such law must also be reasonably justifiable in a democratic society. What is reasonably justifiable in a democratic society is elusive of a precise definition.[20]

In its determination of what is reasonably justifiable in a democratic society the court has to bear in mind that there is always the presumption of constitutionality in favour of legislation.

Thus in *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 GEORGES CJ (as he then was) had this to say at pp 382E – 383F:-

> "We were referred to the case of *Attorney-General of Trinidad and Tobago v Ramesh Mootoo* (1974) 28 WIR 304 in which the matter was canvassed by HYATALI CJ. He cited from a number of cases which in my view indicates the process plainly. Thus in *Crowell v Benson* (1931) 285 US 22 at 62 HUGHES CJ stated:
>
> > 'When the validity of an Act of congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'
>
> Again in Black on *The Construction and Interpretation of Laws* (1911) p 110 para 41H is cited as follows:
>
> > 'Every Act of the legislature is presumed to be valid and constitutional until the contrary is shown. All doubts are resolved in favour of the validity of the Act. If it is fairly and reasonably open to more than one construction, that construction will be adopted which will reconcile the

[20] *Woods & Ors* 1994 (2) ZLR 195 at 195B-C

> statute with the Constitution and avoid the consequence of unconstitutionality.'

Because the person alleging unconstitutionality must establish it, a burden may rest on that person to establish factually that an act does not fall within the ambit of constitutionality. Many neo-Nigerian constitutions permit derogation from the declared rights defined provided that these derogations are, to use the phrase in the Zimbabwean Constitution, 'reasonably justifiable in a democratic society'. Even where the Constitution does not make it clear where the *onus* lies as the Zimbabwe Constitution does, the *onus* lies on the challenger to prove that the legislation is not reasonably justifiable in a democratic society and not on the State to show that it is. In that sense there is a presumption of constitutionality. As LORD FRASER OF TULLYBELTON stated in *Attorney-General & Anor v Antigua Times Ltd* [1975] 3 All ER 81 at 90:

> 'In some cases it may be possible for a court to decide from a mere perusal of an Act whether it was or was not reasonably required. In other cases the Act will not provide the answer to that question. In such cases has evidence to be brought before the court of the reasons for the Act and to show that it was reasonably required? Their Lordships think that the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required.'

In that sense the presumption represents no more than the Court adopting the view that a legislature, elected by universal adult suffrage and liable to be defeated in an election, must be presumed to be a good judge of what is reasonably required or reasonably justifiable in a democratic society. But situations can arise even in such societies in which majorities oppress minorities, and so the Declaration of Rights prescribes limits within which rights may be restricted. It is only in cases where it is clear that the restriction is oppressive that the Court will interfere." (underlining is mine)

In *Nyambirayi's* case, *supra*, this Court reiterated and expanded on this approach. In this regard GUBBAY CJ, (as he then was) at p 12G-13E, had this to say:-

> "In *Woods & Ors v Minister of Justice & Ors* 1994 (2) ZLR 195 (S); 1995 (1) SA 703 (ZS); 1995 (1) BCLR 56 (ZS) this court emphasised that an abridgment of a guaranteed right should not be arbitrary or excessive. It was said at 199B-C, 706E-F and 59C-D respectively:

> 'What is reasonably justifiable in a democratic society is an elusive concept. It is one that defies precise definition by the courts. There is no legal yardstick, save that the quality of reasonableness of the provision under attack is to be adjudged on whether it arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the individual.'

From a procedural aspect the *onus* is on the challenger to establish that the enactment under attack goes further than is reasonably justifiable in a democratic society and not on the State to show that it does not. See *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S) at 382 *in fine* – 383A; 1984 (2) SA 778 (ZS) at 783H. The standard of proof is a preponderance of probability.

In effect the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary of excessive. It will ask itself whether:

(i) the legislative objective is sufficiently important to justify limiting a fundamental right;

(ii) the measure designed to meet the legislative objective are rationally connected to it; and

(iii) the means used impair the right or freedom are no more than is necessary to accomplish the objective."

I agree with the above approach. This Court has to be satisfied that the impugned provisions are arbitrary oppressive and, consequently, not justifiable in a democratic society before striking down such a provision as unconstitutional.

I will now turn to deal with the impugned sections in the order they are set out in the draft order.

IS SECTION 4(2) AND (3) REASONABLY JUSTIFIED IN A DEMOCRATIC SOCIETY?

Section 4 of the Act provides as follows:-

"4.1 The operations of the Authority shall, subject to this Act, be controlled and managed by a board to be known as the Broadcasting Authority of Zimbabwe Board.

4.2 Subject to subsection (3), the Board shall consist of not fewer than five members and not more than nine members appointed by the Minister after consultation with the President and in accordance with any directions that the President may give him.

4.3 In appointing the members of the Board the Minister shall endeavour to ensure that members are representative of groups or sectors of the community.

4.4 Third Schedule shall apply to the qualifications of members of the Board, their terms and conditions of office, vacation of office, suspension and dismissal, and the procedure to be followed by the Board at its meetings."

Section 4(1) provides for the establishment of the Broadcasting Board (the Board). It is not impugned and there is nothing controversial about it. Section 4(2) provides that the Board should consist of not fewer than five members and not more than nine members appointed by the Minister after consultation with the President and in accordance with any directions that the President may give. Section 4(3) provides that in appointing members of the Board the Minister shall endeavour to ensure that members are representative of groups or sectors of the Community.

The challenge to section 4 and 6 of the Act was based on the lack of independence from government control of the regulating authority created under the Act and the undue influence of the Minister in the licensing process. Mr *de Bourbon* submitted that sections 4 and 6 ensures that the responsible Minister, the second respondent, remains firmly in control of the licensing process and the Broadcasting Authority. He further submitted that the Minister retains ultimate licensing power to issue, renew, amend and suspend, or cancel licences. In essence Mr *de Bourbon's*

contention is that the Broadcasting Authority, as constituted in terms of section 4, does not provide sufficient independence for that body and consequently is unconstitutional. In support of this proposition Mr *de Bourbon* cited the case of *Athukorale supra*. I accept that *Athukorale's* case*, supra* is authority for the proposition that a regulating authority that is unduly dependent on the government is unconstitutional. In determining whether a provision creates a dependent or independent regulating authority the standard three tier test enunciated in *Nyambirayi's* case, *supra*, provides no guidance as that test does not deal with independence or lack of it of a regulating authority. A comparison of this section with provisions found in other jurisdictions is therefore instructive.

This section, as already pointed out, is very similar to section 1(2) of the British Broadcasting Act [Chapter 42] of 1990 which provides that the Independent Television Commission shall consist of a Chairman and a deputy Chairman appointed by the Secretary of State and such other members appointed by the Secretary of State, not being less than eight nor more than ten as he may, from time to time, determine. Similarly the Australian Broadcasting Services Act 1992 creates the Australian Broadcasting Authority as the licensing and regulating authority. The Australian Broadcasting Authority consists of seven members all appointed by the Governor-General without any reference to any other body or persons outside governmental structures. In Australia the Governor-General and the Minister for Communications, Information, Technology and Arts have other controlling powers that I have already adverted to in the analysis of the Australian Act above.

In Ireland, as already indicated, members of the regulating authority are appointed by government through the responsible Minister. The government has power to remove a member of the regulating authority for state reasons.

In Norway the King and the Minister have very wide powers including those of making appointment to the regulating authority.

In the United States appointments to the regulating authority are made by the President with the advice and consent of the Senate. Similarly in Sweden, Malaysia, South Korea, Canada and New Zealand the government makes appointments to the regulating authority.

In South Africa the government's power to appoint members of the Independent Communications Authority of South Africa is seriously circumscribed by statutory provisions that seek to enhance the plurality of the regulating authority.

In France and Italy more than one arm of government controls the appointments to the regulating authority.

It is quite apparent from the foregoing that section 4 of the Act is modelled on provisions existing in countries that are generally considered as democratic.

As I have already stated in impugning section 4 and section 6 the applicant relied on the Sri Lankan case of *Athukorale and Ors v Attorney-General,*

supra. It is argued that the authority created under section 4 of the Act was not sufficiently independent of government control and, therefore, unconstitutional.

The facts in the *Athukorale's* case, *supra,* are these: On 21 March 1997 the Sri Lanka Broadcasting Authority Bill was published in the Sri Lanka Government Gazette, and was subsequently placed on the order paper of the Sri Lankan Parliament. The Bill was intended to make provision for the establishment of a new authority, the Sri Lanka Broadcasting Authority, to regulate the establishment and maintenance of broadcasting stations and to provide for the issuance of licences for that purpose. Clauses 3(1), (4), 5(g), 7(7), 10, 11, 17 and 19 of the Bill contained provisions to enable the proposed authority to supervise, direct and control the content of programmes to be broadcast and to provide for the control of the authority by government appointees and for the vesting in the minister of powers to remove the chairman and members of the board and to prescribe guidelines to be followed by licensees. The petitioners, by application under art 126 of the Constitution of Sri Lanka, invoked the jurisdiction of the Supreme Court to determine whether the Bill or any of its provisions was inconsistent with the Constitution and, in particular, Article 14(1)(a) of the Sri Lankan Constitution which provided that every citizen was entitled to freedom of speech and expression including publication.

Section 3 of the Bill whose constitutionality the court was called upon to determine provided as follows:-

> "3 (1) The administration, management and control of the affairs of the Authority shall be vested in a Board of Directors (hereinafter referred to as 'the Board') consisting of the following:-

(a) six *ex officio* members, namely –

(i) the Secretary to the Ministry of the Minister in charge of the subject of Information and Broadcasting or his representative;

(ii) the Secretary to the Ministry of the Minister in charge of the subject of Defence or his representative;

(iii) the Secretary to the Ministry of the Minister in charge of the subject of Posts and Telecommunications or his representative;

(iv) the Secretary to the Ministry of the Minister in charge of the subject of Education and Cultural Affairs or his representative;

(v) the Secretary to the Treasury or his representative;

(vi) the Chairman, National Film Corporation of Sri Lanka; and

(b) five other members appointed by the Minister, at least two of whom shall be persons who have had experience in the field of broadcasting. A member appointed under this section is hereinafter referred to as 'an appointed member' of the Board.

(2) …"

The Sri Lankan Supreme Court was dissatisfied with the above provision and observed:-

"Having regard to the limited availability of broadcasting frequencies, the regulation of broadcasting was necessary to ensure the adequate coverage of issues and to prevent the monopolistic domination of the frequency spectrum by the government or by a few individuals. On that basis regulation did not violate the right to freedom of speech but rather advanced it by serving the interests of the whole community and giving listeners and viewers the opportunity to consider a range of points of view. However, in order to safeguard the fundamental right of freedom of thought and expression, the regulatory body had to be independent of the government. In the instant case, the regulatory body envisaged by the Bill clearly lacked that independence, since its members were government appointees with no security of tenure, and it was obliged to follow directions given by the minister. Moreover, the Bill would empower the minister to interfere with the presentation of programmes

> and commercial advertising, which would undermine the principles of fairness, infringe the public right to information and deprive certain broadcasters of sponsorship income was legally unacceptable …"
> (underlining is mine)

The Court was of the view that section 3 of the Sri Lankan Bill did not provide for such an independent regulating authority and concluded:-

> "Having regard to the composition of the Board of Directors of the Authority, the lack of security of tenure in office either of the Chairman or the appointed members and having regard to the power of the Minister to give direction which the Authority is obliged to follow, the Authority lacks the independence required of a body entrusted with the regulation of the electronic media, which, it is acknowledged on all hands, is the most potent means of influencing thought."

Section 3 of the Bill identified the appointees to the regulating authority through their offices and these were government officials subject to government control, therefore, incapable of being independent of government. Section 4 of the Act merely creates the regulating authority and identifies the Minister as the person who appoints members of the authority. Someone has to make the appointments to the authority. Section 4 does not identify who should be appointed to the authority. It merely provides for the number of appointees and who makes the appointment. The persons to be appointed are not identified in such a manner as to leave the Minister without choice but to appoint people dependant on the government as was the case in *Athukorale's* case, *supra.* *Athukorale's* case, *supra,* is certainly distinguishable from this case. The provisions of section 3 of the Sri Lankan Bill are very different from section 4 of the Act.

On this basis I am satisfied that section 4(2) and (3) creates a regulating authority that cannot be said to be overly dependent on government and, therefore, unconstitutional. I am, therefore, satisfied that the challenge to section 4(2) and (3) of the Act should be dismissed.

However, the same cannot be said of section 6 of the Act. Section 6 seriously undermines the independence of the regulatory authority. Section 6 of the Act makes the Minister the licensing authority. While in terms of the Act the authority processes the applications for a broadcasters licence, section 10(1) of the Act confers on the Minister unfettered power to veto the granting of a license by the authority. This in effect revokes the regulating authority's power to issue licences and confers it on the Minister. In my view the above quoted remarks of the Sri Lankan Supreme Court in *Athukorale's* case, *supra,* apply with equal force to section 6 as read with section 10(1) of the Act.

I accordingly hold the view that section 6 of the Act is unconstitutional because it totally subordinates the regulating authority to the Minister in the process of granting of broadcasting licences.

I now turn to deal with the next section that the applicant seeks to have declared unconstitutional. The applicant seeks, in paragraph 1(c) and (d) of its draft order to have section 8 subsections (1), (2) and (5) and section 22(2) declared unconstitutional.

The above sections provide as follows:-

"8. **Persons disqualified to be licensed**

(1) Subject to subsection (3), a broadcasting licence shall be issued only to individuals who are citizens of Zimbabwe and ordinarily resident in Zimbabwe or to a body corporate in which a controlling interest is held, whether through any individual, company or association or otherwise, by one or more individuals who are citizens of Zimbabwe and ordinarily resident in Zimbabwe.

(2) For the purposes of subsection (1) 'controlling interest' means -

(a) all of the securities in the body corporate; or

(b) securities representing all of the share capital of the body corporate; or

(c) securities equivalent in value to one hundred *per centum* of the share capital of the body corporate; or

(d) securities entitling the holders thereof to all the votes in the affairs of the body corporated.

…

(5) No applicant that is a body corporate shall be qualified to be licensed if any one person holds or controls more than ten *per centum* of the securities in that body corporate.

…

22.2 No person other than a citizen of Zimbabwe ordinarily resident in Zimbabwe shall be a director of a licensee."

Paragraph 2 of the applicant's Founding Affidavit provides as follows:-

"The applicant is a company duly incorporated with limited liability according to the laws of Zimbabwe, having as its main object the purpose of carrying on a broadcasting service within Zimbabwe. Its address for service for the purposes of this application is that of its undermentioned legal practitioners of record, Messrs Honey & Blanckenberg, 51 Samora Machel Avenue Harare."

There is no averment anywhere in the founding affidavit that the applicant is controlled by a foreign interest and might fail to obtain a licence on that basis. There is nothing on the papers to indicate that the applicant has been, is, or is likely to be, affected by the provisions of section 22. Indeed section 22 of necessity can only refer to natural persons. The applicant is a company or an artificial person incapable of being a director of another company. There is no suggestion that anybody wishing to be a director of the applicant has been, in some way, hindered by the provisions of section 22. Given these facts I do not see how the applicant can be adversely affected by section 8. The applicant does not fall under any of the persons disqualified under this section.

In the case of *United Parties v The Minister of Justice, Legal and Parliamentary Affairs & Ors* 1997 (2) ZLR 255 (S) this Court set some guidelines on what constitutes *locus standi* in constitutional applications in terms of section 24(1) of the Constitution. In that case the applicant, an opposition political party, sought to challenge the constitutionality of sections 25(1), 26(5) and 158(2)(c) of the Electoral Act on the basis that these provisions abridged the protection of freedom of expression contained in s 20(1) of the Constitution. The party also sought to challenge the constitutionality of section 3 of the Political Parties (Finance) Act [Chapter 29:04] on the basis that this provision contravened the constitutional protections of freedom of expression and assembly. As regards the challenge to sections 25(1) and 26(5) of the Electoral Act this Court held:-

> "That the applicant had no *locus standi in judicio* to bring the matter before the Supreme Court. In terms of s 24(1) of the Constitution an applicant has *locus standi* to seek redress where there has been a contravention of the Declaration of Rights in relation to himself. The applicant must be able to

> show a likelihood that it would be affected by the law impugned. It has no right to seek redress either on behalf of the general public or anyone else. The applicant was not entitled to carry the torch for claimants and voters generally. The impugned provisions related to individuals who were claimants or voters. A political party could be neither a claimant nor a voter and thus it had no *locus standi* in this matter.

On the authority of the *United Parties* case, *supra*, I am satisfied that the applicant has no *locus standi* to challenge sections 8(1),(2),(5) and 22(2).

The applicant next seeks to have section 9 of the Act declared unconstitutional. Section 9 of the Act provides as follows:-

> "9. **Restrictions in relation to the issue of certain licences**
>
> (1) Only one licence to provide a national free-to-air radio broadcasting service and one licence to provide a national free-to-air television broadcasting service shall be issued in addition to the national broadcasting services provided by any public broadcaster.
>
> (2) Only one signal carrier licence shall be issued to a person other than a public broadcaster.
>
> (3) With the exception of a public broadcaster, a broadcasting licence and a signal carrier licence shall not be issued to the same person."

I have no doubt that the applicant has *locus standi* to challenge this section for a number of reasons. The applicant is applying for a radio broadcasters licence. Section 9(1) permits the granting of only one licence to provide a national free-to-air broadcasting service. This limitation to one licensee no doubt must affect the applicant's prospects of success in its endeavour to obtain a broadcasting licence. The more the licences are available for issue the better the prospects of success for the

applicant. The limitation by statute to one licence to provide a national free-to-air broadcasting service smacks of the State wishing to monopolise the airwaves.

In the case of *Capital Radio v Minister of Information Posts and Telecommunications* SC-99-2000 this Court issued a declarator part of which provided as follows:-

> "1. The monopoly on broadcasting services created by section 27 of the Broadcasting Act [Chapter 12:01] is inconsistent with section 20(1) of the Constitution of Zimbabwe and is therefore invalid insofar as it vests in the Zimbabwe Broadcasting Corporation the exclusive privilege of carrying on a broadcasting service in Zimbabwe;
>
> 2. Sections 14(1) and 19(2) of the Radiocommunication Services Act [Chapter 12:04] are inconsistent with section 20(1) of the Constitution of Zimbabwe and are, therefore, invalid insofar as those provisions prohibit any person, other than the Zimbabwe Broadcasting Corporation, from possessing or working a radio station for the purpose of carrying on a broadcasting service in Zimbabwe."

Section 27 of the Broadcasting Act that was struck down in the above case is strikingly similar to section 9(1) of the Act which is being challenged. It reads:-

> "27. No person other than the Corporation shall carry on a broadcasting service in Zimbabwe."

Mr *de Bourbon*, has argued that section 9 of the Act seeks to entrench a monopoly in the same way as section 27 of [Chapter 12:01] that was struck down as unconstitutional in the *Capital Radio (Pvt) Ltd* case, *supra.* I agree with this submission. Section 9(1) and also (2) of the Act create monopolies, which on the authority of *Capital Radio (Pvt) Ltd, supra*, are unconstitutional. I do accept that airwaves are a finite resource and that the State has to observe international restrictions when allocating the frequencies. I also believe that there is merit in the

contention that the allocation of frequencies should be entrusted to an independent regulating authority which, no doubt, will take into account the constraints relating to the limited frequencies available.

Section 9(3) does not, in my view, create a monopoly. It merely provides that no person should be a holder of both a broadcasting licence and a carrier licence. If anything that section militates against monopoly. The applicant's attack on this subsection appears in paragraphs 18.6.3 to 18.6.6 which provide as follows:-

> "18.6.3 It does not follow, however, that separation of producing and transmitting functions is of benefit to anyone. Broadcasters like Capital Radio are fully able to produce and transmit their own content and regard this as the full realisation of its right to freedom of expression.
>
> 18.6.4 It is submitted that there is no discernible benefit to citizens in the imposition of these provisions. There is no good or cogent reason for this split in function, and it is difficult to see the reason for the inclusion of these provisions in the Act.
>
> 18.6.5 It is Applicant's submission that once again the only benefit that accrues is to the government and the ruling party in that they can now not only control who receives a broadcasting licence (which in effect becomes merely a programme producing licence), but they can also control the transmitting companies. This means that if a broadcaster was to become objectionable to them they could stop the service at the transmission company because this would be a completely different entity.
>
> 18.6.6 It is Applicant's submission that the infringement to its right to freedom of expression is clear. It is not being given the right to be in control of the entities that would produce and transmit its material as is the case with most other broadcasters in the democratic world. This infringement has no discernible benefit to citizens and only seems to benefit the Second Respondent's thirst for control. Therefore the harm is completely disproportionate to the negligible benefits."

The respondents' response to the applicant's contention is found in paragraph 49 of the opposing affidavit which, in part, provides:-

> "49. Ad paragraph 18.6
>
> The decision to allow for one other signal carrier licence other than the public broadcaster is once again, to ensure economic viability for both the public and the private signal carrier. It is also justifiable on the grounds that it will ensure simple and practical policing by the First Respondent to ensure compliance by both the signal carrier and broadcasters."

The main thrust of the applicant's argument is that it is economically better not to split the licences while the respondents maintain the opposite view. The provision no doubt abridges the applicant's freedom of expression. It certainly satisfies most of the criteria required for a law that abridges freedom of speech. The one criteria that is debatable is whether the restriction is reasonably justifiable in a democratic society. As was stated in *Zimbabwe Township Developers (Pvt) Ltd, supra*, there is always a presumption of constitutionality in favour of an Act and it is only, in cases where it is clear that the restriction is arbitrary and oppressive, that the court can interfere. I am not convinced this provision is clearly arbitrary and oppressive. Section 9(3) of the Act may be undesirable from an economic point of view but it is not clearly arbitrary and oppressive. There is no basis, therefore, for striking down section 9(3) of the Act. In any event section 20 of the Constitution is about protecting the freedom of expression *per se* and not on how to exercise that right in the most economically advantageous manner.

The applicant also challenges the constitutionality of sections 11(1) as read with para 9(1)(b) and (c) of the Fifth Schedule, and section 11(4), section

12(1)(f), (2) and (3), sections 15 and 16. It is very clear that these provisions regulate the conduct of business by successful applicants and holders of broadcasting licences. The applicant does not hold such a licence. The applicant has applied to this Court and to the Broadcasting Authority for a broadcasting licence. This Court does not have the jurisdiction to grant such a licence. The Broadcasting Authority has not granted the applicant a licence.

In the result I come to the conclusion that section 4(2) and (3) and section 9(3) of the Act are constitutional. Sections 6, 9(1) and (2) are unconstitutional. The applicant has not established *locus standi* to challenge all the other sections impugned as set out in the draft order. Different judges have come to different conclusions in respect of the different sections of the Act that have been challenged. The net result is as follows:

(1) The court unanimously finds that sections 4(2) and (3) are constitutional.

(2) The court unanimously finds that the applicant has no *locus standi in judicio* to challenge the constitutionality of section 11(1) as read with paragraph 9(1)(b) and (c) of the Fifth Schedule.

(3) The Court unanimously finds section 6, sections 9(1) and (2) unconstitutional and are hereby struck down.

(4) The majority of the court finds section 9(3) unconstitutional and it is hereby also struck down.

(5) The majority of the court also hereby dismisses the application to have the following sections struck down as unconstitutional:

(a) sections 8(1) and (2) and section 22(2)

(b) section 8(5)

(c) section 11(4)

(d) section 12(1)(f)(2) and (3)

(e) section 15 and 16

Costs normally follow the result. In the present case both parties were partially successful and the majority of the court has concluded that equity demands that there be no order as to costs.

SANDURA JA: I have read the judgment prepared by CHIDYAUSIKU CJ and agree that sections 6, 9(1) and 9(2) of the Broadcasting Services Act [Chapter 12:06] ("the Act") are inconsistent with s 20(1) of the Constitution of Zimbabwe ("the Constitution"). Secondly, I agree that it has not been shown that sections 4(2) and 4(3) of the Act contravene s 20(1) of the Constitution. Thirdly, I agree, but for a different reason, that the applicant does not have the *locus standi in judicio* to challenge the constitutionality of s 11(1) of the Act, as read with para 9(1)(b) and (c) of the Fifth Schedule to the Act. In my view, the only valid reason for the conclusion that the applicant does not have the requisite *locus standi* is that the conditions set out in para 9(1)(b) and (c) of the Fifth Schedule only apply to a commercial television broadcasting licence. They do not apply to a radio broadcasting licence which, according to the applicant's founding affidavit, is the type

of licence sought by the applicant. For the same reason, I agree that the applicant does not have the *locus standi* to challenge the constitutionality of s 11(4)(b), which only affects a television broadcasting licensee.

However, I disagree with the conclusion that there is no basis for striking down s 9(3) of the Act. In addition, I disagree with the finding that the applicant does not have the *locus standi* to challenge the constitutionality of sections 8(1), 8(2), 8(5), 11(4)(a), 12(1)(f), 12(2), 12(3), 15, 16 and 22(2) of the Act. Before dealing with the question of the applicant's *locus standi*, and determining whether the challenged provisions of the Act are constitutional, I would like to set out very briefly the factual background in this matter because I consider it relevant to the issue of the applicant's *locus standi*. I would also like to deal with the presumption of constitutionality.

The applicant is a company incorporated with limited liability in accordance with the laws of Zimbabwe. Its main object is the operation of a radio broadcasting service within Zimbabwe.

Shortly after its incorporation, the applicant discovered that it could not carry out its main object because in terms of s 27 of the Broadcasting Act [Chapter 12:01], now the Zimbabwe Broadcasting Corporation Act [Chapter 12:01], the Zimbabwe Broadcasting Corporation ("the ZBC") had an exclusive monopoly over broadcasting services in Zimbabwe. In addition, ss 14(1) and 14(2) of the Radiocommunication Services Act [Chapter 12:04] specifically prohibited any

person, other than the ZBC, from possessing or working a radio station for the purpose of carrying on a broadcasting service in Zimbabwe.

Consequently, the applicant, acting in terms of s 24(1) of the Constitution, filed a court application in this Court challenging the constitutionality of the aforementioned provisions in both Acts. It alleged that the said provisions were inconsistent with s 20(1) of the Constitution and were, therefore, invalid. That contention was conceded by the respondent in that application, who is now the second respondent in the present application.

Accordingly, on 22 September 2000 this Court issued an order declaring that the aforementioned provisions in both Acts were inconsistent with s 20(1) of the Constitution and were, therefore, invalid. In addition, the Court declared that the applicant was entitled under the law to operate a broadcasting service in Zimbabwe. The relevant part of the order reads as follows:-

> "In the premises and for the sake of clarity, it follows that:
>
> (a) The applicant is entitled under the law to operate and provide a broadcast service from within Zimbabwe.
>
> (b) The applicant is entitled under the law to import into Zimbabwe all radio and other equipment to operate a commercial radio station and to broadcast within and outside Zimbabwe, subject to the payment of all customs dues and import taxes lawfully levied in terms of the law, and to possess and utilise such broadcast equipment."

See *Capital Radio (Pvt) Ltd v Minister of Information (1)* 2000 (2) ZLR 243 (S) at 244B-C.

Subsequently, the applicant imported one antenna and one transmitter, hired some broadcasting equipment, and began broadcasting on 28 September 2000.

Thereafter, on 4 October 2000 the Presidential Powers (Temporary Measures)(Broadcasting) Regulations, 2000 ("the Regulations"), published in Statutory Instrument 255A of 2000, were promulgated. These Regulations were subsequently replaced by the Act, which was promulgated on 4 April 2001 and came into effect on that day.

The applicant's contentions, as set out in its founding affidavit, are that various provisions of the Act restrict its freedoms of expression and association, in contravention of sections 20(1) and 21(1) of the Constitution, and have the effect of restoring the monopoly in broadcasting which was struck down by this Court in September 2000. It is further contended that the Act has taken away from the applicant its entitlement to operate a broadcasting service, which was declared by this Court when the monopoly in broadcasting was struck down.

Having set out the factual background, I would like to deal with the presumption of constitutionality. In *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S), 1984 (2) SA 778 (ZS), GEORGES CJ considered the presumption of constitutionality and identified two meanings of the phrase. The first meaning is that where a party alleges that a statutory provision is unconstitutional, the *onus* rests on him to show that it is, and the second meaning is that if the challenged provision is capable of two or more interpretations, one of which is consistent with the Constitution, the Court would presume that the legislature intended to act constitutionally and would uphold the challenged provision.

Emphasising the fact that the presumption has two meanings, the learned CHIEF JUSTICE said the following at 383E-F:-

> "I approach the decision of this matter on the basis that it is in these two senses and these two senses alone that there is a presumption of constitutionality".

Commenting on the first meaning of the presumption he said the following at 383A-E:-

> "Even where the Constitution does not make it clear where the *onus* lies, as the Zimbabwe Constitution does, the *onus* lies on the challenger to prove that the legislation is not reasonably justifiable in a democratic society and not on the State to show that it is. In that sense there is a presumption of constitutionality …
>
> In that sense the presumption represents no more than the Court adopting the view that a legislature, elected by universal adult suffrage and liable to be defeated in an election, must be presumed to be a good judge of what is reasonably required or reasonably justifiable in a democratic society. But situations can arise even in such societies in which majorities oppress minorities, and so the Declaration of Rights prescribes limits within which rights may be restricted. It is only in cases where it is clear that the restriction is oppressive that the Court will interfere."

In my view, the learned CHIEF JUSTICE was merely saying that the burden of proof rested on the challenger, and that unless the challenged provision was clearly shown to be oppressive it would not be struck down. What he said should not be interpreted to mean that before the Court embarks upon the enquiry as to whether a restriction is reasonably justifiable in a democratic society it must be satisfied that the restriction is arbitrary and oppressive and cannot possibly be saved by the presumption of constitutionality.

In any event, about twelve years after the *Zimbabwe Township Developers* case, *supra*, the Full Bench of this Court set out a three-part test which must be satisfied by any restriction of a guaranteed right, before such a restriction can be said to be reasonably justifiable in a democratic society, in *Nyambirai v NSSA & Anor* 1995 (2) ZLR 1 (S). At 13B-E GUBBAY CJ said:-

> "From a procedural aspect the *onus* is on the challenger to establish that the enactment under attack goes further than is reasonably justifiable in a democratic society and not on the State to show that it does not. See *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S) at 382 *in fine* – 383A; 1984 (2) SA 778 (ZS) at 783. The standard of proof is a preponderance of probability.
>
> In effect the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:
>
> (i) the legislative objective is sufficiently important to justify limiting a fundamental right;
>
> (ii) the measures designed to meet the legislative objective are rationally connected to it; and
>
> (iii) the means used (to) impair the right or freedom are no more than is necessary to accomplish the objective.
>
> See *R v Oakes* (1986) 19 CRR 308 at 336-337 (a decision of the Supreme Court of Canada)."

That is the test which I shall apply in determining whether the statutory provisions challenged by the applicant in this case are reasonably justifiable in a democratic society.

However, because of the importance of freedom of expression in a democratic society, the test is to be applied strictly. As the European Court of

Human Rights stated in *Thorgeir Thorgeirson v Iceland* (1992) 14 EHRR 843, at para 63:-

> "The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society … Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted, and the necessity for any restrictions must be convincingly established." (emphasis added)

This application was brought in terms of s 24(1) of the Constitution which, in relevant part, reads as follows:-

> "If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him … that person … may apply to the Supreme Court for redress."

I now turn to the challenged statutory provisions and consider whether the applicant has the *locus standi* to challenge them, and whether the provisions in question are consistent with the Constitution.

I. **Subsections (1) and (2) of section 8**

These read as follows:-

> "(1) Subject to subsection (3), a broadcasting licence shall be issued only to individuals who are citizens of Zimbabwe and ordinarily resident in Zimbabwe or to a body corporate in which a controlling interest is held, whether through any individual, company or association or otherwise, by one or more individuals who are citizens of Zimbabwe and ordinarily resident in Zimbabwe.
>
> (2) For the purposes of subsection (1) 'controlling interest' means –
>
> (a) all the securities in the body corporate; or
>
> (b) securities representing all of the share capital of the body corporate; or
>
> (c) securities equivalent in value to one hundred *per centum* of the share capital of the body corporate; or

(d) securities entitling the holders thereof to all the votes in the affairs of the body corporate."

The first issue to consider is whether the applicant company has the *locus standi* to challenge these provisions. I have no doubt in my mind that it has. That is so because prior to the enactment of the challenged legislation it was lawfully operating a radio broadcasting service and was carrying out the commercial activities for which it had been established. It was exercising its freedom of expression and was unfettered by the restrictive provisions in the two subsections because they were non-existent.

However, that situation changed after the Act came into force because ss 8(1) and 8(2) preclude foreigners and citizens of Zimbabwe not ordinarily resident in Zimbabwe from investing in the applicant. In fact, the provisions impose a total prohibition on foreign investment in the applicant, which the applicant badly needs, thereby making it very difficult, if not impossible, for the applicant to venture into private broadcasting and run a viable commercial radio station.

Emphasising its need for foreign investment, the applicant avers as follows in the founding affidavit:-

> "The Regulations and the Act have stultified Applicant's attempts to obtain the lawful wherewithal (i.e. money etc needed) to broadcast …
>
> None of the equipment used in broadcasting can presently be manufactured in Zimbabwe and must thus all be purchased outside the country and is often quite expensive … One must realise that these technologies are not indigenous to Zimbabwe and Zimbabwean broadcasters will have to purchase the technology (which is prohibitively expensive, given the weakness of the Zimbabwean currency) or will have to offer equity to those who produce it in order to obtain access to it."

In the circumstances, the applicant alleges that its freedom of expression has been abridged. Quite clearly, in terms of s 24(1) of the Constitution the applicant has the requisite *locus standi in judicio* to challenge the constitutionality of ss 8(1) and 8(2) of the Act.

In my view, the fact that the applicant did not, in its founding affidavit, state whether or not it had foreign shareholders is immaterial. That is so because even if all its shareholders were Zimbabwean citizens ordinarily resident in Zimbabwe, it would still have the *locus standi* to challenge the provisions on the basis that the provisions do not permit it to have the foreign shareholders it desperately needs in order to operate a viable commercial broadcasting service. Thus, any foreign investment in the applicant, whether such investment takes place before the application for a radio broadcasting licence is made or after the licence has been granted, would disqualify the applicant from being a licensee.

Quite clearly ss 8(1) and 8(2) constitute a restriction on freedom of expression. The only issue left for consideration is whether the restriction is reasonably justifiable in a democratic society. To determine that, I shall apply the three-part test set out in *Nyambirai's* case, *supra*.

The legislative objectives given by the second respondent are as follows:-

"1. To create employment and a source of income to Zimbabwean citizens, and therefore as a device to protect the economic wellbeing of the country.

2. To ensure that the use of the broadcasting frequency spectrum, which belongs to Zimbabweans as a whole, is not owned and controlled by foreigners to the exclusion and detriment of Zimbabweans.

3. To ensure compliance and monitoring of the provisions of the Act.

4. For the defence and security of the country."

I now wish to consider whether the restriction is reasonably justifiable in a democratic society.

Are the legislative objectives sufficiently important to justify a restriction of the freedom of expression?

It seems to me that the second and fourth objectives are, but the others are not.

Are the measures designed to meet the legislative objectives rationally connected to them?

I do not think they are. In the first place, there is no rational connection between the creation of employment and the total prohibition of foreign investment in private broadcasting. In fact, permitting foreign investment in private broadcasting would be more likely to create employment for Zimbabweans than a total ban of such investment.

Secondly, there is no rational connection between forbidding non-resident citizens of Zimbabwe from investing in private broadcasting, and the legislative objective of ensuring "that the use of the broadcasting frequency spectrum, which belongs to Zimbabweans as a whole, is not owned and controlled by foreigners

to the exclusion and detriment of Zimbabweans." In this regard, there is no rational basis for treating non-resident citizens differently from citizens who are ordinarily resident in Zimbabwe.

Thirdly, there is no rational connection between the total prohibition of foreign investment in private broadcasting and the legislative objective of ensuring "compliance and monitoring of the provisions of the Act."

Finally, there is no rational connection between the total prohibition of foreign investment in private broadcasting and the defence and security of Zimbabwe. In fact, the second respondent does not say in what way the two are connected.

Are the means used to impair the freedom of expression no more than is necessary to accomplish the objectives?

I do not think so. In the first place, there must be many other ways of creating employment for Zimbabweans which do not involve a limitation of freedom of expression.

Secondly, the legislative objective of ensuring that the airwaves are not controlled by foreigners can be achieved without a total prohibition of foreign investment. In fact what the applicant seeks is not an abandonment of control of the airwaves to foreigners, but limited foreign investment which is essential if private broadcasting is to be viable.

Thirdly, the legislative objective of ensuring compliance with the provisions of the Act can be achieved without a total prohibition on foreign investment.

Finally, the defence and security of Zimbabwe can be maintained without a total prohibition of foreign investment in private broadcasting.

In the circumstances, subsections (1) and (2) of s 8 are not reasonably justifiable in a democratic society, and are therefore in breach of s 20(1) of the Constitution.

In addition, these provisions contravene s 21(1) of the Constitution which guarantees freedom of association. It is the applicant's constitutional right to associate in business with any person it chooses.

II. **Section 8 (5)**

This section reads as follows:-

> "No applicant that is a body corporate shall be qualified to be licensed if any one person holds or controls more than ten *per centum* of the securities in that body corporate."

What this means is that the only company which qualifies to apply for a licence is one which has ten or more shareholders. Quite clearly, this is a restriction on freedom of expression.

For the reasons which I set out when I considered the applicant's *locus standi* in respect of ss 8(1) and 8(2), I am satisfied that the applicant has the *locus standi* to challenge the constitutionality of s 8(5). In addition, the fact that in its founding affidavit the applicant did not state that it has less than the required minimum of ten shareholders is not fatal. That is so because even if it has ten or more shareholders, s 8(5) precludes it from reducing that number to less than ten for whatever reason, even if such a move might be absolutely necessary for the company's survival. In that event the applicant might be compelled to give up private broadcasting.

In the circumstances, the only issue left for consideration is whether s 8(5) is reasonably justifiable in a democratic society.

The legislative objective in respect of this provision is set out by the second respondent as follows:-

> "The frequency spectrum is a finite resource, which is owned by all Zimbabweans. Indeed, all Zimbabweans must have the opportunity to participate in the utilisation, control and ownership of their resource. Restricting the amount of equity that may be owned by one shareholder is one way of ensuring that as many Zimbabweans as possible participate in the use of their product."

I now wish to apply the three-part test set out in *Nyambirai's* case, *supra.*

Is the legislative objective sufficiently important to justify a restriction on the freedom of expression?

I think it is.

Are the measures designed to meet the legislative objective rationally connected to it?

I do not think they are. In my view, there is no rational connection between the requirement that a broadcasting company must have at least ten shareholders, and the legislative objective of ensuring that as many Zimbabweans as possible "have the opportunity to participate in the utilisation, control and ownership of their resource." The percentage of ten is arbitrary.

Are the means used to impair the freedom of expression no more than is necessary to accomplish the legislative objective?

I do not think so. The legislative objective could be achieved in other ways, such as increasing the number of national broadcasting licences.

In the circumstances, the restriction in s 8(5) is not reasonably justifiable in a democratic society, and is, therefore, in breach of s 20(1) of the Constitution.

III. **Section 9(3)**

This section reads as follows:-

> "With the exception of a public broadcaster, a broadcasting licence and a signal carrier licence shall not be issued to the same person …"

It was common cause that this provision constituted a restriction on freedom of expression. The only issue was whether the restriction was reasonably

justifiable in a democratic society. That is the issue which I should now determine by applying the test set out in *Nyambirai's* case, *supra*.

Are the legislative objectives sufficiently important to justify limiting the fundamental right to freedom of expression?

The legislative objectives in respect of this provision are set out by the second respondent in his opposing affidavit as follows:-

> "I do not understand how the applicant or any other broadcaster will be prejudiced by this provision. If anything, it is extremely beneficial to them in that they are relieved of the huge expenditures involved in constructing broadcasting studios, acquiring and importing expensive antennas and transmitters, and employing staff on a permanent basis to maintain it. In the scenario envisaged by the Act, the signal carrier, will provide all the expensive aspects of broadcasting listed above, and will, in all probability, provide studios, cameras, etc. All the broadcaster will need to do is walk into an equipped studio, and commence broadcasting on the frequency allocated to them. This makes great economic sense both to the country and to the individual broadcaster. The country is spared the burden of repetitively buying and importing equipment using scarce foreign currency, and the individual broadcasting licensee enjoys the benefits of … low-cost broadcasting."

Thus, the main objectives given by the second respondent for the restrictive provision in s 9(3) are (1) to ensure low-cost broadcasting; and (2) to save foreign currency.

It is pertinent to note that s 9(3) imposes a very serious limitation on the broadcaster's freedom of expression in that it places the broadcaster at the mercy of the signal carrier licensee.

In my view, the above objectives are not sufficiently important to justify the limitation of a fundamental right to freedom of expression. The importance of freedom of expression should never be under-estimated. It lies at the foundation of a democratic society and is one of the basic conditions for its progress and for the development of every man: *In re Munhumeso & Ors* 1994 (1) ZLR 49 (S) at 56F-H.

Is the measure designed to meet the legislative objectives rationally connected to them?

In my view, there is no rational connection between the legislative objectives of s 9(3) set out above, and the measure designed to meet them. There can be no rational connection between the objectives of providing low-cost broadcasting and saving foreign currency, and the measure designed to meet those objectives, i.e. the requirement that a private broadcasting licence and a signal carrier licence shall not be issued to the same person.

Are the means used to impair the freedom of expression no more than is necessary to accomplish the objectives?

Put differently, the question is whether the restrictive provision in s 9(3) is the least drastic means by which the stated objectives of the section may be accomplished. I have no doubt in my mind that the answer to that question is a negative one. There must be many other ways of achieving the stated objectives which are less drastic than limiting the fundamental right to freedom of expression.

In the circumstances, I am satisfied that the restriction in s 9(3) is not reasonably justifiable in a democratic society and is, therefore, in breach of s 20(1) of the Constitution.

IV. **S 11(4)**

This reads as follows:-

> "Not less than ten *per centum* of total programming content broadcast by any licensee shall be –
>
> (a) in any of the national aboriginal languages other than Shona and Ndebele; and
>
> (b) in the case of a television broadcasting licensee, in a manner that may be understood by audiences who have a hearing impairment."

Quite clearly, the applicant has the *locus standi* to challenge the constitutionality of s 11(4)(a). Although it has not yet been issued with a radio broadcasting licence, it has indicated its intention to apply for one and if that application succeeds the applicant's freedom of expression would be restricted, in contravention of s 20(1) of the Constitution. The Declaration of Rights is, therefore, likely to be contravened in relation to it.

However, in respect of s 11(4)(b), I am satisfied that the applicant does not have the requisite *locus standi* to challenge the constitutionality of that provision. That is so because s 11(4)(b) affects a television broadcasting licensee only, and the applicant has not indicated that it intends to apply for a television broadcasting licence.

As I am satisfied that s 11(4)(a) constitutes a restriction on freedom of expression, I proceed to consider whether the restriction is reasonably justifiable in a democratic society.

The legislative objective set out by the second respondent in respect of this provision is to cater for minority language groups. I now wish to subject that objective to the three-part test.

Is the legislative objective sufficiently important to justify a restriction on the freedom of expression?

I think it is.

Are the measures designed to meet the legislative objective rationally connected to it?

I do not think so. There is no rational connection between the requirement that at least ten *per centum* of the total programming content broadcast by a licensee shall be in any of the national aboriginal languages other than Shona and Ndebele, and the legislative objective of ensuring that minority language groups are catered for. The determination of the percentage of ten is not rational but arbitrary.

Are the means to impair the freedom of expression no more than is necessary to accomplish the objective?

I do not think so. In my view, there are other ways of achieving the legislative objective without imposing a restriction on the private broadcaster's freedom of expression. For example, the ZBC, with four national radio broadcasting stations and

one national television broadcasting station, could easily cater for the needs of the minority language groups. It seems to me that this area should be the preserve of the public broadcaster which relies upon public funds. In any event, private broadcasters are in business to make profits for their shareholders, and it may not be within their business plan to cater for minority language groups.

In the circumstances, s 11(4)(a)is not reasonably justifiable in a democratic society and is, therefore, in breach of s 20(1) of the Constitution.

V. **S 12(1)(f)**

This reads as follows:-

> "(1) A licence shall be in the prescribed form and shall specify -
>
> (a) – (e) …; and
>
> (f) the sources and manner of funding of the licensee."

In my view, the applicant has the *locus standi* to challenge the constitutionality of this provision. It has indicated its intention to apply for a radio broadcasting licence but genuinely fears that the requirement that the licence itself should specify such confidential information would create a chilling effect and scare its donors who might fear being victimised. The provision is, therefore, a restriction on freedom of expression. The only issue for consideration is whether the provision is reasonably justifiable in a democratic society.

The legislative objective for this provision is set out by the second respondent as follows:-

> "The requirement indicating sources of funding is essential … The Broadcasting Authority, in assessing the suitability of a client, must be convinced on the financial position and stability of an applicant. It must also be able to ascertain the genuineness and authenticity of the financial statement given to it. If the source and manner of funding is not stated, how will the authority be able to ascertain this?
>
> The financial stability of an applicant is absolutely essential to enable the First Respondent to ensure that the licences are not given to persons who cannot possibly commence operations in terms of their licences, and therefore seek to obtain a licence for speculative and profit-making purposes. The provision is meant to ensure stability and continuity of broadcasting services. This provision also assists the First Respondent in ensuring that the other provisions of the Act have been complied with. For example, provisions relating to cross-ownership … This ensures transparency in the process, and ensures that the public can readily ascertain whether the persons who have a direct interest in the allocation of licences … secretly and corruptly try and benefit from the process."

Thus, the main objectives given by the second respondent for the restrictive provision in s 12(1)(f) are: (1) to assist the Broadcasting Authority ("the Authority") in assessing the suitability, financial position and stability of an applicant for a licence; (2) to assist the Authority in ascertaining the genuineness and authenticity of the financial statement given to it by an applicant; (3) to ensure that licences are not issued to persons for speculative and profit-making purposes; (4) to ensure the stability and continuity of broadcasting services; (5) to assist the Authority in ensuring that the other provisions of the Act, such as those relating to cross-ownership, have been complied with; and (6) to ensure transparency in that the public can readily ascertain whether the persons who have a direct interest in the allocation of licences secretly and corruptly try to benefit from the process.

I will now consider whether the restriction in s 12(1)(f) is reasonably justifiable in a democratic society. I will apply the three-part test already referred to in this judgment.

Are the legislative objectives sufficiently important to justify a restriction on the freedom of expression?

Quite clearly they are not. As already stated, freedom of expression constitutes one of the essential foundations of a democratic society. It is so important that it cannot be restricted on the basis of the objectives given by the second respondent and which I have set out above.

Are the measures designed to meet the legislative objectives rationally connected to them?

In my view, they are not. Firstly, there is no rational connection between the objective of assisting the Broadcasting Authority in assessing the suitability, financial position and stability of an applicant, and the requirement that the licence must specify the sources and manner of funding of the licensee.

Secondly, there is no rational connection between the objective of assisting the Authority in ascertaining the genuineness and authenticity of the financial statement given to it by an applicant, and the requirement that the licence must specify the sources and manner of funding of the licensee. The genuineness of the financial statement can be determined by an examination of the applicant's assets and bank account. The sources of the funds are irrelevant in that exercise.

Thirdly, there is no rational connection between the objective of ensuring that licences are not issued to persons for speculative and profit-making purposes, and the requirement that the licence must specify the sources and manner of funding of the licensee.

Fourthly, there is no rational connection between the objective of ensuring the stability and continuity of broadcasting services, and the requirement that the licence should specify the sources and manner of funding of the licensee.

Fifthly, there is no rational connection between the objective of assisting the Authority in ensuring that the other provisions of the Act have been complied with, and the requirement that the licence should specify the sources and manner of funding of the licensee.

Finally, there is no rational connection between the objective of ensuring that the persons who have a direct interest in the allocation of licences do not secretly and corruptly benefit from the process, and the requirement that the licence should specify the sources and manner of funding, bearing in mind that there are many ways of disguising identity.

Are the means to impair the freedom of expression no more than is necessary to accomplish the objectives?

In my view, the answer to this question is a negative one. I am satisfied that there are other ways of achieving the legislative objectives set out above which do not bring about a limitation on the freedom of expression. For example, the financial position

of an applicant can be determined by examining the applicant's assets and bank account. In that exercise, the identity of the person who supplied the assets or the money in the bank account is irrelevant.

In the circumstances, the restriction in s 12(1)(f) is not reasonably justifiable in a democratic society and is, therefore, in breach of s 20(1) of the Constitution.

VI **Sections 12(2) and 12(3)**

S 12(2) provides that a licence, other than a community broadcasting licence, shall be valid for a period of two years, and s 12(3) provides that a community broadcasting licence shall be valid for a period of one year. In my view, these provisions constitute a restriction on the freedom of expression.

That is so because the very short licence duration exerts a serious chilling effect on freedom of expression in at least two ways. Firstly, it discourages prospective investors from setting up a broadcasting service, as they avoid taking the risk of the licence not being renewed and sustaining heavy financial losses. Secondly, the constant need to have the licence renewed every year or every two years seriously compromises the editorial independence of the licensees, bearing in mind that there is no presumption in favour of licence renewal as is the case in other countries.

Having said that, I would like to deal with the applicant's *locus standi*. In my view, the applicant has the *locus standi* to challenge both provisions.

With regard to s 12(2), the applicant has indicated that it intends to apply for a national radio broadcasting licence. If that application succeeds, the applicant will be bound by s 12(2) and the restriction on freedom of expression will apply to it. Quite clearly, the applicant has the *locus standi* to challenge the provision in terms of s 24(1) of the Constitution on the basis that its right to freedom of expression is likely to be contravened.

As far as s 12(3) is concerned, although the applicant did not indicate in its founding affidavit that it intended applying for a community radio broadcasting licence, in its answering affidavit it stated that it was in effect keeping open its options as to whether or not to seek a community radio broadcasting licence. I am, therefore, satisfied that it has the *locus standi* to challenge s 12(3) in terms of s 24(1) of the Constitution, again on the basis that its right to freedom of expression is likely to be contravened.

In any event, both s 12(2) and s 12(3) specify the duration of radio broadcasting licences, one being a national broadcasting licence and the other being a community broadcasting licence. But both licences are for the purpose of furthering the applicant's main object, which is the operation of a radio broadcasting service. In addition, ss 12(2) and 12(3) are so intertwined and the duration of each licence is so short that it would be impossible to determine the constitutional validity of s 12(2) without in effect determining the constitutional validity of s 12(3).

I now wish to set out the legislative objectives of ss 12(2) and 12(3) before determining whether the two provisions are reasonably justifiable in a democratic society.

In respect of s 12(2), the legislative objectives given by the second respondent are as follows:-

> "to ensure compliance with the Act;
>
> to raise revenue for the State, and therefore, the public;
>
> to encourage competitiveness and therefore the provision of a high-quality service."

In respect of s 12(3), the legislative objective is set out by the second respondent as follows:-

> "… the purpose of a community broadcasting licence is to allow certain communities the right within specific licence areas, to broadcast to their respective communities. We have thousands of communities in our country, which are very diverse, and sometimes have conflicting interests … The State has an obligation to allow each and every community in this country to express themselves, but can only do that in the context of the limited frequencies that are available within Zimbabwe. Therefore, restricting the validity of a community broadcasting licence to just one year, non-renewable, is one way of ensuring that at some point every community will have had the opportunity to broadcast." (emphasis added)

Quite clearly, the second respondent is labouring under the misapprehension that a community broadcasting licence is non-renewable. It is pertinent to note that s 14, which deals with renewals, does not say that.

Nevertheless, I will now consider whether the restriction on freedom of expression imposed by ss 12(2) and 12(3) is reasonably justifiable in a democratic society.

Are the legislative objectives sufficiently important to justify a restriction on the freedom of expression?

In my view, the legislative objectives in respect of s 12(2) are not, but those in respect of s 12(3) may be.

Are the measures designed to meet the legislative objectives rationally connected to them?

There can be no doubt that they are not. In respect of s 12(2), it is pertinent to note that the second respondent does not say how the short licence duration of two years ensures compliance with the Act, or assists in raising revenue for the State, or encourages competitiveness and the provision of high quality broadcasting services.

Similarly, in respect of s 12(3) the second respondent does not say why a licence duration of one year, as opposed to a longer period, for community radio broadcasting would ensure "that at some point every community will have had an opportunity to broadcast."

Are the means to impair the freedom of expression no more than is necessary to accomplish the objectives?

In my view, the means are certainly more than is necessary to accomplish the legislative objectives. I say so because there are other ways of achieving the

legislative objectives which would not bring about a limitation on the freedom of expression. For example, the police can ensure that a licensee complies with the Act.

In the circumstances, the restriction on freedom of expression in terms of ss 12(2) and 12(3) is not reasonably justifiable in a democratic society. Accordingly, the statutory provisions in question are in breach of s 20(1) of the Constitution.

VII. **SECTIONS 15 AND 16**

S 15(1) gives the second respondent the power to amend a licence or any term or condition of a licence for various reasons, after consulting the Broadcasting Authority of Zimbabwe ("the Authority") and giving the licensee an adequate opportunity to make representations in the matter in terms of s 15(2).

Similarly, s 16(1) gives the second respondent the power to suspend or cancel a licence for various reasons, after consulting the Authority and giving the licensee seven days within which to make representations in the matter in terms of s 16(2). In addition, s 16(3) provides that after receiving the licensee's representations the second respondent shall, if in his opinion that course is justified, request the Authority to institute a public inquiry for the purpose of determining whether or not the licence should be suspended or cancelled.

In addition to that, s 16(5) provides that if at the conclusion of the inquiry, and on the basis of the recommendation of the Authority, the second

respondent is satisfied that the licence should be suspended or cancelled, he shall suspend or cancel the licence or take such other action as he considers appropriate.

Quite clearly, the applicant has the requisite *locus standi* to challenge both sections, as it alleges that its right to freedom of expression is likely to be abridged.

In my view, sections 15 and 16 are in breach of s 20(1) of the Constitution because they give to the second respondent, who is a Government Minister, the power to amend, suspend or cancel licences. It is well established that such regulatory powers should be exercised by independent regulatory bodies which are free from political interference. The reason for this requirement is obvious. A politician may be tempted to use his regulatory powers to deprive those private broadcasters perceived to be critical of the government and its policies of their licences and freedom of expression.

In addition, s 15(1)(c) and (d), and s 16(1)(h) constitute a restriction on freedom of expression for a different reason.

Subsections(1)(c) and (1)(d) of s 15 read as follows:-

> "Subject to this section, the Minister, after consulting the Authority, may at any time amend a licence or any term or condition of a licence –
>
> (a) – (b) …; or
>
> (c) if the Minister considers the amendment necessary to reflect the true nature of the service, system or business which the licensee is conducting; or
>
> (d) if for any other reason the Minister considers the amendment necessary or desirable in the public interest."

And s 16(1)(h) reads as follows:-

> "Subject to this section, the Minister, after consulting the Authority, may suspend or cancel any licence if there is evidence that –
>
> (a) – (g) …; or
>
> (h) the licensee has acted in a manner prejudicial to the defence, public safety, public order, public morality or public health of Zimbabwe."

Whilst it is correct that certain restrictions on the freedom of expression are saved by s 20(2) of the Constitution, it is only those that are authorised by law which are saved. In my view, the restrictions in s 15(1)(c) and (d) and s 16(1)(h) are not authorised by law.

In *Chavunduka & Anor v Minister of Home Affairs & Anor* 2000 (1) ZLR 552 (S) at 560E-561C, this Court considered the meaning of the phrase "under the authority of any law" and said the following:-

> "The phrase 'under the authority of any law' is worded differently from such equivalent phrases as 'provided by law', 'prescribed by law' or 'in terms of law', used in other constitutional and human rights instruments … Yet the meaning of these phrases is substantially the same …
>
> In *The Sunday Times v The United Kingdom* (1979-80) 2 EHRR 245, the European Court of Human Rights was required to consider what was meant by the expression 'prescribed by law' in article 10(2) of the Convention on Human Rights. The majority of the court held at 271 (para 49):
>
> > 'In the court's opinion, the following are two of the requirements that flow from the expression 'prescribed by'. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate

> his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail …'
>
> It is crucial, therefore, that the law must be accessible and formulated with sufficient precision to enable a person to regulate his conduct."

In my view, the provisions in sections 15(1)(c) and (d) and 16(1)(h) do not pass the above test. The grounds on which the second respondent may amend, suspend or cancel a licence are vague and imprecise, and give the second respondent an unlimited discretion to interfere with licences.

Accordingly, the said restrictions do not fall into the category of those "under the authority of any law", and are, therefore, not saved by s 20(2) of the Constitution.

VIII. **S 22(2)**

This section provides that no person other than a citizen of Zimbabwe ordinarily resident in Zimbabwe shall be a director of a licensee.

In my view, the applicant has the *locus standi* to challenge the constitutionality of this provision for the same reasons that it has the *locus standi* to challenge s 8(1) and (2). For the reasons that I gave when I dealt with the constitutionality of s 8(1) and (2), I find that s 22(2) is in contravention of s 20(1) of the Constitution. It has the same effect as a total prohibition on foreign investment in private broadcasting, which the applicant badly needs.

In addition, s 22(2) is in contravention of s 21(1) of the Constitution which guarantees freedom of association. It is the applicant's constitutional right to associate in business with any person it chooses.

Finally, I wish to point out that after this Court reserved its judgment in this matter, the Broadcasting Services Amendment Act No. 6 of 2003 was promulgated. This Act amended and repealed some of the sections in the principal Act which had been challenged by the applicant. The views I have expressed in this judgment do not take into account the recent changes to the principal Act.

In the circumstances, I would have issued the following order:

1. The following provisions of the Broadcasting Services Act [Chapter 12:06] are unconstitutional and are hereby struck down;
   a. Section 6;
   b. Section 8(1),(2) and (5);
   c. Section 9(1),(2) and (3);
   d. Section 11(4)(a);
   e. Section 12(1)(f),(2) and (3);
   f. Section 15;
   g. Section 16; and
   h. Section 22(2)

2. The costs of this application shall be borne by the first and second respondents, jointly and severally, the one paying the other to be absolved.

CHEDA JA : I have read the judgment prepared by CHIDYAUSIKU CJ and that prepared by SANDURA JA.

I agree with them that sections 6, 9(1) and 9(2) of the Broadcasting Services Act [Chapter 12:06] ("the Act"), are inconsistent with section 20(1) of the Constitution of Zimbabwe ("the Constitution").

I also agree with the conclusions of the two concerning sections 4(2) and 4(3) which have not been shown by the applicant to contravene section 20(1) of the Constitution. As for sections 8(1),(2) and (5) and section 22(2) I agree with CHIDYAUSIKU CJ, that it is up to the applicant to establish its *locus standi* to challenge that section. The applicant has not made its position clear regarding its status and how it is affected by these provisions. If its composition falls within the prohibited conditions, or if its securities do, then it has not stated that in order to put itself within the ambit of section 24(1) of the Constitution. I would conclude, as does the CHIEF JUSTICE, that its *locus standi* has not been established.

It is difficult to see how these provisions can be said to stultify the applicant's attempts to obtain money needed to broadcast and equipment when the

applicant says it has been previously broadcasting. There is no averment as to how the equipment it has was obtained or that it was a result of foreign investment. The securities held by the applicant have not been disclosed and it is not known how they are structured.

I agree with SANDURA JA that section 9(3) places a serious limitation on freedom of expression by the restriction that a broadcasting licence and a signal carrier licence should not be issued to the same person. This means the one party may stifle the other's freedom of expression if it refuses to co-operate. This is certainly an unjustified restriction and it interferes with the applicant's freedom of expression. It should be struck down.

Section 11(1) in conjunction with section 9(b) and (c) of the Fifth Schedule are also challenged. These provisions relate to television licences while the applicant is applying for a radio broadcasting licence. The applicant has no *locus standi* to challenge them.

As for section 11(4) there seems to be no good basis for challenging a provision intended to benefit the public. The challenge should be dismissed.

The applicant also challenged section 12(1)(f)(2) and (3). Subsection (1)(f) requires that the source and manner of funding be specified in the licence. No reason is given for this. This is the sort of information that can be required on the application form for a licence instead of being on the licence itself.

It is not the broadcaster that issues the licence. If the licensing authority will have that information by the time it issues the licence it is up to it to include it. There is no duty on the applicant as it does not issue the licence to itself.

On the other hand, if there is no provision in the Act for such information to be provided by the applicant there is no basis for having such information on the licence.

However, it is for the licensing authority to obtain the information and I do not find it to be inconsistent with section 20(1) of the Constitution to require such information in view of the provisions of section 8.

Section 12(2) provides that a licence, other than a community broadcasting licence, shall be valid for a period of two years.

It is difficult to understand how a person or company can be expected to acquire what the second respondent accepts is expensive equipment in the form of antennas and transmitters in order to broadcast just for two years. This is most discouraging as there is no guarantee of renewal. This provision clearly acts as a deterrent to those who may wish to set up as broadcasters. It is a serious interference with the right and freedom of expression.

It is not necessary for the court to consider what period can be said to be acceptable or constitutional.

In the case of *United Parties v Minister of Justice* 1997 (2) ZLR 254 (S) this Court dealt with a similar point regarding the threshold set for political parties to qualify for financial assistance. The provision was struck down because the threshold was too high, without having to state what was constitutional or acceptable. This decision follows the one in the Canadian case of *Barrette & Payette v A-G Canada* (1993) 14 CRR (2^{nd}) 166.

Section 12(3) refers to a community broadcasting licence whose validity is for a period of one year. I consider that the applicant has no *locus standi* to challenge this section as it is not applying for a community broadcasting licence.

Sections 15 and 16 give the Minister power to amend or cancel a licence where he considers it necessary to do so.

Sub-sections 2 to 5 provide the procedure to be followed in the event that the Minister wishes to exercise powers given him by section 15 and 16.

In my view there is provision for a fair hearing and there is no breach of the provisions of section 20 of the Constitution.

Accordingly the following sections, as listed in the Draft Order, are to be struck down:

Para (b) section 6;

Para (e) 9(1), 9(2) and 9(3);

Para (h) 12(1)(f), (2) and (3)

The rest of the application is dismissed.

MALABA JA: The applicant ("Capital Radio") had made a direct application to this Court in terms of s 24(1) of the Constitution of Zimbabwe ("the Constitution") for an order declaring specific sections of the Broadcasting Services Act [*Chapter 12:06*] ("the Act") unconstitutional and struck down on the ground that the provisions thereof are violative of the right to freedom of expression enshrined in s 20(1) of the Constitution, in particular that they are restrictions to the enjoyment of that freedom by broadcasting which are not reasonable in a democratic society. The impugned provisions of the Act are listed in the draft order referred to in the CHIEF JUSTICE'S opinion. The applicant contends that the licensing system created and enforced through the impugned provisions regulating access to the use of the airwaves as a medium of communication is violative of freedom of expression.

The respondents contend that the impugned provisions of the Act are constitutional, in that not only do they clear the technological impediments to broadcasting but they also promote and ensure that the physically limited broadcasting facilities placed in the hands of a few broadcasters are used in the public interest.

The first and second respondents also put in issue the *locus standi* of Capital Radio to challenge the constitutionality of certain of the provisions of the Act

mentioned in the draft order, making it necessary to determine the question whether Capital Radio complied with the requirements of s 24(1) of the Constitution to the effect that a person seeking to apply to the Court for redress must allege that the impugned provisions of the Act violate, have violated or are likely to violate specific declaration of a right in relation to himself.

CONSTITUTIONALITY OF THE REGULATION OF BROADCASTING

I take the question of the constitutionality of the regulation of broadcasting as a medium of communication.

In challenging the whole licensing system created by Parliament to regulate through the Act broadcasting as a medium of mass communication on the ground that it violates freedom of expression, Capital Radio assumes that a broadcaster has a right of freedom of expression as such secured to him in s 20 of the Constitution in the same way a speaker or a writer enjoys that freedom.

Capital Radio overlooked the fact that broadcasting is a special medium through which people exercise their freedom of expression, that is to say, to transmit and receive information in the free market place of ideas. Unlike the one-to-one communication or the paper upon which the writer expresses himself to the readers, broadcasting as a medium of communication has inherent or natural physical limitations, making it impossible for all those who would want to use it to do so.

The number of frequencies upon which broadcasting technology depends to convey the information or ideas communicated are limited, such that if

broadcasting facilities are to be effectively exploited as a medium of communication only a few people can use the limited number of airwaves available. If anyone who wished to broadcast had a right to use any frequency regardless of whether there was interference with a prior user a situation would be reached where all spoke without hearing each other. That would be a sure road to chaos and anarchy.

This situation would have occurred in this country following the striking down of the public monopoly of broadcasting by the decision in the *Capital Radio* case *supra*. In the name of the exercise of freedom of expression, many like Capital Radio would have rushed to use the limited airwaves for television, radio and other forms of communication, thereby choking the medium to no-one's benefit.

The history of broadcasting legislation in the United States of America illustrates the effect a free-for-all access to the use of broadcasting facilities would have had on freedom of expression. It also shows that regulation of the broadcasting industry is the only way by which Government can fulfil its constitutional obligations to guarantee the enjoyment of freedom of expression by members of the public through this powerful medium of mass communication.

Before the enactment of the Communications Act 1934, which prohibited radio broadcasting without a licence issued by the Federal Communications Commission, the legislation in the United States had allowed almost free access to broadcasting facilities regardless of whether a particular frequency had a prior user and there was interference with his communication.

In *National Broadcasting Co v United States* 319 US 190 MR JUSTICE FRANKFURTER, delivering the opinion of the Supreme Court of the United States, said at 212-213:

> "These new stations used any frequencies they desired, regardless of the interference thereby caused to others. Existing stations changed to other frequencies and increased their power and hours of operation at will. The result was confusion and chaos. With everybody on the air, nobody could be heard. …
>
> The plight into which radio fell prior to 1927 was attributable to certain basic facts about radio as a means of communication – its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another. Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile!"

At p 214 His Lordship said:

> "… in order to protect the national interest involved in the new and far-reaching science of broadcasting, Congress 'formulated a unified and comprehensive regulatory system for the industry'."

In *Federal CC v Pottsville Broadcasting Co* 309 US 134 MR JUSTICE FRANKFURTER had pointed out that, in enacting the Communication Act 1934:

> "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field. To avoid this Congress provided for a system of permits and licenses. Licenses were not to be granted for longer than three years. No license was to be 'construed to create any right, beyond the terms, conditions and periods of the license'."

Lastly, in *Red Lion Broadcasting Co v FCC* 395 US 367 MR JUSTICE WHITE delivered the opinion of the Supreme Court of the United States on the same subject in these words at 387-389:

"Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of news media justify differences in the First Amendment standards applied to them.

When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilised in the present state of commercial, acceptable technology.

It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Communication Act 1934. …

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish. … It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communications possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum."

The use of regulations is therefore essential to efficient broadcasting facilities.

What happened prior to the enactment of the Act was that the Government of Zimbabwe had, by means of the licensing system, made communication by television and radio broadcasting available to the Zimbabwe Broadcasting Corporation only, thereby creating a public monopoly of the use of the airwaves in violation of the interests of private commercial broadcasters in respect to whose freedom of expression no licensing system had been created to enable them to

exploit broadcasting technology. In enacting the Act, the Government responded to an evident need to provide a licensing system which would regulate broadcasting by public and private broadcasters, at the same time ensuring that the public retained its right to dissemination and reception of information through the same medium consistent with the right to freedom of expression secured to all of them, including those who would have been refused broadcasting licences.

I therefore do not consider that the licensing requirements of the Act limit in principle the rights guaranteed by s 20(1) of the Constitution, as the freedom to impart and receive information through licensed broadcasting is also guaranteed. Freedom of every person, including the broadcaster, to express and communicate ideas without restraint, whether orally or in print or by other means of communication, should not be confused with the privilege conferred upon broadcasters to use broadcasting facilities.

LOCUS STANDI

I now turn to consider the question of the *locus standi* of Capital Radio in these proceedings. The first respondent raised this issue by contending that Capital Radio has not alleged the facts it was its duty to allege in terms of s 24(1) of the Constitution to acquire the right of access to apply for redress to the Court in respect of certain of the impugned provisions of the Act. The provisions of s 24(1) of the Constitution are set out in the CHIEF JUSTICE'S opinion.

The only time the Supreme Court has original jurisdiction to hear an application for the redress of an infringement of a declaration of a right is when the

applicant has alleged that the declaration of a particular right has been, is being or is likely to be violated in relation to himself (if he is not acting in the representative capacity mentioned therein).

It appears to me that, on a proper construction of the language of s 24(1) of the Constitution, where a person has not made the necessary allegations of the facts stipulated therein the question of the constitutionality of the provisions of a statute cannot be a matter for determination by the Court because the person would have no right to be heard.

I appreciate the fact that in *Law Society of Zimbabwe and Ors v Minister of Finance* 1999 (2) ZLR 231 McNALLY JA said the Court was disposed to take a broad view of the question of *locus standi* in matters where the applicant was an organisation bringing a representative action on the allegation that a declaration of rights was being contravened in relation to its members or persons it represented. The organisation would at least have made the necessary allegation of the facts required to be made in terms of s 24(1) of the Constitution for a person to acquire the right to make an application to the Court for redress.

I do not think the principle of a broad view of *locus standi* taken in matters of the nature dealt with the *Law Society's* case *supra* is applicable to a case where the *locus standi* of a party is challenged on the ground that no allegation of the requisite facts prescribed in s 24(1) of the Constitution for founding *locus standi* have been made.

The principles applicable to the determination of the question of *locus standi* under s 24(1) of the Constitution were stated in *The United Parties v The Minister of Justice, Legal and Parliamentary Affairs and Ors* 1997 (2) ZLR 254, where at 258B-C GUBBAY CJ said:

> "… s 24(1) affords the applicant *locus standi in judicio* to seek redress for a contravention of the Declaration of Rights only in relation to itself (the exception being where a person is detained). It has no right to do so either on behalf of the general public or anyone else. The applicant must be able to show a likelihood of itself being affected by the law impugned before it can invoke a constitutional right to invalidate that law. See *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation and Anor* 1995 (2) ZLR 199 (S) at 207H-208A, 1995 (9) BCLR 1262 (ZS) at 1269 E-G, 1996 (1) SA 847 (ZS)at 854 D-F."

In applying the principles enunciated in the *United Parties* case *supra* to the facts of this case I am of the opinion that Capital Radio has not made allegations of the facts which would entitle it to challenge the constitutionality of the following provisions of the Act –

(1) s 8 subss (1), (2) and (5);

(2) s 22 subs (2);

(3) s 11(1), as read with s 9 (b) and (c) of the Fifth Schedule;

(4) s 11 subs (4) para (b); and

(6) s 12 subs (5).

SECTION 8

The effect of the provisions of s 8 subss (1) and (2) of the Act is to prohibit the granting of a broadcasting service licence to a body corporate in which all the securities are not owned by citizens of Zimbabwe who are ordinarily resident in

the country. Subsection (5) of s 8 of the Act prohibits the granting of a licence to a body corporate in which more than ten percent of the securities are held by one person.

In order to acquire the right to challenge the constitutionality of these provisions Capital Radio had to allege that they have violated the right to freedom of expression in relation to itself by prohibiting it from applying for a broadcasting services licence. It had to allege the fact that all its securities are not owned by citizens of Zimbabwe who are ordinarily resident in the country and that more than ten percent of its securities are held by one person. Capital Radio did not make allegations of these facts in its founding affidavit.

In para 31 of the opposing affidavit the second respondent stated:

> "SECTION 8 – PERSONS DISQUALIFIED TO BE LICENSED
>
> There is nothing in the papers to show that the applicant, or any of its members, are not citizens and ordinarily resident in Zimbabwe. I therefore wonder on what basis the applicant lodges this complaint. Certainly, the applicant has no *locus standi* to challenge sections which, according to the papers, cannot possibly affect it."

There is no doubt that s 8 of the Act is a law relating to who may not hold a broadcasting licence. It restricts the classes of persons who may hold broadcasting licences. If Capital Radio fell into the class of people who could not be granted a broadcasting services license by operation of the provisions of s 8 subss (1), (2) and (5) of the Act, it was expected to challenge the second respondent's averments in its replying affidavit. In para 18 of its replying affidavit, Capital Radio dealt with

the matter on the basis that the provisions of s 8 subss (1), (2) and (5) of the Act prevented foreigners who had capital from investing in the broadcasting business.

The reasonable inference to be drawn from what Capital Radio said in the replying affidavit is that it is not one of the corporate bodies affected by the provisions of s 8 subss (1), (2) and (5) of the Act and that there was no contravention of the right to freedom of expression arising from those provisions. Incidentally, s 3 of the Canadian Broadcasting Act stipulates that the broadcasting system should be effectively owned and controlled by Canadians. *Re N.B. Broadcasting Co Ltd v CRTC* 13 DLR (4^{th}) 77 at 86.

SECTION 22(2)

The effect of s 22 subs (2) of the Act is that the granting of a broadcasting services licence to a corporate body in which any person other than a citizen of Zimbabwe ordinarily resident in the country is a director is prohibited. Capital Radio did not allege in its founding affidavit that one or all of its directors are not citizens of Zimbabwe ordinarily resident in the country.

SECTION 11(1), AS READ WITH S 9 (B) AND (C) OF THE FIFTH SCHEDULE

Section 11(1) of the Act, as read with s 9 (b) and (c) of the Fifth Schedule, prescribes the terms and conditions subject to which each commercial television broadcasting licence would be issued.

In para 20 of the replying affidavit it is stated on behalf of Capital Radio that:

> "The applicant wishes to obtain a radio broadcasting licence, as with the old regulations, the Act provides scope for only one national radio broadcaster apart from the public broadcaster."

As s 9(1) of the Act, under which paras (b) and (c) of the Fifth Schedule fall, clearly relates to terms and conditions to which a commercial television broadcasting licence would be subjected, Capital Radio's interest in exercising freedom of expression by radio broadcasting was not infringed by the provisions of the Act relating to commercial television broadcasting.

Capital Radio had no *locus standi* to challenge provisions of the Act which did not contravene the declaration of rights in relation to it.

SECTION 11(4)(B)

For the same reason Capital Radio has no *locus standi* to challenge the constitutionality of the provisions of s 11(4)(b) of the Act because it imposes on a holder of a television broadcasting licence an obligation to ensure that not less than ten percent of the total programming content broadcast is in a manner that may be understood by audiences who have a hearing impediment.

SECTION 12(3)

Section 12 subs (3) of the Act fixes the period of validity of a community broadcasting licence at one year. Capital Radio has not applied for a community broadcasting licence. It has therefore no *locus standi* to challenge the constitutionality of this provision of the Act.

OTHER SECTIONS

I am of the view that Capital Radio has *locus standi* to challenge the constitutionality of the rest of the provisions of the Act, including those that relate to the terms and conditions of the broadcasting services licence under which Capital Radio would have to operate in the event of it being granted a commercial radio broadcasting services licence. The nature, content and duration of the rights Capital Radio would enjoy as a radio broadcaster are required by the Act to be defined by the terms, conditions and period of the licence granted.

Since the only time Capital Radio can control the use of airwaves to facilitate the dissemination and reception of information or ideas by the public in the exercise of the freedom of expression is under a licence, the terms and conditions of which are prescribed by the impugned provisions of the Act, Capital Radio is able to decide before it is granted the licence whether or not the terms and conditions under which it would be required to broadcast are violative of its constitutional rights or not.

In my view, it would be too late for Capital Radio to challenge the constitutionality of the provisions of the Act, after it has agreed to be bound by the terms and conditions of the licence.

I therefore agree with the CHIEF JUSTICE in holding that Capital Radio has *locus standi* to challenge the constitutionality of the provisions of ss 4(2), 4(3), 5, 9(1) and 9(2). I also agree with SANDURA JA that Capital Radio has *locus standi* to challenge the constitutionality of the provisions of ss 11(4)(a), 12(1)(f), 12(2), 15 and 16.

It is accepted by the respondents that the impugned provisions of the Act constitute restrictions on the enjoyment of freedom of expression by broadcasting. I am not convinced, however, that the concession is valid in respect to the provisions of s 12(1)(f).

The question for determination in each case is whether the restriction to the enjoyment of freedom of expression brought about by the impugned provision has been shown not to be reasonably justifiable in a democratic society. In *Osborne v Canada (Treasury) Board* (1991) 82 DLR 321 reference was made to the test which is used to determine whether a provision imposing restrictions upon a declaration of rights is reasonably justifiable in a democratic society. One must look at the objective the Government seeks to achieve by the provision. The objective must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. If the objective is found to meet the above requirement, the means chosen to accomplish the objective must be examined. The means must be reasonable and demonstrably justifiable in a free and democratic society. This is what is called the proportionality requirement. It has three aspects –

(1) the existence of a rational link between the measures under review and the objective;

(2) a minimal impairment of the right or freedom; and

(3) a proper balance between the effects of the limiting measures and the legislative objective.

In *Staffman v Vancouver General Hospital CIT* (1990) 76 DLR (4th) 700 FOREST J explained the proportionality aspect of the test in these terms:

> "The challenged law is then subjected to a proportionality test in which the objective of the impugned law is balanced against the nature of the right it violates, the extent of the infringement and the degree to which the limitation furthers other rights or policies of importance in a free and democratic society."

It is apparent from the application of the test in *Osborne's* case *supra* that in ascertaining the objective of the provision, the means used and the effect of the restriction on the constitutional right or freedom the Court undertakes the construction of the language used in the provision.

In *Nyambirai v NSSA and Anor* 1995 (2) ZLR 1 (S) the above test was also stated as involving answers to three questions, which are whether –

1. the legislative objective is sufficiently important to justify limiting a fundamental right;
2. the measures designed to meet the legislative objective are rationally connected to it; and
3. the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

In ascertaining the legislative objective, it is permissible to take into account what the Minister charged with the administration of the Act says is the objective of the impugned provision.

One reason for this approach is that it is imperative that, when the effective exercise of rights so necessary to the maintenance of democracy is claimed to have been abridged, the courts should "weigh the circumstances" and "appraise the substantiality of the reason advanced" in support of the challenged provisions.

The second reason is the venerable principle to the effect that the interpretation placed on the impugned provisions by those charged with the responsibility of its execution should be followed unless there are compelling indications that it is wrong. The effect of this principle is that the Court should satisfy itself by interpreting the provision that what the Minister claims to be the objective of the impugned provision is correct.

I now apply these principles. I agree with the CHIEF JUSTICE that the provisions of ss 4(2) and 4(3) have not been shown to be unconstitutional. I also agree with his finding that s 6 of the Act is unconstitutional. It is clear from the limitation on the number of individuals who may be chosen to use the scarce public resource of airwaves that the granting of broadcasting services licences is not a mere matter of electromagnetic engineering for the sake of keeping signals clear.

The limited and restricted number of broadcasting frequencies, the decision as to who shall be permitted to use them, and on what terms and conditions

and for what periods of time, requires the exercise of a discretion of the highest order and the most careful application of the principles of equitable treatment to all the classes and interests affected. *Columbia Broadcasting v Democratic National Committee* 412 US 772 at 815.

Freedom of expression finds its true meaning when its enjoyment is protected from interference by Government. To place the power to decide who gets a broadcasting services licence in the hands of the executive arm of Government when there is an independent body exposes the granting of licences to the threat of the danger of political interference with the exercise of freedom of expression by broadcasting.

The mere legislative preference for one body as the licensing authority rather than the other is, in my view, inadequate justification for a provision, the effect of which has the potential of diminishing the effective exercise of rights so necessary to the maintenance of democracy. In many democratic countries the body that allocates airwave frequencies is the licensing authority. In this case the fact that the allocation of frequencies is done by the Broadcasting Authority, whilst the licensing authority is the Minister, has the effect that a person who has been allocated a frequency on which to broadcast may have it then taken away from him by the Minister and the frequency allocated to someone else who then gets the licence to broadcast. In my view, in regulating the activities of the public and private broadcasters the Act created a single broadcasting system, the control of which needed to be in the hands of an independent public authority such as was created under s 4.

I agree that s 9(1) of the Act is unconstitutional. The objective of providing that there shall be one other national free-to-air radio broadcaster apart from the Zimbabwe Broadcasting Corporation, to protect the public broadcaster from competition with private broadcasters, is not sufficiently important to justify limiting the fundamental right to freedom of expression by broadcasting. The stated objective suggests that the restriction is not based upon the limited number of frequencies. The fixing by legislation of the number of private free-to-air national radio broadcasters to one does not take into account the rapid changes in broadcasting technology. Prohibition of competition in the market place of ideas by broadcasting is not in the public interest which demands that there be plurality of ideas and opinions from many different sources.

In *Federal CC v Pottsville Broadcasting Co supra* MR JUSTICE FRANKFURTER said at 138:

> "Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."

I also agree with SANDURA JA that the provision of s 9(3), to the effect that "with the exception of a public broadcaster, a broadcasting licence and signal carrier licence shall not be issued to the same person", is unconstitutional. It is clear to me that, although the second respondent suggested that the objective of the provision was to protect private broadcasters from the huge capital investment required in the establishment of a signals carrier station, the real purpose was to

protect the public broadcaster from competition by placing the control of signals in the hands of one party and the control of the carrier thereof in another. The paternalistic reason given to justify the restriction of the freedom of the broadcaster to own a signals carrier cannot save the restriction from being unreasonable and unjustifiable in a democratic society

Section 11(4)(a) provides that not less than ten percent of total programming content broadcast by any licensee shall be in any of the national aboriginal languages of Zimbabwe other than Shona and Ndebele.

It is clear that the objective of the provision is the protection of the rights of members of the public who speak minority languages to receive information and ideas in the languages they understand. As the second respondent rhetorically but aptly put it, in para 60 of the opposing affidavit,:

> "Of what relevance and use is s 20 of the Constitution if people cannot understand what is being broadcast to them, either because they speak a different language to everyone else …".

The constitutionality of s 11(4)(a) was challenged on the ground that the provision imposed on private broadcasters duties which ought to be borne by the public broadcaster which should represent and serve everyone in the community as a result of the taxes paid to the fiscus. It was contended on behalf of Capital Radio that a private broadcaster has a primary duty to serve its shareholders by making profits. It may therefore not be within the business plan of a private broadcaster to serve every language group.

Capital Radio has not denied the fact that airwaves are a public resource and their use by the preferred few on licence is a special privilege. The overriding principle has to be that, whilst licensees enjoy the privilege to use what is essentially public property for commercial gain, they remain trustees of the public interest component of their use of the airwaves. The right of those members of the public who speak minority languages to transmit and receive information or ideas through the broadcasting medium controlled by a licensee in the language they understand overrides the interest of the licensee to make a profit from broadcasting and the right applies to information broadcast by both private and public broadcasters.

In the *Columbia Broadcasting* case *supra* at 803 MR JUSTICE STEWART said:

> "… Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favour of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."

The Legislature fixed the minimum programming content to be broadcast in any minority language at ten percent. That is a requirement the Legislature considered was necessary as a means of securing the objective of the impugned provision. The requirement is in clear language and constitutes in my view minimal impairment of the broadcaster's constitutional right to freedom of expression.

The requirement of a definite minimum programming content to be broadcast in any of the minority aboriginal languages at a time convenient to the broadcaster is a measure rationally connected to the objective of protecting these groups' right to information in line with the ends and purposes of the right to freedom of expression enshrined in s 20(1) of the Constitution. It cannot, in my view, be said the enjoyment of freedom of expression by broadcasting would on the part of the broadcaster be rendered impossible by the decision of the Legislature, in the exercise of its relatively wide discretion, to fix the minimum programming content to be broadcast at ten percent. It has not been shown what constitutional principle has been violated by the decision of Parliament to fix the minimum programming content to be broadcast in the languages prescribed at ten percent. In my view, it has not been shown that the provisions of s 11(4)(a) of the Act are not reasonably justifiable in a democratic society.

I now consider the constitutionality of ss 12(1)(f) and 12(2) of the Act. Section 12(1)(f) of the Act provides that a licence shall be in the prescribed form and shall specify the sources and manner of funding the licensee. Section 12(2) of the Act provides that a licence, other than a community broadcasting licence, shall be valid for a period of two years.

Section 12(1)(f) of the Act illustrates the kind of problem one can encounter in basing the finding of the objective of the impugned provision on the interpretation of the Minister only. It is clear from the construction of s 12(1)(f) of the Act that what the Minister says is the objective in para 64 of the opposing affidavit

is with respect wrong. For that reason it is necessary to set out the whole of s 12(1) of the Act. It reads as follows:

"**Form and period of validity of licence**

(1) A licence shall be in the prescribed form and shall specify –

(a) the name and address of the licensee; and

(b) the date of issue and expiry of the licence; and

(c) any terms and conditions in addition to those imposed by this Act subject to which the licence is issued; and

(d) any other matters which the Minister considers necessary to give effect to this Act; and

(e) in the case of a corporate licensee, the shareholding structure of the licensee and the names and other relevant details of the directors; and

(f) the sources and manner of funding of the licensee."

The objective of subs (1)(e) of s 12 of the Act is clearly the certification of the legal status of the licensee, that it did not belong to a class of corporate bodies or applicants to whom, according to s 8 subss (1) and (2), as read with s 22 subs (2) of the Act, broadcasting licences could not be issued.

To establish what the objective of s 12(1)(e) of the Act is, one has to construe the provision with reference to s 8 subss (1) and (2), as read with s 22 subs (2) of the Act. Similarly, the objective of s 12(1)(f) of the Act, which is

impugned provision, is ascertainable by reference to s 8 subs (6) of the Act (as amended by s 10 of Act No. 26 of 2001), providing that no person whose broadcasting service or signal transmission station is wholly or partly funded by foreign donations or contributions shall be licensed.

It must be remembered that the objective of s 12 of the Act as a whole is not to compel disclosure of information upon which the licensing authority can decide whether or not to grant a licence to the applicant. The purpose of s 12 of the Act is to use a licence as a certificate of the truthfulness of the particulars recorded therein. The recorded sources and manner of funding would, on the face of the document, be a certification of compliance with the provisions of s 8 subs (6) of the Act. The obligation to specify in the licence the particulars of the facts prescribed in s 12(1)(f) of the Act is placed on the licensing authority. I agree with CHEDA JA that it is not the broadcaster who has to specify in the licence the necessary particulars. The provision cannot be said to be unconstitutional.

The challenge to the constitutionality of s 12(2) of the Act raises the question of what is essentially the result of the exercise of legislative discretion. I do not think it is a question that can be resolved on the basis that the decision by Parliament to fix the period of validity of the licence at two years was arbitrary.

There is, in my view, no question of arbitrariness once Parliament has exercised its wide legislative discretion, because it then owes no-one a duty to explain how it arrived at that figure. The fact is simply that the legal period of a valid licence is two years.

The argument that the period is too short for a business venture involving large capital investment in transmission and ancillary broadcasting assumes that it is the financial interests of the broadcaster that is of paramount importance in determining the period of a broadcasting licence. What is of paramount importance in determining the period of a broadcasting licence is not the financial interests or convenience of the broadcaster, but the interest, convenience or necessity of the public.

In the United States of America for example, the period of a radio broadcasting licence was set at three years, notwithstanding the fact that investment in broadcasting stations required large capital outlays. In the *Federal CC* case *supra* MR JUSTICE FRANKFURTER said at 138:

> "… it is highly significant that although investment in broadcasting stations may be large a license may not be issued for more than three years."

In *Authukorale and Ors v Attorney General of Sri Lanka* 1 BHRC 610 the question was whether the period of one year to which the Broadcasting Authority Bill sought to limit the time of broadcasting licenses was unconstitutional. DE SILVA CJ said:

> "… licence holders have the responsibility of meeting the requirements imposed on them to ensure that the interests of the pubic at large may be safeguarded. Perhaps the period of one year may inhibit the investment of large amounts of money in establishing stations. Yet, as we have seen, a licence to broadcast is a temporary privilege and while in issuing a licence the authority must, among other things, consider the needs of competing communities and the programmes offered by competing stations to meet those needs the authority must have the right, where the public interest requires it, to alter its allocations of frequencies, to reflect changing needs and circumstances."

The period of the licence may therefore be fixed by Parliament, taking into account the need to prevent the development of private monopolies in the broadcasting sector or to be able to change the allocations of frequencies. The point is made by the second respondent that one of the reasons for fixing the period of broadcasting licences at two years was to provide licensees with the opportunity to account for their privileged use of the frequencies allocated to them.

Parliament determined, in the exercise of its wide discretion, that the period of two years was the most effective means by which to enforce the constitutionally mandated goal of ensuring that freedom of expression by broadcasting is enjoyed by the public.

In my view, it has not been shown that s 12(2) of the Act is unconstitutional.

I consider the constitutionality of the provisions of ss 15 and 16 of the Act.

Section 15 of the Act provides that:

> "(1) Subject to this section, the Minister, after consulting the authority, may at any time amend a licence or any term or condition in a licence –
>
> (a) to correct any error in the licence; or
>
> (b) if the licensee requests and is granted an amendment; or

(c) if the Minister considers the amendment necessary to reflect the true nature of the service, system or business which the licensee is conducting; or

(d) If for any other reason the Minister consider the amendment necessary or desirable in the public interest.

(2) Before amending a licence in terms of subsection (1), otherwise than at the request of the licensee, the Minister shall direct the authority to notify the licensee in writing of the nature of the amendment he proposes to make and of his reason for wishing to make the amendment, and shall give the licensee an adequate opportunity to make representations in the matter." (my emphasis)

Capital Radio challenges the constitutionality of s 15 of the Act on two grounds. The first is that it gives the power to amend licences to the Minister, in this case, the second respondent. It contends that the power to amend licences should lie with the broadcasting authority. The second ground is that s 15(1)(d) of the Act gives the second respondent too wide a power to be exercised arbitrarily.

On the first ground, the power to amend a licence is usually given to the licensing authority. The question whether the power to amend the terms and conditions of a licence should be given to a Minister raises the question whether he should be the licensing authority. Since the Minister was constituted by s 6 to be the licensing authority, it could not, in my view, be said that giving him the power to amend the terms and conditions of the licences to be issued by him was unconstitutional for being in breach of the freedom of expression.

On the second ground, I am not convinced that s 15(1)(d) of the Act has been shown to be unreasonably unjustifiable in a democratic society. In the first

place, the object of the provision is clear and it is to ensure that licences reflect public interest. The amendment of the licence can only take place where public interest makes it necessary or desirable. The criterion of public interest is not so indefinite as to permit the Minister to exercise the power to amend a licence arbitrarily or capriciously.

In the *Federal CC* case *supra* the Supreme Court of the United States considered whether a section of the Communications Act 1934, which required the licensing authority to take into account "public convenience, interest or necessity" in granting, revoking or amending a licence, was an over-broad standard. MR JUSTICE FRANKFURTER at p 138 said:

> "In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operations of stations, 'public convenience, interest or necessity' was the touchstone of the exercise of the Commission's authority. While this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy."

In *Federal Radio Com. V Nelson Brothers B & M Co.* 289 US 267 MR CHIEF JUSTICE HUGHES, delivering the opinion of the Supreme Court of the United States, said at 285:

> "In granting licenses the Commission is required to act 'as public convenience, interest or necessity requires'. This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. The requirement is to be interpreted by its context, by the nature of radio transmissions and reception, by the scope, character and quality of services."

It is clear from the authorities that s 15(1)(d) of the Act is not so over-broad as to confer on the Minister a power to act arbitrarily or capriciously.

The section has not, in my view, been shown not to be reasonably justifiable in a democratic society.

I am also not convinced that the provisions of s 16 of the Act are unconstitutional. Section 16(1) of the Act provides that the Minister, after consulting the authority, may suspend or cancel any licence if there is evidence that:

> "(a) the licence was issued in error or through fraud or the misrepresentation or non-disclosure of a material fact by the licensee; or
>
> (b) the licensee has contravened any provision of this Act that is applicable to him; or
>
> (c) the licensee misrepresents the service or system he offers to the public; or
>
> (d) the licensee has ceased to provide the service or system specified in the licence; or
>
> (f) in the case of a licensee which is a body corporate, the licensee has been provisionally or finally wound up or placed under judicial management; or
>
> (g) in the case of a licensee who is an individual, the estate of the licensee has been provisionally or finally sequestrated; or
>
> (h) the licensee has acted in a manner prejudicial to the defence, public safety, public order, public morality or public health of Zimbabwe; or

(i) the licensee has repeatedly breached one or more provisions of the code of conduct applicable to the licensee in terms of section twenty-four, or any standards determined in terms of section twenty-five."

Before taking any action under s 16(1) of the Act the Minister is required to direct the authority to notify the licensee of his intention to suspend or cancel the licence and to give the licensee an opportunity to defend his licence. If what the licensee has said in showing cause why the licence should not be suspended or cancelled warrants further investigation, the Minister is required to request the authority to institute a public inquiry. If the licence is nonetheless suspended or cancelled following recommendations of the authority after the inquiry, the licensee has a right of appeal to the Administrative Court.

It is clear that the procedure the Minister is compelled to follow and the matters he is enjoined to take into account before suspending or cancelling a broadcasting licence militate against arbitrary or capricious use of power. The infringement or restriction on the licensee's freedom of expression is limited to the clearly defined extent where it has been shown that he has either committed a criminal offence or one of the specific acts of misconduct related to broadcasting. There is no over-breadth here allowing for arbitrary or capricious exercise of power because the "prohibited conduct" triggers the inquiry and these acts are specified in clear language for any licensee to know.

The objective served by the provisions of s 16(1) of the Act is clear and legitimate. In my view, the objective of prohibiting fraudulent or dishonest use of broadcasting licences is important enough to warrant the restriction on freedom of expression. Suppression of conduct which contravenes the provisions of the Act,

common law or any other statute cannot be viewed as a contravention of freedom of expression because that right does not include a right to act unlawfully.

Accordingly, I would declare unconstitutional sections 6, 9(1), 9(2) and 9(3) of the Act and dismiss the applicant's contentions in respect of the rest of the sections of the Act specified in the draft order.

GWAUNZA JA: I agree with MALABA JA's reasoning and conclusions as regards the following sections:

4(2)

4(3)

6

9(1)

9(2)

9(3)

11(4)(a)

12(1)(f)

I agree with SANDURA JA's reasoning and conclusions as regards the following sections:

12(2)

15

Honey & Blankenberg, applicant's legal practitioners

Civil Division of the Attorney-General's Office, respondent's legal practitioners