

The legal implications of accreditation or non-accreditation of journalists under the Access to Information and Protection of Privacy Act¹

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To accredit, or not to accredit? That is **not** the first question. Before a journalist can begin to consider this he should make himself aware of how the authority responsible for accreditation is constituted and controlled, and its aims and objectives. Thus one has to look at the Media and Information Commission, which is set up under Part VII of the Access to Information and Protection of Privacy Act (hereinafter referred to as “the Act”).

The Media and Information Commission

The Minister of Information and Publicity appoints the members after consultation with the President. Under the Fourth Schedule of the Act the Minister fixes the period of their appointment (1(1)). He fixes the terms and conditions according to which they are engaged (1(3)) and their remuneration and allowances (8). He can suspend or dismiss a member of the Board for “conduct that renders him unsuitable” (4(1) and (2)). What constitutes such conduct is left undefined and therefore discretionary, vague and open to abuse.

As for the membership of the Board, there is no safeguard to ensure that it is independent and representative of the profession. In terms of section 40(2) only three members out of a potential seven can be nominated by an association of journalists and media houses. In any event, clause 7 of the Access to Information and Protection of Privacy Amendment Bill 9 of 2002 (hereinafter referred to as “the Amendment Bill”) seeks to remove the need to have any input whatsoever from the journalistic profession in the selection of members. The Minister will now select **all** members. Therefore, a Board consisting of no media professionals, only government appointees, may regulate journalists, which therefore denies the profession the basic right to choose its own leaders, regulate its own affairs and enjoy professional independence.

Clause 8 of the Third Schedule also shows how politically partisan the Commission can be. It allows the Commission, with Ministerial approval, to enter into arrangements with government or any local or other authority in order to obtain rights, privileges and concessions from them. The protection of freedom of expression, and the freedom of the press in particular, is a means by which the State and its officials can be challenged and held accountable to the people for their actions, thus promoting democracy. If the Commission’s primary responsibility were to ensure the protection of journalists and the public’s right to freely receive information, why would it wish to enter into agreements with the government and obtain rights and privileges from it? A look at the functions of the Commission under section 39 gives an idea of how it will exercise its duties. They are to ensure that Zimbabweans have effective control of mass media services. They act on comments (not proven evidence) from the public about the administration and performance of the mass media in order to monitor, investigate and resolve complaints against them, and to enforce undefined professional and ethical standards. They are empowered to investigate, adjudicate and enforce their decisions by any means, save for detention in custody.

The Amendment Bill seeks to repeal sections 56 and 58 to 61 and replace them with two new sections: 52A and 52B. Section 52A is entitled *Power of Commission to issue orders*. Section 52B in particular deals with determinations and enquiries by the Commission. It is given the power to decide whether or not the matter at hand involves a substantial dispute of fact or law, and decide all questions of fact **and law** which arise in the course of an inquiry. Thus usurping the function of the courts of this land.

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All in all, this all-powerful Commission polices its members and treats them with suspicion – it does not seem to protect and fairly regulate them and their freedoms in any way.

Who falls within the confines of the Act?

A journalist is currently defined in terms of section 62 of the Act, but the Amendment Bill seeks to make the definition read a little better. It will now read 'a person who gathers, collects, edits or prepares news, stories and materials for a mass media service whether as an employee of the service or as a freelancer'. Such a person must seek accreditation in terms of the Act.

Section 79 of the Act makes it mandatory for a journalist to be accredited by the Media and Information Commission if he wishes to exercise the rights of a journalist in Zimbabwe. The constitutionality of this provision will be dealt with in more detail later in this paper.

An argument that has been put forward is that in order to be classified as a journalist who must accredit, an individual must be connected to a mass media service by reason of **employment**, and that if one were to be a consultant or work for free, then there would be no need to accredit in terms of the Act. It is submitted that the offering of free services to escape accreditation would not find favour either with the Commission or with the courts.

Courts in South Africa and in Zimbabwe have defined employment as a situation where 'one person in terms of an agreement makes his working capacity or energy available to another for remuneration in such a way that the latter may exercise control (authority) over the former'. This would give the employer the right to control the employee².

A consultant, or an independent contractor, on the other hand, also undertakes to render services to another for remuneration without, however, being subject to his control. He sells his services to an organisation or institution at his discretion and in his own time. There is a danger that this category of persons could be seen as freelance journalists and therefore still be subject to accreditation under the Act. However it could be argued that freelance journalists do not have contracts of employment or consultancy contracts, but rather that they operate in terms of contracts of sale. If 'journalists' reconstitute their contracts and become consultants, there is a chance that this might allow them to escape accreditation under the Act. It must be pointed out, though, that this is a tentative argument and also does not take into consideration things such as loss of entitlement to medical aid and pensions, leave and sick days, job security and other benefits existing under a contract of employment.

Who is entitled to be accredited?

In order for a journalist to be accredited he must be:

- a) a citizen of Zimbabwe; or
- b) a permanent resident in terms of the *Immigration Act* (meaning he must hold a valid permanent resident permit issued by the Ministry of Home Affairs and adhere to the conditions specified in the permit); or
- c) any other person who is neither a citizen nor a permanent resident, although such person is only entitled to be accredited for a limited period of time. The period is not stipulated in the Act at present, but section 19 of the Amendment Bill seeks to limit the period to a maximum of 30 days.

The journalist must then also satisfy the Commission that:

- i) he has complied with the prescribed formalities; and
- ii) that he possesses the prescribed qualifications

before he is accredited and issued with a press card.

A journalist can apply for accreditation either individually or means of his employment by a mass media service (defined in terms of the Act) or a news agency (a news agency remains undefined).

² See *The Law of Delict* 2nd Ed : Potgieter and Visser

Apart from these stipulations, the Act is silent on how the Commission shall consider the application for accreditation. The use of the word 'may' in section 79(5) indicates that the Commission has discretion as to whether to accredit a journalist. However, one could, if refused accreditation, argue that reference be made to section 69(1), which sets out the only reasons why a mass media service cannot be registered. These are all technical irregularities related to the application itself, and it could be argued that it is unfair to discriminate between limitations on registering a media house and those used to accredit its journalists. What grounds are used for one should be used for the other.

Of great concern in the Amendment Bill is the clause³ seeking to introduce a new section dealing with appeals to the Administrative Court, which includes the provision that even if the court finds that the journalist should not have been denied accreditation by the Commission the journalist will not be automatically accredited, but rather the application will once again be placed before the Commission for re-determination – giving them a second bite at the cherry.

Implications of accreditation

Once the Commission has accredited a journalist, he can work as such in Zimbabwe and exercise all the rights under section 78. Journalists can enquire, gather, receive and disseminate information. They can visit public bodies to investigate stories and interview individuals. They can access documents and materials prescribed under the Act. They can record audio or video footage and take photographs or film. They also have the right or 'privilege' to refuse to prepare reports and materials inconsistent with their convictions under their name, remove their name or prohibit the publication of a report prepared by them but distorted in the process of editorial preparation. They can also make reports under a pseudonym.

An accredited journalist's name would appear on the roll of journalists and he would receive a certificate of accreditation. He would also be able to access all the information pertaining to public bodies in the manner prescribed by the Act, which would make his investigations and work in general easier.

In terms of section 85(1) an accredited journalist would be obliged to observe a code of conduct, which is enforceable by the Commission. This code of conduct is drafted by the Commission, in consultation with organisations it considers to be representative of the profession. It is not mandatory for the Commission to accept their input, and all other journalistic bodies and representative organisations not approached by the Commission have absolutely no say as to what constitutes acceptable conduct. This code of conduct has not yet been prepared, and therefore the journalist would be agreeing in advance to a document containing rights and duties of which he has no knowledge, and which could be contrary to his convictions.

In the ordinary law of contract, an agreement can be set aside on the basis that it is vague. To require a journalist to agree in advance to terms and conditions, which are not only vague, but also completely undefined, is contrary to the law. If there is no certainty about obligations to be created by the contract, then there can be no meeting of minds, and thus no agreement. Therefore it could be argued that a journalist should not be obliged to enter into an agreement of accreditation with the authorities, as the terms and conditions are uncertain. In this manner the obligation to accredit could be challenged and, if successful, set aside by the courts. However the courts could hold that the journalist should seek accreditation and be bound to all terms and conditions **save** for that of adhering to a code of conduct. The Act would have to be amended and a new 'agreement' entered into with the journalist once the code has been formulated and approved by the Commission.

³ Section 25 of the Amendment Bill, which seeks to introduce a new section 90A in the principal Act entitled "Appeals to Administrative Court"

If the journalist is found, in the discretion of the Commission, to have breached the code of conduct, he is subject to any of the following threats: deletion of his name from the roll; suspension for a specified period; imposition by the Commission of conditions in terms of which he can practise; payment of a penalty up to \$50,000.00; cautioning by the Commission or prosecution by the Attorney General's office on the recommendation of the Commission.

Before any of the above actions can be taken, though, the journalist is entitled to make representations to the Commission. If the Commission rules against him, he may take the matter on appeal to the Administrative Court. There is no appeal to the Minister. The Act is, however, silent on whether a further appeal lies to any higher court.

The journalist would also be subject to the provisions of section 80, dealing with abuse of journalistic privilege and open to criminal sanctions in the event that any of the provisions are contravened.

The implications of failing to accredit

The implications of failing to accredit severely restrict – in fact make it almost impossible – for a journalist to practise his profession in this country.

It is important to note that these rights cannot be exercised by an unaccredited journalist **in Zimbabwe**. Journalists reporting and exercising their profession from outside the country are not affected.

The rights under section 78 of the Act

These have been outlined previously. The most important ones that are unable to be exercised are as follows. A journalist cannot enquire, gather, receive and disseminate information, which effectively restricts him from carrying out his work. He cannot visit public bodies to carry out his duties as a journalist. This means he cannot investigate any stories pertaining to public institutions. He cannot access documents and materials as prescribed in the Act, although any other individual is entitled to such information under the Act. He cannot make audio or video recordings, take photographs or film. This directly affects those in the radio, film and video business.

One can see the implications of this by using a hypothetical example. Lloyd Mudiwa, as an unaccredited *Daily News* journalist, cannot access any information outlined in the Act. Lloyd Mudiwa, as an ordinary Zimbabwean citizen, can approach a public institution and obtain any information he desires unless it is protected in terms of the Act.

The effect of non-accreditation is therefore discriminatory against a section of the public, being unaccredited journalists. It is submitted that this infringes upon an individual's right under the Constitution to protection from discrimination. Section 23(1) of the Constitution states that, "No law shall make any provision that is discriminatory either of itself or in its effect" and "No person shall be treated in a discriminatory manner by any person acting by virtue of a written law or in the performance of the functions of any public office or any public authority". A journalist would have to show that as a result of his creed (being his set of principles or opinions)⁴, and as a professional exercising his right of freedom of expression to inform the public, he is forced to seek accreditation and to subject himself to the monitoring and restriction of his work, whereas any member of the public seeking the same information for himself is allowed to do so freely. Thus, he is being discriminated against. If he is able to satisfy the court that as a result of such beliefs and opinions he is being subjected to a restriction or a disability to which other persons are not subjected, he could succeed in having section 79 struck out as unconstitutional.

Section 79(6)

⁴ Definition to be found in the Concise Oxford Dictionary

An unaccredited journalist cannot work for a news agency operating in Zimbabwe, whether or not the offices and operations are located in Zimbabwe in respect of any of its local operations. Once again, the journalist is being discriminated against as compared to an accredited journalist working for the same news agency. Each could write an identical story and yet the unaccredited journalist will not be able to see his story published, or be paid for his efforts.

Section 80

This is being repealed and substituted by section 20 of the Amendment Bill. Under this section a journalist who is not accredited is open to criminal charges, including an imprisonment term of up to two years.

Section 82

An unaccredited journalist is not entitled to have his name on the roll of journalists or be issued with a certificate of accreditation.

Section 83(1)

An unaccredited journalist cannot practise as a journalist or be employed as such by a mass media service. Apart from the effect on the journalist, this also has serious implications on mass media services, as their certificate of registration can be suspended, withdrawn or refused if they are employing an unaccredited journalist. A mass media service operating without a valid certificate opens its owners or majority shareholders to the commission of a criminal offence in terms of section 72 and payment of a fine or imprisonment for up to 2 years, or both, as well as the forfeiture of its products, equipment or apparatus to the State.

Section 83(2)

Whilst a journalist's name is deleted from the roll, or whilst he is suspended, he cannot practise directly or indirectly by himself or in partnership or association or be employed in any capacity as a journalistic professional except with the written consent of the Commission.

WAY FORWARD IN THE EVENT OF A DECISION NOT TO ACCREDIT

A possible method of avoiding the obligation to accredit, being the 'employment-consultancy argument', has been outlined. There is also the argument that one cannot consent to being accredited and bound to a non-existent code of conduct, as this would constitute a contract that would be void for uncertainty. The constitutional argument of discrimination in violation of section 23 of the Constitution has also been outlined.

If a journalist decides not to seek accreditation, there also exists the argument that section 79 of the Act violates one's freedom of expression, which is protected in terms of section 20(1) of the Constitution.

Violation of the right of freedom of expression

There is no doubt that the State views the independent media both locally and internationally with suspicion. It is concerned with their attempts to undermine the government and the country as a whole. They have little tolerance for criticism or constructive suggestion. In large part, this would appear to be the rationale behind the current legislation.

However in the case of *Chavunduka & Anor –v- Minister of Home Affairs & Anor*⁵ the Supreme Court stated that, "freedom of expression constitutes one of the essential foundations of a democratic society and that it is applicable not only to information and ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness, without which there is no democratic society."

⁵ 2000 (1) ZLR 552 (S)

There is a three-pronged approach to testing whether the constitutional freedom of expression has been limited in a manner that is reasonable and justifiable in a democratic society. This is currently the subject of argument in the Supreme Court⁶. It is a very strong argument and any independent court concerned about the protection of freedom of expression should uphold the submissions by the journalists, especially considering that courts have on several previous occasions indicated that any restrictions on freedom of expression are to be interpreted in a narrow and limited manner⁷.

The first question to address would be whether mandatory accreditation hinders a journalist's enjoyment of freedom of expression and his freedom to hold opinions and receive and impart ideas and information. The Commission is open to political interference as already illustrated, and has enormous powers to restrict a journalist from practising his profession. Criminal sanctions are imposed for those who operate without accreditation, as section 80 makes it an offence to contravene any section of the Act. Finally, there is no guarantee that an application for accreditation will be successful. There is no doubt that section 79 contravenes the freedoms enshrined in section 20(1).

The next step would be to ask: does section 79 fall within the enabling section, being section 20(2)? This subsection lists various instances in which the freedom of expression could be limited. The only one that would need to be looked at carefully would be where the limitation would be in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health. It would be important to remember the words of the Supreme Court in both the *Chavunduka* and the *Munhumeso* cases when the bench indicated that, "It is not sufficient that the limitation on freedom of expression effects merely incidentally one of the specified legitimate aims. It must be primarily directed at that aim – an overriding objective." Also, "derogations from rights and freedoms which have been conferred should be given a strict and narrow, rather than a wide construction. Rights and freedoms are not to be diluted or diminished unless necessity or intractability of language dictates otherwise."

The remainder of the limitations would not be relevant in this case, and in any event would be capable of protection by methods such as civil action, and even criminal defamation suits.

If it were proved that the freedom could be limited for such national interests, it would still need to be proved that such a limitation is reasonable and justifiable in a democratic society.

- a) The legislative objective of the limitation should be sufficiently important to warrant overriding a fundamental right. If it were of primary concern, then this would have been clearly alluded to in the Act. None of the grounds for limitation of the right are even mentioned in the Act, and therefore there is no real legislative objective intended to be protected by section 79.
- b) The measures designed to meet this objective should not be arbitrary, unfair or based on irrational considerations, and the means used to impair the right should not be more than necessary to accomplish the objective. The considerations for requiring mandatory accreditation are not even alluded to in the Act. In any event, the fact that non-accreditation is a criminal offence and the Commission has the power to stop a journalist from making a living by exercising his profession shows how irrational the limitation would be.

In light of the abovementioned, it is submitted that the requirement of mandatory accreditation is contrary to the right of freedom of expression, and it cannot be saved under the limitations clause, as it is not reasonable and justifiable in a democratic society.

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⁶ *Association of Independent Journalists & Ors –v- Minister of Information and Publicity & Ors* SC 252/02
⁷ *Chavunduka op cit* and *In re: Munhumeso Ors* 1994 (1) ZLR 49 (S)

If journalists decide against subjecting themselves to mandatory accreditation, then they should monitor the cases currently before the Supreme Court of Zimbabwe. If the constitutional court rules in favour of the journalists' associations, section 79, amongst other sections, will be struck down as unconstitutional, and the affected journalists will be vindicated. If the applications fail, the judgments will have to be subjected to scrutiny to ensure that all the above arguments have been fully ventilated. If not, a further application can be filed and relevant argument made. Journalists should, however, be aware that they might be subject to criminal prosecution for failure to accredit. If arrested, it would be open to them to approach the courts on the basis of the constitutional arguments already outlined. This is a personal and moral decision, which each individual has to consider carefully. Those journalists who were not previously accredited and were obliged to register within 3 months of the Act coming into operation are free to use the arguments about the unconstitutionality of the discrimination between themselves and those who have been given a lifeline until the end of the year merely because they had been accredited voluntarily before the promulgation of the Act.

In conclusion, the words of the Supreme Court in the *Chavunduka* matter, should be kept in mind and upheld by any court willing to protect the most fundamental of freedoms – that of the freedom of expression:

“The fact that the particular content of a person’s speech might ‘excite popular prejudice’ is no reason to deny it protection for ‘if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought – not free thought for those who agree with us but freedom for the thought of those we hate’”.

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