Analysis of the Zimbabwe Broadcast Services Act

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CONTENTS PAGE

Chapter 1. Introduction 4

i. Court challenge 5
ii. Political landscape 7
iii. Purpose 10

Chapter 2. Freedom of expression
i. freedom of expression- in general 11
ii. the power of broadcasting 13
iii. interpretation of limitation laws 14
iv. only law restricts freedom of expression 15
v. legal restrictions reasonably justifiable 17
vi. interpretation of limitation laws 18
vii. parliamentary legal committee reports 18

Chapter 3. Constitutionality of the Broadcasting Services Act

i. Introduction 20
ii. constitutionality of the Minister's powers 21
iii. independence of licensing authority 27
iv. monopoly of the Zimbabwe Broadcasting Corporation 29
v. technical monopoly 33
vi. political control 37
vii. power to amend, suspend and cancel 42
viii. licence periods 49
ix. ministerial power to interfere with content 52
x. Imposing programme standards: Section 25 55
xi. Emergencies: Section 39 57
xii. Prohibition of property ownership: Section 8 60
xiii. Independence of the Broadcasting Authority 62
xiv. Conclusion 67

Chapter 4. Investment Impact of the Broadcasting Services Act
i. Introduction 69
ii. Investment- general 70
iii. Licence periods 73
iv. Profit 76
v. Programming 77
vi. Shareholding 78
vii. Prohibition against citizens 79
viii. Ten % shareholding 80

ix. Foreign technical employment 81
x. Minister's powers 82
xi. Dispute resolution mechanism 83
xii. Renewal 86
xiii. Seizure powers 87
xiv. Order to cease operating 89
xv. Restrictions on stations 91
xvi. Restrictions on foreign directorships 92
xvii. Mandatory local content requirements 93

Chapter 5. Suggested Changes to the Broadcasting Services Act 99

CHAPTER ONE

1. 1 INTRODUCTION

In Zimbabwe, the electromagnetic transmission of audio and video signals and the available frequency spectrum is regulated by the Broadcasting Services Act [Chapter 12:01] (hereinafter known as the Act). The Act, as most things Zimbabwean, is intensely complex, internally contradictory, and in vain masks its true purpose and effect.

At the attainment of independence, in 1980, the Zimbabwean government unorthodoxly, though perhaps predictably, usurped control of the public owned media. Since then, the government has unashamedly controlled and monopolised all forms of electronic broadcasting. The war of liberation, for which thousands died, was waged in order for the majority of Zimbabweans to exercise their right to self-determination, enjoy the fundamental rights of freedom of expression, movement and association, among other important rights.

The *cliché* that, information is power is no less applicable to modern day Zimbabwe, than it was to Rhodesia. Both the print and electronic media have been used to control the nature of information available to citizens. The Broadcasting Services Act is a product of the prevailing social, political and economic conditions.

The government, ostensibly for legitimate purposes, has deemed it necessary to control information disseminating.

It took twenty (20) years of independence, a commercial company's court battle in the Supreme Court to break, albeit very briefly, the monopoly of the Zimbabwe Broadcasting Corporation. Reference should be made to the Supreme Court case of *Capital Radio (Private) Limited versus Zimbabwe Broadcasting Corporation and others*[1]

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[1] Capital Radio (private) limited versus The Minister of Information, Post and telecommunications. SC/99/200

1.2 COURT CHALLENGE

Until the judgment in the Capital Radio case, it was a criminal offence for any person to broadcast, both radio and television signals. The Supreme Court sitting as the Constitutional Court declared the exclusive broadcasting monopoly of the ZBC invalid. Section 14 and 27 of the Radiocommunications Act and the Broadcasting Act, respectively entrenched the monopoly of the Zimbabwe Broadcasting Act, in violation of section 20(1) of the Constitution of Zimbabwe, which guaranteed the individual's freedom to:

"…*hold opinions and to receive and impart ideas and information without interference…"*

By its very nature a broadcasting monopoly restricts the free flow, quality, quantity and nature of information, available to the citizens of the country.

Not surprisingly in its arguments before the Supreme Court, the government conceded that Section 27 and 14 of the Broadcasting Act[2] and Radiocommunications Act[3], respectively breached Section 20 (1) of the Constitution.

It requested the retention of its monopoly until it had established the necessary legal framework generally regulating electronic broadcasting, and in particular regulating the licensing of broadcasters and the use and allocation of frequencies. The request was not granted. The Supreme Court declared that Capital Radio could begin to broadcast, as the legislation entrenching Zimbabwe Broadcasting Corporation's monopoly had been declared unconstitutional. Capital Radio and other persons with broadcasting equipment began radio broadcasts.

With dialectical resonance, the Supreme Court commendably struck down the Zimbabwe Broadcasting Corporation's monopoly but at the same time permitted the unregulated use of the frequency spectrum. Not surprisingly and with great expedition

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[2] Broadcasting Act [Chapter 12:01]
[3] Radiocommunications Act [chapter 12:04]

the government promulgated the Broadcasting Services Regulations[4] by presidential decree, under the Presidential Powers (Temporary Measures) Act [Chapter 10:20]. The government justified the use of the Presidential Powers (Temporary Measures) Act on the basis that the Supreme Court decision had created a regulatory vacuum. Therefore the hazardous situation created by the unregulated use of the frequency spectrum needed to be contained by the urgent and immediate promulgation of law. The various independent radio stations were illegally and immediately switched off-air. Their broadcasting equipment was confiscated.

Regulations made under the Presidential Powers (Temporary Measures) are valid for six months and lapse thereafter unless passed into law by Parliament[5]. In order to avoid the regulations lapsing, the government utilising its majority in parliament, passed the regulations into an Act of Parliament. Save for very minor, mainly semantic changes the regulations were reproduced by parliament, in verbatim. The government's haste may partly explain the atrocious phraseology and language used in the Broadcasting Services Act. Therefore in part, the Capital Radio's court challenge precipitated the birth of the Broadcasting Services Act.

Political control of broadcasting, which the Supreme Court had struck down in the Capital Radio case, was reintroduced through the Broadcasting Services Act. The Broadcasting Services Act allowed for the creation of a façade of liberalisation, yet placing total control over all broadcasting to the government.

The prevailing political and economic situation in Zimbabwe markedly affected the contents of the Broadcasting Services Act.

1.3 POLITICAL LANDSCAPE

The years 1999 to 2002 have been particularly politically tumultuous, scarring Zimbabwe's psyche in the process. The year 1999 witnessed the birth of a new political party, the Movement for Democratic Change [MDC]. This party presents the strongest opposition to ZANU PF's political dominance since 1980. The call for a change to the Zimbabwean Constitution by the National Constitutional Assembly (NCA), a coalition of

[4] Broadcasting Services (Temporary Measures)(Broadcasting) Regulations,2000

[5] Refer to Section 6 of the Presidential Powers (Temporary Measures) Act.(Chapter 10:20)

various NG0s, led to the creation of a parallel constitution making process initiated by the government. The body created by the government was called the Constitutional Commission [CC]. This *mala fide* effort by the government to usurp the constitutional making process from the Zimbabwean civil society tragically backfired when the government's draft constitution was rejected in a referendum in February 2000. This also represented the greatest defeat to a government's political initiative since 1980.

There is merit in the argument that the referendum dramatically proved that ZANU PF's political dominance was under siege from a determined civil society.

Treading in the unfamiliar waters of defeat and sensing that its formerly and seemingly, unbreakable dominance was under threat, the government sought to desperately save face. It explained its defeat as having been caused by whites and unpatriotic black Zimbabweans. A clause in the draft constitution, which forms part of section 16 of the current Constitution, provided for the acquisition of commercial farm land, which farm land was almost exclusively owned by whites. Most government Ministers also have been systematically elevated to the land owning class. It has been repeatedly alleged, not without much captivating conviction, that in a well orchestrated effort to prevent the resettlement of the majority black people on commercial farms, the white commercial farmers and their workers created a voting bloc, which swung the referendum against the government sponsored draft constitution.

To the credit of the government's argument, it is true that there was generally no real white political participation until the referendum. Two voting blocs were allegedly created. First, white people resident in Zimbabwe and those in the Diaspora, flocked into the country to vote. Second, was the massive black farm labour force. This group was generally composed of black people of foreign origin and had not hitherto been politically active. To the government therefore, the sudden and active political participation of farm workers and white Zimbabweans was sinister and geared to prevent its policy of land redistribution.

Not surprisingly, just after the referendum, farm occupations, spearheaded by the Zimbabwe Liberation War Veterans Association members (referred to as "war veterans"), ZANU PF supporters and master-minded by the government's intelligence

units, began. It is no wonder therefore, that the farm occupations were revoltingly brutal. The murder, massive displacement of farm workers, grievous assaults, massive destruction of property were certainly not “demonstrations” as President Mugabe once said, or unbridled savage anarchy. There is merit in the school of thought that identifies a careful and well-calculated strategy to exert retribution on this voting bloc by the government, for losses suffered during the referendum. Further, it seems to be government’s desire to bankrupt the farmers, by invading and destroying their farms and livelihoods. Indeed farmers were alleged by government to have funded the NCA and its “VOTE NO” campaign and later the formation of the MDC. In addition, by terrorising farm workers, the government seems to have intended to destroy them as a voting bloc. The farm workers were also persecuted for being foreigners. In addition the government destroyed the farm workers employment, effectively preventing them from voting by displacing them. Further in the classic case of voter buying, the government promised land to those that voted for the ruling party in the forthcoming presidential elections.

To further bolster the theory that the farm occupations were not spontaneous, ZANU PF’s campaign slogan during the February 2000 referendum and the June 2000 Parliamentary elections was, “***LAND IS THE ECONOMY AND THE ECONOMY IS LAND”***. Notwithstanding that these brutal acts against Zimbabwean citizens are well chronicled, the police have been exceedingly partial, and very insignificant prosecutions have been initiated, suggesting government connivance. The violence persists.

Judges were threatened and forced to resign. In September 2001, Chief Justice Gubbay, after facing relentless persecution and threatened physical harm, resigned. So too, did four other High Court judges. These are Justices Devittie, Chatikobo, Gillespie and Bartlett. White judges, clearly political scapegoats, were accused of being racist and against the land redistribution policy. The political stage is set.

The Broadcasting Services Act should be analyzed within this socio-political context. Notwithstanding the Supreme Court ruling in the Capital Radio case, the monopoly of the Zimbabwe Broadcasting Corporation (ZBC) remains. The Broadcasting Services Act notwithstanding, the Minister is still to licence any other broadcaster.

The Supreme Court judgment in the Capital Radio case, the prevailing political environment and the worsening economic environment have all fed into and have resulted in the curiously quaint, Broadcasting Services Act, under consideration. Smarting from the year 2000 electoral defeats, the fear of losing the Presidential elections in March 2002 and the obvious political impact of free and unrestrained broadcasting, resulted in absolute information control being reposed in one person, the Minister of State for Information and Publicity in the President's Office. Contrary to the loud proclamation that the Broadcasting Services Act liberates broadcasting, the Act effectively prohibits any investment into the sector. The BSA is a lie; an enactment designed to ensure absolute government control over the dissemination of information.

1.4 PURPOSE OF ANALYSIS

This analysis seeks to expose the inherent weaknesses of the Act and initiate debate on an ideal Broadcasting Services Act. It will seek to show that the Broadcasting Services Act:

- Is inherently unconstitutional violating sections 20 and 16 of the constitution of Zimbabwe, which guarantee the rights to freedom of expression and private property, respectively;
- places absolute and discretionary power upon the Minister;
- prevents all nature and forms of investment into the broadcasting sector; and
- in bad faith creates an absolutely useless and irrelevant Broadcasting Authority.

Further, it will be established that the BSA is internally contradictory, represents government's hypocritical reaction to the Capital Radio Supreme Court decision. The Act is myopic, selfish, feeding into the potent dictatorial and megalomaniac inclinations of the Zimbabwe government. The Act will regrettably result in the stifling of non-conformist views before the 2002 Presidential Elections and beyond.

CHAPTER TWO

2.1 FREEDOM OF EXPRESSION – *IN GENERAL*

Prior to 1980, Zimbabwe then known as Rhodesia was not a democracy. The country did not have a justiciable bill of rights. The majority black people fought a guerrilla war which forced the racist government of Mr. Ian Douglas Smith to agree to the fundamental principles of democracy – One Man-One Vote. The poll of 1980, which resulted in ZANU PF's ascendance to power was an exercise of the right to freedom of expression. Notwithstanding all its other weaknesses, Zimbabwe's Lancaster House Constitution has a justiciable bill of rights.

The right to express one's views and opinions without interference is vital to the nurturing and growth of a sustainable democracy. It has been held that:

> "*Freedom of information is a cornerstone upon which the very existence of a democratic society exists"*[6] *and*

> *"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"*[7]

Zimbabwe's Supreme Court perhaps more than any other, contextualised the right to freedom of expression. It said

> *"This court has held that Section 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...*

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[6] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85 of 13th November 1985, Series A No. 5 paragraph 70.

[7] Handyside Vs The United Kingdom (1976) 1 EHRR 737 @ paragraph 49

Furthermore, what has been emphasized is that freedom of expression has four broad special objectives to serve:

ii) it helps an individual to obtain self-fulfillment;

iii) it assists in the discovery of truth, and in promoting political and social participation;

iv) it strengthens the capacity of an individual to participate in decision-making; and

v) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change"[8]

2.2 THE POWER OF BROADCASTING

Quite apart form the print media it is with electronic broadcasting, radio and television, that in modern society, the right to freedom of expression is forcefully, collectively and purposefully exercised. Radio Zimbabwe broadcast from Mozambique by ZANU PF unlawfully was pivotal in the party's electoral victory in 1980. Such is the power of the radio. It is rather ironic that the same government that ascended to power, in part due to the power of the media, should be its persecutor.

Various superior courts in many countries extol the virtues and importance of broadcasting in the exercise of a people's right to freedom of self-determination, and the protection of their political, economic and social rights. The electronic media, quite apart from the print media, provides life to the exercise of freedom of expression with particular force.

In the United States of America, the US Supreme Court held that:

"*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*

[8] Chavhunduka & Another vs. Minister of Home Affairs and Another 2000 (1) ZLR 552 (SC) @ page 558 D – E. See also in re. Munhumeso and others 1994 (1) ZLR 49 (SC) @ page 56G – 57A and Woods and others vs Minister of Justice & others 1994 (2) ZLR 195 (SC) @ page 198A

ends and purposes of the First Amendment. It is the rights of viewers and listeners, not the right of the broadcasters which is paramount".[9]

The Inter-American Court of Human Rights has consistently stated that:

"It is the mass media that makes the exercise of freedom of expression a reality"[10]

The Belize Court of Appeal held that:

"*Today television is the most powerful medium for communicating ideas and disseminating information. The enjoyment of freedom of expression therefore includes freedom to use such a medium*[11]*"*

The right to freedom of expression permits the democratic exercise of choice and unrestrained exchange of information, views and ideas. Regrettably the BSA seeks to control the nature, quality and quantity of information available to the people. It seeks to swamp and replace the citizen's views and opinions with those of one man, the Minister. The monopoly over information broadcast is maintained, no longer by the Zimbabwe Broadcasting Corporation but by the Minister. Through the Broadcasting Services Act, the government has effectively dropped all democratic pretensions.

2.3 RESTRICTIONS ON FREEDOM OF EXPRESSION

Section 20(1) of the constitution referred to above protects and guarantees the individual's right to freedom of expression, i.e. the *"…freedom to hold opinions and to receive and impart ideas and information without interference…" [Emphasis added]*

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[9] Red Lion Broadcasting Company Inc. & Ors vs Federal communications Commission et al (No. 2) 395 US 367 (1969) @ page 390

[10] 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 34

[11] Belize Broadcasting Authority vs Courteney and Hoare [1986] LRC 276 (Belize CA) @ page 284

In conformity with the constitutions of other countries subsection 2 of Section 20 of the Zimbabwean Constitution provides limitations to the right to freedom of expression. The section reads, in the first part:

> "*(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 for:*
>
> (a) ………………..
> (b) ……………….
> (c) ………………..
>
> *except so far as that provision or, as the case maybe, the thing done under the authority thereof is shown not to be REASONABLY JUSTIFIABLE IN A DEMOCRATIC SOCIETY" [Emphasis added]*

Therefore in order for a limitation on the right to freedom of expression to be valid, such limitation must be in terms of a law enacted by parliament or the appropriate Minister in terms of a statutory instrument. Restrictions on the right to freedom of expression, imposed in the discretion of any person, not provided for by a law are invalid and unconstitutional.

A law authorising the limitation may limit the freedom in the regulation of 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.

Further, the right may be limited in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health.

Any limitation for any other purpose other than the above is void *ab initio.*

In addition, the limitation on the right on the two broad categories referred to should not only be made in terms of a law but be *"reasonably justifiable in a democratic society".*

2.4 ONLY LAW MAY RESTRICT RIGHT TO FREEDOM OF EXPRESSION

International law, including the Zimbabwean constitution, permits restrictions on fundamental rights, only as provided by an Act of Parliament or regulations lawfully promulgated by or under the common law. This also applies to the right to freedom of expression, enshrined in Section 20 of the Constitution.

In *Ontario Film & Video Appreciation Society vs. Ontario Board of Censors,* the Ontario Court struck down a law granting the Board of Censors powers to censor any film it did not approve. The court noted that the evils of vagueness extend to situations in which unfettered discretion is granted to public authorities for enforcing the law; it said:

> "*...law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law*"[12]

A law that is not stated with sufficient particularity to enable citizens to determine their activities appropriately will be considered invalid and unconstitutional.

2.5 LEGAL RESTRICTIONS REASONABLY JUSTIFIABLE IN A DEMOCRATIC SOCIETY

It has been held that any law, including a law that restricts the exercise of the freedom of expression, is considered valid and constitutional, if it is reasonably justifiable in a democratic society. In scrutinizing the constitutionality of laws, the Zimbabwean Supreme Court developed a three-tier test.

The test is whether:

- the legislative objective sought to be achieved by the derogation from the right is sufficiently important to justify limiting the fundamental right concerned;

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[12] In re. Ontario Film and Video Appreciation Society vs Ontario Board of Censors (1983) 41 or (2d) 583 (Ontario H.C) @ page 592

- the measures designed or framed to meet that legislative objective are rationally connected to it and are not arbitrarily unfair or based on unreasonable considerations; and
- the means used to impair the right are not more than is necessary to accomplish the objective[13].

2.6 INTERPRETATION OF LIMITATION LAWS

It is now generally accepted as a general rule of interpretation that courts will restrictively interpret any law that limits any of the constitutionally entrenched rights, including the right to freedom of expression.

The European court has often state that:

> "*freedom of expression, as enshrined in Article 10, is subject to a number of exceptions, which however, must be narrowly interpreted and the necessity of any restriction must be convincingly established*"[14]

2.7 PARLIAMENTARY LEGAL COMMITTEE REPORTS

The essence of what is contained in this analysis is not new criticism. The Parliament of Zimbabwe's legal committee, advised Parliament that the Broadcasting Regulations, which were then passed into the Broadcasting Services Bill were wholly constitutional.

The Parliamentary Legal Committee is a standing committee of Parliament, one of the only committees established in terms of the Constitution of Zimbabwe. *Refer to section 40A of the constitution.* The committee that passed the adverse reports was composed of two senior legal practitioners, Dr Edison Zvobgo, the chairperson and a ZANU PF MP and Professor Welshman Ncube, an advocate and MDC MP. Lastly was Mr Kumbirai Kangai of ZANU PF. DR Zvobgo and Professor Ncube signed the report that stated that the regulations and the bill were unconstitutional.

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[13] Refer to Tawanda Nyambirai vs National Social Security Authority and Another 1995 (2) ZLR 1 (S)(C) @ page 13 thereof

[14] Thongelinson vs Iceland (1992) 14 EHRR 843 para 63

Parliament's disregard of its own committee's report, without considering the contents thereof, is disgraceful and selfish. The ruling party's abuse of its parliamentary majority, courtesy of presidential appointment powers, in the manner that it did is treasonous, punishable in other democracies by impeachment and criminal trials. Such is the version of Zimbabwe democracy were principles, integrity and valour were lost together with the euphoria of independence. Reference will be made to both reports later in the analysis.

CHAPTER THREE

3.1 CONSTITUTIONALITY OF THE ACT

3.1.1 Introduction

This section analyses the various sections of the Act considered unconstitutional. Acts regulating the broadcasting industry are primarily aimed at promoting and enhancing the right to freedom of expression and encouraging the development of free enterprise. Rights protected by section 20 and 16 of the Constitution respectively.

Most of the material sections contained in the Act are unconstitutional, undermining the rights that it purports to protect. Effective power and ultimate control, not just regulation, remains in the control of one man and that is the Minister of State for Information and Publicity in the President's office. The Act is a façade, meant to fool Zimbabweans into believing that the government has regulated the broadcasting industry, in compliance with the Supreme Court decision in the Capital Radio case. The Act will be analysed below.

3.1.2 Constitutionality of the Minister's Powers

The Minister of State for Information and Publicity in the President's office's regulatory powers contained in the BSA are in *toto ultra vires* Section 20(1) of the Constitution, in that they unreasonably and adversely limit the individuals (public) right to receive and impart ideas, views and information.

In the Capital Radio case[15], the Supreme Court was asked to determine whether or not the broadcasting monopoly enjoyed by the Zimbabwe Broadcasting Corporation was constitutional. The government conceded that sections 14 (1) & (2) of the Radio Communication Act and section 27 of the Broadcasting Act were *ultra vires* section 20(1) of the Constitutions. The constitutionality of the Minister's absolute powers over the quality and quantity of information broadcast by the Zimbabwe Broadcasting Corporation

[15] capital Radio (Supra) SC/99/2000

was not decided by the court. This is inspite of the fact that Capital Radio raised among other reasons for the application, the use by the government of the Zimbabwe Broadcasting Corporation as a government and not public broadcaster and the Minister's unconstitutional powers[16].

The Zimbabwe Broadcasting Corporation is still governed by the Broadcasting Act. It cannot be rationally disputed that ultimate control over the quality and quantity of matter broadcast by the Zimbabwe Broadcasting Corporation lies with the Minister. The Minister controls the public broadcaster, the ZBC, using the Broadcasting Act.

The Broadcasting Services Act enables the Minister to prevent and/or discourage private broadcasters from investing and firmly controlling those who hazard to invest in the same manner that the Minister controls the Zimbabwe Broadcasting Corporation.

The centralizing of absolute power in one person has the potential in theory and in practice, of censuring information available to the public.

In terms of the Broadcasting Services Act, among other powers, the minister determines in his absolute discretion:

a) who obtains a licence[17];
b) the terms and conditions attached to an issued licence[18];
c) whether an issued licence should be amended[19], suspended or cancelled[20];

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[16] Refer to 14 – 48 of the applicant's founding affidavit in supreme Court case of Capital Radio (Supra) SC/99/2000

[17] Refer to Section 6 of the BSA

[18] Refer to Section 11 of the BSA

[19] Refer to Section 15 of the BSA

[20] Refer to Section 16 of the BSA

d) whether to close a broadcaster on the basis that inspite of the registered shareholding, a commercial broadcaster is to his *mind* and *feeling* "*controlled"* by some other person(s) or body[21];

e) the appointment, termination and alteration of the conditions of tenure of office of members of the Broadcasting Authority and Board[22];

f) applicable regulations which affect broadcasters, without recourse to any other body[23];

g) the content of programmes: and

h) when to take over broadcasting stations and broadcast.

From the foregoing, it is clear that the Minister is the licensing authority, with absolute and discretionary power over all of broadcasting. The Broadcasting Services Act adds private broadcasting to the Ministers broadcasting dominion.

The Minister's powers reveal the government's determined desire to control information available to Zimbabweans. These powers censure information directly and also by forcing broadcasters to practice self-censorship lest their licences be cancelled.

That the Minister, both as a person and office are not independent of political influence and control cannot be open to serious doubt. If this is accepted, it cannot be disputed that the above mentioned powers are liable to be used to politically discriminate and determine licence holders. Further this political discretion will be used to determine the suspension, cancellation or amendment of licences or those licensees that the Minister decides to economically frustrate or bankrupt.

Further, it cannot be seriously disputed that the powers granted to the Minister are open to personal and government abuse, by prohibiting perceived opponents from broadcasting.

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[21] Refer to Section 20 as read with Section 2(1) re. Definition of "control"

[22] Refer to Section 4 of the BSA

[23] Refer to Section 46 of the BSA as read with the Third Schedule, Section 1 and Section 7 thereof.

The desire by government to control the dissemination of information is aptly dramatized by the Minister's position in government. The office of the Minister was created in the President's office! The Minister himself is a presidential appointee, answerable, as all Cabinet ministers to the President. In apparent consideration and reward for the accepting the ministerial position, Jonathan Moyo was elevated to become a ZANU PF politburo member. This is inspite of the fact that prior to his involvement with the government over the doomed Constitutional Commission he had not been known as a ZANU PF party member.

From the foregoing and without the need for microscopic analysis it is clear that the Minister's powers are not limited to regulating the "*technical administration, technical operation or general efficiency of …wireless broadcasting or television…"*These powers merely affect the nature, quality and quantity of information to be broadcast. The powers are structured to heavily centralise and concentrate absolute power over broadcasting to the ruling party appointee. The Ministers powers may not even be remotely justified on the grounds of public interest. The Broadcasting Services Act centralises power in the Minister and not the Broadcasting Authority Board, or a Parliamentary Committee.

Further, as will be explained in detail below, the apparition of a Broadcasting Authority and Board is a decoy, a red herring. The Board has no powers, is ineffective and cannot justify its existence and use of public resources save to serve the Minister's wishes. Absolute power is therefore centralized in one person.

In reality therefore, there is no distinction between the Zimbabwe Broadcasting Corporation and private broadcasters. To an extent, the monopoly of the Zimbabwe Broadcasting Corporation was removed, only to be bolstered (not replaced) by the continued monopoly of the Minister's power over the Zimbabwe Broadcasting Corporation's broadcasting and private broadcasting in terms of the Broadcasting Services Act, once licences are issued. For practical purposes, in relation to the nature, quality and quantity of matter broadcast, there will be no distinction between the Zimbabwe Broadcasting Corporation and private broadcasting.

The current broadcasting policies of the ZBC, under the Minister, led to the Capital Radio's constitutional court application[24]. It cannot be gainsaid therefore, that the powers of the Minister in the Broadcasting Services Act, hinder individuals in the enjoyment of their right to receive and impart ideas and information without interference.

Further, the Minister's powers under the BSA are not reasonably justifiable in a democratic society. A constitutional court application should result in the wholesale striking down of the Minister's powers rendering the Act unworkable. A new Broadcasting Services Act would then be necessary.

In the *T.S. Masiyiwa Holdings vs. Minister of Information* case[25], one of the first attempts to break the government's monopoly over commercial enterprises, the Supreme Court struck down the Post and Telecommunications monopoly over telephony.

T.S Masiyiwa Holdings commenced preparatory work to set up a cellular service. The government reacted, as with Broadcasting Act, by passing restrictive licensing legislation.

On application to the Supreme Court, it was held that:

> *"On the face of it, the Regulations do not give rise to a fixed monopoly, since the grant of a licence to operate a cellular telecommunication service to another is permitted…. Yet if the control mechanism under the Regulations, while not interfering with the corporation's entitlement to commence to operate a cellular telecommunications service, is designed to prolong the entry of another into the field, or if it has that effect, it would be violative of the constitution…"*[26]

[24] Capital Radio (Pvt) Ltd (Supra) SC/99/2000
[25] T.S Masiyiwa Holdings P/L & Anor vs Minister of Information 1996 (2)
[26] T.S Masiyiwa Holdings P/L (Supra) @ page 765 G-H – per Gubbay C.J

Further, the Supreme Court held;

> "*Certainly no substantial effort is being made to accelerate the procedures under the Regulations. Any sense of urgency is totally lacking. The continuing delay, which remains unaccounted for, must be taken to be deliberate'*[27]*.*

In conclusion, it was held that;

> *"...the cumulative impact of the structure of provisions with reasonable expedition constitutes an abridgment of the constitutionally protected freedom of expression to which Mascom and Econet are entitled."*

In terms of the Broadcasting Services Act, the Minister is the licensing authority, with wide and arbitrary discretionary powers. Very restrictive conditions[28] (as will be discussed below) make it virtually impossible to invest in broadcasting. Twelve months and more after the monopoly of ZBC was declared unconstitutional and the Broadcasting equipment of capital Radio was unlawfully confiscated, the Minister has not called for applications for broadcasting licences and none have been licensed. The delay remains unexplained.

By parity of reasoning, the restrictive and cumulative powers of the Minister in terms of the Broadcasting Services Act and deliberate delays which have arisen as a result of those powers, indicates that the Minister's powers violate Section 20(1) of the Constitution.

A quick reference of the constitutional test against the awesome powers of the Minister reveals the following:

(a) The Act centralises the licensing authority to one political person, exposing the broadcasting industry to political interference, control and ministerial abuse.

(b) The fair and objective technical regulation of broadcasting, being the desired legislative objective of any ideal broadcasting enactment, is in the case of the Broadcasting Services Act grossly over-shadowed by the Minister's power of

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[27] T.S Masiyiwa Holdings (Supra) @ page 765G-H-per Gubbay C.J

[28] For example licence periods – section 2 of BSA, powers of Minister (as above)

control. The Board simply plays an inane and secretarial role, responding only to the Minister's commands. It is clear that the Minister's powers affront Section 20(1) of the constitution. Since the legislative objective seems concerned with political control of broadcasting as opposed to fairly and objectively regulating the industry, it would be fair to conclude that overally the legislative objective is unreasonable, one made in bad faith, ultimately, unconstitutional and anti-democratic. The controversial passing of the Broadcasting Services Act through parliament betrays the legislating objective, which is to stifle opposing views and control perceived political enemies.

(a) The open ended and subjective discretion granted to the Minister prevents the free flow of information, severely limiting the exercise of the right to freedom of expression.

(b) Assuming without conceding that a legitimate and *bona-fide* objective, to regulate broadcasting was the primary reason for the promulgation of the Broadcasting Services Act, the means by which the objective is stated are not rationally connected to the objective. The Minister regulates the broadcasting industry by the total, subjective and absolutely discretionary control of the flow of information.

It is usual for the licensing authority to be composed of persons with certain and specific broadcasting expertise. This is true for most constitutional democracies and particularly those that obtained majority rule in the last 50 years. Comparisons may be drawn with South African and Malawi. To its credit, the BSA makes no pretence that the licensing authority is independent.

3.2 INDEPENDENCE OF LICENSING AUTHORITY

The licensing authority is the Minister, and not the broadcasting Authority or Broadcasting Board. The Board does not license applicants. Section 6 of the BSA reads:

> *"Subject to this Act, the Minister shall be the licensing authority for the purposes of licensing any person to provide a broadcasting service or operate as a signal carrier in Zimbabwe".*

The Minister's control powers restricting the free flow of information referred to above, further bolsters Section 6, making the Minister, as an individual, the ultimate licensing authority.

It has been stated that the licensing authority should be independent. A law creating a licensing authority susceptible to control and interference by the government falls foul of Section 20 (1) of the Constitution. In the case of Zimbabwe, the licensing and regulatory authority created is the government itself. There can be no suggestion therefore that the licensing and regulatory authority (the Minister of State for Information and Publicity in the President's office) is independent.

The Sri-Lanka Supreme Court in the case of *Athukorale and Others vs. Attorney General,* struck down the provisions of a bill which gave an authority regulatory powers capable of being overridden by the appropriate Minister. It held;

> *"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 of the appointed members ,and having regard to the power of the Minister to give directions 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"*[29]

The court further held;

> *"While a regulatory authority is…necessary, it is imperative that such an authority should be independent…The airways/frequencies, as we have seen, are universally regarded as public property. In this area, a government is a trustee for the public; its right and duty is to provide an independent statutory authority to safeguard the interests of the People in the exercise of their fundamental right; NO more no less. Otherwise the freedoms of thought and speech, including the right to information, will be placed in jeopardy"*[30]

Various other courts, in various jurisdictions have also insisted that the licensing and regulatory authority should be independent of government. For example, the Italian

[29] Supreme Court of Sri-Lanka, S May 1997, SD No. 1/97-15/97 page 23
[30] Supreme Court of Sri-Lanka (Supra) @ page 22

Constitutional Court held the radio and television should be under parliamentary and not executive control to ensure independence.[31]

The German Constitutional Court held unlawful and unconstitutional the establishment of a government controlled national broadcaster. The basis; the guarantee of freedom of expression prohibits direct or indirect government control.[32]

Clearly therefore, the Minister's sole monopoly to the nature of information broadcast, violates the right to freedom of expression, enshrined in Section 20 (1) of the Constitution.

3.3 MONOPOLY OF THE ZBC

In September 2000 the Supreme Court in the Capital Radio case declared the broadcasting monopoly of the ZBC to be unconstitutional[33]. Twelve months and more later the government through the Minister of Information is still to licence any other broadcaster. The monopoly of the ZBC remains.

3.3.1 Brief History

In Capital Radio's successful constitutional application, the Supreme Court pronounced;

> *"Having thus declared the legislation invalid, there is at the present time…nothing to prevent the applicant [Capital Radio] from proceeding with immediate effect to operate and provide a broadcasting service from within Zimbabwe."*

Immediately thereafter on the 28th September 2000 Capital Radio began broadcasting. During this period, the Minister of State for Information and Publicity publicly threatened Capital Radio's directors with arrest if they continued broadcasting. Capital Radio obtained a High Court Order interdicting the Minister, the commissioner of Police and Attorney General, from interfering with Capital Radio's operations.

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[31] Refer to Decision 225/1977[1974] Guir.cost.1775. The Material on French, German and Italian Constitutional decisions is drawn from Barendt E, Broadcasting Law; A comparative survey (1995, Clarendon Press, Oxford)

[32] First Television case, 12 Bverf GE 205 (1961)

[33] Capital Radio (Pvt) Ltd (Supra) SC/99/2000

In flagrant and contemptuous contravention of the High Court interdict, the police raided Capital Radio's studio and confiscated its equipment. Assistant Commissioner L Ndlovu was found guilty of contempt of court. The seized equipment was only returned after another High court order.[34]

On or about the 4th October 2000, utilizing the Presidential Powers [Emergency Regulations] Act, the government promulgated the Presidential Powers (Temporary Measures)(Broadcasting) Regulations, 2000.

The regulations, which by their nature, have a lifespan of six (6) months, re-introduced, albeit until broadcasting licenses were issued in terms of the regulations, the Zimbabwe Broadcasting Corporation's monopoly.

Section 7 of the regulations reads:

> *"Subject to these regulations, no person, other than the Zimbabwe Broadcasting Corporation, shall provide a broadcasting service or operate as a signal carrier in Zimbabwe, except in accordance with a broadcasting licence or signal carrier licence, as the case may be."*

Legally, Capital Radio was effectively shut off-air and the Zimbabwe Broadcasting Corporation comfortably retained its broadcasting monopoly.

On the expiration of the legal validity of the regulations, the government with remarkable fastidiousness suspended Parliament's standing rules, sat until the wee hours of the morning and against fierce MDC opposition passed the regulations, (which had been turned into a Bill) into law; i.e. the current Broadcasting Services Act.

Again, Section 7 of the Broadcasting Services Act retains the Zimbabwe Broadcasting Corporation's monopoly, until the Minister has granted broadcasting licences. It reads:

> *"Subject to this Act, and the Zimbabwe Broadcasting Corporation Act [Chapter12: 01], no person shall provide a broadcasting service or operate as a signal carrier in Zimbabwe".*

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[34] For a short chronicle of Capital Radio's brief sonic journey. Refer to the founding affidavit of Geradine Jackson, a Director of Capital Radio in SC/162/2001 @ from para6 to 11 thereof.

To date, no broadcasting license has been issued. The reluctance to issue any licences is evident. No explanation has been tendered for the non-licensing of broadcasters.

The government's reaction to the Supreme Court decision is hardly surprising. It frighteningly mirrors the cellular phone saga involving T.S. Masiyiwa Holdings (Pvt.) Ltd., quoted above.

The desperate use of the Presidential Powers [Emergency Regulations] Act to thwart legitimate attempts to set up competing commercial enterprises, a sustained resistance to competing ventures, the unlawful use of the police, the contemptuous disregard of court orders and the fast-tracking through the ZANU PF dominated parliament of unconstitutional laws, all point to the government's reluctance to break the Zimbabwe Broadcasting Corporation's monopoly.

Econet was licensed by the Supreme Court and not by the government. Such was the government's resistance.[35]

In the T.S. Masiyiwa case, (the Econet case) the court held that the government's delay in licensing applicants in the cellular phone business and the use of cumbersome, complex or unfair procedures to regulate the trade, was meant to maintain and prolong the Post and Telecommunications' monopoly[36]. Therefore, if "*….the central mechanism under the Regulations while not interfering with the corporation's entitlement to commence to operate a cellular telecommunication service, is designed to prolong the entry of another into the field, or it has that effect, it would be violative of the constitution.*"[37]

In the year 2000, the Human Rights Committee expressed the following concern in relation to the ex-Soviet Union province of Kyrgyzstan.

> *"It is also concerned about the functions of the National Communications Agency, which is attached to the Ministry of Justice and has wholly discretionary*

[35] Refer to the T.S. Masiyiwa Holdings (Supra)
[36] T.S. Masiyiwa (Supra) @ page 761H
[37] T.S. Masiyiwa (Supra) @ page 765 G - H

> *power to grant or deny licences to radio and television broadcasters. Delay in the granting of licences and the denial of licences have a negative impact on the exercise of freedom of expression and the press guaranteed under article 19 and result, in serious limitations in the exercise of political rights prescribed in article 25, in particular with regard to fair elections".*

UN Downert, CCPR/CO/69/KGZ, paragraph 21.

In the same vein, the unexplained and seemingly deliberate delay in licensing other broadcasters, the use of restrictive application laws and the concentration of power in the government, point to a fundamental desire to monopolise information dissemination.

Clearly the government is very determined to maintain the Zimbabwe Broadcasting Corporation's monopoly. The Zimbabwe Broadcasting Corporation has since 1980 been a propaganda broadcaster for the ZANU PF government.

Utilising the Broadcasting Services Act and bureaucracy the governments is doggedly maintaining the status quo. Cumulatively the Minister's control powers referred to above serve not to discourage but to prevent all investment into broadcasting. It seems that the government has deliberately not called for applications for licences. In addition, the licence conditions, relating to licence periods, terms and conditions are not economically viable for investors, unless if the investor is the government or "connected" to the government. It can only be concluded that the monopoly of the Zimbabwe Broadcasting Corporation is being maintained subtly, albeit ridiculously so.

In conclusion, it need not be reiterated that monopolies, be they government or private restrict the free flow of information, violating Section 20 of the Constitution

3.4 UNCONSTITUTIONALITY OF TECHNICAL MONOPOLY

The Supreme Court decision in the Capital Radio case notwithstanding, the Zimbabwe Broadcasting Corporation legally retains a monopoly over the recording and transmission of programmes. It is the only broadcaster permitted to transmit its programmes. All other licensees may only record or purchase programmes and just one other licensee may be granted a licence to transmit other licensee's programmes.

Monopolies over broadcasting violate Section 20 of the Constitution, unless sanctioned by a constitutionally valid law.

Section 9 of the BSA provides *inter-alia* that:

i. *only one other signal carrier licence shall be issued, other than that of the ZBC; and*
ii. *save for the ZBC, no other person shall be issued with both a broadcasting and signal carrier licence.*[38]*.*

Definitions relating to the technical monopoly

a) A broadcasting licence - enables the licensee to record or purchase pre-recorded material and broadcast/deliver television or radio programmes to persons with equipment appropriate for receiving such service.

   Holders of broadcasting licence simply record or purchase broadcasting material.

b) A signal carrier licence - enables the holder to operate a signal transmitting station. Therefore its function is limited to the provision of the apparatus through which those with broadcasting licences may broadcast their programmes.

[38] Refer to Section 9 (2) and (3) of the BSA

The effect of Section 9 (2) & (3) therefore is that no broadcaster, other than the Zimbabwe Broadcasting Corporation is permitted to record, flight and transmit its programmes.

In order to transmit its programme, a broadcaster "*…must of necessity enter into a transmission agreement with a party holding a signal carrier licence".*[39]

The Broadcasting Services Act does not compel the signal carrier to flight all material required to be broadcast by the holder of a broadcasting licence.

In practice, the signal carrier may act as a *quasi* censorship board, for political, ideological or commercial reasons. It is reasonable to expect that the signal carrier licensee will not transmit *all* submitted-recorded material, or programmes, effectively censoring matter that may be broadcast.

Further the station limits the number signal carrier licences to two, for the whole country. The Minister already controls the Zimbabwe Broadcasting Corporation's signal carrier. Refer to the Zimbabwe Broadcasting Corporation Act.

Given the Minister's powers under the Broadcasting Services Act, it is unlikely that the only other signal carrier licence will be given to a person independent of government.

Assuming that the second signal carrier licence is granted to an independent person, there is a very real likelihood that commercial or ideological considerations will be used to determine matter, which may not be broadcast.

In addition, the section presupposes that the second the signal carrier will:

i) Set up appropriate signal transmitting equipment with capacity to cover the whole of Zimbabwe; and

ii) accommodate both commercial and community broadcasters

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[39] Refer also to the Report of the Parliamentary Legal Committee on the Broadcasting Services Bill [HB.6, 2001] @ page 3, last paragraph

Sections 9(2) and (3) of the Broadcasting Services Act:

i. unnecessarily and severely restrict the number of persons who may enter the broadcasting sector;
ii. severely limits the number of people who may purchase and utilize signal carrying equipment, without any technical justification given or reasonably apparent;
iii. Places an unnecessary and in all probability uneconomic burden on the "only other" signal carrier to acquire signal carrying equipment with sufficient power and capacity to cover the whole of Zimbabwe and (perhaps) carry most of the commercial and community broadcasts. The Zimbabwe Broadcasting Corporation's signal carrying equipment does not cover all of Zimbabwe; and
iv. Compels broadcasters to use a centralized medium of transmission, limiting the nature, quantity and quality of material broadcast.

Generally, technical restriction on broadcasting is permitted by Section 20(2)(iv) of the Constitution of Zimbabwe. Sections 9 (2) and (3) entrench the monopoly of the Zimbabwe Broadcasting Corporation.

Is the monopoly created by Section 9(2) and (3) of the BSA, reasonably justifiable in a democratic society? The Zimbabwe Broadcasting Corporation's technical monopoly begs another question. Why should the Zimbabwe Broadcasting Corporation be the only broadcaster permitted to transmit its programmes and all other licensees being recorders or purchasers of pre-recorded material? Again the Zimbabwe Broadcasting Corporation is deliberately granted an edge, an advantage over other broadcasters. There is no legitimate objective reasonably apparent.

Section 9(2) and (3) is unconstitutional. It does not satisfy the Nyambirai three-tier test.

3.4.1 Legislative Objective

Section 20 (1) guarantees the individual the right to *"…impart ideas and information without interference..."* Section 9(2) & (3) of the Broadcasting Services Act certainly

interferes with the individual's right to use apparatus it deems necessary in order to broadcast its programmes.

It is exceedingly difficult to appreciate, what, if any legislative objective exists, to justify limiting the fundamental right. The section limits the ability of persons to impact and receive views and information.

The monopoly created cannot be in the interests of defence, public safety, public order, the economic interests of the state, public morality or public health.

A possible, though unsustainable argument exists that the proliferation of signal carrying equipment may cause congestion and consequently raise safety concerns.

However, the Minister may simply ascertain the nature of equipment utilized by licences and monitor radio frequency emissions therefrom.

Since no legitimate legislative objective exists for this limitation on Section 20, there is no need to bring into issue the remaining two rungs of the Nyambirai three (3) tier test.

3.5 UNCONSTITUTIONALITY OF POLITICAL CONTROL-Section 20

Section 20 of the Broadcasting Services Act prohibits political parties or organisations from controlling broadcasting stations. This seemingly benign and reasonable restriction placed on broadcasters suffers from an internal contradiction in that the ruling party ZANU PF controls the Zimbabwe Broadcasting Corporation and private broadcasters, should any be licensed. More alarming is the fact that the restriction on political control is so vague, open-ended and in practice liable to subjective interpretation. The section maybe used to oppressively discriminate against broadcasters disliked by government.

Section 20 of the BSA reads;

> *"No political party or organization shall hold or have control of any broadcasting licence or signal carrier licence."*

This seemingly benevolent restriction on the right to impart and receive information, views and ideas is exceedingly potent. The section violates section 20 of the constitution. It is unconstitutional!

"CONTROL" is defined in the Broadcasting Services Act as

> *"Control" includes control as a result of or by means of trusts, agreements, arrangements, understanding or practices whether or not having legal or equitable force and whether or not based on legal or equitable rights".*[40]

The definition of "control" is of general and wide import. Read with Section 16(1)(6) of the Broadcasting Services Act, section 20 is a potentially devastating. The section maybe be used to suspend or cancel licences whose holders are "*perceived*" or suspected to be sympathetic or aligned with a political party or organisation defined by the Minister, in his discretion, as political.

The Minister need not establish that the broadcaster is indeed under the "*legal"* control of a political party or organisation. A mere suspicion will suffice. The control need not be legal. It is easy to envisage a situation where a broadcaster who transmits anti-government programmes is deemed to be under the control of opposition political parties.

The law in is discriminatory! In this case, that which is good for the goose is certainly not good for the gander! The current Minister administering the Broadcasting Services Act, is none other than the illustrious Prof. Jonathan Moyo, a presidential appointee and ZANU PF politburo member. The current President Mr. Mugabe, who appointed the Minister, is the first secretary of ZANU PF, a politburo position. The Minister has absolute control over Zimbabwe Broadcasting Corporation. Therefore in theory and certainly in practice, ZANU PF has immediate access and control of not only a broadcaster but a signal carrier as well.

Further, in terms of Section 11(5), a licensee is obliged to make one hour cumulatively per week of its broadcasting time available to enable the government to "*…explain its policies to the nation".*

A government of national unity or a coalition of all political parties does not rule Zimbabwe. ZANU PF is still the government of Zimbabwe. ZANU PF, as a party and government is specially blessed with access to both the ZBC and other broadcasters, should any be licensed. To their sad misfortune, all opposition parties will have to wait for their turn to have access to broadcasters, in the unlikely event of winning elections. Unlikely because, they will not have access to the media in order to sell their policies to the nation.

3.5.1 Test for Restriction

Provided By Law

The constitutional requirement that restrictions to fundamental rights be provided by law are intended to prevent authorities from utilizing excessively wide, general, vague and broadly discretionary powers.

The unlimited definition of "control" renders the restriction unconstitutional. The definition is vague and permits the use of *discretion* to restrict the free exercise of the right to freedom of expression. Since that which constitutes political control is so wide as to include a mere unsubstantiated and unreasonable suspicion, the restriction is not articulated with enough precision to be considered to be law.[41]

The restriction affects a "*political party or organization".* A political party or organisation is defined as:

> "*"Political party or organization" includes any group or organization whose objective is the furtherance of the election of a person or persons to public office or the removal of a person or persons from such office"*[42]

A political party is usually easy to define and identify. An organization is defined as political if it has an objective the "*furtherance"* of the election to or removal of a person from public office. A group such as the Combined Harare Rate – Payers Association

[40] Refer to Section 12 of the BSA, page 9
[41] Compare with the case of In re. Ontario Film & Video Appreciation Society (Supra) @ page 592
[42] Section 2, page 10 of the BSA

which for instance petitioned the High court for the removal of the Commissioners running the City of Harare, is prohibited from having a licence or may have a broadcasting licence canceled.[43] In other words, the Residents Association will not be granted a broadcasting licence.

The holding of elections is undoubtedly foundational to any democracy. The use of broadcasting as a medium of expression and exchanging views and opinions on the political process is key to sustaining a true democracy. Organizations that are not necessarily political but participate in the democratic debate related to elections, and seek, say the removal of a corrupt local government will be prevented from broadcasting.

Mr. Justice McIntyre, once held that freedom of expression :

> "…*is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions in western society"* and that
>
> *"Representative democracy as we know it today, which is in great part, the product of free expression and discussion of varying ideas, depends upon its (freedom of expression) maintenance and protection"*[44]

Andras Sajo wrote:

> *"Knowledge is interwoven with the concept of man. Every person must have the possibility of knowing the elements of his environment, the intellectual and scientific achievements of his fellow men, the facts and developments that affect or may affect his life and generally all those elements and facts which enable him not only to survive but also freely to develop his personality. Knowledge cannot and should not be the monopoly of a few. It is a wealth which must be accessible to everybody. Those who lack knowledge are doomed to be always victims of those who know; victims of deceit and distortion of facts; victims of*

[43] Refer to case of Harare Residents Ratepayers Association and
[44] Retail, wholesale and departmental stores union, local 580 et al vs Dolphin Delivery Ltd (1986) 33 DLR (41) 177 @ page 183

irrationality because undoubtedly every person who is ill informed cannot think correctly"[45].

Read in conjunction, with the definitions of "control" and "political organizations". It is clear that Section 20 of the BSA has too wide and general a meaning to be lawful.

Legitimate Aim

It maybe laudable that political parties should not control broadcasting, whether they are in government or opposition. If it is held that the restriction on political groups is one made by a "law' it may argued that direct political control of broadcasting stations will affect the independence, ethics and standards required to maintain objectivity within the broadcasting sector.

However, this aim cannot be legitimate, nor one made in good faith. ZANU PF has access to the ZBC through the Minister. The restriction is made in bad faith. Further, Section 20 of the Constitution does not recognize the restriction on political parties in any of the limitation sections.

The Indian Supreme Court once noted

> "*So long as the possibility [of a restriction] being applied for purposes not sanctioned by the constitution cannot be ruled out, it must be held to be wholly unconstitutional"*[46]

It is doubtful that any <u>legitimate</u> objective exists at all for limiting the right. It seems that the only objective, though made in bad faith, exists to prevent legitimate political opposition, from accessing broadcasting. On the other hand, the legislation allows ZANU PF to have access to the Zimbabwe Broadcasting Corporation and have a compulsory and cumulative one-hour per week broadcasts on every licensed private broadcasting station.

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[45] Rights of Access to Media @ page 3

[46] Refer to Thappar vs State of Madras [1950] SCR 594 (SC) @ P 603

The legislation is offensive and made in bad faith. In *Thorgeson vs Iceland*, it was held that:

> *"Freedom of information, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any enactment must be convincingly established"*[47]

No legally valid explanation seems possible for this particular restriction. It is simply unconstitutional!

3.6 UNCONSTITUTUIONALITY OF SECTIONS 15 & 16

3.6.1 Power to amend, suspend and cancel licences

Ministerial power to amend, suspend and cancel licenses contained in the Broadcasting Services Act is violating Section 20 of the constitution. It unduly restricts the right to receive and impart views and ideas. The Minister's power violates section 18(9) of the constitution, which requires the government to grant citizens the opportunity to be heard before any act prejudicial to the rights or interests of the individual is effected. The dispute resolution mechanism created by Section 16 as read with Section 43 of the Broadcasting Services Act, fails to afford a licensee, an impartial tribunal or court in the determination of the existence and extent of his civil rights and obligations.

Amendments

In terms of Section 15(c) and (d) the Minister may amend a licence if he considers the amendment necessary:

i. in order for the licence to reflect the true nature of the service, system or business which the licensee conducts; or
ii. desirable in the PUBLIC INTEREST.

Section 15(2) obliges the Minister to consult the Broadcasting Authority prior to amending any licence and to cause the Authority to advise the licensee of the reasons

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[47] Thorgeisan (Supra) @ page 63

for the proposed amendments. The licensee is entitled adequate time to make representations.

The above-mentioned conditions are no comfort nor do they make the Minister's power constitutional. The reasons follow:

i. The Minister merely has to consult the Broadcasting Authority Board. He is not however obliged to follow any advice or recommendations.

ii. It should be mentioned, again, that the Board is not independent, has no security of tenure of office and may safely be regarded as the Minister's secretarial staff. The Minister would in reality have occasioned any amendment.

Further, a licensee is granted an opportunity to dissuade a Minister who would have made up his mind relating to whether a licence should be amended. Note that it is not the Authority that amends but the Minister. By the stage representations are made, the Minister would already be biased. An elementary principle of natural justice, also known as the *audi-alteram partem* principle, enshrined in Section 18(9) of the Constitution, renders biased dispute resolution mechanisms unlawful.

The Minister would already be biased because he would already been seized of the matter and have made up his mind that sufficient reasons exist to amend the licence, which reasons he is obliged to transmit to the licensee prior to effecting the amendment.

The Minister, for practical purposes becomes the complainant, judge and prosecutor in the same matter. It is offensive that the Minister determines the amendments, and acts as a court during the representations made against the amendments. The amendments would undoubtedly have adverse effects on the licensee's rights, interests or property. Yet the licensee would not have been provided with an independent or impartial court or tribunal in the determination of the existence or extent of his civil rights in violation of Section 18(9) of the Constitution.

Suspension and Cancellation

In terms of section 16 of the Act, the Minister is granted authority and power to suspend or cancel licences, if *inter-alia*; the licensee has

i. contravened any provision of the BSA applicable to him;
ii. failed to comply with any term or condition of the licence;
iii. acted in a manner prejudicial to the defence, public safety, public order, public morality or public health of Zimbabwe; or
iv. the licensee has repeatedly breached one or more provisions of the applicable Code of Conduct or *any standard determined appropriate by the Minister*.

In terms of the Section 25 of the Act, the Minister has power to impose, vary or revoke any standard in relation to programme content. This means that the Minister has power to interfere, in this discretion with actual programme content. If a licensee ignores or fails to comply with any programme standard set by the Minister, the applicable licensee maybe suspended or canceled.

In addition, the Minister may in his discretion determine that a licensee has acted in a manner prejudicial to the defence, public safety, order, morality or health and thereafter suspend the licence. There is no definition of the above categories. It is left as to the Minister.

Further, as discussed above, an apparent failure to abide by any term or condition of a licence entitles the Minister to cancel or suspend a licence. This too, relates to the terms and conditions, unilaterally imposed by the Minister.

No doubt, there is need to restrict the exercise of freedom of information. The Minister's power to grant, amend, revoke or suspend a broadcasting licence is itself an unbridled restriction on use of the broadcast media. On a general level, this restriction is within the ambit anticipated by law. Is the restriction one that is reasonably justifiable in a democratic society? As above, the restriction has to pass the following test.

3.6.2 Provided by Law

It is commonly accepted that a restriction cannot be regarded as law if it is not formulated with sufficient precision to enable a citizen to regulate his conduct. A restriction must not be in the entire discretion of a public authority. The restriction must be specifically defined, ascertainable and understandable. Therefore, limits, which are not articulated with precision, cannot be considered to be law.

Section 15(1)(c) and (d) grant the Minister, *absolute power* to amend a licence, interfering with the nature, quality and quantity of information broadcast, by a licensee.

It is not possible for a licensee to properly regulate his conduct, since he is not the Minister and will certainly not agree that the quality or content of his broadcasts do not reflect the true nature of the service, he is licensed to provide.

Further, the Minister has power to unilaterally amend a licence in the "public interest". Public interest is a most vague concept. Its definition left to the absolute discretion of one man, a political appointee and ruling party stalwart is open to gross abuse and subjective interpretation. It may be used to cover every conceivable act despised by the government.

The restriction is therefore not "provided by law". Consequently it is not protected by the constitution. The Minister's powers are rendered ultra-vires section 20 of the Constitution.

In terms of the Section 16, the Minister may cancel or suspend any licence, if inter-alia, the licensee does not comply with any condition of the licence. Refer to Section 16(I)(e).

Prima facie, this section is not offensive but its sting is as poisonous as a rattlesnake's strike. In terms of Section 11(I)(c) the Minister may impose a condition to a licence as he "reasonably" determines. In terms of Section 15(I)(c) and (d) the Minister may amend a licence in his discretion in the public interest or for the licence to reflect the service provided by the broadcaster.

Therefore the conditions applied in the absolute discretion of the Minister, in terms of Sections 11(I)(c) and 15(I)(c) and (d), however unreasonable or capricious, will, if not observed result in the suspension or cancellation of the licence.

The Minister may get rid of a broadcaster in the following manner. Utilising his discretionary powers contained in Sections 11(I)(c) and 15(I)(c) and (d), and he will impose onerous conditions, which the broadcaster cannot observe either because of practical or economic difficulties. Failing observance, the broadcaster's licence will then be suspended or canceled.

The above is true for Section 16(I)(h). The Minister is again left to define and decide conduct prejudicial to the defence, public safety, order, morality or health of Zimbabwe. He may suspend or cancel a licence if he considers a broadcaster's conduct to have violated the foregoing.

It cannot therefore be concluded that the restriction is "provided by law". Instead the restriction is provided in the Minister's discretion.

3.6.3 Legitimate Objective

Assuming, without conceding that the Minister's power constitute a "law" the following question would need to be addressed. Is any legitimate aim or objective served by restricting broadcasting through granting the Minister absolute and discretionary power to amend, suspend and cancel licences, in this particular manner?

The law does not precisely state the restrictions but grants broad and general restrictive powers to the Minister. In order to amend a licence, the Minister simply consults the Authority. He need not heed their advice. In order to cancel or suspend a licence, the Minister is obliged to conduct a public hearing through the Authority, after which he has power to disregard any recommendations and still suspend or cancel.

The public hearing envisaged by Section 16, is a farce. A wicked façade to hoodwink the gullible. This is how it operates. Subsection 5 of Section 15 states that the

recommendations of the Authority are based on the breaches stated in Section 16(1)(a) to (l).

For example, if the Minister sets entirely unreasonable conditions in terms of sections 11(l)(c) or 15(l)(c) and (d). The Minister makes these conditions on his own or after consulting members of the Board, whose tenure of office is wholly dependent on his generosity and "good will". These conditions are law and must be observed. A breach of the above restrictions and condition will no doubt result in an "appropriate recommendation" that due to the breach, the licence should be suspended. In order to obtain the suspension or cancellation of a licence, all what the Minister has to do is to impose onerous conditions likely to be breached.

It is the opinion of the writer that no legitimate aim is served by the ministerial powers cited above.

Further, there is no "pressing social need" for such restrictive and draconian ministerial powers.

3.6.4 The Appeal Process

It is arguable that the Minister's power to suspend or cancel licenses is tampered by the appeal process – or dispute resolution mechanism created by section 43 of the BSA.

In terms of Section 43 any person aggrieved by the decision of the Minister; inter-alia, to suspend or cancel or licence may appeal to the Administrative Court.

However, in terms of Section 16(6) of the Broadcasting Services Act, during the period of the suspension or cancellation the licensee is not entitled to broadcast.

During this period, the licensee's right to broadcast and exercise his right to impart and receive views and opinion would have been violated, as would the viewer and listeners rights to utilise the broadcast media of their choice.

A further difficulty with the appeal mechanism is that the Administrative Court will be asked to decide on the breach of a term or condition self-righteously imposed in the

discretion of the Minister. Due to its nature the Administrative Court has no power to set aside a law or issue a declaration that certain laws are ultra-vires the constitution or any other law. The Administrative Court is only permitted to assess if the Minister's actions were exercised in terms of the Act and not whether the particular law itself is valid.

Restricting the appeal mechanism to the Administrative Court, in highly technical matters, which are not administrative in nature, seems to have been deliberate. In terms of the Act the Administrative Court is the court of final appeal. In terms of the Administrative Court Act, appeals against the Administrative Court lie to the Supreme Court.

Further the restriction may however be short-circuited by applying directly to the Supreme Court in terms of Section 24 of the Constitution. The current composition of the Supreme Court, filled as it is will recent appointees, widely viewed as compromised does not leave any room for comfort.

The specific ministerial powers to amend, suspend and cancel a licence are not reasonably justifiable in a democratic society. The Ministerial powers grant the Minister absolutely discretionary, arbitrary power which can be subjectively utilized to close down radio or television stations.

3.7 LICENCE PERIODS

In terms of Section 12(2) and (3) the Broadcasting Services Act, community broadcasting licences shall be valid for a period of one (1) year only, while all other categories of licences shall be valid for only two (2) years. Section 12(2) and (3) of the Broadcasting Services Act is unconstitutional in that it violates section 20 of the Constitution. Section 12(2) and (3) unduly restrict the exercise of the right to receive and impart information, views and opinions. The restriction seems directed at ensuring that only a few people, if any will apply for licences.

For example a signal carrier licence will be valid for two years. The holder of such a licence has to purchase very expensive signal carrying equipment worth millions of

dollars. To expect such a licensee to have recouped expenses and made profit in two years would be to expect the absurd and unrealistic.

The same goes for any broadcaster, commercial or community. The situation is worsened by the fact that all licences are renewed at the discretion of the Minister. *Refer to Section 14 as read with section 6 and section 10(10) of the BSA.*
A potential applicant is likely to be discouraged from applying because, the licence periods do not make economic sense and renewal depends on the Minister's disposition.

In South Africa, community broadcasting licences are valid for four (4) years, television broadcasting licences for eight (8) years, radio broadcasting licences for six (6) years[48], a common signal carrier licence for fifteen years and a signal carrier licence given to a commercial broadcaster, is valid for eight (8) years.[49]

The Zimbabwean legislation creates as unrealistic investment and licensing system. This must be apparent even to the government. This situation throws into doubt the governments good will and bona fides in passing the law.

3.7.1 Provided by Law

The licence periods are provided for by a specific section of the Act. To this extent therefore, the ministerial power should be taken to pass the very first test of constitutionality.

The Minister's discretionary power to renew licences however offends against the concept of law, in the same way that section 6 of the BSA does.

3.7.2 Legitimate Objective

The proper regulation of the use of the frequency spectrum requires licence periods be of limited tenure. Section 20 would be offended, if licences were granted in perpetuity.

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[48] Refer to section 54 of the South African Independent Broadcasting Authority Act, 1993
[49] Refer to section 38 of the South African Independent Broadcasting Authority Act, 1993

Limiting licence periods allow the authorities to regularly ascertain the continued suitability of allowing a broadcaster to retain a licence. It allows for the change of players in the industry, and the introduction of diverse programmes and technological advances. Various and legitimate reasons exist for limiting the duration of licence periods.

The question remains, however; what is reasonable licence duration?

3.8 NECESSITY OR REASONABLE JUSTIFICATION

According to the second (2nd) rung of the Nyambirai test, the issue is whether, "*the measures designed or framed to meet that legislative objective are rationally connected to it and are not arbitrarily unfair or based on unreasonable considerations;"*

It illogical to invest millions of dollars in setting up a radio or television broadcasting station or signal transmitting station, in a relatively unsophisticated economy as Zimbabwe, for a period of two years. And thereafter there being no guarantee that the licence will be renewed.

A signal carrier licensee is forced after two years to reapply. If the Minister does not renew the licence, millions worth of equipment will lie idle. This will affect broadcasters who relied on an affected signal carrier to transmit programmes. In order to survive, the signal carrier licensee will have to lease or sale the equipment.

It is impossible, anywhere in the world, more so in Zimbabwe's dire economic situation for any investor to have recouped its capital investment as well as current expenditure and in addition have made sufficient profit in two (2) years of set up. It is a fact that any person that invests into broadcasting in the current environment will make dire losses.

The situation is exacerbated by the power of the Minister during the tenure of the licence to unilaterally amend, suspend or cancel a license. The totality of the insecurity does not raise strict restrictions to entry into broadcasting. Entry is virtually impossible, save for donor driven small radio stations, if these are even allowed to exist.

Therefore the licence periods imposed are not reasonable, necessary and proportionate to the aim, are arbitrarily unfair and prevent instead of regulate investment into the broadcasting services sector.

In conclusion the restriction are not reasonably justifiable in a democratic society.

3.9 UNCONSTITUTIOANLITY OF MINISTERIAL POWER TO INTERFERE WITH CONTENT

One of the most offensive powers granted to the Minister and his secretarial personnel (the Board) is the power to interfere with broadcasting programme content. The power violates the individual's right to receive and impart information as enshrined in section 20 of the constitution.

3.9.1 The Sections

Section 11(5)	:	In terms thereof, a broadcaster is obliged to make one hour cumulatively per week available at its request to the government to explain its policies
Section 25	:	The Minister is granted authority to evoke amend or impose any programme standard, which in his opinion will provide appropriate Community safeguards.
Section 39 & 5th Schedule Part 111 clause (1)(b)(c)(d)	:	if there is an event which in the Minister's discretion constitutes a major accident, natural disaster, epidemic, civil unrest or public disorder or war and there is a declaration to this effect by the Minister, a licensee shall provide his facilities to anyone to communicate with an emergency organisation free of charge. In addition, a licensee is obliged as a public

Service to provide sufficient coverage of national events.

Further, a licensee is obliged, when providing an information service, to provide a "fair, balanced, accurate and complete service".

Further, by simply publishing a notice in the Gazette, the Minister becomes entitled to broadcast free of charge on a Commercial Broadcast "such items of national interest as are specified in the notice".

Further, by simply writing to a licensee, that an Emergency has risen, the Minister will have the power, through his agents to have control over matter for broadcast using the licensee' s broadcasting facilities.

Fifth Schedule, Part IV clause 10(1) : In terms thereof community broadcasters are Prohibited from broadcasting "political matter"

Political matter is obscurely defined as "*…any Political matter, including the policy launch of a political party.*

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It admits of no doubt that the above and specific legal sections grant the Minister power to interfere with programme content. The Ministerial power violates Section 20 of the Constitution. The sections constitute a "law" as they are clearly spelt out in the Act. It remains to be assessed whether the sections are reasonably justifiable in a democratic society.

3.9.2 Legitimate Objective

Section 11 (5)

The granting of one hour cumulatively per week to government is not justified. Why should the government have greater rights in explaining its policies than say, political opposition parties, or civil society groups?

Further, why should a mandatory government airtime quota compromise the editorial policy of a broadcaster?

The government has control and access of the Zimbabwe Broadcasting Corporation. Why does it need more broadcasting frequencies?

Assuming that a licensee intends to broadcast sport or movies only, why should his rights be compromised by government policy proclamations?

In addition, why should the government get free airtime anyway?

It is submitted that the section constitutes an unreasonable interference with a Broadcaster's right to choose what to broadcast and listener's rights to choose a station of their choice. The restriction cannot be justified on any of the limitations of public safety, morality, defence, or the economic interests of the state. The restriction cannot therefore be even remotely justifiable in a democratic society.

3.9.3 Imposing Programme Standards: Section 25

In terms thereof, the Minister is granted authority and power to impose any programme standard, which he feels in his opinion, every broadcaster, or a particular broadcaster should adhere.

Provided by Law

It is only too plain that the programming restrictions will affect content. The Minister will have power to legislate, for instance that no broadcaster shall broadcast pictures of say, nude or semi-nude people; or of people kissing; or in line with homophobic tendencies of President Mugabe, that no film footage of gay people will be broadcast. In order to

qualify as law, restrictions on fundamental rights may only be limited by a specific and certain enactment. In terms of section 25 the Minister entirely in his discretion imposes programme standards. Therefore the restrictions do not qualify to be classified as law.

Legitimate Aim

The above notwithstanding, it may well be true that the Minister or better still the Authority should have some residual power to regulate actual content through setting certain minimum conditions. If the power was restricted to situations of gross abuse of the licence such as hate speech or direct incitement to racial or ethnic violence the restrictions may well be considered reasonable. However, the power is so wide as to cover any possible situation, which the Minister may decide to prescribe. Due to the nature of the power that is granted to the Minister, it is doubtful that any legitimate objective exists to justify the restriction.

Necessity

Based on the foregoing, the ministerial powers are not reasonably or rationally connected to any legitimate purpose.

3.9.5 Emergencies: Section 39 as read with Fifth Schedule, Part iii, Clause (1)(b)(c) and (d)

Simply put, if the Minister declares that in his opinion an event constitutes an emergency, he may take over and run a broadcasting service or direct the programmes that must be transmitted. Further, every licensed broadcaster is obliged, irrespective of the nature of services provided or capacity, to provide coverage of “national events”.

The following issues emerge:

Emergency

An emergency refers to any event deemed to be such by the Minister. The power to declare an emergency gives the Minister the power to interfere with broadcasting, including content, free of charge.

It is certainly arguable that this restriction is legal, in so far as Section 20 of the constitution permits a restriction of the right to freedom of expression on the ground of public safety, order or defence. Certainly, in the event of a disaster, natural or otherwise, some may deem it morally justifiable for radio or T.V stations to assist by providing access to broadcasting facilities.

It maybe conceded therefore that law provides for the restriction and a legitimate reason may exist for the restriction.

Neccesity of Measures

Are the means established to meet the legislative objective, of allowing the public or public officials access to broadcasting facilities, in emergencies, rationally connected to it? Are the means not arbitrarily unfair and based on unreasonable considerations?

It is submitted that the measures prescribed in section 39 and the fifth schedule are arbitrary, based on unreasonable considerations and extend far beyond merely catering for emergencies.

The Zimbabwe Broadcasting Corporation is a public broadcaster. Is it unable, or will be unable to adequately provide sufficient broadcasting service to any emergency situations that befall Zimbabwe? If the answer is affirmative, another pertinent question arises. Why then is the Minister insisting on maintaining the Zimbabwe Broadcasting Corporation's monopoly by delaying (read refusing) to issue other broadcasting licences?

Further, it must be anticipated that various interest groups will apply for licences in order to broadcast different programmes, e.g. sport, movies and documentary, music and news channels e.t.c. The Minister's power allows him to commandeer all stations once he declares an event to be an emergency. What possible logical explanation exists for such drastic powers? Is it necessary for all broadcasters to broadcast news in an emergency. What purposes would be served?

It would make sense if the Minister's power were strictly regulated and effective only against "news" broadcasters.

Further, Zimbabwe has a tolerably working telephone service. Why should signal carriers be forced to allow individual members of the public or even the Minister's personnel to have free use of equipment, in order to communicate with an emergency organisation.

If an "emergency" should arise, it is not legally an emergency until the Minister, a day or two later, at the very least, gazettes the event as an "emergency". Should all broadcasters then be subjected to broadcasting emergency news?

What constitutes an emergency? This is something not easy to define. It is proposed that news and community broadcasters maybe-suitable target for use during emergencies subject to the Minister's power being granted to the Authority. Broad and general as they are, the Minister's powers are, unconstitutional.

National Interest

The Act obliges ALL broadcasters to "provide sufficient coverage of national events"[50]and allows the Minister, by merely giving notice in the Gazette, power to broadcast using a commercial broadcaster's frequency, such items of national interest.[51]

What constitutes "national interest"? The Minister in this sole discretion determines the answer to this question. This section falls foul of the basic definition of law, and it is therefore unconstitutional.

This section also allows the Minister to compromise editorial independence, as well as programme content. Being a political appointee, the Minister's prejudices will adversely affect the nature of information available to the people of Zimbabwe.

Legislative Objective

In the event of the above notwithstanding, it is doubtful that there exists a legitimate objective for the requirement that all broadcasters are obliged to broadcast matters of

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[50] Refer to Section 39(3) of the BSA

[54] Refer to fifth schedule, part III clause 9(1)(b)(c)(d) to the BSA

national interest at the instance of the Minister. In the first place the Minister should not be the person or body determining programme content.

Public broadcasters are by their nature, obliged to broadcast matters of general and national interest. This obligation should not be exercised at the instance and discretion of the Minister. The respective Board of Directors should control public broadcasters. This is a power which an independent broadcasting authority should not even be permitted to exercise. Regulation authorities should not be permitted to influence editorial choice. Programme content of private broadcasters should not be interfered with, for obvious commercial reasons. The Minister's discretionary power does not qualify to de described as law. No legitimate objective is reasonably self evident and none has been provided. The section is therefore unconstitutional.

3. 10 PROHIBITION OF OWNERSHIP OF PROPERTY

Section 8 to the Broadcasting Services Act as a whole prohibits citizens from owning property.

Briefly stated, section 8, prohibits citizens who are not, or who have not been, ordinarily resident in Zimbabwe from investing in broadcasting, directly or through a corporate body.

If a citizen, prior to investing in broadcasting was not ordinarily resident in Zimbabwe, the Minister using the police or his inspectors, has power in terms of section 42 of the Broadcasting Services Act to cause the seizure of the individual's broadcasting property.

Section 16 of the Broadcasting Services Act, allows the Minister to suspend or cancel licences in his discretion.

The cumulative impact of Section 8 as read with Section 42 and 16, of the Broadcasting Services Act, violates Section 16(1) of the Constitution of Zimbabwe, in that the sections provide for compulsory acquisition of property or interest or right in the property.

Section 16(1)(a)(ii) permits the passing of laws that deprive citizens of private property, in the interests of defence, public safety, public order, public morality, public health, town and country planning or the utilization of that property for a purpose beneficial to the public generally or to any section of the public.

The prohibition of citizens, who for a variety of reasons were resident outside the country, from owning or investing in broadcasting stations, is not justifiable on any of the limitations contained in section 16(1)(a)(ii) referred to above.

Legitimate Aim

A question maybe asked; what is the difference between a citizen who has always been resident in Zimbabwe and that has, say, for educational or employment reasons, been resident in Malawi? Why should one and not the other be prevented from investing and having rights, interests or property in broadcasting?

As explained earlier, this seemingly outrageous and irrational prohibition appears targeted at the directors and shareholders of Capital Radio (Pvt.) Ltd., white Zimbabweans and others in the *Diaspora.* A lot of Zimbabweans are not at present ordinarily resident in Zimbabwe due to marriage, education, employment, business interests or investments elsewhere. This prohibition shows the deep-rooted suspicion the government has of its citizens, particularly those that have lived outside the country for sometime.

The absurdity of the restriction shows that the purpose of the BSA was not to fairly and objectively regulate the broadcasting industry but rather to control the flow of information.

In conclusion, it is stated section 8 the Broadcasting Services Act is unconstitutional, in as much as it offends against commonly accepted norms of non-discrimination and participation by all citizens in all spheres of life, including broadcasting.

3.11 INDEPENDENCE OF THE BROADCASTING AUTHORITY

The principle of the independence of the institution created to regulate broadcasting is premised on the ground that no one person and particularly not the government should have absolute control over the free flow of information.

The world over, countries that are called democracies insist on the independence of the media, both in principle and in practice. Frequency allocation, licensing of broadcasting investors, as well as technical administration of broadcasting is usually the prerogative of a broadcasting authority. Political control of broadcasting has always been regarded as an abridgment of the right to freedom of expression, in any society that claims to be a democracy. Zimbabwe's constitution proclaims that it is a republic and therefore in principle a democratic state.

Absolute or significant control of the broadcasting media by government has often times than not, resulted in the monopolization of the media by government. Zimbabwe is itself a classic case in point.

The Committee of Minister of the Council of Europe in the "Declaration on Freedom of Expression and Information" stated:

> *"[S]tates have the duty to guard against infringements of the freedom of expression and information and should adopt policies designed to foster as much as possible a variety of media and plurality of information sources, thereby allowing a plurality of ideas and opinions"*[52]

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[52] Committee of Ministers; Declaration on the Freedom of Expression and Information, 29th April 1982, reprinted in the Council of Europe DH – MM (91)1

The United States Supreme Court further held that:

> *"It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of the market, whether it be by the government itself or a private licensee"*[53]

Regrettably under the Broadcasting Services Act, Zimbabwe does not enjoy the privilege of an independent broadcasting authority. The Broadcasting Authority plays an ineffective and secretarial role to the actual broadcasting authority, i.e. the *Minister of State for Publicity and Information!* Ultimate control and power over broadcasting lies in the hands of the President, exercised through an appointee, the Minister.

The Minister is the licensing authority and not the Broadcasting Authority.[54]

The Broadcasting Authority refers to the corporate body established in terms of Section 3 of the Broadcasting Services Act. The Authority is controlled and managed by the Broadcasting Authority Board established in terms of Section 4 of the BSA.

The Minister, in accordance with any directions the Presidential gives appoints the Board consisting of not less than five and not more than nine (9) members. The Board is therefore an executive appointment. In reality therefore, the President appoints the Minister and the Broadcasting Authority Board.

In South Africa the enabling legal instrument is called the Independent Broadcasting Act. In Zimbabwe, no such grand pretensions are made. While a name does not mean much, without appropriate content, the South Africans did attempt to ensure that the appointment process of the board members was transparent and rendered the board immune from political control in the exercise of their duties and obligations. The South African broadcasting board is referred to as a Council. In terms of section 3 (3) the Authority:

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[53] Refer to Red Lion Broadcasting Co. In and others vs Federal Communications (No. 2) 395 US 367 (1969) page 390

"…shall function without any political or other bias or interference and shall be wholly independent and separate from the state, the government and its administration or any political party, or from any other functionary or body directly or indirectly representing the interests of the state, the government any other political party".

There is no similar provision in Zimbabwe's Broadcasting Services Act.

3.11. 1 Tenure of Office

Members of the Board do not have any security of tenure of office. Their positions exist solely upon the goodwill and the discretion of the Minister. *Inter-alia* and in particular, Board members maybe dismissed for having conducted themselves in a manner that "*renders him unsuitable as a member…."*[55] The authority that suspends and dismisses a Board member is the Minister[56].

It is not possible, in the circumstances, for the Board to be independent.

Independence of a Board is measured by a variety of yardsticks, but in particular by the appointment process and the security of tenure of office. Executive appointment is certainly not on its own, a basis for declaring a Board partisan and partial.

In South Africa, the President, on the advice of the National Assembly, i.e. the South African parliament, appoints members of the Council.[57] Being the appointing authority the President is empowered *after due inquiry* to remove a Councilor from office.[58] There is a difference between the South African position and that obtaining in the Broadcasting Services Act in this regard. The President in South Africa has no unfettered discretion to appoint Council members. He may only appoint members from a short list that would have been interviewed by parliament. The President is not at liberty to appoint party functionaries. In Zimbabwe, the Minister almost single handedly, and in consultation with his superior, the President, determines the identity of board members to appoint. In

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54 Refer to Section 6 of the BSA

55 Refer to clause 4, Third Schedule to the BSA

56 Refer to clause 4(3) and (4)

57 Refer to section 4 of the South African Independent Broadcasting Authority Act.

58 Refer to section 8 of the South African Independent Broadcasting Authority Act.

addition the Minister has power to suspend and terminate the employment of the Board members. The South African position, though not ideal, does provide some measure of security of tenure of office. In any event the President does not enjoy the same powers to interfere with programme content, as does the Zimbabwean Minister of Information. The President is not the licensing authority, and neither is he involved in the amendment, suspension, and cancellation of licenses.

To emphasise the importance of independence, South Africa's legislature calls its broadcasting regulating body, the Independent Communications Authority of South Africa, established in terms of a similarly entitled Act. This starkly contrasts with Zimbabwe's Broadcasting Services Act, which (fortunately) makes no pretense of creating any independent body.

The independent Communicating Authority of South Africa Act of 2000 [ICASA Act] guarantees the independence of the regulator. It states:

> *"The Authority is independent, and subject only to the constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice"*[59]

Further, the President may only appoint council members after taking into account the following considerations:

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

(b) *transparency and openness;*

(c) *the publication of a shortlist of candidates for appointment ……."*[60]

Further the President's discretion and room to manoeuvre is limited as, in practice, she/her has only limited powers to refer the names of nominees back to the National Assembly. Further the ICASA Act requires the members to possess certain minimum professional qualification, represent plurality of society, be committed to various values, and be committed to the objects and principles of the Act.[61]

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59 Refer to Section 3(3)

60 Refer to ICASA Act, section 5(1)

61 Refer to ICASA, section 5(3) and (4)

In addition, the ICASA Act sets fixed term of office, and sets clear conditions on termination of tenure of office and most important of all, the Minister and all other political figures have no power to interfere with the work and affairs of the Authority.

South Africa's institutional framework seeks to establish, bolster and maintain the independence to the Authority. No such pretences are made in Zimbabwe.

3.11.2 Malawi

A very late entry to democratic practice, Malawi set up the Malawi Communications Regulatory Authority [MACRA].

In section 4(3) the MACRA Act states

> *"The Authority shall be independent in the performance of its functions.*

Further, the Act imposes certain mandatory

> *"…qualifications, expertise and experience…."*[62]

Although, members of the Authority are appointed by the President of Malawi, subject to the above specific qualifications, members may only be removed by the appointing authority on the basis of objective and non-discretionary grounds, such as continued absence from meetings, bankruptcy and after "due inquiry"[63]

The appointment process of the Broadcasting Authority board members should not be over – emphasized. Many democracies allow executive appointment of broadcasting authorities. The United Kingdom is another example where executive appointment is practiced. The test of independence is always practical. An authority;

i. *which is not immune from political interference;*
ii. *whose members do not enjoy security of tenure of office;*
iii. *which is not a licensing authority; and*
iv. *whose sole responsibility is to carry out Ministerial directives*

cannot be independent, nor be said to serve any purpose, save perhaps to dance to the piper's tune.

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[62] MACRA Act – Section 6(2)

The Broadcasting Services Act is glaringly unconstitutional. It appears that the purpose of the Act is not to regulate the transmission of radio and television signals but to control the information that is broadcast by independent broadcasting stations. The government still abuses the broadcasting facilities of the Zimbabwe Broadcasting Corporation, using the corporation as a propaganda tool for the ruling party.

It seems rather obvious that in reality it was never the government's intention to create and set up a truly independent and viable broadcasting authority and environment. The appointment process of the licensing authority and the Broadcasting authority, the powers granted to the Minister, the insecurity of investment, and the very restrictive terms and conditions betray the true meaning and purpose that the Act is intended to serve. Notwithstanding its claims that it adheres to the rule of law and democratic principles, the government clearly still believes in command politics that require muzzling non-conformist views and the press.

In the interests of development of Zimbabwean democracy it is imperative that the Act should be repealed and replaced by a pragmatic and non-political Broadcasting Services Act. The citizens of Zimbabwe require the means to fruitfully engage in and exchange information. Development is well nigh impossible without real and free participation of the citizens of Zimbabwe. It is suggested therefore that the Act should be repealed and replaced by another.

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[63] MACRA Act – Section 6(2)

CHAPTER FOUR

4.1 INVESTMENT IMPACT OF THE BROADCASTING SERVICES ACT

4.1.1 Introduction

Zimbabwe is a country in dire need of investment. Two decades of unbridled corruption, mismanagement, over dependence on the export of raw materials, the failure by the government to use the law to empower the majority black Zimbabweans and lack of any strategic economic vision have resulted in a poor performing and vulnerable economy. Currency stability was achieved from donor foreign currency inflows. Zimbabwe's economy was therefore kept afloat and relatively stable by the West masquerading as well wishers and partners in development, in consideration for the perceived good policies of the Mugabe regime. The war in the Democratic of the Congo, and the farm invasions resulted in the cessation of financial assistance. The results were a shrinking economy, retrenchments, closure of companies, unimaginable unemployment levels: very fertile grounds for opposition politics.

It is imperative that the country receives both local and international investment. A shrinking economy gives rise to instability and mayhem. Freedom of expression permits people to freely exchange and opinions without interference and is necessary for real economic development. The exercise of this fundamental right also allows the citizens to develop real and mature political discourse, absolutely essential to the development of a democratic culture and set of values from within the community.

Unregulated use the electronic broadcast media may be a source of instability, as was the case in Rwanda and Burundi. Regulation must not however amount to control and must adhere to requirements reasonably justifiable in a democratic society.

Regrettably the Zimbabwe government has deemed it necessary to stifle the growth and maturity of the broadcast media, for politically selfish reasons. The analysis follows below.

4.1.2 Investment: General

The ZBC currently monopolizes the broadcasting industry. Riddled with inefficiency, use of antiquated equipment, poor programming and inept and unskilled personnel have, made the ZBC a partisan, third-rate, unprofitable monolithic institution. Supported by a coerced license, (listener's licence tax) and advertisement revenue, the corporation depends, in addition, on government subsidies. The shrinking Zimbabwean economy, the myopic and politically induced price controls have resulted much less advertising revenue accruing to the corporation.

The government's monopoly over broadcasting through the Zimbabwe Broadcasting Corporation has not only resulted in the inefficiencies referred to above, but also prohibited any investment into the sector. Though struck down, the government's monopoly of broadcasting has been maintained by the government's marked and apparently very determined reluctance to licence other broadcasters. The Act purports to demonopolise the industry. In its preamble, it provides that *inter-alia,* its purpose it seeks to provide for the "*regulation and licensing of broadcasting services and systems".*

The government, using its ZANU PF, parliamentary majority, courtesy of the constitutionally provided appointment powers, bulldozed the passing of the Broadcasting Services Act into law. Unashamedly, this law prohibits, and does not permit investment into the sector. Save for donor funded community broadcasters and companies aligned or sympathetic to ZANU PF, it is almost impossible to invest in broadcasting. The entry restrictions imposed are almost insurmountable. Roughly put, the totality of the following discourage, if not prohibit investment;

a) *licence periods;*

b) *prohibition of foreign shareholding;*

c) *prohibition, save with express Ministerial approval, of foreign technical employment;*

d) *prohibition of licensees from possessing both a signal carrier and broadcasting licence;*

e) *the totality of the Minister's discretionary power to grant and amend, suspend and cancel licenses;*

f) *the Minister's unfettered power to interfere with programming;*

g) *the definition of political control; as read with the Minister's powers to cancel or suspend a licence;*

h) *the police, inspectors and Minister's power to seize broadcasting equipment, without a court order;*

i) *the dispute resolution mechanism, which provides that, notwithstanding an appeal, the decision of the Minister, no matter how irrational, remains effective; and*

j) *the Minister's unfettered and absolute power over the Broadcasting Authority and Board, as well as his licensing powers.*

The cumulative effect of the above examples, and others replete in the BSA, prevent any investment into the broadcasting sector.

Disregarding the concept (alien to the current government) of constitutionalism and the unconstitutionality of the Broadcasting Services Act as a whole, the oft-touted policy of the "*indegenisation*" of all sectors of the economy is not simply undermined but surreptitiously prevented by the government in the broadcasting sector. Not that the policy of "*indegenisation"* has resulted in any tangible benefit, save for an absurd feudal and self-defeatist land-grabbing exercise resulting in a non-performing economy and value-less currency.

Since citizens of Zimbabwe as a whole, foreigners and those "deemed indigenous" in today's lexicon, are prevented from investing into this sector, broadcasting is, perhaps viewed as a preserve of the ruling elite. In part, this should explain the Minister's autocratic powers. Any government buoyed afloat by illegitimacy, courtesy of an uneven electoral field will seek to keep the electorate in perpetual ignorance by monopolizing the transmission and nature of information.

It has already been stated that currently the ZBC is an exclusive preserve of ZANU PF, and it editorial policy is determined by the Minister of Information. In the South African case of *National Media Ltd. & Ors vs. Bogoshi.* Hefer J.A stated that:

> "*But we must not forget that it is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the*

formation of public opinion…The press and the rest of the media provide the means by which useful, and sometimes vital information about the daily affairs of the nation is conveyed to its citizens – from the highest to the lowest ranks"[64]

The following analysis will relate to both foreign and local investment save where specifically stated otherwise.

4.2 Licence periods - Section 12(2)

4.2.1 Community Broadcasting

A community broadcasting licence shall be valid for one year, granted and renewable at the instance of the licensing authority, the Minister.

A community broadcaster provides a free-to-air television or radio service capacity of being received by commonly available equipment, not for profit and is prohibited from broadcasting political programmes.[65]

Reasons for non-investment

1. Most of Zimbabwe's communities are poor; a reflection of decades of warped and ill-advised economic policies. Painfully pooled resources to set-up a community television or radio station will only sustain such a station for a year. A year is too short a time for any proper development of the station.

2. All programmes have to be time-framed for a year.

3. Lack of long-term strategic plans, due to the restrictive licence tenure means that employment contracts will be valid for one year. This renders the retention of competent staff extremely difficult. A very mobile workforce prevents any real manpower development, affecting the quality of broadcasting.

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64 National Media Ltd. & Others vs. Bogoshi 1998 (1) S.A 1196 (SCA) @ page 1201 I-J

65 Refer to Section 2 as read with the fifth Schedule, Part IV, clause 10

4. All other contracts, including advertisement and programming contracts have to be for one year or less. This renders stillborn the revenue base of community broadcasters. Lack of revenue results in:

    i. *Poor and subsistence remuneration of employees. Community broadcasters maybe forced to rely on donated services;*
    ii. *Extremely poor programming, i.e. worse than the Zimbabwe Broadcasting Corporation's current programming, notwithstanding its monopoly and varied revenue base;*
    iii. *Increased dependence on the community's or its donor's personal capital resources. In other words. It is extremely unlikely that the community broadcasting station will self-propagate and become self-sustaining. Therefore only an affluent community will be able to set-up a station. All others will have to rely on well wishers. Instead of empowering its citizens the governments seeks to maintain a revoltingly characteristic, donor dependency syndrome.*

5. After the initial investment and licensing, the license is renewable at the discretion of the Minister. There is no guarantee of renewal. The building up of resources to set-up a station and its expensive sustenance, as stated above, may all be in vain. It will all be an expensive waste of time, as the Minister can decline an application for renewal.

   Any rational investor, including a community, will engage in a cost/benefit analysis of setting up a station. In this case only the very rich or the government connected, will be able to set-up a station.

6. The Minister's power of decline the renewal of the one-year license creates a very high level of insecurity on the part of the community. This fact coupled with the Minister's powers of suspend, and cancel licenses during the one year currency of the license, creates such uncertainty and insecurity which may out weigh any interests sought to be advanced by the community broadcaster.

4.2.2 Commercial Broadcasting

A commercial broadcasting license is valid for two years and renewable at the instance of the Minister.

Reasons for Non-investment

1. Much of what have been mentioned above, in relation to community broadcasters applies to commercial broadcasters, *mutatis mutandis.*

2. Commercial Broadcasting operates for profit. Programming equipment as well as broadcasting material cost millions of dollars. The popularity of a broadcasting service determines on the amount and quality of advertisement. The bulk of commercial broadcasters rely on advertisement for most of their revenue.

   However, due to the length of the license periods, it would be exceedingly difficult to generate much good will, popularity and profit.

   A license tenure of two years, whose renewal is uncertain and based on a licensee's ability to remain on the good side of the Minister, is particularly vicious investment deterrent. The time period is too short for any investor to have recouped initial capital and current expenditure, and in addition have made sufficient profit to justify the investment.

3. Further, the uncertainty of renewal means, that strategic planning for the investment is always short term, fraught with the hazard of Ministerial suspension, amendment or cancellation of the broadcasting licence. Investors intent on making profit will not invest into this sector. The risks simply outweigh the benefits.

4. In any event, since the initial capital investment is substantial, potential investors usually borrow capital from lending institutions. Any broadcasting investor is unlikely to obtain finance at all, due to the risks attendant to broadcasting and the exposure of the finance institution.

4.3 Profit

Commercial broadcasters invest in order to make profit. This is trite. For reasons explained above, commercial broadcasters are unlikely to make profit from their ventures.

Community broadcasters are by definition prohibited from making profit. Good reasons may exist for this restriction. A community broadcaster should advance and publicize community interests and not the sectional and parochial profit oriented interests.

What is wrong, in principle with a community broadcaster advancing community interests and at the same time generating profit, for reinvestment and strengthening its capacity? Put slightly differently, is advancing community interests and profit making mutually exclusive? In the writer's opinion, commercial broadcasters serve a variety of community interests and seek to generate profit.

The prohibition of profit making is senseless. Communities must be allowed to operate community stations for profit. They may, however be prohibited from personally disposing of any profits generated, except to further invest into the station or make donations to public institutions or the community such as schools, hospitals, e.t.c.

4.4 Programming

Commercial and community broadcasters' activities are limited to programming, i.e. producing their own programs or buying pre-produced programs and transmitting the programmes utilizing either the Zimbabwe Broadcasting Corporation's signal carrier or the one other signal carrier to be introduced at the mercy of the Minister.

Signal carriers are not obliged to flight programs submitted to them. It is possible for a signal carrier to interfere with the nature and content of broadcasts. As discussed above, the splitting of broadcasting between producers of programmes and signal carriers unnecessarily interferes with the right to freedom of expression. In practice, it means that broadcasters are not allowed to possess signal-carrying equipment. All broadcasters are obliged to enter into lease agreements with the Zimbabwe Broadcasting Corporation or the other signal transmitting company once granted a licence. This situation compares

unfavourably with the South African legislation in terms of which all licensed broadcasters are permitted to apply for a signal carrier licence.[66]

Broadcasters will be forced to purchase airtime from, and physically send their taped programmes to a signal carrier, or use the telephone to transmit their programmes to the signal carrier for dissemination. This will constitute an immeasurably costly exercise for all broadcasters, particularly community broadcasters.

The Act does not compel the ZBC or the other yet to be licensed signal carrier, to provide equipment with sufficient capacity to cover the whole of Zimbabwe. Communities living on the fringes of the country or as regards television, those who live outside Harare have no hope of setting up broadcasting stations.

Therefore, not only will there be terms and conditions set by the Minister, but those set by the signal carrier as a condition to carrying signals. Currently the only signal carrier permitted to broadcast is the ZBC. This monopoly creates a very risky investment environment.

4.5 <u>Shareholding</u>

The Act states that only Zimbabwean ordinarily resident in Zimbabwe, or a Zimbabwean company in which 100% of the shares are owned by Zimbabwean citizens, ordinarily resident in Zimbabwe, maybe granted a licence.[67] This means:

i. *no foreigner may be granted a licence or have shares in a licensee;*

ii. *no Zimbabwean who is not ordinarily resident in Zimbabwe may be granted a licence; and*

iii. *a licensee should have at least 10 shareholders with 10% shares each.*

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66 Refer to section 33 of the South African Independent Broadcasting Authority Act.

67 Refer to Section 8 of the BSA

Reasons for Non-investment

Foreigners

In principle most countries accept that total foreign control of the media is deplorable, as it undermines freedom of expression. However, in determining the issue, the technological capacity of Zimbabwe should be reviewed. Too stringent a restriction on foreign participation in broadcasting will starve this undeveloped sector, of much needed investment.

Section 8 prevents the inclusion of foreigners, even as very minor shareholders say 10% or less as shareholders. It is true that foreigners may have easier access to finance. If they come from a country with a relatively well developed, broadcasting sector, they will have valuable experience, the necessary access and connections to quality programmes and have knowledge of good programming standards.

The blanket and non-qualified exclusion of foreigners is unreasonable, given the virtually non-existence of any quality broadcasting experience and programmes in Zimbabwe.

Owing to finance organisation's insistence on collateral, citizens with an interest in broadcasting but lacking resources due to a poor performing economy, who otherwise would have been able to obtain resources by merely including into the shareholding, as very minor shareholders, foreigners, will be prevented from investing.

Granted, these restrictions affect broadcasters and not signal carriers. But quality programming is based on resources and experience. Therefore, instead of affecting foreigners, the restriction actually affects Zimbabwean citizen's endeavors to invest into broadcasting.

4.5.1 Prohibition Against Citizens

Persons not ordinarily resident in Zimbabwe are prevented from obtaining a broadcasting license, either personally or through a corporate body.

Apart from being unconstitutional, the restriction is absurd. *What mischief did parliament seek to control? Why should a citizen, who has made his fortune elsewhere, be prohibited from investing in broadcasting in Zimbabwe?*

All citizens whether in Zimbabwe or not are governed by Zimbabwean law for their activities in Zimbabwe, and occasionally offences committed in other countries. A lot of USA, British, French, German, Japanese and other countries' companies made their fortunes in other countries and have repatriated the gains to their home countries. *Is the Zimbabwean legislature and government blind to this fact?*

Speculation is rife and rightly so that the restriction is targeted at the directors of Capital Radio, Michael Auret (Jnr) and Gerry Jackson. Mr. Auret is a Zimbabwean currently resident in South Africa. Ms. Jackson is a British citizen with Zimbabwean permanent residency.

Citizens of Zimbabwe recently returned from abroad, with expertise and resources to invest into broadcasting are also prohibited from investing. The restriction unnecessarily limits the number of Zimbabweans who may invest into broadcasting.

4.5 2 10% Shareholding

Section (5) limits the maximum amount of shares, a shareholder in a licensee may possess to 10%. Every broadcasting licensee save for the Zimbabwe Broadcasting Corporation is obliged to have ten or more shareholders.

The possible rationale for this restriction is that one or two persons may create a monopoly. To prevent one person having absolute control, it maybe necessary to limit the shares held by any one individual. *However, why should the ZBC be excluded from the same restrictive clause? Why should it be only one with a monopoly*?

The creation of co-operatives by insisting on ten (10) or more shareholders is unreasonably restrictive. Any legitimate aim is difficult to discern.

It appears that the restriction is aimed at ensuring that would be investors find entry into the industry difficult. An investor is forced to find nine (9) or more other people inorder to apply for a licence. Needless to say, the nine (9) or more other persons must not only have resources but must share a common goal.

Further, corporate governance of a company in which each shareholder is in reality a minority shareholder is extremely difficult to manage, particularly in commercial broadcasting.

4.5.3 Foreign Technical Employment

Section 11(8) prohibits, save with express written Ministerial authority, the employment of foreign persons and citizens not ordinarily resident in Zimbabwe.

The section outlaws the employment of foreigners or citizens not ordinarily resident with technical expertise in broadcasting. Licensees are therefore obliged to apply to the Minister for permission to employ foreigners or citizens not ordinarily resident in Zimbabwe.

This restriction on employment is particularly strange. All citizens in Zimbabwe do not need Ministerial or government authority in order to work in Zimbabwe, or set up businesses. Broadcasting has been made on exception. Citizens, who are not ordinarily resident, may not be employed in broadcasting companies, save with special leave of the Minister.

When in the country, citizens are protected by the constitution whether or not ordinarily resident in Zimbabwe. The restriction is unconstitutional, in that it cannot be justified on the constitutionally provided grounds of public security, morality, economic interests of the country, e.t.c. A significant portion of Zimbabweans is directly excluded from investing into broadcasting.

The Minister is granted power and discretion to grant or decline applications to employ non-citizens or citizens not ordinarily resident in Zimbabwe. However, the grounds upon which the minister may decline an application are not stated. The Minister's power is not only open to abuse but discourages investment.

Unless if all licensees poach personnel from the Zimbabwe Broadcasting Corporation, there will be a shortage of skilled manpower. This is an obvious fact. An artificial though oppressive manpower shortage will be created. Prospective investors faced with a real risk of an able and technical manpower shortage are unlikely to invest.

Further, and in any event, the quality of programming, currently atrocious at the Zimbabwe Broadcasting Corporation is likely to be worse at private broadcasting stations due to the unavailability of qualified and experienced personnel.

4.6 Minister's Powers

The discretionary and unfettered power of the Minister to grant, amend, suspend and cancel licences, to interfere with the content of programming and power to take over control of broadcasting stations in "an emergency", prevent any rational independent investor from investing into the broadcasting services sector.

Investors require security of their investments. The law governing the investment needs to be clear and certain. Rules entirely dependent on the Minister's arbitrary discretion render the investment climate very risky to hazard investing millions worth of dollars of investments and energy.

As an example, if the Minister believes that he should declare that a certain event constitutes an emergency, he has power to take over a broadcasting station.

The Minister has power to change the programme content of a broadcaster if he considers the change necessary

i) *to reflect the true nature of the service or business which the licensee is conducting*[68]*;*

ii) *to provide appropriate community safeguards*[69]*; and*

iii) *if he considers it in the national interest to broadcast, free of charge*[70].

This power, which unreasonably interferes with the actual nature of broadcasting service provided, and editorial independence, prevents investment in broadcasting. A decision of the Minister, exercised under the powers granted to him by the Act may operate to drive an investor out of business due to the forced change in programming.

4.6 1 Dispute Resolution Mechanism – section 43

Appeals against decisions of the Minister are made to the Administrative Court, in terms of Section 43 of the Broadcasting Services Act. An aggrieved licensee may apply to the High Court for a review of the decision of the Minister. However the dispute resolution mechanism created, ineffectively redresses disputes, hence discouraging investment.

An application for review, by its very nature is unlikely to be entertained by the High Court as an urgent chamber or court application. Therefore an application against the decision of the Minister is likely to take up to at least six months to be heard.

According to section 16(6) of the Broadcasting Services Act, if the decision, against which an application for review is pending, relates to the suspension of a licence, the licence remains suspended pending final resolution of the matter. The same is true if a licensee makes an appeal to the Administrative Court.

Since most provisions of the Broadcasting Services Act are unconstitutional, it is possible to make an urgent application to the Supreme Court, sitting as a constitutional court, in terms of Section 24 of the Constitution, in order to strike out the provisions thereof. Since there is no guarantee of a constitutional application being heard on an urgent basis, the avenue does not offer immediate relief to an aggrieved licensee.

Therefore a licensee whose licence has been suspended or canceled, effectively remains off-air on the basis of a decision made by one man, until the matter, many months later is resolved by the Administrative Court.

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68 Refer to Section 15(1)(c)
69 Refer to Section 25
70 Refer to Fifth Schedule, Part III, clause 9(1)(6)

To bankrupt a broadcaster, all what the Minister has to do, is to suspend the licensee's licence and oppose any appeal or application. The licensee will lose revenue from advertising contracts as well as from breached programming contracts. Further, a licensee repeatedly switched off-air is likely to lose its subscriber and viewer base.

Prospective broadcasters would be justifiably wary of the Minister's powers and the inability of the law to effectively, expeditiously and fairly resolve disputes.

Section 43(8) states that applicants declined a licence or whose application for renewal has been declined, are not entitled to receive a licence but to have their applications reconsidered by the Authority.

The dispute resolution mechanism is perverse. Those who intend to invest into the broadcasting sector are likely to find the condensing of all licensing powers in one person the Minister and the dispute resolution mechanism created unduly restrictive and unfair.

A prospective applicant has the right to apply to the High Court for a review of the decision of the Minister, denying him a licence.

The grounds for applying to the High Court are however very limited. The applicant is expected to establish that the decision making process was fundamentally flawed, *inter-alia* establish:

i) *gross irrationality or unreasonableness,*

ii) *bias*

iii) *violation of the principles of natural justice, also known as the <u>audi alteram partem</u> principle; or*

iv) *illegality*

A prospective licensee/investor always asks what his remedies are in case his application for a licence is turned down. Proving any of the above grounds for review is not easy. The court will require some substantial proof of irrationality, bias, illegality or breach of the *audi alteram* principle before it interferes with the decision of the Minister.

Further assuming that an application for review is successful, the High Court is disallowed from ordering that a prospective licensee should be licensed. By its very nature, a review application simply seeks to set aside decisions and not to order specific performance.

A direct appeal to the High Court is disallowed, save in very exceptional circumstances. The Broadcasting Services Act provides that all appeals shall lie to the Administrative Court.[71] It is now a commonly accepted and trite principle of law that the High Court will not lightly exercise jurisdiction in cases where other surbodinate courts are capable of providing effective redress.[72] This is inspite of the fact that the High Court is a court of inherent jurisdiction.[73] Therefore access to the High Court is fraught with substantial problems.

The advantage of the High Court over the Administrative Court is that the High Court may deal with any legal issue arising from a dispute, including making declarations about the constitutionality of any law. The Administrative Court on the other hand has no such powers as the High Court.

<u>Appeal process</u>

In terms of the Section 43 of the BSA, there is no appeal against a decision of the Administrative Court. It is the court of final appeal. The scope of the grounds upon which a decision of the Minister can be challenged are therefore limited.

The merits of the decision of the Administrative Court may not be interfered by either the High or Supreme Court unless if the reasoning is grossly irrational. The decision of the Administrative Court may only be interfered with on review, on the limited grounds stated above. The question of whether the prospective licensee's application had merit or was better than others is irrelevant.

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71 Refer to Section 43 of the BSA

72 Refer for instance to the case of ZIKITI vs UNITED BOTTLERS

73 Refer to Section 13 of the High Court Act [chapter 7:06]

To the prospective applicant, the dispute resolution mechanism presents a risk, potentially economically dangerous to assume.

Renewal

In the actual strategic planning process, prospective applicants consider the long-term sustainability of any intended investment. Two-year life tenure for a radio or television station is certainly unrealistic and not economically feasible. Renewal is neither automatic nor guaranteed. The BSA does not set any prescribed requirements, which if met would guarantee a licensee renewal.

The uncertainty of renewal, after the expiration of two years, not only discourages initial investment into broadcasting but also prevents substantial capital investment by those fortunate to be licensed. This is particularly true for a signal carrier licensee. It would be absurd to expect capital investment, relating to the procurement of appropriate signal carrying equipment, with sufficient capacity to cover all of Zimbabwe, only to have their licence expire after two years and face the very real and grave possibility of being denied a renewal of the licence.

Further an appeal against the decision of the Minister denying a licensee renewal of the licence does not suspend the Minister's decision. The licensee remains off-air and non-functional. The dispute resolution mechanism does not offer any consolation to a prospective investor studying and evaluating the broadcasting investment climate.

The dispute resolution mechanism does not provide effective and expeditious relief to an investor. The system created is certainly most cumbersome. It is too strict and streamlined exalting the Minister's powers over the rights of an investor.

Since, some of the Minister's powers allow him to set legal conditions binding on a licensee; the Administrative Court's jurisdiction to set aside a decision made by the Minister in terms of the Broadcasting Services Act is very limited. Investment in an environment where the whim of one individual is law is disastrous and discourages potential investment.

4.7 SEIZURE POWERS

Section 42(9) and (10) of the Broadcasting Services Act empower an inspector (employed by the Broadcasting Authority) and a police officer to seize and retain for as long as necessary for purposes of investigation, trial or inquiry:

i) *a radio transmitting station, which he has reasonable cause to suspect to be operated or to be in the possession or under the control of a person in contravention of the Act; and*

ii) *any broadcasting material, book, record or document which he has reasonable cause to suspect, will afford evidence of the commission of an offence against the Act.*

Further, Section 42(7) grants an inspector power to enter and inspect a radio transmission station, broadcasting apparatus or premises used by a licensee. In so doing, the inspector is granted power to order a licensee to cease using the broadcasting equipment, which in his opinion is being operated in contravention of the Act, the terms and conditions of his licence or the International Telecommunications Union Constitution.

This power of seizure to be exercised by inspectors and the police is unreasonably oppressive, open to gross abuse with potential to bankrupt a commercial broadcaster or signal carrier. An investor is always particularly interested with the security of his investment. No security is offered to investors by the Broadcasting Services Act. Restrictions to the right to broadcast are not based on law but the discretion of the Minister, the inspectors (who in practical terms are an extension of the Minister's secretariat, the Authority) and the police.

When public officials' discretion is law, security of sensitive investment such as broadcasting is virtually non-existent. Enforcement of "laws" or "orders" based on public officials' discretion breeds corruption. Corruption, unbridled, does offer some protection to investment but not any long-term productive investment.

4.7.1 Order to Cease Operating

An inspector or police officer is granted power to order a broadcaster to cease operating a broadcasting station or equipment. Refer to Section 42(7).

Issues to Note

This power maybe exercised:

i) *by one policeman, if in his "opinion" a station is being operated in violation of the BSA;*

ii) *against any broadcaster, commercial or community or even a signal carrier; and*

iii) *without a court order.*

The power granted to the police and the inspectorate places an inspector or policeman's evaluative discretion, that an offence may have been committed, above the broadcaster's constitutionally entrenched right to exercise freedom of expression. Simply put, the policeman or inspector's subjective assessment results in punitive sanction i.e. suspension of operations. The constitutionally entrenched right to be considered innocent until proven guilty is rendered nugatory. Refer to Section 18 of Constitution of Zimbabwe.

The subjective order by the inspectorate or police to cease operations has the force of law. These authorised persons combine the powers of judge, prosecutor and complainant.

In general, most laws in Zimbabwe provide that the police obtain a warrant of seizure before they obtain possession of property belonging to an individual. The purpose of this requirement is trite. It seeks to avoid excesses often associated with unbridled state power. Obtaining the closure, temporary or otherwise of a broadcasting station is extremely easy. There is simply no security from the police or inspectorate.

The Broadcasting Services Act permits the unbridled use of subjective discretion. The order to cease operations does not even have to be based on a "*reasonable suspicion".* It simply must be in the "*opinion"* of the police officer or inspector.

4.7.2 Power of Seizure

In terms of Section 42(9), the police and inspectors have power to seize and retain broadcasting apparatus and documentation on reasonable cause.

This section also suffers from the criticisms raised above. Of particular note, the seizing officers do not need a court order in order to seize broadcasting equipment.

While, the police and inspectors need to have formed a "*reasonable suspicion"* of contravention of the Broadcasting Services Act, what constitutes a "*reasonable suspicion"* is a particularly slippery concept to define and apply in practice. Use of the power is not controlled by any insistence that a court order be a pre-requisite before seizure of equipment.

The power is particularly capricious in that, the police and inspector is given power to seize equipment for a licensee's failure to adhere to "*terms and conditions"* of its licence. The Minister may in his absolute discretion and in terms of Section 15 amend any "*terms or conditions"* of a licence and "*…. for any other reason….. in the public interest"* or to enable the licence to reflect the "*...true service, system or business which the licence is giving".*

Exercising the powers contained in Section 15, the Minister may create terms and conditions that the licensee will not be able to observe. He can then send the police or inspectors to seize broadcasting equipment being used by the broadcaster.

In terms of Section 42(9) broadcasters face the risk of broadcasting materials, books records or documents, being seized and retained by the police or inspectorate, if they state they have reasonable cause to suspect that the seized matter:

> "*Will afford evidence in the commission of an offence against…."* the Broadcasting Services Act.

There is no requirement that a court order authorising seizure be obtained.

Broadcasters are therefore not afforded security of operations. This discourages initial investment as well as the growth of the current state controlled broadcasting system.

4.8 RESTRICTIONS ON STATIONS

Section 9 of the Broadcasting Services Act permits only one national free-to-air private broadcaster for each of radio and television. This section read cumulatively with the rest of the BSA and particularly as criticised above, undermines rather than promotes private broadcasting and media pluralism. The section is restrictive, inspite of the wealth of the available frequency spectrum in Zimbabwe and the lack of any apparent competition for them.

Effectively therefore, investment into national transmission of both radio and television is severely limited by law.

4.9 RESTRICTION ON FOREIGN DIRECTORSHIPS

Section 22(3) of the Broadcasting Services Act prohibits non-Zimbabweans and Zimbabweans, who on appointment to directorship were not "*ordinarily resident*" in Zimbabwe, from being directors in broadcasting companies. This restriction should be read in conjunction with the restrictions imposed by Section 8 of the Broadcasting Services Act, which prohibits all forms of foreign ownership or interest in a licensed broadcasting company.

In instances where foreigners have invested resources in an enterprise in which they are legally disallowed from having some form of ownership, it is usual for the foreigner to have some managerial control. Normally such an arrangement is intended to be security and to ensure the success of the investment.

The Act prohibits the foreign ownership of broadcasting company of any kind, as well as directorship. Foreign managerial or technical employment is also prohibited.[74]

Foreign funding or technical assistance, in the circumstances is virtually impossible to obtain. Zimbabwe's broadcasting equipment and manufacturing capacity is non-existent. Equipment and ancillary literature have to be sourced externally. Such an exercise

[74] Refer to Section 11(8) of the BSA

requires foreign currency, which is almost impossible to obtain. Currently prospective private broadcasters are obliged to source foreign currently externally.

Only the very rich, or government maybe able to obtain foreign funding. Substantial collateral is required. However, the existence of collateral is unlikely to result in funding. Creditors prefer collateral capable of being liquidated in order to satisfy their claim against a debt due and owing. With virtually minimal foreign currency inflows, and with these being appropriated to pay for recurrent expenditure, fuel, electricity, e.t.c, the disposal of collateral is unlikely to yield any foreign currency. Therefore, even for those with collateral, hopes of accessing foreign funding will remain illusory.

The absurd restriction on Zimbabwean citizens, not ordinarily resident in Zimbabwe from being directors is unconstitutional. There is simply no legal justification for preventing particular citizens *en bloc* from being employed or having business interests in Zimbabwean companies.

This restriction seems to target Ms. Auret and Jackson of Capital Radio (Pvt.) Ltd., who are non-resident Zimbabweans and foreign to Zimbabwe, respectively.

Further, a cursory analysis of Zimbabwe's history will show that most of its citizens who are non-residents are whites, who have set up in South Africa, United Kingdom, Australia, New Zealand and other countries. The general perception, factual or otherwise, is that these people are anti the establishment. Therefore, if allowed access to the electronic media, they will assist or at the most orchestrate the removal of the current government.

In all probability therefore, the effective prohibition of foreign control of any nature, and Zimbabweans non-resident is a ZANU PF political survival strategy. The ramifications, in Zimbabwe with virtually no modern broadcasting technology and expertise would be to prevent any investment. The myopic and short-term political survival strategy operates to the detriment of the citizens, in the long term. Apart from being unconstitutional, the restrictions block the remaining hope of access to foreign currency suitable technology and expertise.

4.10 MANDATORY LOCAL CONTENT REQUIREMENTS

Mandatory local content requirements in matters broadcast are not unique to Zimbabwe. The frequency spectrum is finite. It is therefore a special national resource. This explains why technical regulation of the use of this resource is permitted and acceptable to all and sundry. Local content requirements help culture, nurture and develop a country and people's identity, at the same time guarding against marauding invasions by other cultures. This is a selfishly nationalist condition which most countries, no matter how liberal they claim to be, practice and legislate.

Section 11(3) as read with the Sixth Schedule and Section 11(4) imposes minimum local content requirements to be observed by all broadcasters. The local content restrictions apply to

i) *those who currently and lawfully provide a broadcasting service, [this applies to the ZBC only] must adhere with the local content requirements within two (2) years of the BSA coming into operation; or*

ii) *for the new broadcasters, immediately upon issue of the license; or*

iii) *within such time as the Authority may determine.*

In terms of Section 47(4) the Broadcasting Services Act, notwithstanding the date it was signed into law by the President is deemed to have come into operation on the commencement of the Presidential Powers (Temporary Measures [Broadcasting] Regulations 2000), published in statutory Instrument 255A of 2000. These regulations were passed into law on or about the 4th October 2000.

Effectively therefore the Zimbabwe Broadcasting Corporation has about ten (10) months, counting from January 2002 to broadcast 75% local content in all its programmes.

Depending entirely on the Minister's discretion and this applies to every broadcaster to be licensed as the ZBC retains its monopoly, new licensees maybe lucky and be allowed until October 2002 before being penalized for not broadcasting 75% local content.

The Act seems to grant the Minister power to allow a broadcaster to broadcast programmes which do not meet this quota, for a specific period. There is however no set criteria for extension to be granted to a licensee.

4.10.1 Television Broadcasters

Television broadcasters are obliged to observe the following:

i) *75% local or African programming, immediately or as the Authority may require – clause 2(1)*

ii) *70% or more of its drama, current affairs, social documentary, informal knowledge building, educational and children's programming, from Zimbabwe source – clause 2(3)*

iii) *40% independent television productions, from its local content spread evenly between the programming genres noted in (ii) above; and*

iv) *30% subscription broadcasting, from local sources.*

4.10. 2 Radio Broadcasters

i) *75% local and 10% African music, immediately or as the Authority may require;*

ii) *30% local and 10% African music broadcast for subscription broadcasting.*

10% vernacular languages other than Shona and Ndebele

In terms of Section 11(4), all broadcasting licensees must have 10% of all their broadcasting in other Zimbabwean languages, other than Shona and Ndebele.

The local content requirements stated above are laudable, in principle but not in practice. The requirements ignore the fact that due to the Zimbabwe Broadcasting Corporation monopoly and its failure, since 1980 to develop film and broadcasting production, there is virtually no viable broadcasting industry.

The fundamental problem with the local content requirements is *inter alia,* with the time frame stipulated for observance, by broadcasters.

A question may be asked;

> *Assuming Zimbabwe's broadcasting industry was developed, say for instance, to South Africa's standard and capacity, would it be capable of meeting these steep local content requirements?*

The answer seems to be on emphatic negative.

The ZANU PF government has been in power since 1980. It presided and enforced the monopoly of the Zimbabwe Broadcasting Corporation, until it was removed not voluntarily by government, but under the force of a Supreme Court judgment. In its compulsive obsession with controlling information, the Zimbabwe Broadcasting Corporation's capacity to develop modern broadcasting standards was stultified, as was independent broadcasting. The industry folded because the Zimbabwe Broadcasting Corporation would not flight independent programmers programmes. This is the same government that pushes a law through parliament, using its parliamentary majority, that imposes mandatory local content requirements, which must be developed at break neck speed between January 2002 and October 2002.

The government since September 2000, when the Zimbabwe Broadcasting Corporation's monopoly was struck down has not granted any form of licence to any one. This means that the Zimbabwe Broadcasting Corporation is granted two years and more to develop its own capacity and hopefully meet the local content requirements.

Prospective investors, in addition to all raised above, are obliged to consider, prior to applying whether in conjunction with the broader Zimbabwean market they can obtain enough material to meet the local content criteria. Sadly, save for very poorly programmed "dramas" churned out by the Zimbabwe Broadcasters Corporation, there is virtually no broadcasting market, with the music industry being a poor exception.

Apart from the fact that the restriction seems to have been made in bad faith, the restriction also prevents prospective investors from even considering investing in the industry. There is virtually no support film and programming industry to assist investors, who are obliged to fulfill a 75% local content quota.

Further, section 11(4) unreasonably insist on 10% of broadcasting being broadcast in other language other than Shona and Ndebele. This quota is against excessively high given the strength of local production. The government must know that broadcasters will be unable to meet these quotas. These highly restrictive quotas must therefore be tailored to prevent the entry of other players into the field.

4. 12 COMPARISONS

In South Africa local content is not legislated in terms of an Act of parliament. The Independent Broadcasting Authority Act states that the regulator shall set local content quotas.[75]

In practice, and in terms of regulations promulgated, most private broadcasters are required to carry at least 20% South African content and are given two (2) years to implement this quota. Subscription television is usually required to carry 15% South African local content and public television 50%.[76]

France is a country, well known in Europe for its strict policy on French local content quotas. It limits television broadcasting to 40% French material and 60% European material.[77]

The local content requirements are very restrictive and prevent investment. There will simply be a dearth of material to broadcast. Local content requirements must not be pedantic. It seems rather obvious that the government is aware of the pathetic state of the broadcasting industry and that the mandatory requirements are deliberately aimed at ensuring that very few companies invest into broadcasting.

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75 Refer to IBA, Section 53(2)

76 Refer to the Independent Broadcasting Authority Local Television Content Regulations of 1997, Section 31., 4.1 and 5.1 and the Independent Broadcasting Authority of South Africa Music Regulations, Section 3.1

77 Law No. 86 – 1067 of 30 September 1986, as amended, Article 27

4.13 CONCLUSION

The Broadcasting Services Act represents a milestone along the rocky road of democracy and social development. The complexities and competing interests of the various sectors of the Zimbabwean society pitted and contributed to the peculiar and retrogressive nature of the Act. On the one hand exists a generally unassuming and disgruntled black citizenry persistently ravaged by unemployment, AIDS related deaths and blinding poverty. In the same camp, a most unlikely partner exists. The generally privileged white people of Zimbabwe, the propertied class, whose gripe with the geriatric government of ZANU PF was the brutal assault and land grabbing exercise. With the latter galvanising local and international financial resources and the former providing the critical mass to overthrow the liberation war government, the opposition was established in Zimbabwe. Most unlikely bedfellows!

On the other hand exists the ZANU PF government, A party with waning popularity, presiding over an imploding economy it never managed to take control of since 1980 and opposition which captured the imagination of a very large percentage of the population.

It is the very real possibility of defeat that has resulted in fear within the government camp. Most probably bereft of common appeal, the government took to the trenches, revitalised command politics and sought to control information dissemination.

The Broadcasting Services Act is an instrument testifying to the fear within the government. It is exceedingly difficult to argue in favour of the Act, let alone attempt to justify any objective achieved by the Act save to allow ZANU PF to churn out propaganda in its effort to retain political power.

Unashamedly abandoning its responsibilities and abdicating its rights to the executive and raising party politics above those of the nation, parliament disgracefully failed the country. It is perhaps the lack of a collective national vision and sense of purpose that has made Zimbabwe effectively rudderless, prostrating before the whims of persons who have lost all relevance to the future prospects of the country. In cahoots with the

politicians, land ownership has remained skewed in favour of whites and the corrupt. The failure of this marriage of convenience has resulted in the citizens being the losers.

It is strongly suggested that the Broadcasting Services Act must be repealed, and a truly consultative process to enact an ideal Act must be initiated. Democracy will never be nurtured in an environment where the right to freedom of information is non-existent. Efforts at entrenching democracy are imperative if economic and social progress is to be achieved.